WINTER/SPRING 2002

Blaney McMurtry
BARRISTERS & SOLICITORS LLP

Insurance Observer

BLANEY McMURTRY WELCOMES...

In our continuing commitment to provide unsurpassed industry-specific knowledge and expertise to our insurance clients, Blaney McMurtry is delighted to announce the addition of several new lawyers.

On February 1st, a group of four lawyers, formerly with Enfield Adair and headed by **Mark G. Lichty**, co-author of *Annotated Commercial General Liability Policy*, joined the firm.

Mark brings to Blaney McMurtry his focused expertise in insurance matters, with an emphasis on coverage advice and litigation, including tobacco issues, commercial general liability, commercial property, professional errors and omissions, directors and officers and fidelity policies, as well as product liability. Currently, he is involved in several complicated and significant coverage cases involving product liability and intellectual property issues. Mark also has extensive experience in drafting policies including CGL Manuscript forms, Personal Umbrella and Professional Errors and Omissions Language.

Dominic T. Clarke is a trial and appellate counsel with a broad civil litigation practice including commercial litigation, insurance coverage, professional negligence, property and product liability matters. **Paul A. Giuliano** and **T. James Cass** practice insurance defence litigation, with an emphasis on coverage disputes.

Front row (left to right): Paul A. Giuliano, Mark G. Lichty, Dominic T. Clarke
Back row (left to right): Marcus B. Snowden, T. James Cass

Also recently joining the firm is **Marcus B. Snowden**, formerly with McCague, Wires, Peacock, and co-author with Mark Lichty of *Annotated Commercial General Liability Policy*.

Marcus's expertise is in providing coverage advice to commercial, property, and casualty insurers and reinsurers on priority, excess, umbrella and allocation of loss issues, as well as policy drafting and underwriting risk management. He also represents clients in related coverage litigation in the context of product liability, construction defects, Canadian and cross-border and mass tort cases. In addition, Marcus maintains a defence practice including workplace safety, errors and omissions, product liability and premises torts.

The reputation and experience of these lawyers enhances the already significant coverage expertise Blaney McMurtry has in this sector. This increases the capability we have in our extensive insurance practice, which includes auto, airline, property, D & O, boiler and employment practices policies.

"The addition of these practitioners reflects our unparalleled focus on insurance issues and complements our outstanding team of litigators and business lawyers," says Ian Epstein, the firm's Managing Partner. "Coupled with the recognized expertise of our insurance business and regulatory law practice group, we believe that this consolidates Blaney McMurtry's position as one of the leading insurance firms in the country." ■

ACCIDENT AS A MISCALCULATION OF FORCES: THE "HOLISTIC" APPROACH TO POLICY INTERPRETATION?

Leave to appeal was recently granted by the Supreme Court of Canada in **Martin v. American International Life Co.** (2001) 196 D.L.R. (4th) 427 (B.C.C.A.) ("**Martin**"), one of a trilogy of cases decided by the British Columbia Court of Appeal (B.C.C.A.). This appeal will give the Supreme Court of Canada the opportunity to clarify the longstanding confusion surrounding what constitutes an "accident" in the context of accident insurance policies.

Courts have traditionally recognized a distinction between policies affording coverage in the case of "injuries caused by accidental means" or "injury caused by accident" and those affording coverage for "accidental injury." Insurers seek to minimize risk by agreeing to cover only situations involving unintended actions which give rise to injury (i.e., accidental means). Insureds, on the other hand, favour policies and/or interpretations extending coverage where the injury is unintended (i.e., accidental ends), regardless of whether the actions giving rise to the injury were deliberate.

This model with its dichotomy of accidental means and ends has been under attack by some Canadian courts, which have attempted to either blur or eliminate the dichotomy. One of the most recent contributions to this debate is from the B.C. Court of Appeal in **Martin**, where the court articulated a model of interpretation it labelled the "holistic approach."

Martin involved a death caused by an overdose of self-injected Demerol. The deceased was a physician with a history of Demerol abuse, who had, on the occasion in question, also deliberately consumed phenobarbital, resulting in a particularly hazardous combination of drugs.

The policy at issue provided for a death benefit where the insured's death "resulted directly, and independently of all other causes, from bodily injury effected solely through external, violent and accidental means." The policy also explicitly excluded payment where death occurred as a result of "self-destruction" or "injuries intentionally inflicted." The insurer did not suggest that there was any evidence to support exclusion based on this provision and there was no evidence that the insured intended to commit suicide. Its position was that, while the insured's death may not have been intended, it was not caused by "accidental means," but rather by calculated, deliberate acts.

The beneficiary argued that the distinction between accidental means and accidental ends is artificial. What matters, it was argued, was whether, in the ordinary person's mind, what happened could be considered an accident and, therefore, a risk which could reasonably be expected to be covered by the policy. In this case, the insured's death was caused by an accident - his miscalculation of the amount of Demerol he could inject in his condition and circumstances.

The B.C.C.A. held that the means/ends distinction ought to be abolished, although perhaps it did not go so far as to actually do so. The court recognized that an analysis of an event's causes was required. However, it introduced a "holistic approach" to the issue. This approach entails examining the action that caused the injury and all the circumstances surrounding that action in a holistic fashion and asking, whether in ordinary and popular language, the event as it happened could be described as an accident.

The **Martin** Court held that central to this inquiry

was the recognition that rarely is an accident purely fortuitous. In most cases, a deliberate human act, usually of the insured, initiates the chain of circumstances from which mishap results. The recognition that an accident may be predicated upon a miscalculation or misapprehension of forces by the insured is the key to the holistic approach.

The Court identified two propositions upon which to assess the **Martin** case. First, the parties agreed that there was no evidence that the insured committed suicide. Second, the natural known consequence of a lethal dose of a drug is death. With his knowledge and experience, the insured either intended to take a lethal dose with the natural consequence of death or he injected a quantity of Demerol unaware it was lethal. If the former, his death was the natural consequence of a deliberate act, i.e., it was not an accident. The Court opined that the latter was more likely given the agreed fact the insured did not intend to commit suicide.

The **Martin** Court ultimately held that the insured's death was accidental. In the Court's view, the unintentional overdose of Demerol could be called an accident in common parlance. The taking of a drug was not an inherently dangerous activity of which death is an "almost inevitable" result. In the absence of a suicidal intention, the common experience of mankind would suggest an inference of accident from a lethal dose of drug.

While it is not difficult to sympathize with the argument that the means/ends dichotomy is flawed, the B.C. Court of Appeal's holistic approach does not appear to provide a clear answer. The Court is correct in that, taken to its extreme, it is folly to focus purely on "means" as all mishaps involving injury can be deconstructed into a series or a combination of deliberate, even if innocent, actions. On the other hand, if we are to give any credence to the notion that insurers never intend to assume unlimited risk and that many policies by their terms anticipate the existence of "non-accidents" short of deliberate self-harm or suicide, an insured's expectation that all injuries are covered, regardless of the risk inherent in the underlying activity, is unworkable.

The "holistic approach" in its explicit failure to delineate a workable governing test or factors, seems little more than a reformulation of the "ends" analysis. Where the Court determined that the injury - in this case death - was not intended, the deliberate acts leading up to the occurrence are explained away as misjudgement, misstep, or a "misapprehension of forces" resulting in a finding of accident. Under this analysis, absent suicide, intentional self-injury, or sickness/disease, it is hard to imagine any non-accidental injury.

The B.C. Court of Appeal's trilogy of decisions arguably render the word "accident" in the coverage clause of policies to be irrelevant, at least where the policy elsewhere provides specific exclusions for suicide, intentional self-injury, and sickness/disease. This, in part, is what the B.C. Court of Appeal intended. In **Martin**, the Court states that the solution to deal with the reckless or negligent insured is open to the insurers themselves by means of specific exclusion clauses, such as those involving intoxicants, narcotics, anaesthetics, etc. The onus, it seems, is to be upon the insurance industry to anticipate the myriad of human activities which might give rise to unintended risk and to clearly specify those activities by way of specific exclusion.

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SPOLIATION: DUTY TO PRESERVE EVIDENCE

"Spoliation" refers to the destruction or loss of evidence by a party to an action. Spoliation often arises with respect to evidence that is destroyed through destructive testing or evidence that is destroyed after it has been examined by one party, but not by the other. Another example that has gained recent notoriety is the destruction or shredding of documents.

A litigant claiming spoliation must prove the following: 1. the spoliation was intentional; 2. the destroyed evidence must be relevant to an issue or a matter before the court; and 3. the party alleging spoliation must have acted with due diligence with respect to the spoliated evidence.

Canadian courts have traditionally viewed the destruction of evidence strictly as an evidentiary issue giving rise to procedural remedies. In particular, a rebuttable presumption is raised against the wrongdoer in respect of the destroyed evidence.

More recently, spoliation has been interpreted by the Ontario courts to give rise to the procedural remedies under the *Rules of Civil Procedure*, including revoking or suspending a parties right to discovery or striking the offending party's pleading resulting in judgment against the wronged party. Also, Courts may prevent the introduction of expert evidence on the basis of spoliation, where the expert caused the destruction of the evidence.

While several jurisdictions of the United States have developed the tort of spoliation, it is essentially novel in Canadian law. However, two recent decisions of the Ontario Court of Appeal, **Spasic Estate v. Imperial Tobacco Ltd.** (2000), 49 O.R. (3d) 699 (C.A.) ("**Spasic**") and **Robb v. St. Josephs Health Care Centre** (2001) O.J. No. 606 (C.A.) (motion to quash); and O.J. No. 4605 (C.A.) (hearing of the appeal), have left open the possibility of such a tort being recognized in Ontario.

In these two cases, the Court of Appeal overruled the finding of O'Driscoll J. in the Divisional Court that, "the foreseeable trend is to view spoliation as an evidentiary rule that raises a presumption and not as a stand alone, independent tort." Instead, the Court of Appeal agreed with the dissent by Corbett J. in the Divisional Court, wherein she observed that the Supreme Court of Canada had left undecided in **St. Louis** whether the tort of spoliation existed in Canada.

With these two decisions, the Court of Appeal has recognized that the tort of spoliation is a novel cause of action, which it is content to have determined by a trial judge.

Counsel and their clients must take care to prevent the possible spoliation of evidence, whether by the plaintiff of by the defendant. Steps should be taken to preserve evidence, to ensure that cases are decided on their merits and not on the basis of inference and speculation arising from the absence of evidence

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Insurance Observer is a publication of the Insurance Law Group of Blaney McMurtry LLP. The information contained in this newsletter is intended to provide information and comment, in a general fashion, about recent cases and related practice points of interest. The information and views expressed are not intended to provide legal advice. For specific legal advice, please contact us.

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