THE NAVIGATOR

IN THIS ISSUE

The Plausible Inference of Liability Test

The Supreme Court of Canada has recently clarified the standard to be applied in determining whether a plaintiff has the requisite degree of knowledge to discover a claim and trigger a limitation period for commencing a legal proceeding in New Brunswick. Although based in New Brunswick, the decision in *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31 has broad applicability to other jurisdictions (including Ontario, Alberta, and Saskatchewan) where the limitations of court action statutes have codified the common law rule of "discoverability".

In the fall of 2008, the Atcon Group of Companies ("Atcon") sought loans from the Bank of Nova Scotia (the "Bank"), but needed loan guarantees from the Province of New Brunswick (the "Province") to obtain them. The Province agreed to provide $50 million in loan guarantees, conditional upon an external review of Atcon's assets by the Province's auditor, Grant Thorton LLP ("Grant").

In June of 2009, Grant delivered its Unqualified Auditors' Report to the Province, in which it opined that Atcon's financial statements presented "fairly, in all material respects, the financial position of Acton as at January 31, 2009 and the results of its operations and its cash flows for the year then ended in accordance with Canadian generally accepted accounting principles" (*1). Relying on Grant's report, the Province executed the loan guarantees and Atcon then borrowed the funds from the Bank.

Four months later, Acton ran out of working capital. The Bank commenced insolvency proceedings against Acton, and then called on the Province to satisfy its loan guarantees. The Province paid out the loan guarantees on March 18, 2010. It also retained a separate accounting and auditing firm to review Acton's financial position and issue a report on its findings.

The new auditor's draft report was issued on February 4, 2011 and finalized on November 30, 2012 (the "Richter Report"). The Richter Report found that Acton's financial statements had not been prepared in conformity with Canadian generally accepted accounting principles, that there were various material errors in the financial statements, and

FIRM AND INDUSTRY NEWS

- **Fernandes Hearn LLP** has been selected as Law Firm of the Year in Canada 2021 in Transportation by **The Lawyer Network**.

- **Rui Fernandes** will be speaking at the **Best Practices Council** on September 22nd, 2021 in Toronto, on "Negligent Carrier Selection, Contingent Cargo Liability and Broker Agreements."

- The **Women's International Shipping & Trading Association (Wista)** AGM & Conference will take place in person and virtually from October 12- 15, 2021 in Hamburg, Germany. **Kim Stoll** will be in attendance virtually in her role as Wista Canada VP Central Region.

- The **Canadian Transport Lawyers Association** AGM and Conference will take place virtually on October 22, 2021. Vice President **Carole McAfee Wallace** and **Kim Stoll** will be in attendance.

- The **International Maritime Law Seminar** will take place October 28, 2021 in London England.

- Mark your calendars. The next **Fernandes Hearn LLP Annual Seminar** will take place on February 10, 2022. Send us an email to info@fhllp.ca to let us know what topics you would like us to cover.

that Acton's assets and net earnings were overstated by $28.3 million to $35.4 million.

On June 23, 2014, the Province filed a Statement of Claim against Grant alleging negligence. Grant denied the allegations and brought a summary judgment motion seeking to have the Province's claim dismissed as being statute-barred under the *Limitation of Actions Act* (the "LLA") (*2) because it was commenced two years after it was discoverable – that is, after the facts giving rise to the claim were, or should have been known.

The motion judge granted summary judgment in favour of Grant, holding that the proper test is whether the plaintiff knew or ought to have known that it had *prima facie* (that is, at first blush on the face of things) grounds to infer the existence of a potential claim. The motion judge found that the Province knew or ought to have known that it had *prima facie* grounds to infer that it had a potential claim against Grant by March 18, 2010, more than two years before commencing the suit. In the alternative, the motion judge found that the Province had the requisite knowledge after it received the draft Richter Report on February 4, 2011, and that this was also more than two years prior to the commencement of the Province's claim.

The Court of Appeal overturned that decision and held that the test is whether the plaintiff "knows or ought reasonably to have known facts that confer a legally enforceable right to a remedy," (*3). In claims for negligence, "that right only exists if the defendant was under a relevant duty of care and its loss-causing act or omission fell below the applicable standard of care" (*4). Applying this test, the Court of Appeal found that the two-year limitation period had not been triggered because the Province could not have discovered its claim until Grant produced its audit-related files for inspection, which Grant had consistently refused to do.

The Supreme Court of Canada allowed Grant's appeal, finding that the Province *had* discovered its claim by February 4, 2011, the day it received the draft Richter Report. The Province did not bring its claim within two years of that date, and so it was statute-barred.

Under section 5(1)(a) of the LAA, no claim shall be brought after two years from the day on which the claim is discovered. Section 5(2) of the LAA states that a claim is discovered on the day

on which the plaintiff first knew or ought reasonably to have known

> (a) that the injury, loss or damage had occurred,
> (b) that the injury, loss or damage was caused by or contributed to by an act or omission, and
> (c) that the act or omission was that of the defendant.

The Court confirmed that section 5 of the LAA codifies the common law discoverability rule, which provides that "a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable due diligence" (*5).

Under section 5(2) of the LAA, the Court held that a claim is discovered "when a plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn"(*6). The material facts that must be known are those set out in section 5(2) of the LAA, reproduced above.

Both direct and circumstantial evidence can be used when assessing the plaintiff's state of knowledge. Mere suspicion or speculation is not enough, but it may trigger the requirement to exercise reasonable diligence.(*7) The plaintiff does not need knowledge of all of the constituent elements of the claim.(*8)

Andrea Fernandes

Endnotes

(*1) *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31, at para. 8.
(*2) SNB 2009, c L-8.5.
(*3) 2020 NBCA 18, at para. 7.
(*4) *Ibid*.
(*5) *Supra* 1 at para. 40.
(*6) *Supra* 1 at para. 42.

2. Interpretation of Releases: The Blackmore Rule vs. *Sattva* Debate

In *Corner Brook (City) v. Bailey*, the Supreme Court of Canada addresses the debate of whether a special interpretive rule applies to releases (*1) and provides helpful guidance on the way the courts should consider the surrounding circumstances in the interpretive process.

Background

The facts of this case are straightforward. Mrs. Bailey struck a city employee with her husband's vehicle while the employee was performing road work. As a result, the employee commenced an action against Mrs. Bailey for injuries sustained in the accident (the "employee action"). In a separate action related to the same incident, Mrs. Bailey sued the City for her physical injuries and damage to the car. Mrs. Bailey settled her action against the City and released the City from liability relating to the accident.

Mrs. Bailey signed a release in which she agreed to:

. . . the [Baileys], on behalf of themselves and their heirs, dependents, executors, administrators, successors, assigns, and legal and personal representatives, hereby release and forever discharge the [City, its] servants, agents, officers, directors, managers, employees, their associated, affiliated and subsidiary legal entities and their legal successors and assigns, both jointly and severally, from all actions, suits, causes of action, debts, dues, accounts, benefits, bonds, covenants, contracts, costs, claims and demands whatsoever, including all claims for compensation, loss of use, loss of time, loss of wages, expenses, disability, past, present or future, and any aggravation, foreseen or unforeseen, as well as for injuries presently undisclosed and all demands and claims of any kind or nature whatsoever arising out of or relating to the accident which occurred on or about March 3, 2009, and without limiting the generality of the foregoing from all claims raised or which could have been raised in the [Bailey Action] . . . . [Emphasis added.] (*2)

Four years later, Mr. Bailey as the defendant in the employee action, commenced a third-party action against the City, claiming contribution or indemnity from the City. The City moved for a summary trial and argued that the release barred Mrs. Bailey's third-party claim. The trial judge agreed with the City and stayed the third-party claim. In interpreting the release, the trial judge relied on the Blackmore Rule, a 150-year-old rule of interpretation that "required him to consider what was in contemplation of the parties at the time the release was signed and the specific context in which it was signed" (*3). The trial judge noted that at the time Mrs. Bailey signed the release, she had already been served with the employee's action. Accordingly, the third-party claim was stayed.

The trial judge's decision was overturned by the Court of Appeal of Newfoundland and Labrador. The Court of Appeal concluded that "the Blackmore Rule has, overtime, been subsumed into the principles of contractual interpretation" set out by the Supreme Court in *Sattva (*4)*. In the Court of Appeal's view, "the words, the context, and the exchange of correspondence were all consistent with the Release being interpreted as a release only of the Bailey's claims in the Bailey action" (*4). The Court of Appeal accepted Mrs. Bailey's argument and concluded that the release did not contemplate a claim to recover damages claimed by a third party. Accordingly, the Court of Appeal reversed the trial judge's decision and reinstated the third-party claim.

The Supreme Court Decision

In an unanimous decision, the Court overturned the Court of Appeal and confirmed that there is no special rule of contractual interpretation that applies only to releases. The Court reiterated that the guiding rule for the interpretation of contracts is the one set out in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 which directs courts to "read the contract as a whole,

giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract "(*5).

Citing *Sattva*, the Court explained that the relevant surrounding circumstances "consist only of objective evidence of the background facts at the time of the execution of the contract. . . , that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting"(*6). While the courts can rely on the surrounding circumstances in the interpretive process, the Court warned, "courts cannot use them to deviate from the text such that the court effectively creates a new agreement" (*7).

In addressing the *Blackmore Rule vs. Sattva* debate, the Court provided some historical background of the circumstances and judicial concerns that existed when the Blackmore Rule was developed. The Court explained that "judges in the 18th and 19th centuries were less sensitive to context and "were reluctant to admit … evidence of background which would put the language into context" (*8). Simply put, the courts' traditional approach to contract interpretation was to stay within the "black letter" meaning of the contract. This interpretive approach was problematic from the view of releases. The Blackmore Rule addressed this problem by allowing courts to consider the factual context when that was not the general rule (*9).

The Blackmore Rule was adopted by Canadian courts, but as the Court explained, it was interpreted narrowly (*10). Since then, the approach to contractual interpretation has evolved. The Sattva decision marked a significant change in the jurisprudence of contractual interpretation. In Sattva, the Court explained that "contractual interpretation is a fact specific exercise and should be treated as a mixed question of fact and law for the purpose of appellate review, unless there is an inextricable question of law". The Court explained that situations in which a question of law can be extracted will be uncommon. Whether something was or should have been within the common knowledge of the parties is a question of fact (*11).

In applying the rules of contractual interpretation as set out in *Sattva* to the release in question, the Court found no error in the application judge's conclusion that the wording of the release included Mrs. Bailey's third-party claim. In the Court's opinion, the release did not need to list third party claims explicitly. The Court concluded that the third-party claim came "within the plain meaning of the words of the release, and the surrounding circumstances confirmed that parties had objective knowledge of all the facts surrounding the third party claim when they executed the release, and the parties agreed to limit the scope of the release to claims arising out of the accident" (*12). Accordingly, the Court allowed the appeal and reinstated the order of the trial judge.

Francisca Sotelo

Endnotes

(*1) *Corner Brook (City) v. Bailey*, 2021 SCC 29 [*Corner Brook*].
(*2) *Corner Brook* at para. 7.
(*3) *Corner Brook* at para.11.
(*4) *Corner Brook* at para.13.
(*5) *Corner Brook* at para.20.
(*6) *Corner Brook* at para.20.
(*7) *Corner Brook* at para.20.
(*8) *Corner Brook* at para.23.
(*9) *Corner Brook* at para.23.
(*10) *Corner Brook* at para.24.
(*11) *Corner Brook* at para.44.

3. Ensuring a Safe Workplace – What is reasonable during a pandemic?

Every employer has a statutory duty to ensure a safe and healthy workplace. How this is achieved during COVID-19 depends on several factors including the nature of the particular workplace. Employers are now considering, among other requirements, mandatory vaccination policies, or rapid testing policies; what may be acceptable in one workplace, could be challenged in another.

The June 10, 2021 labour arbitration decision of *EllisDon Construction Ltd./EllisDon Corporation and Verdi Structures Inc. v. Labourers' International Union of North America, Local 183* (*1), dealt with a grievance challenging EllisDon's Rapid COVID-19 Antigen Screening Policy (the "Rapid Testing Policy" or "Policy").

The Facts

EllisDon is the general contractor on a 59-floor residential condominium in Toronto (the "Project"). Verdi Structures Inc. ("Verdi") is a formwork contractor, engaged by EllisDon to do certain concrete formwork at the Project. Work began in January 2020 and at the time of the arbitration, 10 floors had been completed. There are no walls on the floors of the building where Verdi's employees work, so there is good airflow. Both EllisDon and Verdi direct the workers to maintain a 6 ft distance from each other, where possible. An employee who fails to comply may be sent home or disciplined.

There are other trades and contractors working at the Project and as of May 2021 there were approximately 108 construction employees on site. Verdi's work at the Project is expected to continue until July 2022.

The Rapid Testing Policy

In February 2021 EllisDon implemented the Rapid Testing Policy as part of a pilot program led by the Ministry of Health. The objective was to assess the value of the Abbott Panbio Antigen ("AP") test as a screening tool to support employee safety and business continuity in a variety of workplaces. EllisDon determines which job sites are subject to the rapid testing based on a number of criteria including community spread and case counts, hot-zone locations and the size of the project. All individuals who attend at affected job sites, including the Project, are required to submit to the AP test.

The AP test is conducted on site twice weekly, and there is no need to send the specimen to a lab for processing. This test is not administered through a nasopharyngeal swab, but via a throat and bilateral lower nostril swab. It is administered by third party qualified healthcare professionals. After a worker has completed the standard-form screening questionnaire and had their temperature checked upon arrival, they then undergo the AP Test, which takes 15 minutes to yield a result. EllisDon has set up a testing area in which individuals are physically distanced from each other, the results are read and recorded by the healthcare worker and cannot be observed by anyone else. No personal health card information is taken or stored during testing – only the individual's name, phone number and email address are taken down, so they can be notified in the case of a positive result. The testing is described as follows:

An individual can refuse the test but is then denied access to the worksite. Verdi will try to find them work elsewhere, but if no work is available the employee is laid off. If the AP Test is negative, the individual returns to work. If it is positive, the individual and the EllisDon HSE Coordinator are notified, and employees who were in close contact with the positive employee will be required to self-isolate and the local public health unit will be notified. The individual must get a PCR COVID-19 test within 24 hours and cannot access the job site until the outcome of that test. During the time spent testing, and the 15 minutes spent waiting for the results, the employee is paid. If the employee needs to take time off for the PCR COVID-19 test, it is up to the individual contractor whether to pay the employee during that time. Any requests for

accommodation based on human rights are addressed on a case-by-case basis.

In addition to the Rapid Testing Policy, EllisDon has implemented additional health measures, including, but not limited to, daily screening and temperature check of workers, the provision of PPE, prohibiting non-essential visitors and guests on site, and an enhanced cleaning and disinfection program.

The Grievance

The Union filed a grievance claiming that by implementing the Rapid Testing Policy, both EllisDon and Verdi had violated the applicable collective agreements. The Union argued that the Policy is unreasonable on the basis that the evidence does not demonstrate that it is a reasonably proportionate response to mitigate the risk of COVID-19 transmission. The Union's position is that the risk of transmission in the workplace has been significantly reduced through other less intrusive measures and that the "open air" setting of the Project is such that the risk of transmission is at the low end of the spectrum. Further, the Union argues that the collection of a body sample through the AP Test is inherently invasive and engages critical employee interests, including the right to privacy and bodily integrity.

Is the Rapid Testing Policy Reasonable?

In determining whether a unilateral policy in a unionized workplace is reasonable, it must not be inconsistent with the collective agreement, it must be clear and unequivocal, it must be brought to the employee's attention before it can be acted upon, the employee must be notified of the consequences of any breach of the policy, and it must be consistently enforced by the employer. The arbitrator must also consider the nature of the interests at stake, and whether there are less intrusive means available to achieve the objective and the impact of the policy on the employees.

There was no dispute that the underlying objective of the Rapid Testing Policy is to mitigate the risk of COVID-19 in the workplace. The Union relied on the Supreme Court of Canada's decision in *Irving Pulp & Paper Ltd.* (*2) in which a random drug testing policy was at issue, to argue that the Policy was unreasonable. The Court emphasized the importance of the concepts of proportionality and reasonable cause and stated that the dignity and privacy of employees should not be impacted unless there is reasonable cause, such as a general problem of substance abuse in the workplace. In other words, the dangerousness of a workplace does not automatically justify the imposition of a policy that impacts an employee's dignity or privacy. The *St. Michael's Hospital and ONA* (*3) decision was also referred to by the Union. In that case the employer was seeking to justify a mandatory vaccine or mask policy, and the arbitrator stated that this policy cannot be upheld simply because it is supported by good faith and some evidence. Rather, to satisfy the reasonableness test, objective evidence of a real problem that will be addressed by the specific policy, is required.

Two recent arbitral decisions addressing COVID testing were also considered. In *Caressant Care Nursing and Retirement Homes* (*4) the union challenged the reasonableness of a policy requiring all staff at the retirement home to be tested every two weeks, on the ground that it was an unreasonable exercise of management rights. In that case the arbitrator concluded that the intrusiveness of a test every 14 days weighed against the problem to be addressed, being the spread of COVID-19 in the retirement home, was reasonable. The fact that the retirement home had not had an outbreak did not take away from that – given the seriousness of an outbreak, waiting to act until that happens was not reasonable.

In *Unilever Canada Inc*. (*5), the employer, who operated a food manufacturing plant, implemented a mandatory testing policy following an increase in the number of COVID-19 cases in the community, which had led to a number of its employees testing positive (there was no evidence that they had contracted the virus in the workplace). In this workplace the

testing was a rapid antigen test, it was conducted by a third-party contractor, and the employee's health information was protected. Balancing the interests of the employees and the benefits of a testing program in preventing the spread of COVID-19 in the workplace, and because several employees had in fact tested positive, the arbitrator held that the policy was a reasonable attempt to protect the health and safety of workers in the plant.

The Union argued that given the open-air work environment at the Project and the other protocols and protections that EllisDon has put in place, there is no objective evidence that the AP Test is reasonable. The arbitrator considered these arguments and stated that while an open-air environment may result in a lower risk there was no evidence or assertion that it eliminates the risk. The arbitrator also considered the fact that it was not always possible for employees to practice social distancing in the workplace. The arbitrator also considered the significant effort made to protect the privacy and dignity of the employee and that the AP test itself is minimally invasive comparted to the laboratory-based PCR COVID-19 test.

The Decision

The arbitrator held that the spread of COVID-19 remains a threat to the public at large and to those working at EllisDon construction sites. Weighing the intrusiveness of the AP test against the objective of the Policy, which is to prevent the spread of COVID-19, the Policy is reasonable. The grievance was dismissed.

Takeaways

While the assessment of the rapid testing policy in this case was undertaken in the context of a unionized workplace, an employer who implements any similar policy should be prepared to show that the objectives of the policy, and the methods to achieve those objectives, are reasonable. In addition, any such policy must also ensure that an employee's individual human rights are protected, to the point of undue hardship. How far an employer can go to protect the workplace is a moving target and each day brings another announcement from an employer or industry, about the policies they are implementing to ensure a safe work environment, including mandatory vaccinations. It remains to be seen whether these policies will be the subject matter of a future grievance, but with a fourth wave of COVID-19 and new and more transmissible variants, an arbitrator may very well find such a policy reasonable in order to achieve the objective of a safe and healthy workplace.

Carole McAfee Wallace

Endnotes
(*1) 2021 CanLII 50159 (ON LA)
(*2) 2013 SCC 34
(*3) (2018) 295 L.A.C. (4th) 109 (Kaplan)
(*4) 2020 CanLII 100531 (ON LA) (Randall)
(*5) April 24, 2021 (Unreported Bloch)

4. No Cap on *Family Law Act* Damages: Ontario Court of Appeal

Moore v. 7595611 Canada Corp., 2021 ONCA 459

The Ontario Court of Appeal has confirmed a new high-water mark for *Family Law Act* damages. This will also likely impact on any Dependents' Claims under the *Marine Liability Act*.

In Ontario, and similarly in all the provinces, there is a category of compensation directed to those who have lost family members resulting from the fault of a third party. Section 61 of the *Family Law Act*, R.S. O. 1990 as amended (and similarly s. 4 of the *Marine Liability Act R.S.C. 2001)*) state that specified individuals whose family member (*1) has died or been injured as a result of the fault or neglect of another, can claim compensation for "loss of care, guidance and companionship" as well as pecuniary loss that they would have received from the had the incident in question not occurred.(*2)

Such damages assessments are difficult as money is a poor replacement for a person, but it is the only possible measure available for compensation.

To measure "loss of care, guidance and companionship," a court considers evidence of the deceased or injured person's relationship with the family member claimants before the incident, including the quality of the relationship and evidence of the impact that the person's death/ injury has had on the family. The type of evidence is not exhaustive and differs from family to family. Caselaw has developed a range of damages available.

The claims can also include pecuniary loss in respect of:

(a) Reasonable expenses actually incurred, such as funeral expenses
(b) Lost Income – for example an unpaid leave of absence from work or use of sick leave or vacation credits or financial loss
(c) Dependency Losses - loss of financial support

The high-water mark for general damages compensation was, until recently, the case of *To v. Toronto District School Board*, 2001 CanLII 11304 (ON CA) . The case concerned the death of a 14-year-old child at school. The deceased was the first generation of an immigrant Chinese family, and despite his young age was the liaison between his parents and others in the community given his English skills. The evidence was that he was expected, according to his parents' culture, to care for his parents, and to provide financial support to them when he grew older. The Ontario Court of Appeal reviewed the jury's decision to award $ 100,000 to each of the parents and $50,000 to his sister. The Court confirmed that each case would be based on its own merits and discussed general or accepted ranges for such claims and found that the awards for the parents were high but not so inordinately high as to justify appellate intervention. The sister's award was considered inordinately high and was reduced to $25,000.

The High-Water Mark is Higher: Moore v. 7595611 Canada Corp., 2021 ONCA 459 ("Moore")

The high-water mark for *Family Law Act* claims and mental distress damages in wrongful death cases has changed this year by the *Moore* case, a decision of the Ontario Court of Appeal in 2021.

Alisha Lamers died due to a fire in her basement apartment in the morning hours of November 20, 2013. Ms. Lamers was trapped and unable to escape because the interior staircase was blocked, the windows were barred, and there was only one exit which was blocked by smoke and fire. Ms. Lamers was rescued but died a few days later in hospital. She had suffered third-degree burns over half of her body, went into cardiac arrest on more than one occasion and her parents ultimately decided to remove her from life support. The parents presented extensive evidence at trial about their claims for loss of care, guidance and companionship.

Ms. Lamers' parents commenced an action against the landlord and his company alleging negligent conduct that led to the death of Ms. Lamers. The matter went to trial before a judge and jury.

The jury awarded $1.326 million in damages:

1. Loss of care, guidance and companionship of $250,000 for each parent;
2. Mental distress damages of $250,000 for each parent;
3. Future care costs of $174,800 for the father; and
4. Future care costs of $151,200 for the mother.

The defendant landlord's appeal was dismissed.

Regarding the damages for mental distress, the parents had witnessed the horrific events and the Court of Appeal found that there was clear expert evidence at the trial supporting the parents' mental distress including psychological assessments that showed that the mother had suffered a marked deterioration in her mood and daily functioning and had also experienced passive suicidal ideation. The father was experiencing PTSD symptoms and anxiety. The parents testified about what they saw, what they experienced, and how they had been impacted by their daughter's death. The Court of Appeal found no reason to interfere with the jury's assessment of damages for mental distress. The defendant landlord's appeal included submissions that the awards were too high for loss of care, guidance, and companionship considering that the Court of Appeal had established that $100,000 (adjusted for inflation) represented the "high end of an accepted range of guidance, care and companionship damages" per its decision of *To v. Toronto Board of Education*.

The future care costs for the parents had been put forward via expert evidence and the jury had reduced the numbers substantially. It is unclear what evidence was provided by the defence in this regard though, given the reductions applied, it would appear that defence experts also testified. The Court of Appeal found no grounds to interfere with the amounts awarded by the jury in this regard.

To attract judicial intervention, the Court of Appeal confirmed, at para. 29, that jury awards would have to be such that they "shock(ed) the conscience of the Court" or were so "inordinately high" to be "wholly erroneous". The Court of Appeal found no basis to interfere with the jury award of $250,000 for each parent for loss of care, guidance and companionship. As in *To v. Toronto Board of Education,* the awards were high but not so inordinately high to justify judicial interference given the circumstances of the case.

Per the Court of Appeal in *To v. Toronto Board of Education, t*he Court of Appeal in *Moore* went on to confirm that there is, in fact, no legislated upper limit on such dependent claims. Osbourne A.C.J.O. had stated in *To v. Toronto Board of Education*, at para 29, that "each case must be given separate consideration" and that there was no legislative cap in Ontario [in] determining such damages. At para. 27 of the Moore decision, the Court of Appeal stated simply, "…there is no neat mathematical formula that can be applied to determine the correct amount.", but rather each case must be considered in light of the evidence material to the guidance, care and companionship claims in that case and in light of the particular family relationships involved in that case.

Finally

In conclusion, the high-water mark for general damages for loss of care, guidance and companionship is simply higher ($100,000 corrected for inflation is about $150,000 in 2021 and the new high-end amount is $250,000). Such damages claims have always been decided on a case by case basis, but the Court quite clearly confirmed that there will be no intention to interfere with jury verdicts unless the jury award shocked the conscience of the court to the point that the result was a "wholly erroneous" estimate of damages. Again, this test was the same in *To v. Toronto Board of Education.* Defence counsel are now put on notice that the stakes are higher, and more attention must be paid to such claims as they may no longer be so easily wrapped into a global settlement.

It is interesting, however, as the viability of jury trials continues to be in issue in these pandemic times, that juries might seem more appealing to plaintiffs once again given the courts' reluctance to interfere with higher jury awards and thereby potentially increasing the high-water mark for all cases.

Kim E. Stoll
Follow Kim on LinkedIn and at url: linkedin.com/in/kim-stoll-transportationlaw

Endnotes
(*1) *Family Law Act* , s. 61 claimants can include children, grandchildren, parents, grandparents, brothers and sisters of the injured or deceased person. *Marine Liability Act*, s. 4, claimants can include a son, daughter, stepson, stepdaughter, grandson, granddaughter, adopted son or daughter, or an individual for whom the injured or deceased person stood in the place of a parent; a spouse, or an individual who was cohabiting with the injured or deceased person in a conjugal relationship having so cohabited for a period of at least one year; or a brother, sister, father, mother, grandfather, grandmother, stepfather, stepmother, adoptive father or mother, or an individual who stood in the place of a parent.
(*2) Motor vehicle accidents apply another layer of benefits and claims under Statutory Accident Benefits or similar depending on the province and which are beyond the scope of this article.

5. Not-for-Profit Corporations Act, 2010 Coming into Force October 19 2021

The Ontario government has announced that the new Ontario *Not-for-Profit Corporations Act, 2010* ("ONCA") will be proclaimed into force on **October 19, 2021.** After over a decade of anticipation, the ONCA will provide Ontario's not-for-profit corporations and charities with much needed modernization and legal update from the *Ontario Corporations Act* ("OCA"), which dates back to 1907.

Existing not-for-profit corporations will have a three-year transition period once *ONCA* comes into effect to make any necessary changes to their incorporating and other documents to bring them into conformity with *ONCA*.

Existing corporations are encouraged to review their documents before the end of the transition period.

When it does come into force it will:

- simplify the incorporation process, making it easier and more efficient
- clarify rules for governing a corporation and increase accountability
- clarify that not-for-profit corporations can earn a "profit" through commercial activities (e.g., selling T-shirts) as long as it is reinvested to support the corporation's not-for-profit purposes
- allow some corporations to use a "review engagement" in place of an audit
- enhance members' rights and outline actions they can take if they believe directors and officers are not acting in the corporation's best interest
- give members greater access to financial records

Some of the changes to the *ONCA* include:

- allowing electronic notices to be given for members' meetings (refer to clause 93(1)(a) and subsection 296(2))
- allowing members' meetings to be held by electronic means (refer to section 125.1)
- giving not-for-profit corporations natural person powers, such as buying and selling property as well as borrowing money (refer to section 126.1)
- giving a not-for-profit corporation flexibility to sell, lease or exchange all or a substantial amount of its property (refer to section 126.2)
- allowing for the adoption of pre-incorporation contracts (refer to section 126.3)
- creating a standard for the duties of directors and officers (refer to section 127.1)
- allowing the removal of directors by majority vote of members generally (refer to section 127.2)
- making it easier to waive an audit and not appoint an auditor by lowering the members' approval threshold and changing references from "income" to "revenue" for clarity (refer to section 130.1)
- not requiring directors to be members, if it is stated in a corporation's by-laws (refer to subsection 286(3))
- allowing an application to a court for an order to appoint directors if a corporation has neither directors nor members (refer to subsection 288(4))
- Updating rules governing protections if a corporation is continuing in another jurisdiction (refer to section 313 (1.0.1))

When *ONCA* comes into force it will generally apply automatically to every corporation that does not issue ownership shares (does not have "share capital") that is incorporated under an act of the Ontario legislature, including the current *OCA*.

There are some cases where *ONCA* will not apply. For example, *ONCA* will not apply to:

- insurance corporations under Part V of the *Corporations Act*
- corporations without share capital that fall under the *Co-operative Corporations Act*
- when a statute clearly says otherwise
- companies with social purposes, like share-capital social clubs (e.g., some golf, tennis or country clubs) – these companies will continue to be governed by the *Corporations Act.* If they were incorporated or continued under this Act, they will have a transition period of five years once *ONCA* comes into force. Within the 5-year

transition period, they must continue as either a:

- - non-share capital corporation under *ONCA*
- - co-operative corporation under the *Co-operative Corporations Act*
- - share capital corporation under the *Business Corporations Act*

With some exceptions, *ONCA* will apply to not-for-profit corporations that are incorporated under special or private acts.

If there is a conflict between *ONCA* or one of its regulations and another act or its regulations that applies to a corporation without share capital, the other act prevails.

ONCA will introduce a new process for reviewing a corporation's financial records called the "review engagement." This new process is less extensive than an audit and, as a result, generally less expensive.

Whether or not your corporation can use a review engagement instead of an audit or waive an audit and review engagement will depend on its revenue per financial year and whether or not it is a public benefit corporation.

After the three-year transition period, any provisions in letters patent, by-laws or special resolutions that are inconsistent with the ONCA (with a few limited exceptions) will be deemed to be amended to comply with the ONCA.

We strongly recommend amending letters patent that do not comply with the ONCA by filing articles of amendment and adopting ONCA compliant by-laws within the three-year transition timeframe to avoid future confusion as to what is amended and how.

Rui M. Fernandes

DISCLAIMER & TERMS

FERNANDES HEARN LLP

155 University Ave. Suite 700

Toronto ON M5H 3B7

416.203.9500 (Tel.) 416.203.9444 (Fax)