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MODERN PARADIGMS — NEW INSURANCE ACT REGULATIONS APPROVED

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At long last the Lieutenant Governor in Council has provided Regulations enacting the changes to the *Insurance Act* (the "Act"). Executive Council orders were announced on December 2, 2011 formally enacting the *Insurance Amendment Act*. The new Act contains significant amendments and the new *Regulations* contain provisions implementing the reforms which, subject to some transitional provisions, will come into force on July 1, 2012.

The reformed Act and these *Regulations* have been a long time coming. In 2003 the Supreme Court of Canada in *KP Pacific v. Guardian Insurance* declared British Columbia's *Insurance Act* to be "outmoded" leading to "unproductive, wasteful litigation about technicalities" and urged the legislatures to "rectify this situation by amending the Insurance Acts".

In October 2009 the British Columbia legislature passed the *Insurance Amendment Act 2009* which was the first comprehensive review and revision of the *Insurance Act* in more than 40 years. Highlights of the new Act include:

- Eliminating the Fire Part of the previous Act;
- The limitation period for claims against insurers under the general provisions of the Act, now being 2 years from the date the insured knew or ought to have known of a loss or from the date the cause of action against the insurer arose;
- The limitation period under Accident and Sickness and Life Insurance Policies to be, in actions involving insurance proceeds payable upon a person's death, the earlier of either 2 years from the furnishing of a proof of claim or 6 years from the date of death. For other actions, not later than 2 years after the date the claimant knew or ought to have known of the first instance of the loss or occurrence giving rise to the claim. In regards to insurance monies payable on a periodic basis, 2 years after the date the next payment would have been payable;
- Allowing a 30 day grace period for payment of overdue premiums in life and health insurance contracts;
- Improved dispute resolution mechanisms including a requirement that insurers put in place an internal complaint resolution procedure;
- Requiring insurers to become members of an ombudsman service organization for the purpose of resolving disputes.

The *Regulations* implementing the *Act* contain several key components in terms of implementing the above key changes as well as transitional provisions. The substantive provisions of the *Regulations* provide:

Electronic Communications

While the *Act* allows the service of documents under the *Electronic Transaction Act*, the *Regulations* provide that the *Electronic Transaction Act* does not apply in respect to an insurer's notice terminating a contract under either a statutory condition or for non-payment of premiums. In those circumstances service of documents has to be done in accordance with the *Act*, i.e. personally or by registered mail.

Notification of Dispute Resolution Processes

In general, the dispute resolution processes set out in the *Act* and *Regulations* are those formerly referred to as the appraisal process.

The *Regulations* require an insurer to give written notice to an insured of the availability of the dispute resolution process applicable to disagreements over the value of the insured property, the value of the property saved, the nature and extent of the repairs or replacements required, or if made, their adequacy or the amount of loss or damage or any other condition of the Policy.

The *Regulations* require an insurer to give written notice to an insured of the availability of the dispute resolution process at one of two points in time. The first, within 10 days after the insurer determines that there is a dispute between themselves and the insured over matters to which the dispute resolution process would apply. The second, within 70 days after the insured submits a proof of loss if at the time the insurer has not yet made a decision in respect of a matter which would be subject to the dispute resolution process.

Notification of Limitation Periods

The *Regulations* provide that notification of the statutory limitation periods must be given at two points in time: (a) at the time or within 5 business days after the insurer denies liability for all or part of the claim; and (b) at or within 10 business days after the first anniversary of the date the insurer receives a claim.

However, the requirement for notification does not apply if the insurer has already adjusted the loss acceptably to the claimant or settled the claim. Further, an insurer is not required to give notices to a claimant who is represented by legal counsel.

The *Regulations* do not require an insurer to advise as to the date of the limitation period will expire, but rather just what the applicable statutory limitation period provides.

If an insurer fails to give the required notice the running of time with respect to the applicable limitation date is suspended. The limitation date only starts running on the date notice is given or a date that would cause the limitation period to exceed 6 years after the date the cause of action against the insurer arose. There is no provision for discretion on the part of a trial judge in regards to the suspension of the limitation period.

Exclusion of Statutory Conditions

The *Regulations* define a number of classes of insurance to which the Statutory Conditions set out in the General Provisions of the *Act* do not apply, namely; aircraft insurance, boiler and machinery insurance, credit insurance, credit protection insurance, hail insurance, mortgage insurance, product warranty insurance, title insurance, travel insurance, and vehicle warranty insurance.

Permitted Exclusions

The *Regulations* also set out the permissible fire exclusions as:

- (a) Generally those related to an intentional criminal act or omission of an insured; and,
- (b) Riot, civil commotion, war, invasion, act of a foreign enemy, hostilities, civil war, rebellion, revolution, insurrection or military power.

As expected, the permitted exclusions do not include fire following earthquake. However, they do include terrorism, albeit only for policies applicable to property that is not used for a residential purpose, i.e. commercial policies.

In addition the *Regulations* provide that a policy must not contain an exclusion for loss or damage by fire that occurs when the insured property is vacant for a period of less than 30 days.

Recovery by Innocent Persons

The provisions relating to the rights of innocent co-insured individuals to recover damages under a policy was brought into force in June 2011. However, for greater cohesion, the *Regulations* re-enact these provisions.

The *Regulations* provide that the protection for innocent co-insureds only extend to natural persons. In addition, in order to avail themselves of this protection, innocent co-insureds must cooperate with the insurer in respect of the investigation of the loss including submitting to an examination under oath and producing relevant documents.

Cooling off Period

The *Regulations* provide for a cooling off period in terms of life and accident and sickness contracts. In this regard a person who purchases a contract of life or accident and sickness insurance may rescind it within 10 days after receiving the policy or within a longer period specified within the policy.

Transitional Regulations for Part 2 General Provisions

The *Regulations* provide for the *Act* to come into force on July 1, 2012 so as to be coordinated with the implementation of Alberta's new *Insurance Act*. A further 6 month transitional period until January 1, 2013 is provided to insurers to allow them to continue to use their existing license insurance classes for reporting and business authorization purposes.

In addition the transition sections of the *Act* state that certain sections of the *Act* do not come in force in regards to a contract which is in effect on July 1, 2012 and only come into force the date the contract is renewed or replaced. These sections include requirements for certain policy wordings, time for payment of claims, statutory conditions, limitation of liability clauses, exclusions from coverage and fire peril exclusions.

The dispute resolution portions of the *Act* do not apply to a contract in respect of the claim if an insurer has already given notice under the appraisal process before July 1, 2012.

Under the *Regulations* certain provisions of the *Act* do not apply to a contract in respect of loss or damage covered by the contract if the loss or damage occurs before July 1, 2012, namely, postponement of the limitation period, new 2 year limitation periods and the recovery by innocent persons provisions.

Conclusion

It has taken the British Columbia Legislature until now to rectify the "outmoded paradigm incapable of coherently addressing the modern multi-peril policy" [*KP Pacific*] but with these *Regulations* and an enactment date of July 1, 2012 for the new *Act*, the insurance industry in British Columbia is, at long last, close to having a modern legal framework regulating contracts of insurance.

QUANTUM OF DAMAGES

Injury	Non-Pecuniary	Total	Paragraph
Brain	\$200,000	\$836,000	¶M-2558
Brain	\$300,000	\$3,198,776	¶G-2423
Shoulder	\$85,000	\$253,666	¶M-2555

RECENT CASES

Full-Text Decisions

Decision Applying Discoverability Principle To Extend Time for Filing Claim in Doubt

Ontario Superior Court of Justice, October 26, 2011

The plaintiff purchased accident disability insurance from the defendant insurer. After an accident at work, he claimed and received benefits until he returned to full-time work. About a year later, he was laid off due to a shortage of work. Shortly thereafter, the plaintiff was advised of the results of an MRI and was told by his doctor to cease working. The plaintiff then claimed for continuing benefits but was denied on the basis that more than six months had passed since he had returned to full-time work. The defendant moved for summary judgment to have the action against it dismissed, but the motion was dismissed. The defendant appealed that decision.

The motion was granted. The Court stated that the test for granting leave to appeal is conjunctive: the Court must be satisfied that there is good reason to doubt the correctness of the order, and the proposed appeal must involve a matter of general importance. The Court held that if the motions judge had applied the undisputed facts to the clear and plain terms of the policy, it was obvious that the plaintiff's claim would have been defeated by those terms, and the defendant's motion for dismissal would have been granted. Instead, the motions judge reviewed the law of discoverability as it applied to limitation periods and held that the discoverability principle should also be applied to the facts of the case, with the result that the recurrent claim might have been filed in a timely fashion. The Court noted that this was seemingly the first time the discoverability principle had been applied to extend the time for filing a disability claim. Although the motions judge recognized that aspect, the Court found that she relied on the principle, even though it and facts in support had not been pleaded by the parties. The Court concluded that a strict application of the facts to the policy would have resulted in a successful summary judgment motion. The application of the discoverability principle in this manner was therefore open to question, leaving the Court with good reason to doubt the correctness of the decision. Furthermore, the issue rose above the interests of the parties, and therefore was an issue of public importance relevant to the development of the law.

Dube v. Manulife Financial, [2012] I.L.R. ¶1-5205

Insurer Had No Duty To Indemnify Insured for Settlement Payout

Ontario Superior Court of Justice, November 28, 2011

A workplace accident occurred at the plaintiff scrap yard business when an employee operating a crane ran over another employee and severed his right leg. The injured employee commenced an action against the plaintiff, which was settled with payments by the plaintiff and the plaintiff's insurance broker/brokerage. The plaintiff's commercial general liability ("CGL") insurer, the defendant Lombard General Insurance ("Lombard"), denied coverage, so the plaintiff commenced this action for indemnity. The central issue was whether the injury was covered by the CGL policy, which was part of a comprehensive business policy provided by Lombard to the plaintiff. A complicating factor was that years prior, the business owners had taken the management team (which included the injured employee) out of workers' compensation ("WSIB") coverage. Unfortunately, this fact was never related to the broker. No coverage was ever requested to specifically protect against the management team/executive officers being injured by an employee. The CGL policy excluded "bodily injury" to an employee of the insured arising out of and in the course of employment by the insured.

The action was dismissed. The Court noted that the responses in the insurance application left the impression that all employees of the plaintiff were covered by WSIB, that there was employer's liability insurance for those not covered, and that there was contingent employer's liability insurance for all employees covered by WSIB. The broker's lack of knowledge that certain employees were not fully insured meant that he did not seek an extension of the base policy. The Court disagreed with the plaintiff's argument that the characterization of the injured employee as an executive officer instead of an employee somehow carved out an exception to the limitation of coverage. Case law has described an executive officer as not being an employee for the purposes of the *Workers Safety Insurance Board Act* but nonetheless an employee at common law. Therefore the injured employee could very well have been both. The Court concluded that there was no ambiguity in the policy. In addition, the definition of who was an insured could not be considered commercially unreasonable; there was a WSIB scheme in place to provide disability insurance to participants. While the gap in coverage was not considered by either the plaintiff or the broker, Lombard was not required to second-guess those parties. The Court concluded there was no coverage for the injured employee as either an employee or an executive officer; therefore, there was no requirement for Lombard to indemnify the plaintiff or the broker in respect of the settlement.

Sam's Auto Wrecking v. Lombard General Insurance, [2012] I.L.R. ¶1-5206

Trial Judge Erred in Piercing Corporate Veil and Finding Insured Driver Was Owner of Vehicle

Court of Appeal of New Brunswick, November 3, 2011

The now-deceased Michael Burke, through no fault of his own, was severely injured in a motor vehicle accident with an uninsured vehicle in 2000. He was driving a tractor-trailer unit that was owned by 1021256 Ontario Inc., a company in which Burke was the sole officer and shareholder. At the time of the accident, the tractor-trailer was leased to another company. The policy (as provided by the lessee) covering the vehicle provided uninsured motorist coverage (to a maximum of \$200,000) but not underinsured motorist coverage. However, Burke had underinsured coverage for his personal vehicle through an NBEF No. 44 — Family Protection Endorsement attached to a policy issued by the defendant insurer. The insurer submitted, among other arguments, that Burke was not an "insured person", because at the time of the accident he co-owned the vehicle along with its registered owner (the numbered company). The trial judge "lifted the corporate veil" and found that Burke should be deemed to be the owner of the truck, which had the effect of excluding him from coverage. The deceased's estate appealed.

The appeal was allowed. The Court concluded that Burke was both an "insured person" and an "eligible claimant" for the purposes of the NBEF 44 endorsement. The insurer's denial was unsustainable, for two main reasons: (1) the insurer's pleadings did not provide the required statement of facts upon which objection to Burke's eligibility was taken and accepted at trial, and as a result, he and his estate sustained significant prejudice in the prosecution of the case for such coverage; and (2) the insurer did not discharge its burden of proving that Burke owned or co-owned the tractor-trailer at the time of the accident. With respect to the former, the Court held that the trial judge erred in law in basing his decision on facts that were neither pleaded nor proven, and in disposing of the case by way of an unrequested equitable remedy. The Court found that abiding by the rules of pleading was not optional, and in this case, certain rules were not respected. In addition, the Court found ample case law supporting the proposition that lifting the corporate veil was only appropriate where those in control of the corporation used it as a shield for fraudulent or improper conduct. The trial judge found that such conduct was not in issue and appeared to have pierced the corporate veil for "just and equitable" reasons. The Court held that the present case was not appropriate for deviating from accepted principles.

Burke Estate v. Royal & Sun Alliance Insurance Company of Canada, [2012] I.L.R. ¶1-5211

Alleged Failure To Operate Seat Belts Properly Did Not Affect Duty To Defend

Court of Queen's Bench of Alberta, November 2, 2011

The issue was whether the defendant Aviscar Inc. or its insurer was obliged to defend the two applicants regarding the third-party notices issued against them by some of the defendants. The applicants and their minor children were in an automobile accident caused by the defendant Carpenter. The allegations in the third-party notices included an allegation that the infant children were injured as a result of the applicants' failure to ensure proper use of seat belts.

The application was allowed. The subissue was whether there was operation of “any part” of an automobile or a failure to operate any part of an automobile, and whether there was therefore a difference in the duty to defend. The applicants claimed that use or improper use of the seat belts constituted an operation of “any part” of the automobile. The respondents submitted that the failure to operate the seat belts was a cause of the injury. The Court held that the applicants’ failure to properly fasten seat belts, if so proven at trial, was no different than the failure of a passenger (if so able) to brake, blow a horn, or take other evasive action. All arose out of the operation of a motor vehicle in which a passenger was present. The Court concluded that the injuries resulted from the use or operation of a motor vehicle in the broad sense. While indemnity might be ultimately denied, there was a possibility of indemnity, and therefore there was a duty to defend.

Shum Estate v. Dewetter, [2012] I.L.R. ¶I-5215

Other Insurance Decisions

- **Mental Distress Damages Upheld on Appeal**

McQueen v. Echelon General Insurance Company, [2012] I.L.R. ¶I-5207, Ontario Court of Appeal (October 18, 2011)

- **Arbitrator Correct in Finding Tractor-Trailer Insureds Solely Liable for Winter Accident**

Markel Insurance Company of Canada v. Certas Direct Insurance Company, [2012] I.L.R. ¶I-5208, Ontario Superior Court of Justice (October 13, 2011)

- **Out-of-Province Insurer Added as Defendant Despite Limitation Period Issue**

Moldovan v. Republic Western Insurance Company, [2012] I.L.R. ¶I-5209, British Columbia Court of Appeal (October 27, 2011)

- **Insurer Had Standing To Bring Appeal Despite Change in Statutory Basis**

Shapiro v. Dailey, [2012] I.L.R. ¶I-5210, British Columbia Court of Appeal (October 28, 2011)

- **Insurer Obligated To Defend Properly Pleaded Non-Derivative Defamation Claim**

British Columbia Medical Association v. Aviva Insurance Company of Canada, [2012] I.L.R. ¶I-5212, Supreme Court of British Columbia (October 19, 2011)

- **Exclusionary Clauses Applied Such That Professional Liability Insurer Not Required To Defend**

Gertner v. Lawyers’ Professional Indemnity Company, [2012] I.L.R. ¶I-5213, Ontario Superior Court of Justice (October 19, 2011)

- **Court Interpreted Eligibility Period for Disability Policy Was One Day’s Work**

Jackson v. The Standard Life Assurance Company, [2012] I.L.R. ¶I-5214, Supreme Court of British Columbia (November 3, 2011)

- **Plaintiff “Struck by” Snowplow Within Meaning of Insurance Act**

Shepard v. Sanderson, [2012] I.L.R. ¶I-5216, Supreme Court of Prince Edward Island, Trial Division (October 31, 2011)

Torts — Motor Vehicle

Trial Judge Erred in Finding Contributory Negligence of Mother Who Supervised Daughter’s Driving

Court of Appeal of Alberta, October 20, 2011

The respondent was injured in a wintertime car accident in which her teenage daughter was killed. The respondent was a passenger in a car driven by her daughter. The trial judge awarded the respondent various damages for her injuries but also found her contributorily negligent for the accident (see ¶M-2448). The trial judge held that the respondent could not be faulted for allowing her daughter to drive but that the circumstances changed during the trip. She did not breach her duty by not insisting her daughter slow down in between snowdrifts, but she should have noticed the peril of the snowdrifts and cautioned her daughter about her speed prior to reaching the first snowdrift. The appellant estate and lessor of the vehicle appealed the damages awarded to the respondent for pre- and post-trial loss of income and cost of future psychological care. The respondent cross-appealed the finding of contributory negligence.

The appeal was dismissed, and the cross-appeal on contributory negligence was allowed. The Court concluded that the trial judge erred in law in finding contributory negligence by setting the wrong standard of care and by failing to consider causation. The trial judge set a standard of care that was unreasonable. The duty to supervise a driver with a learner's licence could not demand a higher standard of supervision just because the person with the operator's licence was a parent. The Court found that what little case authority existed on the standard of supervision required by an experienced driver to an inexperienced driver recognized that supervision once driving had commenced was limited. In finding that the respondent failed to recognize the perils posed by the snowdrifts (as recognized by the professional truck driver witness with 25 years of experience), the trial judge set too high a standard for supervision. The Court noted that the daughter had already been driving for two years and was scheduled to take her operator's licence test the next day. Had she passed and had the respondent been driving with her daughter one day later, there would have been no basis for finding any contributory negligence. Finally, the Court held that the trial judge failed to ask whether, in the circumstances, the respondent could have reasonably done something to avoid the collision; the breach of the supervisor's standard of care had to be causative, not made on the mere fact that the student driver made an error.

McLaren v. McLaren Estate, [2012] I.L.R. ¶M-2553

Plaintiff Awarded \$30,000 for Spousal-Related Care and Transportation Assistance Costs

Supreme Court of British Columbia, October 31, 2011

The defendant admitted liability for the 2007 motor vehicle accident, so the issue was the assessment of damages. The most serious injury the plaintiff suffered was to her right shoulder. A complicating factor was that since May 2010, the plaintiff had been the sole income earner for her family. Her husband suffered from a rheumatoid disease and could not work. The nature and extent of his medical condition were not fully ascertained, but the outlook was not good. The plaintiff sought damages regarding her ability to care for her spouse. The plaintiff had returned to full-time work as a restaurant manager, but was given significant accommodation by her employer.

The action was allowed. In awarding non-pecuniary damages of \$85,000, the Court accepted that the pain the plaintiff endured was debilitating. She had worked through much of it out of necessity, but the cost to her had been great. The Court noted that while care had to be taken to not require the defendant to compensate the plaintiff for costs incurred by her family solely due to her spouse's present condition, it was a fact that the defendant's negligence reduced the plaintiff's ability to cope with the vicissitudes of life. With respect to cost of future care related to spouse-related services, the Court noted that in a foreseeability analysis, it was immaterial whether the injured party's services for a disabled spouse did not materialize until after the defendant's negligent act, provided the need to provide such services manifested before trial. The Court found that it was foreseeable that a shoulder injury that affected usual household tasks would cause similar difficulty in performing tasks of a related nature, even if those tasks came into existence after the injuries were caused. On the other hand, the Court needed to consider whether the costs claimed were too remote for compensation. As a result, the Court rejected the claim for new flooring (to minimize the plaintiff's need to vacuum) and the claim for a new kitchen (with lower cabinets to minimize reaching), as well as the purchase of a wheelchair-accessible vehicle (so she wouldn't need to lift her spouse). While the Court found the latter cost medically justifiable, the amount sought was not reasonable. In this respect, the Court awarded \$30,000 for care aide costs for the plaintiff's difficulties in providing services to her spouse, primarily in relation to her post-surgery recovery period, as well as transportation assistance costs.

Milliken v. Rowe, [2012] I.L.R. ¶M-2555

Defendants Unable To Add Claim for Contribution and Indemnity by Way of Equitable Set-Off

Ontario Superior Court of Justice, November 7, 2011

The plaintiffs were injured in a motor vehicle accident in 2006 and commenced proceedings in 2008. In their statement of defence, the defendants pleaded contributory negligence against the plaintiff driver but made no counterclaim against him for contribution and indemnity for the injuries suffered by the plaintiff passenger. By 2011, the limitation period for adding this counterclaim had expired, so the defendants now sought to amend their statement of defence by

adding a claim against the plaintiff driver for equitable set-off. They submitted that the limitation period was not applicable to this new claim.

The motion was dismissed. The Court noted that, to date, the issue had not been directly addressed in jurisprudence. It granted leave to bring the motion, stating that the claim for contribution and indemnity was a serious matter affecting the defendants' substantive rights. Turning to the merits of the motion, the Court agreed that the limitation period did not apply to equitable set-off. Although neither *Canada Trustco Mortgage Co. v. Pierce Estate* nor *Spiral Aviation Training Co. v. Attorney General of Canada* dealt with claims for contribution and indemnity, it was bound by the broad and definitive statement from a Superior Court judge that claims for equitable set-off are not subject to a limitation period.

However, the Court found that the defendants could not satisfy the second or third requirements of the test for equitable set-off as summarized by the Supreme Court of Canada in *Holt v. Telford*. The grounds asserted by the defendants against the plaintiff driver did not go to the root of the claim by the driver — although both plaintiffs' injuries arose from the same accident, they were separate claims. In addition, the claim for contribution from the driver for his passenger's injuries was not connected to the driver's claim for his own damages — while his conduct was connected to both claims, the claim for contribution as a result of that conduct was not connected with the driver's claim for his own injuries. The Court also concluded that this was not one of those rare cases where what amounted to a counterclaim could be pleaded by means of equitable set-off.

Goma v. Raghunandan, [2012] I.L.R. ¶M-2557

Other Motor Vehicle Tort Decisions

- **Trial Judge Erred in Accepting Higher Rate for Loss of Valuable Services Award**
Furlotte v. Elward, [2012] I.L.R. ¶M-2554, Court of Appeal of New Brunswick (October 20, 2011)
- **Court Declined To Retroactively Authorize Audio-Recorded Medical Examination**
Forbes v. Drouin, [2012] I.L.R. ¶M-2556, Ontario Superior Court of Justice (October 14, 2011)
- **Accident Substantially Worsened Thin Skull Plaintiff's Work and Personal Life**
Gilbert v. Bottle, [2012] I.L.R. ¶M-2558, Supreme Court of British Columbia (October 17, 2011)

Torts — General

Plaintiff Awarded Over \$3 Million for Battery With Golf Club

Supreme Court of British Columbia, November 4, 2011

The plaintiff was injured when the defendant Irvine struck him in the head with a golf club during an altercation that occurred on Irvine's front lawn. The plaintiff's friend and Irvine's tenant were fighting; both the plaintiff and Irvine intervened, but their versions of the intervention differed. Irvine perceived the plaintiff's approach as threatening. Irvine's liability was the sole issue. He conceded he struck the blow that caused the injuries, but submitted the circumstances were such that his responsibility at law should be substantially limited. He pleaded that he was protecting his tenant and that he feared for his own safety.

The action was allowed. The Court chose to approach the matter within the framework of the plaintiff's allegation of battery. As the plaintiff had established battery and injuries, the focus was on Irvine to establish that he acted justifiably with reasonable force. The Court concluded that to the extent that Irvine believed the plaintiff needed to be subdued with force, his assessment was in error. The evidence did not support the contention that the plaintiff was involved in the attack on the tenant, nor was it reasonable to believe the plaintiff was about to enter the fight. The Court found that even if there had been a proper basis for Irvine's use of force, his decision to strike a two-handed blow with a golf club to the side of a man's head was markedly excessive and disproportionate. The Court also held that neither the *volenti* principle nor the maxim of *ex turpi causa non oritur actio* assisted Irvine's defence. Finally, stating that the striking of the blow was an intentional act, the Court did not find it necessary to discuss the plaintiff's alternative claim in negligence. In assessing damages, the Court accepted that the blow caused a severe traumatic brain injury, and although the plaintiff had learned to walk again, he had difficulty and still relied on a wheelchair. The Court

awarded \$300,000 in non-pecuniary damages for the devastating change to the plaintiff's life. In all, the plaintiff was awarded over \$3 million in damages.

Saether v. Irvine, [2012] I.L.R. ¶G-2423

Plaintiff Could Not Succeed in Action for Negligent Breach of Statute by City

Ontario Superior Court of Justice, October 28, 2011

The plaintiff had raised wild boars on his property for many years when the defendant city sent him a letter. The plaintiff advised the city that the *Farming and Food Production Protection Act, 1998* applied to his practice and that he was complying with that legislation. Nevertheless, the city charged him pursuant to an exotic animal bylaw. The plaintiff removed the boars from his property. One week before the trial date, the charges were withdrawn without explanation. The plaintiff commenced negligence proceedings against the city, claiming negligent breach of a statute by the city, which was a novel claim. The city submitted, in a rule 21 motion, that it was plain and obvious that the plaintiff's negligence claim would fail, but its motion was dismissed. The city sought leave to appeal.

The motion was allowed; leave to appeal was granted. To succeed in his claim for negligence, the plaintiff had to establish that the defendant had a duty of care toward him that was breached. The parties agreed that the facts did not come within a category of cases where a duty of care had been found to exist. The Court noted that negligent breach of a statute by a government authority, as alleged by the plaintiff, was not a recognized tort in Canada, although such a breach might be relevant to demonstrate that the relevant standard of care was not met. The Court commenced the two-stage process in *Cooper v. Hobart* (see ¶G-1534) and found that it was arguable that damage was foreseeable, and that the relationship between the parties might be sufficiently close to warrant the imposition of a duty of care. However, residual policy considerations applied in this case, which included a "chilling effect on government and the specter of indeterminate liability". In addition, the plaintiff had alternative remedies available to him, such as judicial review. Finally, the Court noted the absence of a penalty and remedy in the statute itself. The Court concluded that it was plain and obvious that the negligence action could not succeed.

Pickering (City of) v. Rausch, [2012] I.L.R. ¶G-2424

Court Permitted Plaintiffs To Consolidate Two Conspiracy Actions

Ontario Superior Court of Justice, November 1, 2011

The plaintiff Sweda Farms Limited ("Sweda") claimed in two actions that the defendants were acting tortiously to damage its business. The first action was commenced in May 2005 and the second in July 2008. Sweda and the other plaintiffs now alleged that the information of a whistle-blower alerted them to a larger conspiracy against them by the defendants, and that what the plaintiffs previously understood to be two unrelated claims were parts of a coordinated conspiracy. The plaintiffs sought an order to consolidate both actions into one and to file a proposed fresh statement of claim.

The motion was allowed. The Court noted that the plaintiffs took one step where they could have taken two: they could have sought leave to amend each statement of claim and thereafter pursue consolidation. However, the Court also noted the requirement to construe the *Rules of Civil Procedure* liberally, and found that there was no point in forcing the plaintiffs to take two steps rather than one. The Court next looked at whether some of the new claims were time barred, and held that the broader, factually oriented approach to the meaning of "cause of action" in interpreting and applying rule 26.01 was the correct approach. The Court found this consistent with the trend in cases and with the purposive approach to interpreting limitations legislation. As a result, the defendants' basic entitlement to have notice of the factual matrix out of which the claim for relief arose was met. The Court concluded that the proposed fresh statement of claim simply reframed the allegations of facts; it pleaded an alternative claim for relief out of the same facts, stated different legal conclusions from the same facts, provided better particulars for claims already made, or asserted a new head of damage from the same facts. The Court also found that the allegations were sufficient to draw a connection between the two actions.

Sweda Farms Ltd. v. Ontario Egg Producers, [2012] I.L.R. ¶G-2425

Other General Tort Decisions

- **Police Service Added As Defendant to Claim Regarding Private Law Duty**
Haggerty Estate v. Rogers, [2012] I.L.R. ¶G-2421, Ontario Superior Court of Justice (October 12, 2011)
- **Deposing Expert Witnesses Prior to Trial Appropriate in Circumstances**
Gill v. A & P Fruit Growers Ltd., [2012] I.L.R. ¶G-2422, Supreme Court of British Columbia (October 20, 2011)
- **Plaintiff Not Granted *Sanderson* or *Bullock* Order or Double Costs in Complex Trial**
Danicek v. Alexander Holburn Beaudin & Lang, [2012] I.L.R. ¶G-2426, Supreme Court of British Columbia (October 14, 2011)
- **Action Was Statute Barred; Plaintiff Knew of Claim Within Limitation Period**
Muirhead v. Coulas, [2012] I.L.R. ¶G-2427, Ontario Superior Court of Justice (November 7, 2011)

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