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# Insurance Observer

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## COVERAGE ON APPEAL: SOME RECENT CASES OF INTEREST

Marcus B. Snowden

The Supreme Court of Canada has recently handed down some rulings of significance to the insurance industry including one case of interest to claims departments dealing with coverage and two cases of significance for both claims and underwriting departments.

In **Monenco**,[1] the question of interest was whether and to what extent a trial court could look beyond the pleadings at "extrinsic evidence" to determine defence obligations under liability policies. The Supreme Court of Canada's decision gives claims departments and coverage counsel some guidance on this issue. The Court has confirmed that the law of pleading, which usually allows parties to refer to a document without restating its entire contents in detail, can be used to determine defence obligations under certain conditions. Firstly, the pleaded reference to the document must be explicit. A vague or general reference will not suffice. Secondly, the Court must be satisfied that its findings for duty to defend purposes do not end up deciding substantive issues in the underlying case. Thus, if it is necessary to review and rule on the meaning of a document which ruling itself is pivotal to a party's success or failure in the underlying case, the Court should refrain from examining the document. Finally, the exercise must be necessary. No review is required if the Court can decide the issue based solely on the facts as pleaded.

In **Monenco**, the Court ruled in the insurer's favour and upheld the British Columbia Court of Appeal's discretionary step of looking beyond the pleadings in doing so. Notably, the rule can also assist policyholders in proving a defence obligation where pleadings are unclear.

In **Dersken**,[2] the question of interest was whether and to what extent an automobile insurer could look to a general liability insurer for participation in defending and indemnifying a common policyholder for what looked, on the surface, to be an auto-related hazard. On the general liability side was the site clean-up negligence: a large metal plate was left on the tow bar of a compressor unit. On the auto liability side was pre-travel inspection negligence: failure to conduct a routine "circle check". The truck left the work site towing the compressor unit and the unsecured metal plate. The plate became airborne when the truck-compressor combination came to a railway crossing. The metal plate went into the windshield of an oncoming school bus causing fatal and catastrophic injuries. The Court confirmed that the facts in this tragic accident had to be viewed from the perspective of concurrent causes and ruled that there was a reasonable theory of the case to show contractor's liability for negligent work-site clean up (general liability cover) as well as failure to conduct a circle check (auto cover), thus triggering a defence under both policies.

Of interest is the Court's method of avoiding the "automobile liability" exclusion in the general liability policy. Two guideposts for underwriters, claims examiners, and coverage counsel come from the Court's ruling. The first and least surprising ruling is the Court's refusal to apply its previous decision in **Amos**,[3] which had construed the phrases "arising out of" and "arising from" in a broad manner. The Court pointed out that in the **Amos** decision it had considered the words used in an insuring agreement, while in **Derksen** it was construing an exclusion clause which was subject to a restrictive interpretation.

The second guidepost is somewhat more controversial. The Court concluded that the time-honoured concurrent causation doctrine could only be relied upon if underwriters drafted specifically for

Marcus B. Snowden is co-author of "Annotated Commercial General Liability Policy" (Canada Law Book, 1997+ looseleaf). He is a member of the firm's Coverage Counsel group. He and other members of the group provide coverage opinions, associated investigation and representation in litigation/dispute resolution for insurers as well as assisting underwriter clients of the firm's Corporate Insurance group in product revisions, development, and risk management.

Marcus can be reached at 416.593.3924 or msnowden@blaney.com

this result. In times past, Canadian courts had applied a British line of cases and a Supreme Court of Canada decision in **Ford**[4] to conlcude that where a loss was brought about by both covered and non-covered (or excluded) events, the case was to be resolved by excluding the whole of the loss. The **Derksen** Court ruled that, while this result could be achieved, underwriters need to specifically draft language to do so. Thus, underwriters who might otherwise assume concurrent causation automatically applies must now carefully consider the context of their exclusionary wordings. **Derksen** appears to bring Canadian jurisprudence on this subject squarely to the middle of British and several American approaches, with the Americans tending to take the opposite approach of ruling the loss covered in concurrent causation scenarios. The significance for underwriters is that their products will now either need to be re-drafted or re-priced to account for potential partial coverage not previously included in the experience rating. The significance for claims departments and coverage counsel is to recognize that partial coverage (in the first party setting) or overlapping or joint coverage (in the third party setting) will be a policyholder's strongest argument in concurrent causation scenarios. While there are those who optimistically treat **Derksen** as being restricted to third party liability scenarios, this writer points to the **Ford** case which the Court specifically referred to in support of restricting the concurrent causation doctrine: **Ford** was a first party indemnity case. In this context, this writer adopts the more cautious view that **Derksen** applies generally to all underwriting until an appellate level Court gives us guidance to the contrary.

Finally, the **Family Insurance**[5] case resolves at least one other controversy about overlapping coverage. In this case, the competing policies were again third party liability coverage forms: Family Insurance had the homeowner's cover, Lombard Canada Ltd. had a group liability policy issued as part of an association membership. At issue was what a Court should do to construe the indemnity obligations of competing insurers if their "other insurance" clauses are irreconcilable. Based on a number of previous court decisions at a lower level, the trial court "read out" the competing clauses and compelled the insurers to share equally. The British Columbia Court of Appeal reversed, finding it appropriate to delve into the surrounding "circumstances" to determine the priority issue. This approach was firmly rejected by the Supreme Court of Canada, which restored the trial judge's ruling. The Court also gave the industry guidance on the formula to be applied, holding that the policies must contribute equally until the lower limits were exhausted and specifically rejecting a pro rata by limits approach. Of note for underwriters is the default result where the "other insurance" clause is "read out." This case establishes not only that there will be sharing but that it will be equal regardless of competing limits.

Notably for claims examiners and coverage counsel, this case is restricted to scenarios involving irreconcilable clauses. Where competing policies can be resolved without prejudice to the policyholder, the wording will be honoured and no "reading out" is required. As with the **Derksen** case, this writer asserts that the guidance is equally applicable in both third party and first party settings involving competing "other insurance" provisions. ■

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1 **Moneco Ltd. v. Commonwealth Insurance Co.** (2001), 204 D.L.R. (4th) 14 (S.C.C.).

2 **Derksen v. 539938 Ontario Ltd.** (2001), 205 D.L.R. (4th) 1 (S.C.C.).

3 **Amos v. Insurance Corp. of British Columbia** (1995), 127 D.L.R. (4th) 61B (S.C.C.).

4 **Ford Motor Co. of Canada v. Prudential Assurance Co.** (1959), 18 D.L.R. (2d) 273 (S.C.C.).

5 **Family Ins. Corp. v. Lombard Canada Ltd.** (2002), S.C.J. No. 49 (Q.L.).

Roderick S.W. Winsor can be reached at 416.593.3971 or rwinsor@blaney.com

## THE STIGMA OF CONTAMINATION: WHAT DAMAGES MUST A POLLUTER PAY?

Roderick S.W. Winsor

It is commonly believed that the party which spills a contaminant on its own property which then spreads to its neighbour's property must pay the cost of removal of all contamination. In many cases, this is correct. However, a recent Ontario Court of Appeal decision[1] illustrates that this is not always true and deals with how damages should be assessed in such circumstances.

### FACTS

Shell operated a service station on Bank Street in Ottawa. Fuel leaked from a line contaminating both Shell's own property and that of a neighbouring car dealership owned by Tridan. The applicable MOE guidelines permitted a partial clean-up due to the use of the property. Shell therefore removed part of the leaked fuel and argued it should only be liable for the $300,000 cost of a similar partial clean-up of Tridan's property.

Interestingly, Shell assisted Tridan when Tridan faced the prospect of increased mortgage costs due to the contamination by giving the lender an indemnity against the cleanup costs.

### TRIAL DECISION

At trial, the judge awarded Tridan $550,000 which was the cost of removing all contamination on Tridan's property at the time of trial. However, Tridan also claimed $85,000 which was the cost of erecting a barrier between the two properties to stop recontamination from the fuel remaining on Shell's property. It also claimed $350,000 for the diminution in the value of the property due to the stigma of having been contaminated and pre-judgement interest on the damages. The judge ordered Shell to either pay the $85,000 or clean-up its own property, to pay the $350,000 and to pay $442,012.81 in interest on the cost of remediation and diminution. Tridan appealed.

### APPEAL

The first issue was whether Tridan was entitled to the cost of remediating its property to "pristine" condition given that the property was in a commercial area and the MOE's guidelines for such property permitted a partial cleanup. In accepting the trial judge's conclusion, the Court of Appeal did not say that plaintiffs are entitled to have the cost of removing all contaminants in all cases. Rather, they noted that on the facts of this case it made sense. On the evidence, it was cheaper to fully remediate and avoid diminution or stigma damages than to partially clean-up and then pay stigma damages.

The reasons are not detailed, but courts should weigh the cost of a full remediation against the diminution in value if only a partial remediation is conducted, regulatory guidelines, the use of the property, the effect of remaining contamination on the probable and possible uses of the property, and probably other factors, such as the uniqueness of the property and the plaintiff's use.

Second, the Court of Appeal did disallow the award of $350,000 for stigma. It did not say that just because the plaintiff's property was to be fully remediated that no such award could be made. But on the evidence of this case it was satisfied that the trial judge had no basis for concluding that there was a diminution assuming Tridan's property were fully remediated. In some cases, it is possible that expert evidence will show that there is a diminution particularly if the contaminant is one that is more alarming to purchasers than traces of gasoline. Clearly, no such diminution should be awarded in the absence of compelling evidence.

Third, the Court of Appeal simply ordered Shell

[1] **Tridan Developments Ltd. v. Shell Canada Products Ltd.** (2000), O.J. No. 1741.

to pay the cost of a barrier deleting the direction to erect such a barrier. This is interesting in that it is not compensation for damages incurred, but the cost of attempting to avoid a future loss.

Last, the Court of Appeal disallowed the interest on the remediation costs and the disallowed damages noting that the remediation damages were assessed as of the date of the trial and the expenses had not been incurred.

The lesson for insurers is to look at the damages claimed in pollution cases with great care. Do not assume that the contamination has to be removed and consider early intervention to limit the contamination or the resulting damages. ■

## NOTA BENE: ASSUMING JURISDICTION OVER OUT-OF-PROVINCE DEFENDANTS

Giovanna Asaro

Giovanna Asaro can be reached at 416.593.3902 or gasaro@blaney.com

In five recent decisions, the Ontario Court of Appeal clarified the law regarding the circumstances in which Ontario Courts will assume jurisdiction over out-of-province defendants in claims for damages sustained in Ontario as a result of a tort committed elsewhere.

The following seven factors were identified by the Court to be considered and weighed together in making the determination:

1. The connection between the forum and the plaintiff's claim.

The forum has an interest in protecting the legal rights of its residents and affording injured plaintiffs generous access for litigating claims against tortfeasors. If the plaintiff lacks a significant connection with the forum, the case for assuming jurisdiction on the basis of damage sustained within the jurisdiction is weaker.

2. The connection between the forum and the defendant.

If the defendant has done anything within the jurisdiction that bears upon the claim advanced by the plaintiff, the case for assuming jurisdiction is strengthened.

3. Unfairness to the defendant in assuming jurisdiction.

4. Unfairness to the plaintiff in not assuming jurisdiction.

The Court should consider the plaintiff's interest in access to the courts of his or her home jurisdiction.

5. The involvement of other parties to the suit.

The involvement of other parties bears upon the degree of connection to the jurisdiction. Where the core of the action involves other foreign parties, courts should be wary of assuming jurisdiction.

6. The court's willingness to recognize and enforce an extra-provincial judgement rendered on the same jurisdictional basis.

The Court must consider whether it would recognize and enforce an extra-provincial judgment against a domestic defendant rendered on the same jurisdictional basis, whether pursuant to common law principles or any applicable legislation

7. Whether the case is inter-provincial or international in nature

The assumption of jurisdiction is more easily justified in inter-provincial cases than in international cases. ■

[1] **Muscott v. Courcelles**, [2002] O.J. No. 2128 (C.A.) (Q.L.); **Sinclair v. Cracker Barrell Old Country Store Inc.**, [2002] O.J. No. 2127 (C.A.); **Leufkens v. Alba Tours International**, [2002] O.J. No. 2129 (C.A.); **Gajraj v. DeBernardo**, [2002] O.J. No. 2130 (C.A.); and **Lemmex v. Sunflight Holidays Inc.**, [2002] O.J. No. 2131 (C.A.).

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*Editor:* Giovanna Asaro (416.593.3902)
*Assistant Editor:* Caroline Mostyn (416.593.3960)

We welcome your comments. Address changes, mailing instructions or requests for additional copies should be directed to Chris Jones at 416 593.7221 ext. 3030 or by email to cjones@blaney.com. Legal questions should be addressed to the specified author.

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Blaney McMurtry
BARRISTERS & SOLICITORS LLP

20 Queen St. West, Suite 1400
Toronto, Canada M5H 2V3
416.593.1221 TEL
416.593.5437 FAX
www.blaney.com