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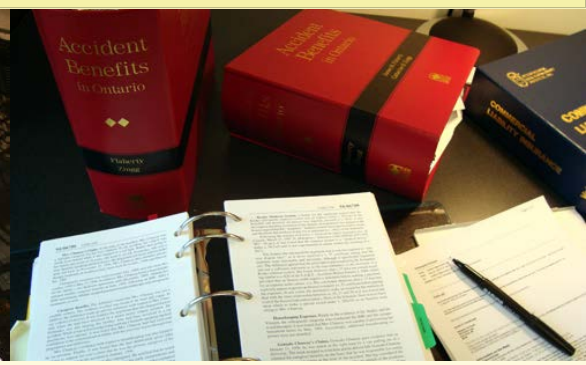


# Casualty Update: A Year in Review

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# Duty to Defend

- ***Lefeuvre v. Boekee* (2017 ONSC 6874)**
- **Facts:**
  - Plaintiff was walking on road and was seriously injured when struck by vehicle.
  - Plaintiff brought action against driver and owner of vehicle, and against regional municipality and municipality where collision occurred.
  - Municipalities contracted out winter maintenance and lighting services, and contractors were also named as defendants in main action.

# Duty to Defend

- ***Lefeuvre v. Boekee* (2017 ONSC 6874)**
- **Facts:**
  - Contractors had comprehensive general liability insurance that covered municipalities to extent their liability arose from contractors' responsibilities under contract.
  - Municipalities commenced third party claims against insurers.
  - Insurers agreed to defend municipalities in respect of any claims against them in main action.
  - Municipalities brought an application for a declaration that they were entitled to appoint their own counsel and manage their own defence of main action at insurers' expense.

# Duty to Defend

- ***Lefeuvre v. Boekee* (2017 ONSC 6874)**
- **Decision:** Application granted.
  - Conflict of interest between insurers and municipalities was evident.
  - Much of municipalities' defence in main action was that contractors failed in carrying out their responsibilities, which was in direct conflict with insurers' pecuniary interests.
  - Conflict was exacerbated by fact that insurers only had to indemnify municipalities to extent of contractors' liability, so had interest in proving contractors were not liable.

# Duty to Defend

- ***Lefeuvre v. Boekee* (2017 ONSC 6874)**
- **Decision:** Application granted.
  - There were concerns that information obtained from municipalities may be used against them in litigation in order to protect insurers' pecuniary interests.
  - Insurers could not oversee municipalities' defences in these circumstances.
  - Given insurers acknowledged their duty to defend, municipalities were also entitled to compensation for any reasonable costs incurred in litigation up to that point.

# Duty to Defend

- ***Lefeuvre v. Boekee* (2017 ONSC 6874)**
- **Take Away:** Insurers should be prepared to reserve double defence costs when the duty to defend has been acknowledged in cases where co-defendants protected by the same policy have serious allegations against each other.
  - In particular, where information obtained from an additional insured may be used against the named insured (thus impacting the insurer's potential duty to indemnify), it is important for the insurer to avoid any conflict of interest by allowing the additional insured to appoint and instruct its own defence counsel.

# Occupiers' Liability

- ***Tondat v. Hudson's Bay Company* (2018 ONCA 302)**
- **Facts:**
  - Plaintiff entered department store on rainy day and slipped and fell when she stepped onto wet floor at entrance. She fractured her right kneecap and required surgery.
  - HBC's expert opined that the tile flooring where the fall occurred had a superior coefficient of friction when wet, such that the flooring was reasonably safe whether wet or dry.

# Occupiers' Liability

- ***Tondat v. HBC* (2018 ONCA 302)**
- **Facts:**
  - Plaintiff's action against store and property management company was allowed and she was awarded $100,000 in damages.
  - Trial judge concluded that plaintiff's fall was caused by wet floor, and that defendants lacked effective inspection or maintenance system to abate risk of fall or account for bad weather conditions.
  - Defendants appealed decision. Their main argument was that the trial judge failed to require the plaintiff to prove that the wet floor "created an unreasonable risk of harm", before he turned his focus to the measures adopted by the HBC to make the premises safe.

# Occupiers' Liability

- ***Tondat v. HBC* (2018 ONCA 302)**
- **Decision:** Appeal dismissed.
  - Ontario's *Occupiers' Liability Act* imposes an affirmative duty requiring occupiers to take reasonable care in circumstances to make their premises safe.
  - Plaintiff was not required to prove that the wet floor created "unreasonable risk of harm".

# Occupiers' Liability

- ***Tondat v. HBC* (2018 ONCA 302)**
- **Decision:** Appeal dismissed.
  - There was no merit to defendants' argument that plaintiff was obliged to call her own expert witness to prove that floor was inherently slippery.
  - Defendants' expert conducted his testing "in a highly controlled way" and did not take into account other factors that could have affected the co-efficient of friction of the floor tiles. As such, the trial judge reasonably concluded that, as there were too many variables unaccounted for in the expert's report, the expert evidence could be rejected.

# Occupiers' Liability

- ***Tondat v. HBC* (2018 ONCA 302)**
- **Take Away:** Liability experts do not always save the day! When retaining an expert to testify about the slip co-efficient or "slipperiness" of the floor, be sure that the testing replicates the conditions present at the time of the fall.
  - (Surely affecting the appellate court's decision was the fact that a single maintenance person had been on duty both as a cleaner and a porter in the 118,348 square foot store on the day in question and there were no logs to confirm what activity, if any, had been taking place in the vestibule prior the accident.)

# Waivers of Liability

- ***Schnarr v. Blue Mountain Resorts* (2018 ONCA 313)**
- **Facts:**
  - Two appeals were heard together as they raised common issues.
  - The plaintiffs were both patrons of ski resorts and had executed waivers of liability as a condition of their ski tickets.
  - In both cases, the plaintiffs had been injured on the ski resorts' premises and had sued.
  - In both decisions, plaintiffs' claim was accepted that waivers did not exempt ski resorts from statutory obligation under consumer legislation to provide services of "reasonable acceptable quality".

# Waivers of Liability

- ***Schnarr v. Blue Mountain Resorts* (2018 ONCA 313)**
- **Facts:**
  - Ski resorts appeal decision.
  - The appeals raised the question of whether the *Consumer Protection Act* or the *Occupiers' Liability Act* governed the relationship between the parties.
  - The Court of Appeal was asked to decide whether ss. 7 and 9 of the *CPA* void a waiver of liability which is otherwise valid under s. 3 of the *OLA*, where the party seeking to rely on the waiver is both a "supplier" under the *CPA* and an "occupier" under the *OLA*.

# Waivers of Liability

- ***Schnarr v. Blue Mountain Resorts* (2018 ONCA 313)**
- **Decision:** Appeal allowed.
  - The statutes conflict and are irreconcilable. As such, the more specific provision in the *OLA* was found to prevail over the general provisions in the *CPA*. The plaintiffs were bound by the waivers.
- **Take Away:** Recreational businesses and municipalities can (and should!) continue to use waivers to protect themselves from liability in activities that have inherent risk, **so long as the waivers are properly worded and there are proper procedures in place for the signing of the waivers.**

# Public Transit

- ***Seyom v. Toronto Transit Commission* (2018, ONSC 6848)**
- **Facts:**
  - Plaintiff fell while she was a passenger on a Toronto Transit Commission (“TTC”) bus.
  - The plaintiff had just boarded the bus, and was in the process of walking to the rear to find a seat when the bus accelerated. The plaintiff lost her balance, and fell to the floor.
  - The plaintiff was sympathetic, presented well, and did suffer objective injuries.

# Public Transit

- ***Seyom v. Toronto Transit Commission* (2018 ONSC 6848)**
- **Decision:** Summary judgment granted to TTC
  - Although sympathetic to the plaintiff's injuries, the Court unequivocally held that the bus driver's actions did not fall below the requisite standard of care.
  - The Court held that it was *not* negligent for a driver to move a bus away from a bus stop after a passenger has boarded, but before the passenger has taken a seat.

# Public Transit

- ***Seyom v. Toronto Transit Commission* (2018 ONSC 6848)**
  - Justice Nakatsuru closed his decision by stating:

*"I know you blame them. But the driver drove like he always does…the floors in the bus may have been wet, but the floors of a bus in Toronto, for many days of the year, are wet. The busses still have to run. Passengers can still move or walk in the bus…*

*…*

*You falling the way you did, as the driver slowly pulled out, was not a harm that he could have seen happening. Even with the high standard we expect of bus drivers."*

# Public Transit

- ***Seyom v. Toronto Transit Commission* (2018 ONSC 6848)**
- **Take Away:** The standard of care of a reasonable municipal bus driver does not require that they ensure that every passenger is safely seated, before pulling away from a bus stop.

# Municipal Liability

- ***Chiocchio v. Hamilton (City)*** **(2018 ONCA 762)**
- **Facts:**
  - The action arises out of a motor vehicle accident which occurred in the City of Hamilton.
  - The defendant driver stopped at a stop sign which was 8.4 to 9.4 metres behind a faded stop line.
  - He accelerated from the stop sign and T-boned a minivan in which the plaintiff was a passenger, rendering the plaintiff a quadriplegic.
  - Trial judge found the City of Hamilton 50% liable for failing to repaint the faded stop line.
  - The City of Hamilton appealed.

# Municipal Liability

- ***Chiocchio v. Hamilton (City)* (2018 ONCA 762)**
- **Decision:** City of Hamilton's appeal was allowed.
  - Drivers who stop in a position where their view of oncoming traffic is completely obscured and who do not stop again before entering an intersection fall well below the standard of an ordinary reasonable driver and are negligent.
  - Drivers who fail to comply with the rules of the road established under the *Highway Traffic Act* and who also act in a manner that is contrary to common sense cannot meet the ordinary reasonable driver standard.

# Municipal Liability

- ***Chiocchio v. Hamilton (City)*** **(2018 ONCA 762)**
- **Take Away:** A municipality's duty of care does not extend to remedying conditions that pose a risk of harm *only* because of negligent driving.

# Occupiers' Liability

- ***Bonello v. Gores Landing Marina* (2018, ONSC)**
- **Facts:**
  - Plaintiff put his left arm through loop in rope that was used for recreational game of tug-of-war.
  - When game began, loop tightened on plaintiff's arm, and he suffered injury to his left forearm that required amputation.

# Occupiers' Liability

- ***Bonello v. Gores Landing Marina* (2018, ONSC)**
- **Facts:**
  - Plaintiff sued owner of campground where game took place and its principal, claiming they were liable under Occupiers' Liability Act, for common law negligence, and were vicariously liable for actions of principal's son who obtained rope that was used for game.
  - Owner and principal issued third party claim against nine men who were cottagers, campers or visitors at campground and who had participated in tug-of-war game, seeking contribution and indemnity.
  - Third parties brought motion for summary judgment.

# Occupiers' Liability

- ***Bonello v. Gores Landing Marina* (2018 ONSC 2237)**
- **Decision:** Motion granted.
  - Canadian courts had not recognized that relationships between participants in recreational activity that was not inherently dangerous, such as game of tug-of-war, was a category that gave rise to duty of care owed by one participant to another, so it was necessary to consider whether proximity was established.
  - None of third parties intentionally attracted and invited persons to inherent and obvious risk that he created or controlled.

# Occupiers' Liability

- ***Bonello v. Gores Landing Marina* (2018 ONSC 2237)**
- **Decision:** Motion granted.
  - Tug-of-war game was not inherently risky activity, and there was no evidence that any of third parties was organizer or supervisor of game.
  - Third parties were not in special relationship with plaintiff, and they did not have material role in creation or management of risk.
  - Mere participation in recreational tug-of-war game would not involve likelihood that harm would result.

# Occupiers' Liability

- ***Bonello v. Gores Landing Marina* (2018 ONSC 2237)**
- **Decision:** Motion granted.
  - Relationship between third parties and plaintiff was not sufficiently close and direct to render it fair and reasonable to establish prima facie legal duty of care — There was no genuine issue requiring trial in relation to whether third parties owed duty of care to plaintiff.
- **Take Away:** A duty of care should not be placed upon participants in an innocent game, like one of tug-of-war. Participants in such activities are not required to take positive actions that would minimize or eliminate possible risks to other participants in game.

# Surveillance

- ***Jamieson v. Kapashesit* (2018 ONSC 279)**
- **Facts:**
  - This personal injury action was scheduled to proceed to trial. However, four days before two-week civil jury trial, the defendants brought a motion that sought permission to use recently obtained surveillance evidence at trial.
  - All counsel agreed to adjourn the trial date.
  - Issue in decision was whether the plaintiffs were entitled to their costs, following the adjournment of the trial.

# Surveillance

- ***Jamieson v. Kapashesit* (2018 ONSC 279)**
- **Decision:** Plaintiffs awarded $11,300.00 in costs.
  - In this case, defendants only provided unsworn affidavit of documents shortly before trial.
  - Practice of having sent unsworn affidavit of documents was unacceptable as it failed to comply with the *Rules of Civil Procedure*.
  - By having delivered surveillance evidence on eve of trial, defendants ensured that plaintiffs would not have time to have availed themselves of further right to cross-examination or discovery.
  - Fact remained that actions of defendants primarily necessitated mistrial to have been declared and that adjournment would be granted in order to avoid prejudice to any party.

# Surveillance

- ***Jamieson v. Kapashesit* (2018 ONSC 279)**
- **Take Away:** Cautionary tale for defendants who wish to use surveillance at trial. Must comply with the *Rules* – specifically Rule 30.09 - and governing case law re use of surveillance.

# Limitations Act

- ***Mega International Commercial Bank (Canada) v. Yung* (2018 ONCA 429)**
- **Facts:**
  - Real estate transaction gone wrong! Thankfully, the facts are not important to the *Limitations Act* analysis.
  - On its face, section 18 of the *Limitations Act* (commencing claims for contribution and indemnity) does not refer to discoverability.

# Limitations Act

- ***Mega International Commercial Bank (Canada) v. Yung* (2018 ONCA 429)**
  - **Contribution and indemnity:**
  - **18** (1) For the purposes of subsection 5 (2) and section 15, in the case of a claim by one alleged wrongdoer against another for contribution and indemnity, the day on which the first alleged wrongdoer was served with the claim in respect of which contribution and indemnity is sought shall be deemed to be the day the act or omission on which that alleged wrongdoer's claim is based took place. 2002, c. 24, Sched. B, s. 18 (1).

# Limitations Act

- ***Mega International Commercial Bank (Canada) v. Yung* (2018 ONCA 429)**
- **Facts:**
  - This had led to an interpretation which holds a defendant to a strict two year limitation from the date he/she was served with the Statement of Claim in order to commence a Third Party proceeding against another potentially liable tortfeasor.
  - However, what happens if, at the time the defendant is served with the Statement of Claim, that defendant is unaware of the existence of that tortfeasor or, even if aware of their existence, is unaware of their potential liability?

# Limitations Act

- ***Mega International Commercial Bank (Canada) v. Yung* (2018 ONCA 429)**
- **Decision:** Appeal allowed. Principles of discoverability apply for commencing claims for contribution and indemnity.
  - Section 18 works with other provisions of the *Limitations Act, 2002* to create a presumed start date for the running of the limitation period. That presumed limitation period start date will result in a claim for contribution or indemnity being statute-barred two years after the party seeking contribution or indemnity is served with the Statement of Claim…

  **UNLESS …**

  - … that party proves that the claim for contribution or indemnity was not discovered and was not capable of being discovered through the exercise of due diligence until some later date.

# Limitations Act

- ***Mega International Commercial Bank (Canada) v. Yung* (2018 ONCA 429)**
- **Take Away:** The defence is no longer faced with a hard and fast two year limitation period from the date of the service of the claim for commencing claims for contribution and indemnity.
  - The presumed expiry of the limitation period does mean that the availability of potential claims against non-parties before the two year period will still need to be explored expeditiously, as the onus will ultimately be on the party advancing the claim for contribution and indemnity to establish that the claim was not discovered and was *not capable of being discovered* through the *exercise of due diligence* until some later date.

# Duty to Defend

- ***National Art Gallery v. Lafleur de la Capitale* (2018 ONSC 2921)**
- **Facts:**
  - Property owner hired Lafleur to supply all labour and equipment to complete interior and exterior maintenance at owner's property.
  - Lafleur agreed to indemnify and hold-harmless the owner from all claims arising out of or in connection with its work under contract.
  - Lafleur also agreed to obtain comprehensive general liability insurance policy under which owner was additional named insured.

# Duty to Defend

- ***National Art Gallery v. Lafleur de la Capitale* (2018 ONSC 2921)**
- **Facts:**
  - Employee of Lafleur (Mr. Lafreniere) was performing routine maintenance work, near the entrance ramp to the National Gallery's underground parking garage. As a vehicle approached to enter the garage, Mr. Lafrenière moved over to the edge of the entrance ramp, fell over a concrete ledge, and suffered fatal injuries.
  - Employee's wife and relatives commenced actions against owner for damages, and owner commenced third party claims against Lafleur for contribution and indemnity.
  - Owner brought application for determination that Lafleur's insurer had duty to defend owner.

# Duty to Defend

- ***National Art Gallery v. Lafleur de la Capitale*** **(2018 ONSC 2921)**
- **Decision:** Application dismissed.
  - The wording of the indemnity provision made it clear to the court that indemnity was “based upon, arising out of, related to, occasioned by or attributable to the activities of the Contractor.”
  - Lafleur was the Contractor and was not named as a party in the Statement of Claim. There were no allegations in the Statement of Claim that alleged negligence or tortious activities of Lafleur so no indemnification could be triggered.
  - The allegations in the Statement of Claim related to design and control by the National Gallery as occupier and, therefore, could not be related to or attributable to the activities of Lafleur.

# Duty to Defend

- ***National Art Gallery v. Lafleur de la Capitale* (2018 ONSC 2921)**
- **Take Away:** When assessing whether a defence is owed under a services contract, the pleadings are absolutely paramount.
  - An insurer is required to defend a claim on behalf of an insured when the facts alleged in the pleadings, if proven true, would require the insurer to indemnify the insured for the claim.
  - The duty to defend should, **unless the contract of insurance indicates otherwise**, be confined to the defence of claims which may be argued to fall under the policy.
  - Where only some of the claims are potentially covered, a court must assess the substance or the "true nature" of each claim contained within the pleadings to see if it falls within the scope of coverage.

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# THANK YOU!


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