FIELD LAW

DEFENCE & INDEMNITY

An Analysis of Insurance Case Law and Legislation

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I. INSURANCE ISSUES

A. The Alberta Court of Appeal reiterated that policies cover insured perils but not pre-existing deficiencies in the property that are not caused by the peril, but only discovered as a result of the peril, such as building by-law compliance.

852819 Alberta Ltd v Sovereign General Insurance Company, 2017 ABCA 76

I. Facts and Issues

The insured's building suffered ice damage and the Defendant insurer paid to have the damaged portions of the roof repaired. Subsequently, a building inspector advised the insured that the entire roof structure had to be changed because it was not compliant with the building code. The roof had not been compliant with the building code before the loss. The insured had the roof brought up to code at a cost of $527,497.46. It sought indemnity for this from the insurer. After a summary trial, the trial judge held for the insured and awarded it the indemnity. The insurer appealed.

II. HELD: For the insurer; appeal allowed and claim dismissed.

1. The Court noted that the trial judge had not had the benefit of the Court of Appeal's decision in ***Roth v. Economical Mutual Insurance Company***, 2016 ABCA 399 [briefed in the February 2017 edition of ***Defence & Indemnity***]. The Court re-iterated its conclusion in that case to the effect that an insurance policy does not cover losses (such as lack of building code compliance) that are not caused by the loss, but are only discovered because of the loss:

> [8] In ***Roth*** at para 23, this Court decided that:
>
> It cannot reasonably be suggested that either the insurer or insured would have anticipated recovery for pre-existing deficiencies in a building where the peril insured against . . . did not actually create the bylaw issue. Extending coverage in such cases would require that the insurer determine in each case whether the property complied with all relevant bylaws, as it would be responsible for the costs of remedying any and all deficiencies unearthed as part of subsequent damage insured against. Quite apart from the fact that this would be practically impossible in most cases, it would also effectively turn an insurer into a guarantor of construction defects and building code violations. Insurance indemnifies against risk whereas requiring an insurer to be responsible for hidden damage pre-existing the fortuitous event in question is more in the nature of a warranty: ***University of Saskatchewan v Fireman's Fund Insurance Co. of Canada*** (1997), 1997 CanLII 9789 (SK CA), [1998] 5 WWR 276 (Sask CA) at paras 36-37. This cannot be reasonably expected of an insurer.

Here the non-compliant roof may have been *discovered* as a result of the damage caused by the insured peril, but the damage was not *caused* by that peril.

> [9] For the same reasons as given in ***Roth***, in our view the appellants are not obliged to indemnify the respondent for the $527,497.46 incurred to upgrade the entire roof of its building because this cost is not from "a loss resulting from an insured peril." The structural deficiency involving the undamaged portion of the building's roof did not come about as a result of the ice damage.

B. Where a claimant pleads an intentional act as negligence, in the context of an exclusion clause for intentional acts, the claim for negligence may be considered to be "derivative" of the intentional tort and thus excluded by the exclusion clause.

Reeb v. Guarantee Co. of North America, 2016 ONSC 7511 per Bondy, J.

I. Facts and Issues

This case considered an application brought by Ryan Reeb (hereinafter referred to as "Ryan") seeking a declaration that he is insured under two policies of insurance. The first (the "Guarantee policy") was a policy issued to his father Tim Reeb ("Tim") by the respondent Guarantee Company of North America ("Guarantee"). The second (the "Co-operators policy") was issued to Tim's second wife, Theresa Curry-Reeb ("Theresa"), by the respondent Co-operators.

The underlying action involved a claim by James Riley ("James") that he was injured on February 25, 2007 at his parent's home in Ontario, by Ryan. James and Ryan had been playing at James' house. They were both 14 years of age. James' mother had received a call and, as a result, left on an errand, leaving James and Ryan in the house alone. They were playing a game using "BB guns". Ryan fired a pellet which struck James in his left eye, leaving James blind in that eye.

The respondent insurers conceded that Ryan met the definition of "insured person" in both policies. The issue was whether the insurers could avoid coverage pursuant to the "intentional act" exclusions in their respective policies.

The Guarantee policy exclusion clause provided as follows:

> You are not insured for claims arising from:
>
> . . .
>
> (5) bodily injury or property damage caused by any intentional or criminal act or failure to act by
>
> (i) any person insured by this policy; or
>
> (ii) any other person at the direction of any person insured by this policy

The "Legal Liability" section of the Co-operators policy provided:

> We will pay all sums which you become legally responsible to pay as compensatory damages because of unintentional bodily injury or property damage up to the limit of insurance stated on the Certificate of Insurance. You are insured for legal liability arising out of your personal actions any-

where in the world.

The Co-operators policy also stated:

> You are not insured for claims made against you arising from:
>
> • bodily injury or property damage caused intentionally by you or at your direction or resulting from your criminal acts or omissions.

II. HELD: For the Defendant; the damages resulting from the negligence pleaded were entirely derived from the intentional shooting and, accordingly, were subsumed for purposes of the exclusion clause.

1. The Court found that the torts plead by the Plaintiff in the pleadings were in substance an intentional tort and not negligence.

a) The Court first noted at that "an insurer is required to defend a claim where the facts alleged in the pleadings, if proven to be true, would require the insurer to indemnify the insured for the claim" (para. 12). See: ***Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada***, 2010 SCC 33, [2010] 2 S.C.R. 245 (S.C.C.), at para. 19."

b) The Court then noted (at para. 13) that "the duty to defend, however, extends only to claims that could potentially trigger indemnity under the policy absent any language to the contrary: see ***Non-Marine Underwriters, Lloyd's London v. Scalera***, 2000 SCC 24, [2000] 1 S.C.R. 551 (S.C.C.), at para. 49."

c) The Court held that "in considering whether a claim could potentially trigger indemnity under the policy, however, the court must look beyond the labels used by the plaintiff in the pleadings to ascertain the "substance" and "true nature" of the claims. See: ***Tedford v. TD Insurance Meloche Monnex***, 2012 ONCA 429, 112 O.R. (3d) 144 (Ont. C.A.), at para. 14; ***Monenco***, at paras. 34-35; ***Scalera***, at para. 79."

i) That is because "a plaintiff may draft a statement of claim in a way that seeks to turn intention into negligence in order to gain access to an insurer's deep pockets. See: ***Non-Marine Underwriters, Lloyd's London v. Scalera***, at para. 84; and E. S. Pryor, "The Stories We Tell: Intentional Harm and the Quest for Insurance Funding" (1997) 75 ***Tex. L. Rev.*** 1721 (S.C.C.), at p. 1735."

ii) At paras. 50-52 of the decision in ***Scalera***, the Supreme Court sets out a three-stage process to determine whether or not a particular claim could trigger indemnity. The Court summarized those three steps as follows:

> "First, the court should determine which of the plaintiff's legal allegations are properly pleaded. In doing so, courts are not bound by the legal labels chosen by the plaintiff.
>
> At the second stage, the court should determine if any claims are entirely derivative in nature. The duty to defend will not be triggered simply because a claim can be cast in terms of both negligence and intentional tort. If the alleged negligence is based on the same harm as the intentional tort, it will not allow the insured to avoid the exclusion clause for intentionally caused injuries.
>
> At the third stage the court must decide whether any of the properly pleaded, non-derivative claims could potentially trigger the insurer's duty to defend."

d) The Court held (at para. 29):

> I find at the first stage that the applicant's legal allegations are not properly pleaded. I say that because the labels used by the applicant are consistent only with negligence while the evidence supports an intentional act. The pleadings are silent as to Ryan having intentionally pointed the gun in James' direction and intentionally firing the handgun with the intention of hitting and injuring James.

e) The Court held (at para. 31) that "at the second stage, if the alleged negligence is based on the same harm as an intentional tort, it will not allow the insured to avoid the exclusion clause for intentionally caused injuries."

f) Ryan's counsel argued that the injuries that would result from shooting James with a pellet in a place other than his eye would "not rise to the level" of the injuries sustained when the pellet struck James' eye. Ryan's counsel maintained that the intended "minor transient injuries" are not the same as "serious and permanent injuries to his eye." As a result, applicants counsel argued that although the act was intended, the consequences were not. However, the Court found that the distinction between shooting James in the eye and shooting him in some other body part to be a distinction without consequence.

i) "The first reason is that "if a tort is intended, it will not matter that the result was more harmful than the actor should, or even could have foreseen." See: ***Scalera***, at para. 99; A. M. Linden, ***Canadian Tort Law***, 6th ed. (1997), at p. 45; ***Bettel v. Yim*** (1978), 20 O.R. (2d) 617 (Ont. Co. Ct.), at p. 628."

ii) "The second reason is because there is no effective distinction between an exclusion clause which covers "intentional acts" and one which covers "intentional injuries". See: ***Bu-***

chanan v. GAN Canada Insurance Co. 22 (Ont. C.A.) . . . 2000 CanLII 5756; and ***Sansalone v. Wawanesa Mutual Insurance Co.***, 2000 SCC 25, [2000] 1 S.C.R. 627 (S.C.C.) . Where the tort was intended, it doesn't matter if the result was more harmful than intended. See: ***GAN***, at para. 20 and ***Bettel v. Yim***, at p. 628."

iii) "The third reason is because in his examination of November 11, 2016, Ryan acknowledges at question 105 that "if you shot someone in the face or eye you could seriously injure them." He agreed and added that, as a result, he himself was not allowed to own guns of any kind. In other words, Ryan knew what was at stake when he pulled the trigger with the gun pointed in James' direction."

g) Concluding, the Court stated that "the damages resulting from the negligence pleaded were entirely derived from the intentional shooting and, accordingly, were subsumed for purposes of the exclusion clause. In other words, the harm which resulted from that intentional shooting was the same harm upon which the claims in negligence are based. See: ***Scalera***, at paras. 85 and 130. It follows that even if the plaintiff is successful at trial, the respondents will have no duty to indemnify because of the exclusion clause for intentional acts."

2. The Court found that the case law relied upon by the applicant did not address the core issue of the exclusion clause for intentional conduct. The Court held that each of the cases were distinguishable.

a) Some cases, such as ***Sovereign***, consider the fortuity principle. The fortuity principle aids in precluding coverage for harm caused by an intentional act where the insured intended to inflict the actual harm complained about by the plaintiff. In other words, it is not enough that the act be intended, but there also must be an intention to inflict the actual harm which results. See: ***Sovereign***, at para. 48; ***Liberty Mutual Insurance Co. v. Hollinger Inc.*** (2004), 236 D.L.R. (4th) 635 (Ont. C.A.), at paras. 18-19. A fortuitous loss is one that is neither intentional nor inevitable. The Court further provided:

i) "The fortuity principle does not preclude coverage for an intentional act with unintended consequences. Rather, it precludes coverage for an intended act with intended consequences." See: ***Sovereign***, at para. 48. In this case we have an intended act, the firing of the gun, with an intended consequence: some level of injury to James. Believing Ryan's evidence, it was the level of injury that was unintended. However, I reiterate that where a tort is intended, it does not matter if the result was more harmful than intended. See: ***GAN***, at para. 20."

ii) "In ***Sovereign***, the Ontario Court of Appeal found that the application judge did not err in finding that the insurer had a duty to defend, notwithstanding the harm was caused by the insured's intentional act. ***Sovereign*** is clearly distinguishable, however, because in ***Sovereign***, the court found that although "malicious prosecution involves intentional conduct", the policy specifically provided coverage for "malicious prosecution". See: ***Sovereign***, at para. 63."

b) The Court noted (at para. 43 - 48) as follows:

> 43 In several of the applicant's cases there were evidentiary voids at the time the motion was brought. In other words, the motion was premature for evidentiary reasons. As an example, at paras. 16-18 of the decision in ***Simone v. Economical Mutual Insurance Co.***, 2013 ONSC 3223, 23 C.C.L.I. (5th) 115 (Ont. S.C.J.), it is clear that there is an evidentiary void as to the issue of a negligence claim which might advance with merit. As a result, it was too early in the process to determine if the negligence allegations would be determined to be a derivative of the intentional assault.
>
> 44 Similarly, the decision in ***F. (R.D.) (Litigation Guardian of) v. Co-operators General Insurance Co.***, 2003 MBQB 190, 176 Man. R. (2d) 316 (Man. Q.B.), involves a fire that was intentionally lit. Kaiser J., however, was unable to establish on the available evidence whether there was an intention to damage property, nor did the pleadings allege such an intention. The court concluded that it was entirely conceivable that the fire had been intentionally lit but negligently allowed to spread and cause damage. Again, it was too early in the proceedings to establish whether there was an intention to damage property. I reiterate that in the case before me, there was an intention to injure.
>
> 45 In other cases put forth by the applicant there was no suggestion whatsoever of an intent to injure. As an example, in ***Savage v. Belecque***, 2012 ONCA 426, 111 O.R. (3d) 309 (Ont. C.A.), the plaintiff was held by someone inside an automobile, pulled for some distance, and then fell. The driver of the car then violently reversed the vehicle not realizing the plaintiff had fallen behind it. The plaintiff was injured in the process. In that case, there was no suggestion that there was any intent to injure, as was the case here.
>
> 46 Similarly in ***Gamblin v. O'Donnell***, 2001

NBCA 109, 244 N.B.R. (2d) 102 (N.B. C.A.), a hunter in one hunting party fired at a truck belonging to another hunting party. The bullet struck the plaintiff, who was a passenger in that truck, in the head. Again, there was a finding that the defendant had no intention to injure the plaintiff. In the case before me, the intent to injure is admitted.

47 In ***Mitsios v. Aviva Insurance Co. of Canada*** (2008), 89 O.R. (3d) 556 (Ont. S.C.J.), one employee, the plaintiff, sprayed the other, the defendant, with water. The defendant placed the plaintiff in a headlock. The plaintiff lost his balance and was injured. Again, although the headlock itself was intentional, there was no intent to injure. I reiterate Ryan's acknowledgment of the intent to injure.

48 In other cases it was clear that although the action was intended, the consequences were not. For example, in ***Stats v. Mutual of Omaha Insurance Co.***, [1978] 2 S.C.R. 1153 (S.C.C.), the court considered the issue of whether the death of Helen Kathleen Brennan in a motor vehicle accident occurred from "accidental bodily injuries" as a result of the vehicle in which she was riding striking a building. The autopsy of Ms. Brown, who was driving the car, indicated that she was "grossly impaired". The trial judge concluded that Ms. Brown "voluntarily undertook to drive while in her impaired condition" and ruled that the collision was not accidental. The Supreme Court found that it was. That case is clearly distinguishable in that there was no suggestion that Ms. Brown had deliberately driven the car into the building. I reiterate that in the case before me, Ryan intended to both shoot and injure James.

II. LIABILITY ISSUES

A. The Ontario Superior Court again recognized the privacy tort of intrusion upon seclusion in awarding damages against a husband who surreptitiously videorecorded his wife in the bedroom.

Patel v. Sheth, 2016 ONSC 6964, per Fragomeni, J.

I. Facts and Issues

A husband (Patel) and his wife (Sheth) were involved in a divorce action with included a claim by the wife Sheth for damages against her husband for the tort of invasion of privacy.

The parties were married on 18 September 2010. They were separated temporarily beginning on 26 April 2012 when Sheth reported Patel to the police for having assaulted her. In 2013, the parties reconciled. When they reconciled, the husband surreptitiously placed a video camera in a keychain located on an armoire in their bedroom, which faced the bathroom. At discovery, the husband lied under oath by denying that he had ever placed a camera in the bedroom and suggested that it had been his wife who had done so. He further lied in claiming that he did not know where the keychain had come from and had asked his wife about it. He also denied having told anyone about planting the camera.

At trial, the husband acknowledged having planted the camera. He testified that after the couple of reconciled their relationship had changed. He recording conversations with his wife, allegedly because he had difficulty talking to her and he claimed that she had become aggressive. He claimed to have become concerned about his own safety and to have felt insecure in his own home. He claimed that his wife had falsely accused him of assault back in 2012. He claimed that he would turn the camera on in the morning. He claimed only to have had it turned on for a couple of days and that he had never downloaded its contents. He also acknowledged to having told someone about planting the camera.

In cross-examinations, the husband's mother testified that she had not known about the camera in the bedroom until she saw it in the pleadings. Her reaction to discovering the camera was that she was "shocked and offended" but claimed that she was not surprised and noted that her son had told her that he planted the camera for his own safety. She acknowledged that she would consider it offensive if someone had planted a camera in her room without her consent.

The wife Sheth testified to having found the camera in October 2014 when she was moving her bedroom furniture. She gave it to her lawyer at the time. She was able to retrieve some photos from the camera. She testified that she was "highly offended" at learning about the camera in her bedroom and that it "all took her by surprise and she was embarrassed."

The wife did not claim that she had suffered any pecuniary losses as a result of the planting of the camera. She did not tender any medical evidence to establish that she had suffered harm as a result.

At trial, the husband argued that there should be no damages awarded for this tort. The wife argued that the circumstances involved in planting the camera were "exceptional", including the fact that the husband had lied about it at discovery and tried to blame her. She argued that the excuse her husband gave for planting the camera made no sense. She argued for general damages of $50,000.00 to "send a strong message". Although she had not pleaded for punitive damages, she asked the court to award them nonetheless.

II. <u>HELD</u>: For the wife Sheth; damages of $15,000.00 awarded; no award for punitive damages.

1. The Court held that the privacy tort of intrusion upon seclusion had been recognized in ***Jones v. Tsige***, 2012 ONCA 32. The Court summarized the law with respect to the elements of the tort as follows, quoting from ***Jones v. Tsige***:

> 105 In deciding the elements of the action for intrusion upon seclusion Justice Sharpe notes the

following at paragraph 70:

> One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person.

106 At paragraph 71 Justice Sharpe states:

> The key features of this cause of action are first that the defendant's conduct must be intentional, within which I would include reckless; second that the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. However, proof of harm to a recognized economic interest is not an element of the cause of action. I return below to the question of damages, but state here that I believe it important to emphasize that given the intangible nature of the interest protected, damages for intrusion upon seclusion will ordinarily be measured by a modest conventional sum.

2. The Court also followed the ***Jones*** case in summarizing the factors that ought to be taken into account in quantifying an intrusion upon seclusion claim:

> 107 Commencing at paragraph 74, Justice Sharpe deals with the question of damages. After reviewing damages under Ontario case law and damages under Provincial legislation Justice Sharpe sets out the following at paragraph 87:
>
> > In my view, damages for intrusion upon seclusion in cases where the plaintiff has suffered no pecuniary loss should be modest but sufficient to mark the wrong that has been done. I would fix the range at up to $20,000. The factors identified in the Manitoba Privacy Act, which, for convenience, I summarize again here, have also emerged from the decided cases and provide a useful guide to assist in determining where in the range the case falls:
> >
> > 1. The nature, incidence and occasion of the defendant' wrongful act;
> > 2. The effect of the wrong on the plaintiff's health, welfare, social, business or financial position;
> > 3. Any relationship, whether domestic or otherwise, between the parties
> > 4. Any distress, annoyance or embarrassment suffered by the plaintiff arising from the wrong; and
> > 5. The conduct of the parties, both before and after the wrong, including any apology or offer of amends made by the defendant.

3. The Court awarded $15,000.00 in general damages, setting out the factors that were taken into account:

> 116 I am satisfied that damages of $15,000.00 is appropriate in this case. I am not satisfied that punitive or aggravated damages are warranted. The factors that have to be balanced in this case include the following:
>
> 1. the nature of the intrusion. It took place in a bedroom and bathroom, places which are very private. The privacy interests of Sheth were significant.
> 2. the intrusion takes place within a domestic relationship.
> 3. although Sheth was embarrassed and shocked at the intrusion no medical information was filed to support and establish an evidentiary basis to find any significant effect on Sheth's health or welfare.
> 4. the conduct of Patel in lying about the intrusion at his Discovery and even attempting to blame Sheth herself for the camera being installed is extremely aggravating and demonstrates a lack of any insight into what he did as being wrong.

III. Commentary

This case suggests that the privacy tort of intrusion upon seclusion is now well settled in Ontario (and we suggest that it will be recognized in the rest of the common law jurisdictions in Canada as well). Plaintiffs seeking to establish a compensable emotional trauma must prove it with medical evidence. Although the Court follows the ***Jones v. Tsige*** decision in limiting general damages to $20,000.00, an argument could be made that in cases where trauma can be established a higher award may be justified. In ***Jane Doe 464533 v. D.(N.)***, 2016 ONSD 541 [briefed in the August 2016 edition of ***Defence & Indemnity***], Stinson, J. held the defendant boyfriend liable for the somewhat different privacy tort of publication of embarrassing private facts for posting a sexually explicit video of the plaintiff girlfriend on the internet. The evidence established emotional trauma on her part. The Court held that damages should be quantified in a manner analogous to awarding damages in sexual assault cases because the injury is to the plaintiff's "dignity and personal autonomy". One might argue for a similar approach for intrusion upon seclusion where that sort of injury is similar, as in the ***Patel*** case. The decision of Stinson, J. in the ***Jane Doe 464533*** case (in the context of a default judgment) has since been set aside to allow the defendant to defend on the merits without any comment on the correctness of the recognition of the tort and the quantification of damages: 2016 ONSC 4920, per Dow, J ; app. dismissed 2017 ONSC 127, per

Kitely, J. [briefed in our February 2017 edition].

B. Where a vehicle owner is exposed to statutory vicarious liability for the negligence of a driver who was immune from liability by the *Workers' Compensation Act*, the owner (who was not covered by the Act at the time) may be exposed to liability for which he/she will not be immune.

McIver v McIntyre, 2016 ABQB 667, per Campbell, J.

I. Facts and Issues

The Defendant McIntyre, took his motor vehicle (the "Vehicle") to Calgary Propane and Automotive (the "Employer") and left the vehicle there to have the Vehicle's brakes repaired. The Defendant provided the Employer's mechanic Morgan (the "Employee Driver") with the keys to the Vehicle for him to properly secure the Vehicle and complete the requested servicing of brakes. After completing the repairs, the Employee Driver took the Vehicle for a test drive to ensure the repairs were complete. In the course of the test drive, the Employee Driver was involved in an accident with the Plaintiff McIver. (As McIntyre had given possession of the Vehicle to the Employer and Employer Driver, he was statutorily exposed to liability for the negligence of the Employee Driver under the *Traffic Safety Act*, RSA 2000 c T-6 (the "*TSA*"), subject to the potential application of workers' compensation legislation.)

At the time of the accident, both the Plaintiff and the Employee Driver were engaged in the employment covered by the *Workers' Compensation Act*, R.S.A. 2000, c. W-15 (the *WCA*"), and the Employer was an "employer" under the WCA. Because s. 23 of the WCA bars any action being commenced against a covered "employer" or "employee" by any other individual who is also covered by the *WCA*, the Plaintiff could not, and did not, commence an action against either the Employer or the Employee Driver or name them as a party to the action.

The two issues before the Court were:

1. Can the Employer beheld vicariously liable for the negligent acts of its Employee Driver notwithstanding the operation of the *WCA*, which bars any action being brought against a covered employer and have apportioned to it the loss or damage occasioned by that fault or negligence; and

2. If so, how should the liability for the damages be apportioned between the Defendant and the Employer?

II. Applicable Legislation

Section 23 of the *WCA* reads as follows:

> 23 (1) If an accident happens to a worker entitling the worker or the worker's dependants to compensation under this Act, neither the worker, the worker's legal personal representatives, the worker's dependants nor the worker's employer has any cause of action in respect of or arising out of the personal injury suffered by or the death of the worker as a result of the accident
>
> a) against any employer, or
>
> b) against any worker of an employer,
>
> in an industry to which this Act applies when the conduct of that employer or worker that caused or contributed to the injury arose out of and in the course of employment in an industry to which this Act applies.
>
> (2) In an action to which section 22 applies, a defendant may not bring third party or other proceedings against any employer or worker whom the plaintiff may not, by reason of this section bring an action against, but if the court is of the opinion that that employer or worker, by that employer's or worker's fault or negligence, contributed to the damage or loss of the plaintiff, it shall hold the defendant liable only for that portion of the damage or loss occasioned by the defendant's own fault or negligence.

III. <u>HELD</u>: For the Defendant; the Plaintiff will not be able to recover any of his damages from the Defendant. 100% of the vicarious liability for the Plaintiff's damages should be apportioned to the Employer.

1. The Court held that s. 23(2) of the *WCA* is intended to address apportionment of fault or negligence to a defendant and, in so doing, does not bar either a claim or apportionment based on vicarious liability, even when the negligent party has statutory immunity from suit.

a) Vicarious liability can be based on relationships (e.g. employer-employee) or statutory responsibility (e.g. responsibility of the owner derived from the ownership of his/her vehicle) and related risks arising from it, with no regard to fault, blame, intent or maliciousness.

b) The jurisprudence does not suggest that vicarious liability and apportionment of fault is restricted only to those found to be "owners" under the *TSA*. As was the case for vicarious liability, the Legislature could have expressly excluded master-servant/employer-employee relationships from "its own fault or negligence" in s 23(2) of the *WCA* but chose not to do so.

c) Indeed, the Legislature appears to have contemplated that if the "employer's or worker's fault or negligence contributed to the damage or loss of the plaintiff" then it was a proper case for the court to apportion liability and "hold the defendant liable only for that portion of the damage or loss occasioned by the defendant's own fault or negligence":

> [31] It is clear that s 23(2) of the *WCA* is intended to ensure that a defendant, who is an unprotected party, is only liable to an injured WCA protected employee for that portion of the damages attributable to its own fault or negligence, including that arising by reason of vicarious liability. In this way, the unprotected defendant is relieved of responsibility for that portion of the claim that was the "fault or negligence" of an employee or employ-

> er protected under the *WCA*, including any "fault" found by reason of a relationship that results in vicarious liability. By including this provision, it appears that the Legislature has expressly retained the statutory and common law rights of contribution and indemnity for parties not protected under the *WCA*.
>
> [32] Practically, thus, while the Employer in this case cannot be a named party to the lawsuit, the Defendant can share or redirect some of his liability for that loss or damages under s 23(2) of the *WCA* by way of fault apportionment with the Employer, who is also vicariously liable for the acts of its Employee Driver.
>
> [33] The fact that the Plaintiff may not recover from the Employer under the *WCA* is not a relevant consideration in light of ***Dempsey v Bagley***, 2016 ABQB 124 ("***Dempsey***") which allowed for apportionment of liability under s 23(2) of the *WCA* between one party protected by the *WCA* and one party not protected by the *WCA*.

2. Pursuant to section 23(1) of the *WCA*, where a *WCA* protected party is found to have contributed to a plaintiff's loss or injury, the non-protected tortfeasor's liability will be limited to that proportion to which the non-protected tortfeasor is responsible and liable. The Court held that 100% of the vicarious liability for the Plaintiff's damages should be apportioned to the Employer.

a) The Court noted that in ***Wadsworth v Hayes***, 1996 ABCA 39, the Court concluded that a defendant with no personal fault was 100% at fault solely on the basis of vicarious liability. The Defendant here too had no personal fault for the Plaintiff's damages or losses. However, in this case, there are two parties who are vicariously liable.

   It was held that s. 23(2) creates a liability that is several; not joint and several: ***Dempsey*** at para 66. As Philips J. explained:

   > Section 23(2) of the *WCA* therefore, provides a balance and fairness in respect of liability between protected tortfeasors and non-protected tortfeasors under the *WCA* scheme. Non-protected tortfeasors under section 23(2) are only liable for their own portion of fault or negligence and nothing more.

   This means that where a *WCA* protected party is found to have contributed to a plaintiff's loss or injury, the non-protected tortfeasor's liability will be limited to that proportion to which that non-protected tortfeasor is responsible and liable. In this case, because the Employer is protected under the *WCA*, the Plaintiff can recover vicariously against the Defendant but only to the extent of the Defendant's respective proportion of liability as determined by the Court.

b) Unequal apportionment of liability is available in cases of vicarious liability; it is the level of supervision that determines the degree of fault: ***Blackwater v Plint***, 2005 SCC 58 at para 69.

   i) In this case, the Defendant was the owner of the Vehicle who had left the Vehicle in the care and custody of the Employer for the sole purpose of completing brake repairs to the Vehicle. The Defendant had no control or say over who drove the Vehicle and had no personal fault for the accident. The Defendant is liable only because the statutory ownership provisions under s. 187 of the *TSA* makes him vicariously liable.

   ii) At the time of the accident, the Employer had full custody and control of the Vehicle and supervised the Driver Employee who drove the Vehicle. The Employer was responsible for hiring and supervising its mechanics and for authorizing test drives of third party owned vehicles entrusted to it for repairs. The Employer was best positioned to have supervised, trained and directly controlled who and how the Vehicle was test driven while the Vehicle was in its care and custody. As such, the Court held that the Employer was in a better position than the Defendant to supervise the situation and prevent the loss.

C. The fact that the tenant agrees to abide by rules imposed during the tenancy does not put the landlord in control of the premises to make the landlord an "occupier". Additionally, the imposition of additional or stricter rules upon a tenant does not elevate the standard of care owed by a landlord to its tenants (though it may elevate the standard of care owed by the tenants to the landlord).

Holmes v Edmunds, 2017 ABCA 28, per Kenny, J.

I. Facts and Issues

This is an appeal of a summary dismal of a claim against the respondent landlords arising out of an attack by a tenant's dog, Chopper, on the five-year-old while she and her mother were visiting a residence occupied by the tenants . The landlords had permitted the tenant's previous dog to reside at the premises but they were not aware that the previous dog had died and Chopper had subsequently begun living with the tenants.

The Residential Tenancy Agreement, Lease Amendment and Pet Agreement executed on May 5, 2010 by the landlords and tenants provided that "permission from landlord for any new or additional pets" was required, and that the tenants would comply with the Pet Rules. These Rules included ensuring that pets had collars, did not display a tendency to be aggressive, and that their licenses and tags would be kept current.

The chambers judge granted the landlords' application for summary dismissal concluding that they were not liable as "occupiers" pursuant to the *Occupiers' Liability Act*, RSA 2000, c O-4, ("*OLA*") or in negligence under the common law. The appellants appeal both findings and submit that the chambers judge erred in granting summary dismissal.

The issue under appeal was whether the landlords were "occupiers" pursuant to the *Occupiers' Liability Act*, RSA 2000, c O-4, ("*OLA*") or whether the landlords were liable in negligence under the common law.

II. HELD: For the Defendant, the Landlord is not an "occupier" as defined by the *OLA*.

1. The Landlord was held not to be an "occupier" as defined by the *OLA*.

   a) The definition of "occupier" is provided in the *OLA* at section 1(c)(ii) as "a person who has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises."

   b) The Court rejected the plaintiffs' argument that the chambers judge had erred in failing to conclude that the landlords were occupiers because they exercised control over the premises through the Residential Tenancy Agreement, the Pet Agreement and the Pet Rules ("Agreements").

   c) The chambers judge referred to a number of Alberta decisions which held that a landlord is not an occupier absent "minute to minute, hour to hour control" of the premises (para 14). She noted that the tenants were entitled to "privacy, quiet enjoyment, and exclusive use of the premises" (para 13). She also held that if the "the tenant agrees to abide by rules imposed during the tenancy, the breach of which attract repercussions, [that] does not in any way put the landlord in control of the premises" (para 15).

2. The landlords were held not to be negligent at common law.

   a) To establish negligence by a landlord at common law, the appellants must first establish the landlords owed them a duty of care. The Court of Appeal stated that "historically, almost no duty of care at common law was owed by a landlord to a tenant, and by extension to a visitor (Christopher A.W. Bentley, John McNair & Mavis J. Butkus, Williams and Rhodes *Canadian Law of Landlord and Tenant*, 6th ed. looseleaf, (Toronto: Carswell, 1988) at 10:3:1)."

   b) The Court of Appeal held at paragraph 15 that in order "to establish whether a duty of care exists between a visitor and a landlord in circumstances such as these requires determining, first, "whether the facts disclose a relationship of proximity in which failure to take reasonable care might foreseeably cause loss or harm to the plaintiff. If this is established, a prima facie duty of care arises and the analysis proceeds to the second stage, which asks whether there are policy reasons why this prima facie duty of care should not be recognized." (***R v Imperial Tobacco Canada Ltd.***, 2011 SCC 42 (CanLII) at para 39, [2011] 3 SCR 45)."

   c) The appellants argued that the Pet Rules, which required the tenant to do certain things with respect to pets, created a duty of care owed by a landlord to a visitor to the premises. However, the chambers judge had rejected this analysis. She noted that while "it may create a higher standard of care for the tenant, it does not do so for the landlord. The extra diligence and rules of the landlord create no greater duty to the public and no higher standard of care vis a vis the public than without the addition of the extra Pet Rules" (para 21). She concluded that the landlords "acted as reasonable landlords and owners and, they took all reasonable steps to ensure that the premises were safe for visitors, including the extra steps relating to pets on the premises" (para 22).

   d) The appellants further argued that the landlords' failure to enforce the Pet Rules is analogous to a grocery store which fails to comply with its comprehensive floor safety inspection system. The Court of Appeal held at paragraph 17 that this analysis is misplaced "a failure to comply with an inspection policy might be relevant to determine if a party took reasonable steps to meet its duty of care, but the existence of such a policy does not, by itself, create a common law (i.e., not statutory) duty of care to third parties."

III. Commentary

Landlords and Insurers may take comfort from knowing that the existence of pet rules or any other pet policy made pursuant to a lease agreement does not create a duty of care for the Landlord where none otherwise existed.

D. An owner may give possession of a vehicle to a driver under condition that possession of the vehicle may not be transferred to yet another driver that holds up against parties injured in an accident with the third driver.

Garrioch v. Sonex Construction Ltd., 2017 ABCA 105

I. Facts and Issues

In its ground-breaking decision in ***Garrioch v. Sonex Construction Ltd.***, the Alberta Court of Appeal re-iterated the general law of a vehicle owner's vicarious liability for the negligence of a driver, focusing on the issue of "consent" to possess the vehicle. It specifically sets out the law on an owner's liability where the owner grants possession to a second party who, in turn, consents to a third party taking over possession of the vehicle.

Sonex Construction entrusted its truck to its employee Garrioch as its "designated driver" for that vehicle, not realizing that he did not have a driver's licence. Sonex policy designated drivers for each vehicle and prohibited personal use of company vehicles but the trial judge held that these policies were merely "paper" policies and not enforced.

The day before the accident the truck was reported to have been driven irresponsibly in a farmer's field. The trial judge held that Garrioch had been driving and that this came to the attention of the Sonex supervisor who gave Garrioch possession of the truck. He nonetheless left Garrioch in possession of the truck.

On the day of the accident, Garrioch felt he was too drunk to drive so he allowed Tessman to drive. Tessman had worked for Sonex in the past but had not been working for it for six weeks before the accident. He maintained that he was a Sonex employee, because he expected to be called back after spring break-up but Sonex disputed that he would be. Tessman got into an accident and Garrioch sued for his injuries.

The trial judge found that Tessman was driving with Sonex's implied consent such that Sonex was vicariously liable for his negligence pursuant to the *Traffic Safety Act*, R.S.A. 2000, c. T-6, s. 187. She concluded that Garrioch had actually consented to Tessman acquiring the truck and that Tessman reasonably believed that he had permission to possess the truck. She found Tessman to have been a Sonex employee at the time but that this was not a determinative fact. She found that a vehicle owner's conditions on transferring possession of the vehicle to a driver are inoperative as against injured third parties following the Court of Appeal in ***Mugford v. Weber,*** 2004 ABCA 145. Accordingly, she concluded that "[w]hen a vehicle owner trusts someone with the complete possession of the vehicle and the permission to drive, the owner no longer exercises control over the vehicle" and a condition that the vehicle not be turned over to a third party driver is invalid against injured parties. She also found Sonex liable for negligent entrustment of the truck to Garrioch.

Sonex appealed.

II. <u>HELD</u>: For the vehicle owner Sonex; appeal allowed and action against Sonex dismissed.

1. The Majority re-iterated the rule in ***Mugford*** that conditions imposed by an owner in giving possession of a vehicle to a driver are not binding against injured third parties.

a) The Court summarized the policy behind the traffic safety legislation in that regard:

> [16] The solution selected was to make the owners of motor vehicles vicariously liable for drivers. That solved the problem with the law of tort, because vicarious liability is a well known concept. Making the owner liable for any driver would disrupt the insurance paradigm, because it would not enable underwriters to properly assess the risk of insuring any particular owner or vehicle. The policy line was drawn at making owners vicariously liable for those who drive with their consent. Presumably if the owner is sufficiently responsible to be insurable, he or she will only consent to persons with a similar risk profile having control of the automobile. On the other hand, if the vehicle was stolen the insurance would not apply; compensation to any injured party would be provided by the state under s. 5 of the Motor Vehicle Accident Claims Act, RSA 2000, c. M 22.
>
> [17] That solution led to the enactment of s. 187 of the *Traffic Safety Act*. The wording of the section is perhaps a cumbersome way of achieving its objective. It could have simply said that owners are vicariously liable for those who drive with consent. Instead it "deemed" the existence of certain common law relationships where vicarious liability attaches. In the end the result is the same.

(b) The Majority held the following with respect to an owner's "consent":

> [18] At this point the main problem is solved. The owner of the automobile has insurance, and is vicariously liable for the torts of the person driving with consent, providing the injured party with access to the insurance. The next obvious question was whether consent can be given on conditions. For example, could the owner say:
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> > "I give you consent to drive my vehicle, but it is on the express condition that you will not go through any stop signs."
>
> If such conditional consent was possible, then if an accident was caused by the driver going through a stop sign it could be argued that consent was absent. That would break down the link between plaintiff, driver, owner, and insurance.
>
> [19] It is now established that conditional consent is impermissible. Consent is an "on or off" switch: either it exists or it does not. If an owner gives consent to a driver, the owner is deemed to accept the risk that the driver might in some particular respect, on some particular occasion, be negligent, or use the vehicle in an unauthorized or unanticipated way: see the ***Mugford*** case, discussed infra, paras. 30-1.
>
> [20] It follows that the owner's personal or internal policies about use of the vehicle, even if expressly made a condition of the transfer of possession of the vehicle, are ineffective in law against third parties. The failure to comply with a policy or condition cannot terminate

the "possession with consent". For example, the following conditions are essentially red herrings in this appeal:

a) any provisos about the safe or lawful use of the vehicle by the employees of Sonex, including driving after drinking;

b) the existence or content of any "personal use" policy by Sonex's employees, or other limitations on use;

c) any "fatigue" or duration of operation restrictions;

d) whether the employee knew or ought to have known of these policies;

e) whether the policies are strictly enforced, or just "paper policies".

If these internal policies are breached, the employer can caution, discipline or terminate the employee, but the breaches cannot be put up against a third party who has been injured in a motor vehicle accident.

2. The Majority held "the only reasonable inference from the facts is that Sonex did not give Garrioch permission to pass on possession to other persons, at least those who were not employees". In reaching this conclusion, the Majority reviewed the ***Mugford*** case and reconciled decisions that provided divided opinions on this issue: ***Palsky v Humphrey*** [1964] SCR 580; ***Marcoux v Martineau*** (1987) Alta LR (2d) 379; ***Godsman v Peck*** (1997) 29 BCLR (3d) 37 (B.C.C.A.); (***Ireland (Next Friend of) v Perez***, 2007 ABCA 12 and ***E.T. Estate v Tran***, 2007 ABCA 13. The Majority summarized the applicable principles (at para. 54):

a) "The only issue is as to whether or not the owner expressly or implicitly consented to the third party having possession of the vehicle."

b) "Implied consent is a question of fact, requiring that an inference be drawn from all of the circumstances, including such things as the knowledge or expectation of the owner about subsequent transfers of possession, the relationship between the parties, any past pattern of conduct, any express prohibition on transferring possession, and any other relevant fact."

c) "Consent to possession cannot be granted on conditions, such as conditions respecting the manner of driving or the occasions on which driving is consented to: ***Mugford***. Such conditions cannot be asserted against an injured plaintiff." The Court was unanimous in concluding that "conditional consent is impermissible" and that an owner's consent "is an 'on or of' switch: either it exists or it does not."

d) However, there is an exception.

i) "There is an important exception to the ***Mugford*** principle that consent cannot be granted on conditions. An owner can consent to possession of the vehicle on the condition that possession will not be passed on to third parties, or classes of third parties: ***Marcoux***, confirmed by the majority in ***Ireland*** and ***Tran*** (Ritter JA's view on this point is in dissent), ***Godsman***".

ii) The Majority concluded:

The answer to the question is simple: the third party driver exception recognized in ***Marcoux*** is permitted because the statute says it should be permitted. The one condition that the statute specifically allows the owner to place on his vicarious liability is "consent". The owner is allowed to consent to the second party having possession of the vehicle, and limit that consent to the second party. If the third party wants consent to possess the vehicle, he has to get it from the owner. Just because the owner consents to one driver having possession of his vehicle does not mean that the owner consents to the whole world having possession.

3. The consent issue was held to be easy to resolve where the owner expressly allows or prohibits the second party to transfer the vehicle to a third party. Where the owner says nothing about passing on possession to third parties, consent to do so may be implied from the context, the onus being on the plaintiff to prove it.

a) "[T]he subjective belief of the third party driver is not directly relevant, except to the extent that it reflects the view that the informed, objective, reasonable person might have of the circumstances, as that latter view might demonstrate the existence of implied consent in fact . . . [but] [t]he driver cannot turn his subjective perceptions into the owner's actual state of mind."

b) Also, "the question cannot be subjectively resolved by the owner with hindsight, and a negative answer to a hypothetical question put to the owner at trial of whether consent would have been granted at the time of the accident is not conclusive". In dissent, Mr. Justice Berger did not reject the exception recognized by the Majority, but was of the view that the evidence did not establish that Sonex had prohibited Garrioch from lending the vehicle to another and that Tessman had Sonex's implied consent in the circumstances.

4. The Majority held "the only reasonable inference from the facts is that Sonex did not give Garrioch permission to pass on possession to other persons, at least those who were not employees."

5. In dissent, Mr. Justice Berger did not dispute the exception or assert that an owner's condition on a second party not to turn over possession to a third party is inoperative. He held that the evidence did not support the proposition that Sonex prohibited a second party from turning over a company vehicle to a third party. He found that the trial judge had not erred in concluding that Tessman had the implied consent of Sonex to possess the truck, in all the circumstances.

6. The Majority also held that the plaintiff failed to establish negligent entrustment by Sonex.

a) That Garrioch was not authorized by law to drive (not having a licence) did not establish that he was incompetent to do so. Garrioch's competence to drive at the time was not the issue.

b) The evidence did not establish that Sonex knew or ought to have known that Garrioch would use poor judgment in selecting alternate drivers.

c) Importantly, the Majority held that "[w]hen the statute does not impose vicarious liability (because there is no consent for the possession by the driver) care should be taken in imposing liability through an alternative theory of 'negligent entrustment'" because "this theory has the potential of finessing the public policy that liability only arises (and the owner's insurance coverage is only engaged) if the third party driver has consent to operate the vehicle."

III. Commentary

This case will now be the Bible regarding an owner's consent with respect to transferring possession of a motor vehicle. From a practical perspective, we expect that this will be a major case for the defence. In claims where the owner (be it an employer, rental company or otherwise) has provided consent to a person who then hands the keys to another, Garrioch may shield the owner's insurer from liability.

III. QUANTUM/DAMAGES ISSUES

A. Even in a catastrophic injury context, a tortfeasor is not required to place the Plaintiff in a better position than he or she would have been but for the tortious injury. A negative contingency applied to the future loss of income can also apply to the incurred costs associated with past care and the costs of future care.

Wood v Willox, 2017 ABQB 2, per Moreau, J.

I. Facts and Issues

This action involved a claim for damages relating to negligence regarding a birth. In the reasons for Judgment dated August 29, 2016, Justice Moreau, for the purposes of a provisional assessment of damages, determined that there was a 15% risk that the newborn referred to as KS would have suffered a significant impairment in any event, as a result of the risks associated with premature birth at 28 to 29 weeks. The Defendants requested at trial that a negative contingency to reflect these risks be applied to the Plaintiff's loss of future income. However at trial, no argument was advanced at that time as to whether it should be applied to other heads of damage. The issue was whether a negative contingency factor should be applied to all or some of the other heads of damages.

II. HELD: For the Defendant, a 15% negative contingency applies to the provisionally assessed awards for non-pecuniary damages and for past and future cost of care.

1. A 15% negative contingency applies to the provisionally assessed awards for non-pecuniary damages and for past and future cost of care.

a) The Court noted that non-pecuniary damages were capped as a matter of policy in the Supreme Court of Canada trilogy: ***Andrews v Grand & Toy Alberta Ltd***, 1978 CanLII 1 (SCC), [1978] 2 SCR 229, [1978] SCJ No 6, ***Thornton v Prince George School Board***, 1978 CanLII 12 (SCC), [1978] 2 SCR 267, [1978] SCJ No 7 and ***Arnold v Teno***, 1978 CanLII 2 (SCC), [1978] 2 SCR 287, [1978] SCJ No 8.

b) Counsel for the Plaintiff argued that the 15% contingency Justice Moreau assessed after trial should be deducted from the uncapped amount determined on the evidence to be appropriate in this case and that if the resulting award exceeds the cap, the capped amount should be awarded. If the resulting award does not exceed the cap, the reduced amount should be the award. In support of this, Plaintiff referred to ***Lindal v Lindal***, 1981 CanLII 35 (SCC), [1981] 2 SCR 629 at 635, [1981] SCJ No 108, where the Court held:

> A number of secondary principles flow from the basic precept of compensation. The first is that anything having a money value which the plaintiff has lost should be made good by the defendant. If the plaintiff is unable to work, then the defendant should compensate him for his lost earnings. If the plaintiff has to pay for expensive medical or nursing attention, then this cost should be borne by the defendant. These costs are 'losses' to the plaintiff, in the sense that they are expenses which he would not have had to incur but for the accident. The amount of the award under these heads of damages should not be influenced by the depth of the defendant's pocket or by sympathy for the position of either party. Nor should arguments over the social costs of the award be controlling at this point. The first and controlling principle is that the victim must be compensated for his loss.

c) The Plaintiff argued that the cost of future care award assessed in the Reasons for Judgment is a necessity for KS akin to food or essential medications. Reducing the cost of this award by 15% to

reflect the risk that KS would have been born with significant injury, even at 28 to 29 weeks, would reduce KS's resources for essential care items and services. For example, a 15% reduction in attendant care would equate to approximately 4½ days per month without this cost being covered. There is a difference between a reduction of a future loss of income claim and a future cost of care claim. A loss of $15 out of every $100 of a future loss of income claim would not affect the health, safety, and wellbeing of KS whereas a similar reduction in the cost of future care award would do so, as every dollar is required for his care.

d) The Defendants argued that the 15% negative contingency should apply across all heads of damages. Counsel for the Defendants noted the basic principle in the assessment of damages that a tortfeasor is not required to place a plaintiff in a better position than he or she would have been but for the tortious injury.

> [14] A contingency associated with the risk of the manifestation of a pre-existing condition that would have caused injury in any event may properly be considered in assessing non-pecuniary damages: ***Zacharias v Leys***, 2005 BCCA 560 (CanLII) at paras 25-26, 219 BCAC 88; ***Bouchard v Brown Bros Motor Lease Canada Ltd***, 2012 BCCA 331 (CanLII) at para 23, 326 BCAC 128. The application of the contingency is to the "overall award" as noted in ***Athey v Leonati***, 1996 CanLII 183 (SCC), [1996] 3 SCR 458 at 473, [1996] SCJ No 102. The Defendants argued that the Plaintiff's assertion that the 15% contingency would apply only to the loss of future income is contrary to the principles of compensation set out in ***Athey*** at 473:
>
> > The defendant need not put the plaintiff in a position better than his or her original position. The defendant is liable for the injuries caused, even if they are extreme, but need not compensate the plaintiff for any debilitating effects of the pre-existing condition which the plaintiff would have experienced anyway. The defendant is liable for the additional damage but not the pre-existing damage **.... Likewise, if there is a measurable risk that the pre-existing condition would have detrimentally affected the plaintiff in the future, regardless of the defendant's negligence, then this can be taken into account in reducing the overall award ....** This is consistent with the general rule that the plaintiff must be returned to the position he would have been in, with all of its attendant risks and shortcomings, and not a better position." [Court added emphasis].

e) The Court noted (at para. 19), that "trying to rank different but terribly deleterious outcomes is too imprecise a basis for the calculation of damages" referring to the comments of Graesser J. in ***AT-B v Mah***, 2012 ABQB 777 (CanLII) at para 543, 79 Alta LR (5th) 223.

f) The Court noted (at para. 20) that in ***Sczebel v Silverston*** (1988), 1988 CanLII 3470 (AB QB), 85 AR 293, [1988] AJ No 1233 at paras 51-54, it was held that "costs of care awards are of paramount importance in the most serious cases and that the defendant has the burden of full restitution to the victim." However, the Court stated that "this is nonetheless subject to the principle, expressed in ***Athey*** that the material risk that significant impairments would have manifested themselves in any event as a result of premature delivery at 28-29 weeks, regardless of any negligence on the part of the Defendants, can be taken into account in reducing the overall award."

g) The Court concluded (at para. 20):

> "The approach proposed by the Plaintiffs, essentially making the Defendants insurers of 100% of cost of care claims in these circumstances was not supported by any case authorities submitted by the Plaintiffs and is not consistent with the principle that a tortfeasor is not required to place the Plaintiff in a better position than he would have been but for the tortious injury. The Defendants cannot be held responsible for the risk that the Plaintiff would have incurred the costs associated with his past and future care associated with a premature delivery at 28-29 weeks."

B. A plaintiff's lack of credibility in a case of subjective chronic ongoing pain is critical in the assessment of the plaintiff's case and undermines the weight to be given to her experts.

Petz v Duguay, 2017 ABQB 90 per Sullivan, J.

I. Facts and Issues

The plaintiff was the passenger in a vehicle which was involved in an accident where the defendant's vehicle made a sudden across the path of the of the oncoming plaintiff's vehicle. The plaintiff's driver suffered injuries but settled his claim. The plaintiff claimed that she instantly suffered a back injury and that her pain was immediately 9 out of 10.

Prior to the accident, the plaintiff worked full-time as a legal assistant, was a very active person and was involved in a relationship. She gave evidence at trial that following the accident, her health deteriorated to the point where it affected her work and ultimately her personal relationship due to financial difficulties. The plaintiff complained of injuries to her shoulder,

neck, back and stated that she suffered from a brain injury, depression, insomnia and sinus problems. Essentially, the plaintiff alleged chronic ongoing pain and disability.

The main issues dealt with at trial were causation, credibility and damages. The plaintiff claimed for $102,000 – $166,000 for general damages. The defence submitted that the appropriate range was $22,395 – $60,901.

II. HELD: The plaintiff was awarded $50,000 in general damages, $21,710 for loss of capacity to earn income and $4,319 for out of pocket expenses for a total award of $76,028.

1. Causation

   a) "But for" test – the Court noted that the summarized the test for causation as being the "but for" test whereby the plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred: ***Clements (Litigation Guardian of) v. Clements***, 2012 SCC 32; ***Bumstead v Dufrense***, 2015 ABQB 787, at para. 266 and 269.

      (i) It was noted that this is a factual test and that if the plaintiff does not establish this on a balance of probabilities, having regard to all of the evidence, then the action fails.

      (ii) The "but for" test must be applied in a robust common sense fashion and there is no need for scientific evidence of the precise contribution the defendant's negligence made to the inquiry.

   b) Competing theories – the Court held that the trial judge must determine which of the competing theories is most probable; it is an error of law in the analysis of causation for the trial judge to conclude they do not have the authority to make the final legal determination in the face of competing theories.

2. Credibility

   a) The Court held that many of the plaintiff's injury claims were subjective, rendering her credibility to be of "utmost importance" in assessing her case:

      > [160] Ms. Petz claims that she has chronic pain with continuing severe disability as a result of the accident. Many of the injuries that Ms. Petz claims to have suffered are soft tissue in nature. Her level of perceived pain cannot be reasonably explained by reference to any organic cause. In such circumstances, Ms. Petz's credibility is of utmost importance because the onus is on her to prove his claim in all respects on a balance of probabilities: ***Bumstead*** at paras 284-285; ***Kirkham v Richardson***, 2014 BCSC 1068 at para 131.

   b) The Court enumerated the factors to be considered in assessing a witness's credibility – firmness of the witness's memory, ability of witness to resist modifying recollection, whether the evidence harmonizes with independent evidence that has been accepted, whether the witness changes evidence during direct or cross-examination or between the discovery process and trial or is otherwise inconsistent in their recollections, whether the witness's evidence seems generally unreasonable, impossible or unlikely and the witness's demeanor.

      i) The fundamental question is whether the witness's evidence is consistent with the probabilities affecting the case as a whole.

   c) The Court listed the factors that cast doubt on the plaintiff's credibility in this case (at para. 162):

      i) Surveillance and the plaintiff's response thereto. The Court found that surveillance was "one piece of evidence" for the judge to use in assessing the plaintiff's evidence and determining when the Plaintiff recovered.

      ii) The plaintiff's explanations for the inconsistencies in her testimony were found to be "inadequate."

      iii) Medical evidence of amplification.

      iv) The plaintiff's family doctor's doubts about the plaintiff's pain.

      v) The correlation between events in the litigation, such as Questioning, and the plaintiff's reports of pain to her doctors.

      vi) "The inconsistency in Ms. Petz's reports of pain to her family physicians versus her reports of pain to doctors providing IMEs for this litigation."

      vii) "[E]vidence of Ms. Petz's extreme preoccupation with this litigation and the financial gain flowing therefrom (a source of secondary gain)."

      viii) The plaintiff's "dissatisfaction with any health care provider that did not give her a favourable report with respect to this litigation."

   d) False subjective complaints

      i) The judge found that the plaintiff's false complaints about her injuries severely undermined her credibility.

      ii) All of the defence experts called found issues/inconsistencies with the plaintiff's evidence.

      iii) The judge held that if a court finds that a plaintiff is making false complaints, this will be detrimental to his/her credibility and reduces any damages he/she should be awarded.

   e) Sulllivan, J. held that there were inconsistencies in the plaintiff's evidence and found her to not be

credible. In light of this, the judge used the objective findings of the many medical experts in order to accurately assess the plaintiff's damages. The plaintiff's lack of credibility was held to permeate the experts' evidence to the extent that those offering opinion based on objective signs were favoured over those relying on subjective reporting. In particular:

i) The Court was troubled by the fact that plaintiff expert Dr. Zabrodski (family, emergency and occupational Medicine) refused to produce his testing data and other material.

ii) Sullivan J. was concerned that plaintiff expert Dr. Giantomaso (physiatrist) seemed "overly invested in Ms. Petz's position in her ongoing litigation" and that the same put into question his objectivity and undermined his evidence.

iii) Defence experts Dr. Hu and Dr. van Zuiden (orthopedic surgeons) were found to be eminently qualified, objective and forthright in presenting their evidence.

f) The judge found that based on the totality of the evidence, the plaintiff suffered a WAD I+ lumbar strain as a result of the accident, that this injury gave rise to disabling pain for a period of time and that the plaintiff ultimately recovered from the injury.

3. Damages

a) Non-pecuniary – after finding that the plaintiff essentially suffered a 4 year long injury, the judge noted that injury awards in these types of cases are very fact specific and may vary in large measure because of the lingering aspect of the pain involved

i) The judge looked at case law and ruled that the authorities put forth by the plaintiff were not of much use as they involved severe, complex and long-term injuries.

ii) The judge found the authorities put forth by the defendant to be much more on point, as they dealt with injuries of similar length and severity.

b) Pecuniary – this is one area where the court found the evidence to be more believable, as other evidence supported the idea the plaintiff was a "workaholic"

i) Expert evidence put forth five different "without-accident" income paths and the judge found that the plaintiff would have progressed at the rate of an average paralegal given her history, intelligence and work abilities.

III. COMMENTARY:

The ***Clements*** decision is briefed in the September 2012 edition. The clarification of the court on causation (the "but for" test) and credibility (listing the factors that should be used to test credibility, including surveillance as a a useful tool) are encouraging signs for insurers in cases involving subjective complaints. Our Doreen Saunderson was counsel for the defence in the ***Bumstead*** case upon which this decision was based, which is briefed in the June 2016 edition of ***Defence & Indemnity***.

C. Courts expect "the utmost honesty for a plaintiff" in subjective complaint cases such that the lack of credibility can undermine his/her expert opinions and the plaintiff's case in general.

Kohlendorfer v Northcott, 2017 ABQB 114 per Clackson, J.

I. Facts and Issues

The Plaintiff was in a car accident where his vehicle was rear-ended in January 2002. This involved a low-speed collision resulting in less than $700.00 damage to the Plaintiff's vehicle. The Plaintiff sought and received no treatment from May 2003 until April 2005. Almost 15 years later, the matter finally came to trial. The Plaintiff complained that since the accident he suffered from neck pain, headaches, a TMJ injury and decreased range of motion with his neck and shoulders. He claimed that the only way he could get relief from the pain was through hot springs, hot water, deep massage, rolling his shoulders, general movement and a herbal remedy known as white willow. Since the accident, the Plaintiff made regular trips to the Nevada Hot Springs area for 2-4 weeks at a time to seek relief. The trip is a one way distance of 2200 km and he usually drove with his wife.

The Plaintiff had been a rig manager in the oilfields but at the time of the decision was unemployed. He claimed that his injuries prevented him from being able to work safely or quickly and in 2004 he transitioned away from his rig manager position while fully ceasing to work in 2012. Throughout the years since the accident the Plaintiff regularly took time off from work to follow his passion of prospecting, and at the time of trial, the Plaintiff continued to indulge in this passion despite his injuries.

The Court noted that most of the case turned on the credibility of the Plaintiff. The main issues dealt with at trial were the Plaintiff's credibility, the subjectivity of his complaints and the quantum of damages.

II. <u>HELD</u>: The Plaintiff was awarded $23,000 in general damages, $41,786 in income loss and prejudgment interest.

1. Credibility

The Court found that the plaintiff experts' reports relied on his subjective complaints. The Court found that there was not "much truly objective evidence to establish the proof of the Plaintiff's complaints" and that the "objective evidence which exists tends to show that the Plaintiff does not have or could not have the injuries he claims" (paragraph 15).

a) With respect to subjective complaint cases the

Court held as follows (at paragraph 18):

> [28] In my view, in the world of personal injury litigation where so much turns on subjective complaint, the Court is entitled to expect the utmost honesty from a plaintiff. Obviously, where the plaintiff claims sequelae which are not borne out by the evidence, the Court must remain open-minded but must also exercise caution when assessing the plaintiff's subjective claims when they are at odds with or inconsistent with the objective evidence before the Court. Although the sequelae are not supported by the objective evidence, the plaintiff might actually be experiencing the claimed sequelae from a subjective, individual perspective. However, where the plaintiff, in the course of testifying, wilfully exaggerates or complains of symptoms that the medical profession and its practitioners are not familiar with, that plaintiff's credibility is significantly undermined. In cases such as that, the Court must be wary and concerned about such testimony. Simply accepting the plaintiff's word at face value is neither wise nor fair to the defendant. That is the situation here. Consequently, some objective evidence or proof of the Plaintiff's claims is necessary in this case.

b) The Plaintiff was found to be not credible due to inconsistencies in his evidence/story including:

   i) The Court accepted the defence accident reconstruction expert opinion that such a low speed collision was unlikely to have caused injury (paragraph 35).

   ii) The Court accepted defence submissions that the fact that the Plaintiff sought no treatment from 2003 to 2005 indicates that he was not genuinely injured and was not truthful (paragraph 46 – 47).

   iii) The Court found that the Plaintiff "was getting better from what had to have been a minor occurrence" and then "inexplicably he regressed". The Plaintiff "made a number of extraordinary claims and complaints which were largely recognized by the doctors as inexplicable"(paragraph 48).

   iv) The test results on range of motion were "were often less than was apparent while being observed doing other things in the course of the examination" and were "inconsistent" (paragraph 48).

   v) Surveillance videos in 2006 and 2012 showing the Plaintiff appearing to be active, strong and moving his neck and shoulders freely.

   vi) The Plaintiff claimed to have a TMJ injury from the accident but he did not mention this to his dentist or doctor until 3 years after the accident (he claimed he didn't realize the alleged pain was caused by the accident).

   vii) The Plaintiff testified that he could handle pain, so much so that when he had a bad tooth while prospecting (with no dentist within 500 km) he used his own tool to pry out the tooth The Court found that if this was true, then his supposed TMJ injury could not have been very serious.

   viii) The Plaintiff frequently drove long distances to Nevada (for hot springs) and the Northwest Territories (for prospecting).

c) The evidence of the medical experts did not support the Plaintiff's position

   i) When the Plaintiff was tested by experts, his range of motion was less than when he moved without knowing he was being watched or tested.

   ii) The Plaintiff did not pursue further medical treatment after 2002.

   iii) The Plaintiff claimed his TMJ injury stemmed from the accident despite denying this to his dentist previously.

   iv) The Plaintiff continued to prospect and engage in physical labour despite his reported functional limitations.

2. Subjective Complaints of Pain

   a) The Plaintiff made numerous outrageous or subjective complaints that had no standing

      i) The Plaintiff claimed of erectile dysfunction and blood circulation issues – none of the experts who heard these claims did anything about them because they were not legitimate.

      ii) The Plaintiff claimed that he suffered from episodes of "paralysis", describing that he fell anywhere from 2-10 times; he described the falls resulting from extreme upper back and neck pain where he would simply lose control of his body; as soon as he fell the symptoms would abate and he did not recall having any numbness or tingling after.

      iii) The Plaintiff claimed that, even as a man 56 year old man, he had never had neck pain or headaches before the accident; the Court felt this was not believable.

3. A note on these first two topics: The Court accepted that the Plaintiff had been hurt and did not find that he was out just to get a buck. However, the Court struggled reconciling the objective evidence with the subjective evidence. The Court found that the Plaintiff had "convinced himself" that his

ongoing issues stemmed from the accident, but the Court felt there were too many other reasons for the Court to be able to come to the same conclusion.

4. Also, a quick note on causation: The Court separated the Plaintiff's subjective belief that his pain stemmed from the accident from the question of whether the pain already existed at the time of the accident. There was evidence of pre-existing conditions and though the Plaintiff's belief was an important consideration, the lack of documentation supporting those pain complaints contemporaneous to when the Plaintiff believed he had pain was also an important consideration of the Court.

5. Damages

   a) General Damages

      i) The Court (with a focus on the Plaintiff's credibility) was not convinced that the ongoing complaints were related to the accident; $23,000 was awarded for general damages.

      ii) The Court found that the Plaintiff suffered WAD or soft tissue neck injury and that the recovery period for this time of injury is in the range of 12 weeks to a year.

   b) Income Loss

      i) The Court noted that the Plaintiff lost approximately 6 weeks of work due to injury in the period leading up to spring break (in 2002); the Court found that the Plaintiff spent most of the year trying to get better instead of looking for work so it was difficult to accurately calculate the income loss for 2002.

      ii) With this in mind, the Court used the Plaintiff's income in 2001 as a base; the Court found that the Plaintiff earned $66,221.00 in 2001 and $24,435.00 in the time he worked in 2002.

      iii) This left the Plaintiff with an income loss of $41,786.00.

   c) Interest

      i) The Court found the delay in this case to be "ridiculous" and the defendant asked that due to this delay the interest should be reduced.

      ii) The Court declined, noting that though much of the responsibility for the delay rested with the Plaintiff, the Defendant had not been overly cooperative and had they shown more cooperation the trail could have been completed in a much timelier fashion.

III. COMMENTARY:

This decision shows that plaintiffs will need to be found credible and provide the Court with as honest a perspective as possible to maximize damage awards. If subjective complaints are not supported by objective medical evidence, it can hurt the credibility of the plaintiff. In regards to interest, this is a good warning to defence counsel to try to be as cooperative and productive as possible. Even with the delay being noted as "ridiculous", the lack of cooperation of the defence prevented a reduction in the interest.

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