October 31, 2016

I. INSURANCE ISSUES

A. In bad faith cases, the insurer may have to disclose internal reference material, even if the material had not been consulted as it could be relevant and material to determining whether or not the insurer dealt with the insured's claim properly

> ***Alexander v. Sun Life Assurance Company of Canada*, 2016 ABQB 445, per Manderscheid J.**

I. FACTS AND ISSUES:

The Plaintiff sued her employer's group insurance provider Sun Life after it denied her claim for long-term disability benefits. The Plaintiff insured alleged, *inter alia*, that Sun Life breached the duty of good faith.

In particular, the Plaintiff alleged that Sun Life had failed "to provide … adequate assistance … in the preparation, completion, and submission of documentation required" to process the claim, and failed "to obtain or solicit additional information or documentation" it was entitled to.

During pre-trial document disclosure, Sun Life refused to disclose the index for the reference material (including training and claims manuals) it provides to its case managers to assist them in dealing with disability claims (the "Index").

Sun Life took the position that the Index was not relevant, that employees generally were not required to consult the reference material, and that the employees handling the Plaintiff's benefits claim did not consult any reference material while adjudicating this claim. It argued that the Plaintiff was on a "fishing expedition."

The Plaintiff sought an Order confirming that the Index and a subset of the reference material listed in the Index (collectively, the "Records") were relevant and material, and therefore subject to disclosure.

II. HELD: Order granted, the Records are relevant and material and must be disclosed

1. The Records are relevant

> (a) It was held that the pleadings will primarily determine relevance. In this action, the Statement of Claim sufficiently particularized the allegation that Sun Life breached its duty of good faith. It was not a bald assertion. Further, the Statement of Defence specifically denied the allegation of bad faith, and asserted that Sun Life adjudicated the Plaintiff's claim

fairly, objectively, and "at all times acted in good faith"

(b) An insurer's duty of good faith will be evidenced by the insurer's conduct throughout the claims process (citing ***Fidler v. Sun Life Assurance Co of Canada***, 2006 SCC 30 at para. 72). The Records were found to be relevant for several reasons:

i. They will show how Sun Life interpreted its duty of good faith;
ii. They will show the best practices Sun Life developed for its employees in adjudicating claims; and
iii. They will show how the Plaintiff's benefits claim *should* have been dealt with, from Sun Life's perspective.

2. The Records are material

(a) The Court held that materiality is the pertinency or weight of the information in relation to the issue it is adduced to prove

(b) It was held that the Records could reasonably be expected to significantly help the Plaintiff assess the merits of, or prove, two specific allegations against Sun Life: (1) that it failed to provide her with "adequate assistance … in the preparation, completion, and submission of documentation" required to process the claim; and (2) that it failed "to obtain or solicit additional information or documentation" to which it was entitled

(c) Additionally, the Court held that the Records would allow the Plaintiff to reconsider the merits of her claim if they show that Sun Life dealt with the benefits claim in accordance with its best practices

III. <u>COMMENTARY:</u>

Justice Gates recently said that the Court must guard against "fishing expeditions" and "wild goose chases," noting that ordering disclosure can cause unnecessary expense (*Auer v. Auer*, 2015 ABQB 67 at para. 13, citing *Belanger v. Belanger*, 2011 ONSC 5851 at para. 2).

The question of whether an insurer's reference material is subject to disclosure appeared to have been a novel one before the Court. In the context of a bad faith allegation, there was no clear reference to on-point Alberta authorities. However, the Court noted that this question appeared to have been answered in a number of other jurisdictions in Canada, giving a nod to the authorities submitted by Plaintiff's counsel.

The Court relied on the existence of these other Canadian authorities to dismiss Sun Life's argument that the Plaintiff was on a "fishing expedition." This may embolden future plaintiff insureds in Alberta to widen the scope of what they request from defendant insurer, in the context of allegations of bad faith. It may also mark a change in insurers' routine disclosure practices when such allegations are made.

In any case, the decision reminds plaintiff counsel that pleadings will determine the scope of what is relevant for the purposes of document disclosure. However, as

can be seen in this matter, clever counsel may be able to push the bounds of what has conventionally been considered relevant.

SHARE THIS ARTICLE

CALGARY
400 - 604 1 ST SW
Calgary AB T2P 1M7
403-260-8500

EDMONTON
2000 - 10235 101 ST NW
Edmonton AB T5J 3G1
780-423-3003

YELLOWKNIFE
601 - 4920 52 ST
Yellowknife NT X1A 3T1
867-920-4542

October 31, 2016

B. Stanley Cup rioters were not held jointly and severally responsible for all the damage caused to vehicles insured by ICBC during the riot. Individually, some Defendants were found jointly liable for the full damage to vehicles they were actively involved in destroying

> ***Insurance Corp. of British Columbia v. Alexander*, 2016 BCSC 1108, per Myers J. [4201]**

I. FACTS AND ISSUES:

This case involved claims for damage done to vehicles during the Stanley Cup riot in Vancouver on June 15, 2011. The defendants participated in the riot to varying degrees. Damage was done to multiple vehicles during the Stanley Cup riot. Ten defendants contested their liability up to and including trial. The main issue was establishing liability of the defendants who did not directly do all or any of the damages to any particular vehicle. To succeed, the plaintiff had to establish joint liability for the wrong.

II. HELD: Action allowed in part. The defendants' participation in the riot did not establish joint and several liability for torts committed during the riot. On an individual basis, the defendants were found jointly liable for the full damage to vehicles they were actively involved in destroying. The Court concluded that punitive damages were not warranted because the defendants had been adequately punished in other criminal proceedings.

> 1. The Court held that the defendants did not all have the common purpose of destroying vehicles. As such, their participation in the riot did not establish joint and several liability for torts committed during the riot
>
> > a. The Court rejected the argument that as participation in the riot was a common design, everyone who participated in the riot is a joint tortfeasor and therefore liable for all the damage done in the riot
> >
> > b. The Court held that the insurer's proposition was too broad. First, it was too broad on a geographical level. Rioters on Seymour Street would be jointly liable for damage done by participants on Howe Street. Second, it was too broad from a conduct point of view. For example, the Court provided that individuals that were in the riot area to take photographs would be equally liable for the destruction of vehicles. Third, the above proposition was too broad because it does not recognize that the assistance rendered to

the principal tortfeasor must be substantial to establish liability

c. Generally, the Court noted that cases regarding joint liability arising out of a tort committed during the course of carrying out criminal activity are more limited in scope than this present case. Here, the Court provided that joint tortious liability must be kept within reasonable bounds

2. Some individual defendants were found jointly liable for the full damage to vehicles they were actively involved in destroying

a. The Court held that individual rioters may be joint tortfeasors if it is apparent they acted together pursuant to a common design to do the damage

b. In the riot context, it is not necessary that the plan be explicitly laid in advance

c. Here, behavior that included flipping over a vehicle, rocking a vehicle immediately prior to the vehicle being set on fire, and striking the headlight approximately six times with a wooden sign immediately prior to the vehicle being set on fire, amounted to a common design with others, to destroy the property and individuals were held jointly liable

d. However, cheering or observing the vehicle damage, in this case, did not amount to a common design upon which is necessary to find joint liability

e. The rioters may also be concurrent tortfeasors, if the damage they cause is impossible to apportion. Here, each is liable of the full amount of the loss

3. Punitive damages were found not to be warranted because the defendants had been adequately punished in other criminal proceedings

SHARE THIS ARTICLE

CALGARY
400 - 604 1 ST SW
Calgary AB T2P 1M7
403-260-8500

EDMONTON
2000 - 10235 101 ST NW
Edmonton AB T5J 3G1
780-423-3003

YELLOWKNIFE
601 - 4920 52 ST
Yellowknife NT X1A 3T1
867-920-4542

October 31, 2016

II. LIABILITY ISSUE

A. A claim against police for failing to prevent a driver observed to be impaired and driving dangerously from continuing to drive by motorists killed in a subsequent accident caused by that driver was allowed to proceed as the police potentially owed a duty of care to the plaintiffs

> ***Canada (A.G.) v. Walsh*, 2016 NSCA 60, per Bryson J.A. [4197]**

I. FACTS AND ISSUES:

The RCMP received a tip that Coady was impaired and was driving dangerously. Following that tip, members of the RCMP approached and interacted with Coady while he was in his truck and parked at a convenience store. It is not clear whether there were grounds to arrest or detain Coady. The RCMP members eventually left Coady to drive away in his truck.

Later, Mr. Coady's truck crossed the centre line of the highway and collided with a tanker truck driven by Walsh. Both men died in the collision, which also resulted in several million dollars of property and environmental damage.

The owner of the tanker truck sued Coady's estate and a business which had made repairs on Coady's truck. Walsh's estate and immediate surviving family sued the same defendants as in the first action. Both sets of plaintiffs added the RCMP and certain RCMP members as defendants.

The plaintiffs claimed, as alternatives, that (1) the RCMP failed to act on evidence that either Coady should not drive or that his vehicle should not be driven; or (2) the RCMP failed to undertake a proper investigation which would have revealed to them the compromised state of Coady or his vehicle.

The RCMP brought a motion seeking dismissal of the claims, alleging they disclosed no cause of action against the RCMP and the members. The chambers judge dismissed the motion because it was not "plain and obvious" that the claim against the RCMP would not succeed. The RCMP appealed.

II. HELD: Appeal dismissed, the claim against the RCMP allowed stand

> 1. The case law has not clearly established that a private law duty of care was owed by police to members of the public in the position of the plaintiffs in this case. A full duty-of-care analysis is necessary, requiring consideration of (1) foreseeability and proximity, and (2) residual policy concerns. The Court rejected the plaintiffs' argument that a full duty-of-care analysis was

not necessary because the jurisprudence had already established this point led cases in support of their position, finding that those cases were not applicable in the case at Bar

> (a) Cases in which police were found to owe a private duty to users of public roads. However, these cases did not properly "settle the category" for a variety of reasons: they did not contain a duty-of-care analysis; the relied-upon portions therein were *obiter*; the police duties in the cases were equivocal; and they were cases of first instance, lacking persuasive value
>
> (b) Analogous cases in which the relationships gave rise to a duty of care. However, these cases were not analogous to any duty police owed to third parties through the medium of a potentially dangerous Coady
>
> (c) Cases supporting the plaintiffs' argument regarding the analogy of a relationship between victims and government or police. However, these cases were not decided because the plaintiffs were victims, but instead because of a proximity analysis. A Court cannot "work backwards" and impose a duty of care based on that relationship in general
>
> (d) Several other cases, found to have no application either because they have been questioned by later authority, the facts were too dissimilar to the case at bar, or they had been overturned on appeal

2. The Court held that it was foreseeable that users of the highway in proximity to Coady might have been injured in an accident caused by his compromised state or his truck which the RCMP did nothing to prevent Coady from driving. Indeed, it would be the rare case in which physical damage caused by a defendant's unchecked negligence would not be foreseeable

3. The Court found that when the RCMP located Coady and interacted with him, a potential proximity between them and the plaintiffs arose

> (a) It was held that generally there is no proximity between the police and members of the public based on a private relationship. Nor are members of the public, in law, "neighbours" of the police, because the police owe their duties to the public as a whole, not to specific members of the public
>
> (b) Police have statutory and common law duties that require them to take positive steps, and to ground a private duty of care, the circumstances must transcend a police officer's obligations to the general public
>
> (c) Proximity can be grounded in a close causal relationship between the alleged negligence of the defendant and injury to the plaintiff, absent any relationship otherwise. In this case, despite the RCMP having no interaction with the plaintiffs, the parties were connected through the

RCMP members' alleged knowledge of and dealings with Coady

(d) The Court found that there was no concern here of indeterminate liability because the foreseeable damage was discrete and physical. The spectre of indeterminate liability usually arises in the context of claims for pure economic loss, which is not applicable here

4. The Court held that the residual policy arguments did not displace a potential duty of care as between the RCMP and the plaintiffs in this motion

(a) The literature raises a credible concern that a private law duty of care may negatively affect performance of duties the police owe to the public generally, either in their day-to-day contact with the public, or in terms of the diversion of resources to address potential civil liability

(b) However, there is too little evidence on the record to assess the conflict between a private duty of care and the statutory and common law duties that police owe to the public generally

(c) An alleged duty of care that survives a motion to strike may yet be defeated by an evidence-based policy analysis at trial, or on a motion that permits the entertaining of evidence

III. COMMENTARY:

In appreciating the impact of the Court's decision to dismiss the RCMP's appeal, the context of the hearing cannot be overemphasized. This was an appeal of a chamber judge's decision to dismiss the RCMP's motion to strike the pleadings on the basis that the RCMP did not owe the plaintiffs a private law duty of care. This was *not* an appeal of a trial judge's finding of same.

As such, this decision does not determine whether or not a duty of care existed in the circumstances. The Court considered whether the chambers judge was correct in applying the test for summary judgment. A Court applying this test (1) assumes that the facts pleaded are true and (2) decides whether the claims disclose "no cause of action" and are "clearly unsustainable."

A defendant must meet a high threshold before being successful on a motion to strike pleadings. Further, no evidence is admissible on such a motion and courts should use the power to strike pleadings cautiously.

It should not be surprising that the Court of Appeal affirmed the chambers judge's finding that there is *potentially* a duty of care owed by the RCMP to the plaintiffs. The merits of this question will now be left to a trial judge to determine after considering all of the evidence and arguments.

Another notable aspect of this decision is the consideration of the residual policy concerns which the RCMP raised. Given that parties were not permitted to lead evidence on the motion to strike, one suspects that the Court of Appeal conducted its own survey of relevant cases wherein relevant literature was cited.

Bryson J.A. quotes in full Chief Justice McLachlin's review of the relevant literature in *Hill v. Hamilton-*

Wentworth Regional Police Services Board, 2007 SCC 41 at paras. 57, 58, 61. He draws attention to the Chief Justice's dismissal in *obiter* of what she calls the "lack of evidence of a chilling effect" that imposing tort liability on police would have on the investigation of crime.

He continues bluntly by calling the Chief Justice's summary of the literature "problematic" for several reasons, asserting that "[i]t is simply counter-intuitive to suggest the police would ignore potential tort liability when planning, resourcing, or implementing their public duties" (at para. 89).

Bryson J.A. seems to concede that the nature of the hearings and the prohibition on evidence prevented him from finding in the RCMP's favour on this point. However, he all but invites them to press this argument with sufficient evidence at trial or on a motion permitting evidence (at para. 97). It remains to be seen whether and to what degree a trial or motions judge will adopt the strongly-worded *obiter* of the Court of Appeal when that day comes.

SHARE THIS ARTICLE

CALGARY
400 - 604 1 ST SW
Calgary AB T2P 1M7
403-260-8500

EDMONTON
2000 - 10235 101 ST NW
Edmonton AB T5J 3G1
780-423-3003

YELLOWKNIFE
601 - 4920 52 ST
Yellowknife NT X1A 3T1
867-920-4542

B. During a high-school field trip, a student engaged in horseplay in a public plaza and was seriously injured when the lamppost he was climbing tipped over. The government, which owned the plaza, had negligently failed to maintain the lamppost. The chaperones were not at fault because they provided adequate supervision

> ***Mackey v. British Columbia*, 2016 BCSC 1333, per Macintosh J. [4200]**

I. FACTS AND ISSUES

The Plaintiff had been a 17-year-old student from Phoenix, Arizona on a chaperoned school trip to Victoria. He was generally responsible, well-behaved, and well-mannered. A teacher and four parents chaperoned the group of 24 students.

The students and chaperones visited a plaza, owned and managed by the provincial Crown. The plaza was edged with a sturdy railing built of concrete balusters, 46 inches tall and two feet wide. Lampposts were mounted on top of the balusters. Beyond the railing was a drop of 30 feet to a walkway below. The plaza was heavily frequented with tourists. There were no signs advising people not to climb the balusters.

One of the students stepped onto the baluster and walked around a lamppost before jumping down. A chaperone scolded him, and the Plaintiff probably heard this. He then, or had already, stepped onto the baluster to copy the other student.

The Plaintiff did not merely walk around the lamppost, but instead attempted to swing his body around it. With this added force, the base of the lamppost failed. It separated from the baluster and tilted away from the plaza. The Plaintiff fell to the concrete walkway below and suffered severe traumatic brain injury.

On inspection, the lamppost was corroded to the core, likely due to the salty air. The skirt of the lamppost had never been bolted to the baluster, though holes had been drilled for that purpose. In the 20 years the lampposts had stood under the Crown's care, their condition or stability had never been inspected, though they had been painted annually. A cursory inspection would have revealed the deficiencies.

The Plaintiff sued the Crown, which added the chaperones as third parties.

II HELD: Only the Crown and the Plaintiff were at fault

> 1. The Crown breached the standard of care it owed to the Plaintiff
>
> a. The British Columbia *Occupiers Liability Act* informed the standard of care in this case, being one of reasonableness and not perfection. The

Act applied because the Crown was the "occupier" of the plaza, which itself was considered "premises"

b. The lampposts were in a prominent and central location frequented by visitors of all ages throughout the year. The railing was safe but the Crown had entirely neglected the maintenance and inspection of the lampposts, which had been allowed to become extremely unstable

c. Expert evidence is not required to determine the standard of care in matters like this where an ordinary person can be expected to have knowledge, or when the defendant's actions, or inactions, are such that it is obvious the conduct has fallen short

2. Liability was apportioned as between the Plaintiff (65 percent) and the Crown (35 percent)

a. Apportioning liability must be based on the degree to which each person was at fault (blameworthiness), not the degree to which each person's fault caused the damage

b. The age of a young plaintiff in a negligence action can affect the apportionment of fault

c. The Plaintiff was highly intelligent and 18 years old at the time of the accident. He had climbed atop the railing and swung on the lamppost in a dangerous location. He had probably heard—and disregarded—one of the chaperone's warnings to another student not to climb the balusters

3. The chaperones were not at fault

> a. The correct legal test for assessing the responsibility of a chaperone is that of a careful and prudent parent. There are various degrees of chaperone supervision. The appropriate level depends on the location, the age of the students, and the type of activity
>
> b. Chaperones cannot be held as guarantors for students' welfare, particularly for older students
>
> c. The circumstances required only the lowest level of supervision in this case. The chaperones achieved this at the time of the accident and throughout the trip generally
>
> > (i) The students were 16 or 17 years old, and generally responsible and well-behaved, requiring a more relaxed level of supervision compared to younger children. The Plaintiff, in particular, was not the sort of student who required specific monitoring
> >
> > (ii) At time of accident, all five chaperones were likely on the plaza. One of them had scolded a student for climbing the baluster immediately before the accident, probably loudly enough to be heard by other students, including the Plaintiff

(iii) The chaperones had not formally addressed safety during the trip. However, they had evidenced a sense of responsibility in sending home one of the students partway through the trip for missing curfew

III. COMMENTARY:

Most of the trial judge's discussion of liability addresses the question of apportionment as between the Crown and the Plaintiff. The Crown had attempted to deflect liability by arguing that the baluster was a solid and satisfactory protection against the danger of falling.

The apportionment analysis would likely have been very similar had the matter been tried in Alberta. Under our contributory negligence legislation, courts in this province also apportion liability based on the weight of the fault that should be attributed to each of the parties, not the weight of causation.

Alberta courts will consider a number of factors in apportioning fault, including: the nature of the duty owed; the number of acts of fault or negligence; the timing and sequence of the negligent acts; a party's indifference to the results of negligent; and the extent to which the conduct breaches statutory requirements.

Aside from the question of apportionment, the one element absent from the trial judge's liability analysis was consideration of whether the Plaintiff's injuries were reasonably foreseeable. The trial judge quotes and adopts authorities which discuss foreseeability at length, although he does not apply this in his reasons.

It is implicit in the decision that it was reasonably foreseeable that an accident of this sort would occur. However, the silence on this point is difficult, in light of the circumstances. Given the dimensions of the baluster and the immediate drop of 30 feet on the other side, one can imagine that any reckless individual of adult height could easily climb atop and then fall from the baluster, leading to serious injuries, lamppost or no lamppost.

Would such circumstances be any more or less foreseeable than if a fall was subsequent to the failing of a lamppost? Would liability have been apportioned differently? What if the Plaintiff had attempted to swing around a secure lamppost but he fell nonetheless? Missing from the decision was a proper discussion of foreseeability addressing the combination of the baluster, the lamppost, and the corrosion. Such an analysis would have been helpful, especially for owners, landlords, and other occupiers of potentially dangerous premises accessible to many people.

CALGARY
400 - 604 1 ST SW
Calgary AB T2P 1M7

EDMONTON
2000 - 10235 101 ST NW

YELLOWKNIFE
601 - 4920 52 ST
Yellowknife NT X1A 3T1

403-260-8500 Edmonton AB T5J 3G1 867-920-4542
780-423-3003

October 31, 2016

C. Municipality breached its duty of care to Mr. Campbell by failing to provide adequate warnings of the danger and risks involved in using its mountain bike adventure park

***Campbell v. Bruce (County)*, 2016 ONCA 371 [4202]**

I. FACTS AND ISSUES

In 2005, the municipality opened the Bruce Peninsula Mountain Bike Adventure Park. The Park consisted of a series of bike trials and a skills development area ("Trials Area") with various wooden obstacles where riders could learn what to expect on the trails. The Park was open to the public with no admission fee and was not supervised. The municipality installed signs cautioning riders to ride within their abilities, wear helmets and yield to other groups.

Two of the wooden obstacles in the Trials Area were called "Pee Wee" and "Free Fall," teeter-totter obstacles located directly after one another. Mr. Campbell, an active rider with extensive mountain bike trail experience, rode over Pee Wee onto Free Fall but he did not have enough speed to make it over the pivot point. Mr. Robinson fell off his bike and landed on his head, rendering him a quadriplegic.

The trial judge found that the municipality had breached its duty owed to Mr. Campbell under the *Occupier's Liability Act* ("*OLA*") and that Mr. Campbell was not contributorily negligent. The municipality appealed on the following five issues:

1. Did the trial judge impose an incorrect and onerous duty of care?
2. Did the trial judge err in assessing the question of inherent risk?
3. Did the trial judge err in his analysis of the standard of care?
4. Did the trial judge err in his analysis of causation?
5. Did the trial judge err in his assessment of contributory negligence?

II. HELD: Appeal dismissed on all issues and costs awarded to the respondents

1. Duty of Care

The appellant argued that the trial judge needed to assess its conduct in light of its duty to take reasonable care as an occupier. The appellant felt the trial judge did not do this, instead the trial judge focused on the nature of the respondent's injury. The Court of Appeal dismissed this argument, noting that the trial judge specifically cited the leading case dealing with duty of care under the *OLA.* The Court of Appeal noted that the "goals of the Act are to

promote…positive action on the part of occupiers to make their premises reasonably safe" and that the trial judge's decision was in line with achieving this.

2. Inherent Risk

The appellant argued that the trial judge erred by using the respondent's subjective inability to foresee the damage he sustained as somehow delineating the scope of inherent risk. However, the Court of Appeal did not agree and noted that the trial judge's analysis properly delineated the meaning of inherent risk. The trial judge had noted that Mr. Campbell had extensive trail experience but did not have experience on the wooden obstacles such as Pee Wee and Free Fall. The trial judge concluded that an adequate person using common sense would not be able to perceive or appreciate the full amount of risk involved with these obstacles and that the municipality did not properly warn Mr. Campbell of the dangers.

3. Standard of Care

The appellant brought forth the argument that the trial judge did not spell out the actual nature of the hazard and did not articulate the standard of care to which the municipality was subject. The Court of Appeal disagreed, concluding that the trial judge clearly identified the nature of the problems of Free Fall as being the following: i) riding too slow and losing momentum, ii) riding too fast and being launched off the end of the structure and iii) failing to appreciate that in the case of a fall on Free Fall a rider must act contrary to their instincts and immediately release grip on their bike and jump free.

The trial judge clearly articulated what the appellant could have done differently. The trial judge clearly laid out that there should have been instructional signs, better warning of serious injury, more detailed warnings about the skill level required to use the obstacles and warnings of the risk of injury from being off the ground.

4. Causation

The test for causation in a negligence action is the "but for" test and the trial judge applied this test and found that the appellant caused Mr. Campbell's injuries with respect to the breaches of the standard of care discussed above. Causation is a factual inquiry, which means the trial judge's causation finding is only reviewed for palpable and overriding error.

The Court of Appeal found that the trial judge clearly applied the "but for" test and did not apply a standard of reasonableness as argued by the appellant. The trial judge applied the facts of the case using the proper test and none of this analysis came close to being a palpable and overriding error.

5. Contributory Negligence

The Court of Appeal agreed with the trial judge's decision that Mr. Campbell was not contributorily negligent. The Court of Appeal noted that the trial judge found (during the analysis of breach of duty of care) that Mr. Campbell lacked the

foresight of the severe consequences of the accident. The Court of Appeal did not find that the trial judge had made a palpable and overriding error in coming to a factual finding and dismissed the appellant's arguments.

III. COMMENTARY: This case can serve as a warning to municipalities and businesses which run similar types of adventure/activity parks. The municipality provided warnings through signage and a brochure. However, the trial judge found these warnings to be inadequate and provided a clear and concise list of what steps/measures should have been taken.

The list provided by the trial judge provides an example of what similar adventures parks should use as proper warnings and the systems they should put in place to deal with accidents and emergencies.

SHARE THIS ARTICLE

CALGARY
400 - 604 1 ST SW
Calgary AB T2P 1M7
403-260-8500

EDMONTON
2000 - 10235 101 ST NW
Edmonton AB T5J 3G1
780-423-3003

YELLOWKNIFE
601 - 4920 52 ST
Yellowknife NT X1A 3T1
867-920-4542

October 31, 2016

III. PRACTICE ISSUES

A. A driver's statements to police after an accident are only protected from being used against him/her under the *Traffic Safety Act* if the statement was given under the belief that he/she was legally required to provide them to police

> ***R. v. Deighan,* 2016 ONCJ 453, per Ray, J. [4196]**
>
> **I. FACTS AND ISSUES:**
>
> The Defendant Deighan was charged with impaired driving with respect to an accident that occurred in Toronto. A black Honda alleged to have been driven by him was seen driving into the Queen's Quay street car tunnel and becoming stopped near the station platform. In the process, damage had occurred to the vehicle. The driver and passenger were instructed by TTC employees to get out of the car, that help would be called and that police were on the way. They did not leave the scene.
>
> When police arrived, they noted the vehicle stuck on the tracks. They testified that the driver told them that he had consumed three drinks five hours previously. Unfortunately, the investigating officer's notes were made "on the fly" and the officer's trial recollection "was confused." The investigating officer's partner recalled speaking to the person who had been pointed out to him as the driver and asking if he had been the driver. When he received an affirmative response, he asked the driver if he had been drinking and again received an affirmative answer. The Accused was arrested.
>
> The Accused testified indicating that he did speak to police. He remained at the scene and spoke to them to make sure that "the proper steps were taken." He testified that leaving the scene of the accident was something he knew to be illegal and that his understanding was that after being in an accident he had to report to police and his insurance company. He did not know that he had an option not to answer police questions.
>
> The Court concluded that there was "no evidence of anything that was explained to Mr. Deighan about the purpose behind the questions he was asked by police i.e. whether they pertain to a collision report pursuant to the *Highway Traffic Act*, or whether he was simply participating in an ordinary police investigation." The Court found that it was "not clear from Mr. Deighan's evidence whether he thought he was reporting a collision or simply complying with a legal and moral responsibility to cooperate with police." However, on the totality of the evidence it was found that he stayed behind and answered questions because "[h]e thought he had to answer the questions asked by

police" and that he "thought he did not have any choice."

The issue was as to whether or not the Accused's statements to police about having been the driver and having consumed alcohol could be used against him, i.e. whether or not their contents were protected pursuant to the *Highway Traffic Act*, R.S.O. 1990, c. H.8, s. 199 [equivalent to *Alberta's Traffic Safety Act*, R.S.A. c. T-6, s. 71].

II. <u>HELD:</u> For the Accused, driver statements to police ruled inadmissible

1. The Court held that statements made by a driver to police following an accident are considered to be statutorily compelled (and cannot be used against the driver in legal proceedings) where the statement was based on an honest and reasonably held belief that the driver was required by law to report the accident, and that the onus is on the Accused to establish on the balance of probabilities that his/her statement had been statutorily compelled

(a) A statutorily compelled statement pursuant to Ontario's s. 199 of the *Highway Traffic Act* cannot be used against a driver as having been statutorily compelled per ***R. v. White*** [1999] 2 SCR 417; ***R. v. Soules***, 2011 ONCA 429 (Ont.C.A.)

(b) However, if the driver's statements fall short of having been made under statutory compulsion, such as where they are volunteered to police, including pursuant to a perceived moral obligation to cooperate with police, the statutory protection is not available: ***R. v. Parol*** [2011] O.J. No. 2641 (Ont.C.J.); ***R. v. Bociat*** [2014] O.J. No. 2449 (Ont.C.J.); ***R. v. Bacci*** [2016] O.J. No. 879

(c) Thus, the issue in this case was as to "[w]here in the continuum between compulsion as reflected in ***White*** and ***Soules***, in volunteering information, as reflected in ***Parol***, ***Bociat***, and ***Bacci***, do we find the Defendant Andrew Deighan?"

2. The Court concluded that the Accused had established that he made his statements to police because he believed that he was legally required to provide that information. Although the question asked to him as to whether or not he had been drinking went farther than what is required in a driver statement under the provincial traffic legislation, that information also was covered by the statutory privilege because asking him that question in the circumstances amounted to an "overreach of power" on the part of the police:

15 What has made me hesitate, before finding that he volunteered the information, is that I accept his evidence that he felt he had no choice but to provide answers to questions posed to him by the police. His evidence was generally credible but for what he could not remember. Most of his evidence was not inconsistent with that of Officer Isaac.The Defendant had a

generalized and non-specific understanding of a driver's responsibility to report the details of an accident. For this reason, he was not really volunteering the information. The police already knew he was the driver. They were only confirming that with him, and it is a normal sort of question that would be answered in a s. 199 report. I accept his evidence that he wanted to make sure that everything was filed and completed properly. But the question that was asked with regard to his drinking is not an appropriate question for a s. 199 report. That went beyond reporting the collision, and Mr. Deighan thought he had to answer the question. One of the purposes of the principle against self-incrimination protected by s. 7 of the *Charter* is to prevent an abuse of power by the state. When Mr. Deighan felt he was obliged to answer the question about whether he had been drinking, and he did so as part of making sure that everything was filed and completed properly, it was an overreach of the power of the state to compel an accident report, because this information does not have to go in an accident report. This overreach into a question that should not be compelled, that Mr. Deighan felt he had to answer, supports the factual basis for a finding of compulsion in this case, and the credibility-based factual foundation for the violation of s. 7 that I find.

Conclusion

16 This Soules application is allowed. The Defendant made statements as a result of his belief that he had to answer questions about the collision, that everything should be filed and completed properly i.e. reported. He had a generalized and non-specific understanding of a driver's responsibility to report the details of an accident, and he acted pursuant to this understanding. His subjective understanding was reasonable in the circumstances.

III. COMMENTARY: Accordingly, a driver's statement made to police about an accident is not automatically precluded from being used against the driver. The evidence must establish that the driver provided the statement pursuant to a perceived legal (as opposed to simply moral) obligation to provide police with the answer. Furthermore, information provided to police going beyond what is required in a driver's statement can also enjoy the privilege if the police are found to have used the opportunity to compel a driver's statement to obtain that additional information as well. In this case, the police question about whether or not the Accused had been drinking went beyond the scope of the driver's statement addressed by the traffic legislation but was accorded the privilege that goes along with a driver's statement because obtaining it in

the circumstances was found to be "an overreach of the power of the state to compel an accident report."

SHARE THIS ARTICLE

CALGARY
400 - 604 1 ST SW
Calgary AB T2P 1M7
403-260-8500

EDMONTON
2000 - 10235 101 ST NW
Edmonton AB T5J 3G1
780-423-3003

YELLOWKNIFE
601 - 4920 52 ST
Yellowknife NT X1A 3T1
867-920-4542

B. Where electronic records already produced are not efficiently usable, and the native format provides relevant and material metadata not included in the TIFF format provided, disclosure of the native files can be ordered where the expense, delay, danger or difficulty in producing said records is not grossly disproportionate to the likely benefit

> ***Bard v. Canadian Natural Resources*, 2016 ABQB 267, per Nixon, J. [4198]**

I. FACTS AND ISSUES:

This was an interlocutory application where the plaintiffs, collectively known as Devon, sought the Court's permission to amend their Statement of Claim, as well as an Order to compel the defendants CNRL, to produce a series of documents in their native electronic format.

Devon and CNRL were parties to an agreement made in 1968 where Devon held an undivided 5% working interest in a lease for an oil sands project and CNRL held the other 95%. Devon's share of the proceeds and costs were to be recorded in a Carried Account, tracking their financial interest in the lease. Devon was not to be paid unless and until the proceeds exceeded the costs in the Carried Account.

CNRL was to provide periodic statements of the Carried Account to Devon. Devon disputed the accounting done by CNRL, and advanced a claim for breach of contract, breach of fiduciary duty and unjust enrichment.

Documents had already been produced by CNRL relating to the spreadsheets of the Carried Account, but had been produced in TIFF format in accordance with a Complex Case Litigation Plan agreed upon by the parties.

II. HELD: Application allowed; all relevant and material records that are not privileged ought to be produced, even if already produced in TIFF form

> 1. The records requested were found to be relevant and material
>
> > (a) Devon's proposed expert, an accredited accounting professional, swore an affidavit that these additional records were necessary for the preparation of his report
> >
> > (b) At the interlocutory stage of proceeding, the Court is not to scrutinize counsel's proposed line of argument too finely

(i) So long as counsel discloses a rational strategy that the disputed document would play a material part in, that is sufficient in meeting the materiality threshold

(ii) The proper accounting of the Carried Account was a key issue in this action, as the claim involves not only the subject matter of certain debits or credits, but the accuracy and authenticity of the same

2. Native spreadsheets, including embedded formulas and metadata, of already produced TIFF versions were found to be relevant

(a) The Court held that metadata in itself qualified as a record subject to disclosure

(i) While in many cases it only contains irrelevant dates, where the pleadings disclose that the identity of the author of the electronic records, the timing of the treatment of those records are potentially at the core of the issues raised, they are relevant and material

(ii) In this case, Devon requested the metadata for two purposes: discovering how certain numbers were calculated and learning the source of certain data

(iii) Providing the metadata was the only way to be certain as to how certain cells were calculated, which in turn would help prove facts directly in issue

(iv) CNRL failed to demonstrate that the metadata was privileged

(b) Records produced in accordance with the parties' mutually agreed upon Complex Case Litigation Plan were directed to be reproduced in native format

(i) As the metadata and native files were found to be material and relevant, the issues became whether ordering re-disclosure of the records already disclosed, this time in their native format, would result in CNRL suffering significant prejudice; and whether the requirement to re-run the query in the program to regenerate the already produced records mean the records were not "reasonably accessible"

(ii) CNRL's representative at questioning stated that the native spreadsheets were at CNRL's office Even if the records were not saved, it was clear that CNRL had ready access to the information on which those records were based on

(iii) The records, as currently produced, were not usable in an efficient manner, which CNRL's representative at questioning

conceded Rather, to find the answers needed, he stated he would use the native format

(c) The expense, delay, danger or difficulty in reproducing the documents in native format was not grossly disproportionate to the likely benefit

(i) While CNRL claimed a high time and expense (1,000 hours or 25 weeks, and over $1 million), given the amount at stake in the action was in the hundreds of millions, this was found not to be grossly disproportionate to the likely benefit

III. COMMENTARY: This is a case involving claims in the hundreds of millions, thereby meaning the threshold for grossly disproportionate is quite high. Where claims are in a lower amount, and the costs of reproducing records is a more substantial percentage of the claim, then the reproduction may not be as likely to be ordered. However, if the documents are readily available/accessible, then the technical argument that the records have already been produced in another format in accordance with a litigation plan agreement will not be successful.

SHARE THIS ARTICLE

CALGARY
400 - 604 1 ST SW
Calgary AB T2P 1M7
403-260-8500

EDMONTON
2000 - 10235 101 ST NW
Edmonton AB T5J 3G1
780-423-3003

YELLOWKNIFE
601 - 4920 52 ST
Yellowknife NT X1A 3T1
867-920-4542