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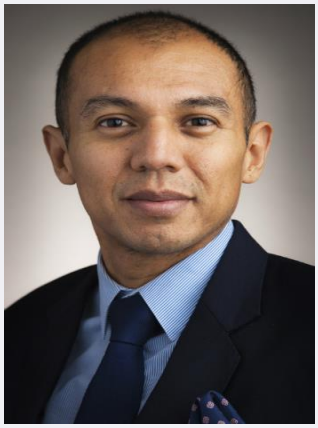
IN THIS ISSUE

Implied Warranties in the *Sale of Goods Act* 1
Coverage Upheld Where no ROR or Non-Waiver Agreement 2
Betterment in the Construction Context 4
Dismissal of Personal Injury Claim by DWF's Manjote Jhaj 6



18th FLOOR – 609 GRANVILLE ST
VANCOUVER, BC. V7Y 1G5
Tel: 604.689.3222
Fax: 604.689.3777
E-mail: info@dolden.com

Unit 302 – 590 KLO Road
KELOWNA, BC. V7Y 7S2
Tel: 1.855.980.5580
Fax: 604.689.3777
E-mail: info@dolden.com

850 – 355 4th AVE SW
CALGARY, AB. T2P 0H9
Tel: 1.587.480.4000
Fax: 1.587.475.2083
E-mail: info@dolden.com

14th FLOOR – 20 ADELAIDE ST E
TORONTO, ON. M5C 2T6
Tel: 1.416.360.8331
Fax: 1.416.360.0146
Toll Free:1.855.360.8331
E-mail: info@dolden.com

Implied Warranties in the *Sale of Goods Act*

By Mario Delgado, DWF Toronto, Email: mdelgado@dolden.com

In Canada, provinces have codified warranties law through their respective *Sale of Goods Act* legislation.

All goods are subject to an implied warranty. This implied warranty creates a liability that sellers and manufacturers alike must be aware of in the course of their business. Liability can be broken into two separate duties; (1) the goods must be fit for a particular purpose; and (2) the goods must be in a condition of merchantability.

The fitness of a product refers to its suitability for a particular purpose that the buyer either expressly or impliedly makes known to the seller. The buyer in this scenario must be relying on the skill and judgment of the seller or manufacturer. Furthermore, the goods must be sold in the ordinary course of the seller's business in order for fitness to apply. Merchantability, on the other hand, applies when the goods are bought by description. The products in this case must be fit for their obvious purpose. If a plaintiff can prove these things, then the seller and/or manufacturer will be found liable to the plaintiff.

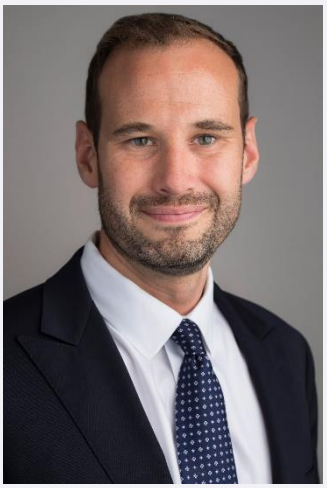
Notwithstanding the implied warranty provisions on goods sold, by contract (typically found under the Terms and Conditions) manufactures, suppliers, distributors, wholesalers and the like can limit the implied warranties imposed upon them by the legislation. In *Hunter v Syncrude*, [1989] 1 SCR 426, the Supreme

Court of Canada held that the presence of express warranties do not automatically render the statutory warranties inconsistent; instead clear and direct language must be used to contract out of statutory provisions, using the same language as the statute itself.

Moreover, having a limited warranty is not enough on its own; there must also be notice of any limitations. A limitation clause is not imported into a contract unless the party relying upon it has taken reasonable steps to bring it to the other party's attention at the time of or prior to making the contract.

Take Away

All goods sold in Canada are subject to an implied warranty. Manufactures and other parties involved in the supply chain may negate or vary the obligations imposed by the provisions of the implied warranty. While there are ways to avoid the onus imposed by the legislation, parties attempting to limit their liability need to take the time to be explicit, thorough and bring to the attention the limitation clauses to the purchaser.



Coverage Upheld Where No ROR or Non-Waiver Agreement

By Matthew Miller, Partner, DWF Toronto, Email: mmiller@dolden.com

The recent Ontario Court of Appeal decision of *The Commonwell Mutual Insurance Group v. Campbell*, 2019 ONCA 668, contains valuable guidance for insurers and claims professionals in communicating with insureds and attempting to deny coverage.

The starting point was an April, 2013 collision between a dirt bike driven by Shayne Campbell ("Campbell") and an ATV. The ATV driver sustained injuries and sued Campbell. Campbell owned a personal auto policy with The Guarantee Company of North America ("Guarantee") and a homeowners' policy with The Commonwell Mutual Assurance Group ("CMAG"). He submitted the claim to both insurers for defence.

Guarantee had Campbell sign a non-waiver agreement and provided him with a reservation of rights letter before investigating and ultimately denying coverage.

CMAG took a different approach when Campbell presented the claim: it immediately appointed defence counsel, who delivered a statement of defence and crossclaim on Campbell's behalf and defended him to the discovery stage. In total, defence counsel retained by CMAG on behalf of Campbell represented him for 10 months.

At discovery the issue of coverage came up. CMAG then appointed separate coverage counsel who wrote to Campbell advising him that it had been an error to defend him. CMAG brought the lower court application asking for a finding that Campbell was not insured by CMAG.

The lower court judge found there was a duty for CMAG to both defend and indemnify Campbell. CMAG appealed to the Court of Appeal, which dismissed the appeal.

The Court of Appeal discussed the distinct legal doctrines of estoppel and waiver but only analyzed the former. The Court noted that CMAG had appointed a lawyer for Campbell who had acted on his behalf for 10 months before Campbell was given any reason to believe that there were coverage issues. The Court determined that the litigation was "*well advanced*" by the point that CMAG denied coverage and that Campbell had relied on this coverage to his detriment.

Campbell also argued that he was prejudiced due to the long period of time he was represented before coverage was denied. The Court of Appeal agreed and found at para. 14:

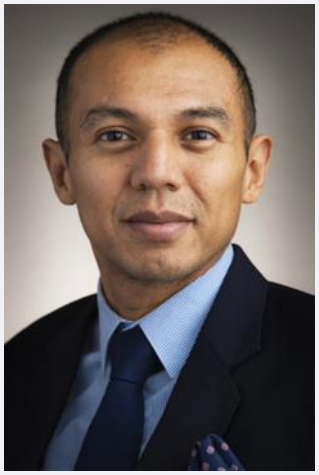
> *We do not accept that to prove prejudice Mr. Campbell is obliged to identify missteps that have occurred; this is an unrealistic and unnecessary burden to impose at this stage of the litigation. The immediate point is that as a result of CMAG's conduct, Mr. Campbell allowed CMAG to prosecute the defence of his case for a year without taking charge of his own defence.*

The Court also found that CMAG was estopped from relying on any of the exclusion clauses it argued at the application.

The Court concluded that CMAG had an obligation to both defend and indemnify Campbell and was estopped from denying coverage.

Take Away

The *Campbell* decision is a useful reminder to insurers and claims professionals that any questions regarding insurance coverage must be communicated to an insured at an early stage. The doctrines of waiver and estoppel are alive and well in Ontario and can be used to successfully defeat a denial of coverage in circumstances where the insurer has not protected itself by securing a signed a non-waiver agreement and/or sending the insured a reservation of rights letter.



Betterment in the Construction Context

By Mario Delgado, DWF Toronto, Email: mdelgado@dolden.com
and by Renata Antoniuk, DWF Toronto, Email: rantoniuk@dolden.com

Courts have affirmed that damages can be reduced when there is betterment; ie: when restoration or repairs increase the value of a plaintiff's property. The onus is on the defendant to prove betterment, but defendants often struggle navigating when it is appropriate to do so. Below, we highlight three guiding principles to assist in determining when a betterment argument may be successful.

Damages may be reduced where a defendant can prove that the plaintiff obtained a better product that they would not have originally chosen during the initial construction.

In *Madalena v Comox-Strathcona (Regional District)*, [2009] B.C.J. No. 2324, the plaintiff built a new home and retained the Defendant, Karel Kuun, as the contractor to design and build the home. Approximately one year after the house was constructed, the plaintiff discovered water entering the home. A consultant was retained and found that the repairs would cost $139,016.13, which included replacing the building envelope. The plaintiff proceeded with these repairs and subsequently brought the action.

When quantifying the damages, the defendant contractor argued that the damage award should be reduced due to betterment as the plaintiff obtained a better quality building when the building envelope was replaced.

The Court found that the rain screen design employed in the reconstruction was more expensive than the original design that had initially been employed and that given the plaintiff's financial restrictions, she would not have spent those funds to install a rain screen when she initially built her home. Mr. Kuun was thus successful in establishing betterment and the Court reduced the damages by $7,500, the approximate cost of the rain screen envelope.

Deductions for betterment should be supported by evidence, and not simply appeal to pleas of equity.

In *James Street Hardware and Furniture Co. Ltd. v Spizziri et al*, [1987] 62 O.R. (2d) 385, the plaintiff, acting as his own general contractor, undertook renovations to an old building. The defendant, Aldo Spizziri, performed welding work which ultimately caused a fire that damaged the building. The plaintiff rebuilt the building in a different, larger and superior form, as the building code prohibited the exact restoration.

Courts have held that it is for the defendant to prove the value of an alleged improvement. If the defendant cannot provide supporting evidence of the enhancement, then no deduction can be made for betterment. However, where the plaintiff alleges a loss with respect to being required to make an unexpected expenditure (ie: compliance with new building code regulations), the onus of proof lies with the plaintiff.

In *James Street Hardware*, the Court did not make a deduction for betterment, as the defendant had led no evidence to support that the building had a greater value than before the fire.

Where the construction at issue is ultimately delivered to a non-party, a defendant will not likely be successful in claiming betterment.

In *DiBattista Gambin Developments Ltd. v Niran Construction Limited,* 2013 ONCA 161, a developer retained a sub-contractor to construct a bicycle path in the City of Brampton. The bicycle path was not properly constructed and the City of Brampton subsequently required the developer to replace it, which it did at a cost of $185,967.08. The developer then claimed that amount from the sub-contractor.

Experts agreed that a properly constructed bicycle path should last approximately 15 years. As the path built by the sub-contractor was replaced after 6 years, the sub-contractor argued that there should be a deduction for betterment because the City of Brampton would now have a bicycle path for 21 years before having to replace it.

As the developer would be transferring the bicycle path to the City of Brampton, the Court of Appeal held that it would be inequitable to apply any reduction, as the developer would not get any value for the path. If any deduction were made, it would be at a loss to the developer. The Court thus dismissed the sub-contractor's appeal and upheld the decision requiring the sub-contractor to pay the full amount being claimed to the developer.

Take Away

The starting proposition is that damages are awarded to restore a plaintiff to the position he or she would have been in if the tort had not been committed. If the plaintiff acting reasonably in replacing the property obtains an enhancement, then the tortfeasor cannot escape payment of the damages incurred by the plaintiff to replace the property. However, defence counsel should always look to a betterment argument and ensure that they lead evidence on betterment, where applicable.

Dismissal of Personal Injury Claim by DWF's Manjote Jhaj

Editor's Comment:

Congratulations to Manjote Jhaj (pictured) of DWF's Vancouver office, who was recently successful in securing a dismissal of a personal injury claim. Reasons for judgment were published by The Honourable Mr. Justice Funt from the British Columbia Supreme Court: *Van Hartevelt v Oita Investments (B.C.) Ltd.*, 2019 BCSC 1370 (CanLII).

In *Van Hartevelt*, the plaintiff, a 74-year old man, was a tenant in an apartment complex owned by the defendants. He claimed that he injured his left knee as a result of banging it against a

refrigerator that was left in the hallway beside his unit by the defendants. The plaintiff further alleged that the defendants were negligent to leave the refrigerator in the hallway.

The plaintiff knew that the refrigerator was in the hallway and testified that he walked past it on January 16, 17, 18, and 19, and earlier in the day of January 20, 2017, prior to the incident. In fact, the plaintiff took a picture of the refrigerator at 12:46 p.m. on January 19, 2017.

In dismissing the claim, Justice Funt applied the principles from *Lawrence v. Prince Rupert (City) and B.C. Hydro & Power Authority,* 2005 BCCA 567 (CanLII), dealing with known risks, and relied upon the following relevant facts:

- The hallway was reasonably wide such that one could pass without difficulty;
- The hallway was well lit;
- The plaintiff had the ability to "*easily avoid*" hitting his knee on the refrigerator;
- The plaintiff had passed by the refrigerator several times without incident;
- When applying common sense to the facts, the "*defendants' conduct ceased to be a proximate cause of the accident*."

Take Away

This case reaffirms the principles from *Lawrence,* that the presence of known risks does not constitute the requisite proximate cause for a successful action in negligence. A court will also apply "*common sense*" to situations to assess liability.

Manjote can be reached at: mjhaj@dolden.com

EDITOR

Chris Stribopoulos
Tel: 647.798.0605 Email: cstribopoulos@dolden.com

Please contact the editor if you would like others in your organization to receive this publication.

CONTRIBUTING AUTHORS

Mario Delgado
Tel: 647.798.0606 Email: mdelgado@dolden.com

Matthew Miller
Tel: 647.252.3553 Email: mmiller@dolden.com

Renata Antoniuk
Tel: 647.252.3557 Email: rantoniuk@dolden.com