Crawford®

VOLUME VIII ISSUE 2

LEGAL SERVICES NEWSLETTER

Crawford & Company (Canada) Inc.

Another Stark Reminder

| Written by Mini Kohli

THE MATTER OF APPLICANT AND AVIVA[1] is another reminder that to be effective, *"all notices governed by the Schedule must be clear and readily understandable to the unsophisticated person."*[2]

In a dispute over a number of Treatment and Assessment Plans (OCF-18) relating to physiotherapy treatment, the Applicant in this case sustained soft-tissue injuries in the accident which were not the point of contention in this claim. The Applicant had a pre-existing psychological condition ultimately removing the Applicant from the MIG. The insurer disputed whether or not the Applicant's left-knee impairment, which was ultimately treated with arthroscopic surgery, arose from the accident. The left-knee injury was noted in the disputed Treatment and Assessment Plans (OCF-18). Naturally, the insurer disputed causation arguing that the left knee impairment was a pre-existing condition.

The Applicant claimed that her left knee impairment was aggravated by the accident. The Applicant's treating Orthopedic surgeon provided a report indicating that the Applicant sustained myofascial strain to the left knee, characterized as exacerbating pre-existing left knee pain.

The Adjudicator agreed that the Applicant's left knee problems arose and were being treated two years before the accident. The Applicant contended that the insurer was negligent in not requiring an amendment to its IE reports after she was removed from the MIG. The Adjudicator found this argument to be "meritless" because the insurer's section 44 assessments supported denials based on the "reasonable and necessary" standard, the MIG removal was based on psychological issues, not physical ones. As a result, all three OCF-18's were found to be not reasonable and necessary by the Adjudicator.

However, as a further argument in relation to one of the three OCF-18's, the Applicant claimed that the denial did not meet the requirements of section 38 of the Schedule. Most notably, the Adjudicator agreed that the insurer's notice of denial was insufficient, in that the insurer failed to provide a medical reason for its refusal. The Adjudicator went on to state that the insurer linked its determination that the proposed OCF-18 was not reasonable and necessary to the Applicant's failure to attend a previously scheduled IE in relation to different earlier claims and further found that the insurer:

> *"gave an invalid reason that was misleading to the applicant and frustrated the purpose of the notice to provide the applicant with accurate information on which to base her decisions...No medical reason for refusal was given...The respondent effectively stated to the applicant that it would refuse to even consider the August 15th claim because of her failure to attend an IE scheduled in June 2015 to assess another, different and earlier claim. No such right exists: it could have and should have issued a new, proper notice of examination." The Notice was confusing, and had "imprecise and unexplained references to sections of the Schedule [that] would confuse or at least fail to help the typical reader."*[3]

As a result of the insurer's insufficient explanation of benefits, the insurer was found liable to pay the cost of the OCF-18 plus interest, as prescribed by s.38 of the *Schedule*. ■

[1] *Applicant and Aviva* (2018 CanLII 81888)

[2] *Ibid* at para 24(ii)

[3] *Ibid* at para 24

Achilles' heel in the Protection for WSIB Schedule 1 Employers

Kandavanam Maria-Antony v. Sritaran Selliah, 2014 ONSC 4264

THE WORKPLACE SAFETY AND INSURANCE ACT, 1997, SO 1997, c 16, Sch A, contains what is essentially a grand compromise between employers and employees, creating insurance for injured employees in exchange for protection from lawsuits for employers. Every employer who qualifies ("Schedule 1 Employers"), being most employers, is required by law to pay into the compensation fund, in exchange they are protected from liability for any accident that might occur during work to any Schedule 1 Employer's employees.

The Workplace Safety and Insurance Act, supra, exclusion from liability section reads as follows:

> **28 [1]** A worker employed by a Schedule 1 employer, the worker's survivors and a Schedule 1 employer are not entitled to commence an action against the following persons in respect of the worker's injury or disease:
>
> 1. Any Schedule 1 employer.
> 2. A director, executive officer or worker employed by any Schedule 1 employer.

Same, Schedule 2 employer

> **[2]** A worker employed by a Schedule 2 employer and the worker's survivors are not entitled to commence an action against the following persons in respect of the worker's injury or disease:
>
> 1. The worker's Schedule 2 employer.
> 2. A director, executive officer or worker employed by the worker's Schedule 2 employer.

Restriction

> **[3]** If the workers of one or more employers were involved in the circumstances in which the worker sustained the injury, subsection (1) applies only if the workers were acting in the course of their employment.

However, a little-known exception to this rule exists, which is often overlooked. This exception, combined with common business arrangements of leasing vehicles, could lead to possible liability for a Schedule 1 employer in the exact scenarios the grand compromise was designed to address.

Exception

> **28 [4]** Subsections (1) and (2) do not apply if any employer other than the worker's employer supplied a motor vehicle, machinery or equipment on a purchase or rental basis without also supplying workers to operate the motor vehicle, machinery or equipment.

Generally speaking, people look to this to prevent Schedule 1 Employers from being excluded from liability for issues such as manufacturer's defects, which largely do not involve the grand compromise between employees and employers – it is a difference in kind. However, other issues can arise with regard to leased vehicles, unrelated to manufacturer's defect, due to the attribution of liability for rules under S. 192(2) of the *Highway Traffic Act*, RSO 1990, c H.8.

Liability for loss or damage

> **192 [2]** The owner of a motor vehicle or street car is liable for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle or street car on a highway, unless the motor vehicle or street car was without the owner's consent in the possession of some person other than the owner or the owner's chauffeur.

The driver of a vehicle might be an employee of a Schedule 1 Employer, and so qualify under the protections from the *Workplace Safety and Insurance Act, supra.* This makes sense as it relates to the interaction between employees of various Schedule 1 Employers in this grand compromise. However, by this section, the driver's negligence is attributed to the owner of a vehicle.

The owner of the vehicle, who may also be a Schedule 1 Employer, having only provided a vehicle without also supplying the workers to operate it, would fall under the S. 28(4) exception and so not receive the benefit of protection.

There are some additional protections in S. 29 of the *Workplace Safety and Insurance Act, supra* that could be thought to address this situation. S. 29 essentially states that to the extent that the negligence is from a protected defendant, the plaintiff can't recover those amounts from anyone:

SCHEDULE 1 EMPLOYER WHO LEASES CARS MAY BE 100 PERCENT LIABLE FOR THE NEGLIGENCE OF A SCHEDULE 1 EMPLOYER'S EMPLOYEES IN THE COURSE OF EMPLOYMENT – EVEN DESPITE THE GRAND COMPROMISE BEING SPECIFICALLY CREATED TO PREVENT LAWSUITS OVER THAT SORT OF NEGLIGENCE.

Liability where negligence, fault

> **29 [1]** This section applies in the following circumstances:
>
> 1. In an action by or on behalf of a worker employed by a Schedule 1 employer or a survivor of such a worker, any Schedule 1 employer or a director, executive officer or another worker employed by a Schedule 1 employer is determined to be at fault or negligent in respect of the accident or the disease that gives rise to the worker's entitlement to benefits under the insurance plan.
> 2. In an action by or on behalf of a worker employed by a Schedule 2 employer or a survivor of such a worker, the worker's Schedule 2 employer or a director, executive officer or another worker employed by the employer is determined to be at fault or negligent in respect of the accident or the disease that gives rise to the worker's entitlement to benefits under the insurance plan.

Same

> **[2]** The employer, director, executive officer or other worker is not liable to pay damages to the worker or his or her survivors or to contribute to or indemnify another person who is liable to pay such damages.

Determination of fault

> **[3]** The court shall determine what portion of the loss or damage was caused by the fault or negligence of the employer, director, executive officer or other worker and shall do so whether or not he, she or it is a party to the action.

Same

> **[4]** No damages, contribution or indemnity for the amount determined under subsection (3) to be caused by a person described in that subsection is recoverable in an action.

However, in *Maria-Antony v. Selliah, supra,* the Superior Court rejected any application of S. 29 to the Highway Traffic Act, supra, vicarious liability attribution, and instead allowed a 100 percent recovery against the owner due to that section. In doing so, the Court found that because the legislation does not specifically bar that right of claim, it is not barred:

continued >

32 Where the legislature intends to remove or restrict a right, such as confining liability to personal negligence and to exclude vicarious liability, "the Legislature knows how to do it". To remove a right it must do so in clear and unambiguous term. (See *583809 Ontario Ltd. v. Kay,* [1995] O.J. No. 1626 (Ont. Gen. Div.), at para 13)

33 Contrary to the *obiter dicta in Ling v. Transamerica Commercial Corp.,* because s. 29 does not specifically restrict or remove statutorily available vicarious liability claims, such actions must remain actionable.

34 The purpose of the provision at issue is to eliminate joint liability between protected and unprotected defendants that would otherwise exist, not to eliminate an unprotected defendant's vicarious liability. It is to ensure protected defendants are not subject to liability in court by eliminating the principal of joint and several liability with unprotected defendants, and by precluding the unprotected defendant from recovering contribution or indemnity from the protected defendants for their negligence.

35 In summary, the provision does not specifically preclude the vicarious liability of the unprotected owner of the vehicle where indemnity against the negligent tortfeasor is barred by operation of the Act. The limited right of action cited by the Appeals Tribunal includes actions based on vicarious liability.

The interaction of the legislation, and the court's interpretation thereof, has created a counterintuitive situation where a Schedule 1 Employer who leases cars may be 100 percent liable for the negligence of a Schedule 1 Employer's employees in the course of employment – even despite the grand compromise being specifically created to prevent lawsuits over that sort of negligence. Furthermore, such a leasing company would still be precluded from subrogating against the driver or the driver's Schedule 1 Employer, as both of them remain protected.

The Divisional Court denied leave to appeal in *Maria-Antony v. Selliah* 2015 ONSC 2951. However, in denying leave, the Divisional Court did comment specifically on this interpretation by the Superior Court, indicating that it was an open issue and that no final determination had been made. As they state at para. 2:

> **2** I say nothing about the motion judge's conclusion that the claim against FTI is not barred by the privative provisions in the *Worker's Compensation Act*. The motions judge did not make a final order to this effect in favour of the plaintiff. Rather, he declined to grant summary judgment in favour of FTI, leaving all issues outstanding to be argued before the trial judge.

There is contradicting case law, in accordance with the more intuitive result, that vicarious liability for those negligent actions is also excluded, as set out in the decision *Ling v. Transamerica Commercial Corp.,* 1980 CarswellOnt 1303, as

> **15** True enough, the broad purpose of the Act is to remove litigation between employer and employees. But when I unbutton the words of sub-section 11 and look at the underlying purpose of the Act, I find no convincing reason to place limitations on the plain meaning of the words. It seems to me that the intention of the Legislature was to confer jurisdiction to bar, in the facts of this case, recovery of damages against the owner of the vehicle involved in the accident giving rise to the litigation, even though the owner is a stranger to the act. If the plaintiff's submission is correct and sub-section 11 is inapplicable to Transamerica, then it would follow that Transamerica would be liable to pay 100% of the damages but it would be deprived of its common law right of indemnity from Buettner. If it was the legislative intention to deprive Transamerica of its common law right of indemnity from the driver Buettner, would not the Legislature have used different language? I think so.

As referenced above, this part of the decision was addressed by the Court in *Maria Antony v. Selliah, Supra,* which found it to be *Obiter* (meaning it is non-binding) and chose not to follow that decision.

The Divisional Court left room for courts to reject the reasoning in *Maria Antony v. Selliah, supra,* but if other courts choose to accept the reasoning, some companies are going to be paying for a protection they do not receive.

Case Note by Ted Bethune, 416-957-5007 ■

NO MORE WAIVERING ON WAIVERS?

| Written by Paul Famula, BA, LLB, LLM

Schnarr v. Blue Mountain Resorts Limited

Woodhouse v. Snow Valley Resorts (1987) Ltd. aka Ski Snow Valley (Barrie) et al. 2018 ONCA 313

THE ONTARIO COURT OF APPEAL recently considered the balancing of interests between occupiers and users of recreational facilities. *The Consumer Protection Act,* 2002, SO 2002, c 30, Sch A ("CPA") s. 9 precludes suppliers from obtaining waivers in a *"consumer agreement"* from its obligation to provide a warranty that the subject of the transaction is of *"reasonably acceptable quality."*

Two actions were joined for the purposes of the appeal as they dealt with a common issue. Both Schnarr and Woodhouse suffered injuries at ski resorts after purchasing a ski ticket from the respective resorts. Both claimants had signed the waiver of liability and both sued for damages. The Appeal came from the motion court decisions in both instances. In the motions court, in the *Schnarr* matter, the motion's judge held that the Blue Mountain waiver partially offended ss.7(1) and 9(3) of the *CPA*, insofar as it purported to waive liability in contract, and was void and severed from the consumer contract. In the *Woodhouse* matter, the motion's judge held that the Snow Valley waiver was void in both in tort and contract.

On the other hand, the *Occupiers Liability Act*, R.S.O. 1990, c. O.2 (*"OLA"*) permits an occupier to obtain a waiver of liability from the user.

Although it would seem that the *OLA* is at odds with the *CPA*, the Court concluded that the *CPA* s.3 permits occupiers to obtain a waiver of liability. The Court stated as follows:

> **[4]** In my view, when applied to the instant context, ss.7 and 9 of the *CPA* fundamentally undermine the purpose of s.3 of the *OLA*. The statutes are irreconcilable and conflict. As such, and as I shall explain below, the more specific provision in the *OLA* prevails over the general provisions in the *CPA*.

It is interesting to note that although this would seem to be a straightforward injury claim, a number of intervenors were permitted to make representations. These included Conservation Halton, Credit Valley Conservation and Toronto Conservation. Standing was granted to the Ontario Federation of Snowmobile Clubs and Ontario Cycling Association, as well as the Canadian Defence Lawyers, Ontario Trial Lawyers Association, Tourism Industry Association of Ontario and the Ontario Minister of Government and Consumer Services. The matter raised significant issues relating to occupiers in Ontario and in particular, in addition to the private parties, the public bodies such as Conservation Authorities and trail bodies that provide recreational opportunities to the public at large. The application of the decision will have far-reaching consequences to all occupiers both in the for-profit and not-for-profit sectors.

THE APPLICATION OF THE DECISION WILL HAVE FAR-REACHING CONSEQUENCES TO ALL OCCUPIERS BOTH IN THE FOR-PROFIT AND NOT-FOR-PROFIT SECTORS

The Court reviewed in some detail the nature of the two waivers and mentioned that the Blue Mountain waiver was web based and was part of the process involved in obtaining a seasonal pass. With respect to the Snow Valley waiver, one waiver was contained on the lift ticket and another in a rental agreement. In this latter case, the waiver was never explained to the purchaser, Woodhouse, but she had reviewed the wording on the Snow Valley website. It is interesting that the purchasers in either case challenged the validity of the waivers on the basis of a failure to give notice or otherwise bring the waiver to their attention. In both matters, the factual record was established by statements of fact.

As the Court determined that the statutes were in conflict and could not be reconciled or read harmoniously in some manner, an examination of the history and purpose of both statutes was required.

The OLA

The Court noted that the *OLA* was enacted following the Ontario Law Reform Commission's 1972 *Report on Occupiers' Liability*, which concluded that the common law duty of care owed by occupiers should be replaced with a generalized statutory duty. Previously, at common law an enquiry was required to determine the nature of the entrant's status, be it invitee, trespasser, etc., before determining the nature of the duty owed to them. The *OLA* s.3 established a single primary default duty of care. The Court noted that the legislation created was "exclusive and comprehensive".

The Court noted the two critical sections, namely ss.3 and 4, of the *OLA*. Section 4 establishes the lower *"reckless disregard"* standard applicable in recreation trails circumstances. In addition, the Court made the following comments:

> **[28]** When considering the purpose of the OLA, it is of some importance to recognize that part of the rationale for including s.4 in the statute was to encourage private landowners to voluntarily make their property available for recreational activities by limiting their liability. This was made clear in the *Discussions on Occupiers' Liability and Trespass to Property* issued by the Ministry of the Attorney General in May 1979. ...

The CPA

In 2002, the *CPA* was also a consolidation and modernization of sorts of consumer protection laws found scattered in numerous statutes. Significantly s. 7(1) of the *CPA* employed a mechanism to protect consumers by maintaining rights given *"despite any agreement or waiver to the contrary"*. This is the so-called "no contracting out provision". The other significant element was found in s.9 which deemed a "supplier" to warrant that the "services provided" under a "consumer agreement are of reasonably acceptable quality".

The Court noted that the parties did not disagree that the Plaintiffs were consumers, the Defendants were suppliers and that the contracts that they entered into were consumer agreements.

Again the Court reviewed the Ministry of Consumer and Commercial Relations consultation paper entitled *"Consumer Protection for the 21st Century"*, which explained the reasoning behind the proposed CPA and cited the following:

> **[35]** First, proposal 4(a), at p. 9 of the consultation paper, points out that "consumer law should not apply to transactions already governed under regulatory regimes that adequately address consumer protection". The paper expands on this point, at pp.9-10:
>
> Although any transaction in which individuals pay for anything is in some sense a consumer transaction, there are *several areas in which other specialized legal regimes apply instead of consumer law... The Ministry is not proposing that general consumer law apply to these sectors...*
>
> *(Emphasis added)*

Furthermore, the Court pointed out that the consultation paper discussed industry and sector specific concerns that led to the introduction of the *CPA*. Occupiers' liability was not such a concern. Financial transactions were the principal concern.

The Analysis

The Court addressed the problem on the basis of statutory interpretation with respect to the analysis of conflicting statutes. The Court saw the resolution of the problem that a general statute must yield to a specific one and by application of the absurdity doctrine. The *OLA* is a specific statute that permits an occupier to "restrict, modify or exclude" its duty of care by a waiver. The *CPA* on the other hand, *"seeks to regulate the entirely separate category of consumer transactions between a supplier and consumer"*.

continued >

continued >

> **[62]** However, in my view, in this factual situation, the *OLA* must be reasonably seen as dealing with the core issue, that is, the ability of occupiers of premises to obtain waivers of liability. In contrast, the *CPA* deals generally with all forms of consumer transactions. Buying a ski pass is but one of a myriad of consumer transactions to which the *CPA* could apply. The *OLA*, on the other hand, deals directly, and substantially, with the activities on premises (as defined), including the operation of recreational activities on premises. Indeed, as I have explained above, part of the rationale for permitting occupiers to obtain waivers of liability was to promote the use of their properties by others for those very activities.

The Court concluded that this result did not "invalidate" the *CPA*. The Court held the view that"... *this result simply recognizes that the OLA carves out consumer transactions that relate to activities covered by the OLA from the application of the CPA".*

Furthermore, the Court held the opinion that if the effect was to defeat the purpose of the *OLA* in providing protections to occupiers, the result would be an *"absurdity"*. The *OLA* would be impliedly amended by such an interpretation of the *CPA*. This was clearly not the intended result:

> **[66]** I am reinforced in my conclusion in this regard by the actions of the legislature in 2016 when it enacted the *Ontario Trails Act, 2016*, S.O. 2016, c. 8, Sch. 1. This legislation, among other things, amended the *OLA* to provide protection to occupiers who permitted their premises to be used by members of the public for recreational trails, including hiking, portaging or snowmobiling trails. These amendments resulted from concerns expressed by landowners of being exposed to liability as a result of allowing access to trails on their land. Volunteer non-profit clubs and associations taking care of those trails also voiced similar concerns.

The Court viewed the efforts of the legislature through the Minister of Tourism, Culture and Sport to clarify the purpose of the *Trails Act* in encouraging the opening up of recreational opportunities would be in vain if the *CPA* simply nullified such efforts.

The Court did review the notion of remedial rules applicable to tort versus contract. Interestingly, it found such distinctions to be artificial and unjustified in this context where the *OLA* was clear in what is permissible to an occupier, including restricting, modifying and excluding a duty imposed by statute by means of a waiver.

Conclusion

CPA s.9 is clearly at odds with the *OLA*. Because s.9 of the *CPA* "undermines" the intent of the *OLA*, it is a factor that militates towards a finding that the *OLA* supersedes the *CPA*. The *OLA* operates to exclude consumer transactions that relate to activities covered by the *OLA* from the application of the *CPA*. If the waiver is not otherwise void, the *CPA* will not make it so.

It should be noted that an Application for Leave to Appeal has been filed with the Supreme Court of Canada and is scheduled to be heard later this fall. It will be interesting to see, if leave is granted, on what basis the Court does so. It would not seem to be a matter of national interest, but the Court has not dealt with the subject of waivers for some time.

Case Note by Paul Famula, 416-957-5006 ■

For more information, on Legal Services, contact: Mini.Kohli@crawco.ca