SPRING 2004

Blaney McMurtry
BARRISTERS & SOLICITORS LLP

Insurance Observer

PUSHING OVERLAPPING COVERAGE TOO FAR: *UNGER v. UNGER*

Marcus B. Snowden

In certain circumstances, where an employer's vehicle and employee are involved in an automobile accident, there may be good cause to draw in the GL carrier. Since *Derksen v. 539938 Ontario Ltd.* was released by the Supreme Court of Canada, both the plaintiffs' bar and defence practitioners have been careful to fully exploit the perceived "additional player" in employer-related accidents.

In *Unger v. Unger*, the passengers in the Unger car sued their driver as well as the driver/employee, Riccia and owner/employer of the truck, Matthews. The auto carrier, Pilot, acknowledged a defence obligation for Riccia and Matthews, but successfully moved for an order requiring the GL carrier, Co-operators, to co-fund the defence. Pilot's case was based upon four paragraphs in the pleading alleging Matthews' negligent conduct, including inadequate instruction, inadequate maintenance of the truck, inadequate supervision and wrongful entrustment to Riccia as an incompetent employee. The motion's judge concluded that these allegations were sufficiently "separate and distinct from the defendants'…use and operation of" the truck to meet the "mere possibility" test for a duty to defend.

Co-operators asked the Ontario Court of Appeal to determine the correctness of this ruling. Writing for an unanimous panel, Justice Doherty reversed the ruling and dismissed Pilot's motion with costs.

On first reading, one might be forgiven for thinking the Court of Appeal was in error. After all, in the *Derksen* case, we are all aware the GL carrier had been required to defend the non-automobile related aspects of the claim in the face of fairly conventional exclusionary language.

However, a close examination of the Court of Appeal's analysis suggests that GL carriers are not necessarily properly drawn in by pleadings in all such employment related claims. The GL wording contained two related exclusions. The first simply excluded injury or damage arising out of the policyholder's ownership, use, etc. of any automobile. The second excluded injury or damage covered by any auto policy in effect or that would be but for exhaustion of limits. These two clauses, although appearing to address the same risk, in fact serve different purposes. The first clause more broadly applies to claims arising from the operation, etc. of "any automobile." while the second clause is restricted to those circumstances where other coverage is in fact available. As it turned out, Doherty J. was satisfied that both clauses applied to the facts pleaded.

In this instance, Pilot argued its auto policy did not cover the four paragraphs relating to employer conduct. This required the Court to consider whether the claims against the employer were sufficient to create a "separate and discrete cause of action" as the motions court judge had found. This concurrent cause analysis comes from the *Derksen* case.

However, Justice Doherty was also aided by the Supreme Court of Canada's decision in *Sansalone v. Wawanesa Mutual Insurance Co.* (the companion decision to the *Scalera* case), which requires the Court to examine the "true nature" of the claim regardless of the labels used in the pleading. Justice Doherty concluded the allegations against Matthews added no new cause of action for the

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Ungers and were entirely derivative of Riccia's use, operation, etc. of the truck.

Writing for the panel, Doherty J. put it this way:

> ...I conclude that in substance all of the allegations of negligence made in the statement of claim allege that the Ungers were injured as a result of the use, operation or ownership of the vehicle driven by Riccia and owned by Matthews or his business. The mere description of some of the acts of negligence as "negligent business practices" does not create a separate and discrete cause of action. Those allegations could assist the Ungers in establishing their claim only to the extent that the helped them demonstrate that the vehicle was being used or operated in a negligent fashion when the accident in which the Ungers were injured occurred.
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> ...
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> Were the Ungers to establish any of these allegations, but fail to establish that the vehicle was used or operated in a negligent manner at the time of the accident, they would not succeed in their claim... they do not provide a stand alone ground for recovery by the Ungers.

For auto carriers, the test appears to be clear: Establish that there is a "stand alone ground for recovery" which has a possibility of being proven on the pleadings. In the absence of such a pleading, the GL carrier should, based on this latest decision, have good grounds for denying coverage and a defence.

For GL carriers, this case illustrates the importance of closely examining the pleaded case against the policyholder in the context of the policy wording. If there is a mere possibility of a claim within coverage succeeding concurrently with an excluded cause, in the absence of concurrent cause language, the pleading likely triggers coverage and a defence obligation. However, where the pleading does not establish such a separate cause, if the exclusion otherwise applies to the "true nature" of the claim, no coverage or defence is owed. ■

INTERIM COST AWARDS: A NEW TEST FOR PUBLIC INTEREST LITIGATION

Caroline Mostyn

It is well settled law that the court has discretion to order costs. Traditionally, costs are awarded to a successful party after judgment has been given. In *Okanagan*,[1] a recent decision of the Supreme Court of Canada, the court held that the defendant was required to pay the plaintiffs' interim costs so they could advance their litigation. In essence, the Crown was ordered to fund the plaintiffs' litigation. As stated by Major J. in dissent, "by any standard, this is an extraordinary remedy."

In *Okanagan*, four Indian bands began logging on Crown land in B.C. without authorization. The Minister of Forests served the bands with stop-work orders. The bands sued the Crown in right of British Columbia claiming they had aboriginal title to the lands in question and that they were entitled to log them. The bands argued that the matter should be heard in a summary manner as they were impecunious and lacked the financial resources to fund a trial. In the alternative, they argued the court should only order a trial if the Crown was also ordered to pay their legal costs in any event of the cause (regardless of who was ultimately successful).

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At the Superior Court level, Sigurdson J. held that due to the complexity of the matter, a resolution of the dispute would require a trial. He went on to consider whether the Crown should pay the bands legal costs and acknowledged that he had discretion to make such an order. However, his discretion was very narrow and was limited by the traditional principle of law that he could not prejudge the outcome of a case. He declined to order costs on this basis. His decision was overturned on appeal and the Crown was ordered to pay the interim costs of the band.

Ultimately, a majority of the Supreme Court of Canada upheld the Court of Appeal decision. By doing so, the Supreme Court appears to have articulated a new test to be applied by courts when determining whether to order interim costs in the context of public interest litigation involving **Charter** and constitutional claims.

In its decision, the Supreme Court acknowledged that the traditional approach to awarding costs was to indemnify a successful party. The principles underlying such a cost award are as follows:

1. They are an award made in favour of a successful party, payable by the loser;

2. Of necessity, the award must await the conclusion of the proceeding, as success or entitlement cannot be determined until that time;

3. They are payable by way of indemnity for expenses and services incurred; and

4. They are not payable for the purpose of assuring participation in the proceedings.[2]

The Supreme Court stated that the above principles are still applicable to the law of costs where there are no "special circumstances" to be considered. However, in public interest litigation, special considerations must also be taken into account, namely, ensuring that litigants have access to the courts to determine their constitutional rights and other issues of broad social significance.

The special circumstances that would appear to justify an award of interim costs are related to the public importance of the questions at issue in a case. The Supreme Court stated as follows: "it is left to the discretion of the trial judge to determine in each instance whether a particular case which could be classified as "special" by its very nature as a public interest case, is special enough to rise to the level where the unusual measure of ordering costs would be appropriate."[3]

The Supreme Court set out the following criteria that must be present for a trial judge to make such an award:

1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issue to trial – in short, the litigation would be unable to proceed if the order were not made.

2. The claim to be adjudicated is prima facie meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.

3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.[4]

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To date, this case has not been considered. It is uncertain how courts will interpret and apply this decision. The test articulated by the Supreme Court of Canada is vague as it does not define what makes a case "special enough" to warrant the defendant funding the plaintiffs' litigation. As such, courts may be hesitant to exercise their discretion. Alternatively, courts may feel bound by the decision and order interim costs in similar aboriginal claims. The principles set out in this case could also be applied to other public interest litigation cases, such as residential school claims. ■

[1] **British Columbia (Minister of Forests) v. Okanagan Indian Band,** (2003) S.C.J. No. 76 (Q.L.).

[2] **Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc.** (1985), 51 O.R. (2d) 23, at p. 32 (H.C.J.)

[3] **Supra,** note 1 at para. 38.

[4] **Ibid.** at para. 40.

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