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# Gibbs Law
# February 2007 Newsletter

## A Commentary on Recent Cases and Relevant Legal Issues

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### 1. *Doyley v. YCC No. 478* – Plaintiff's Case Permitted to Proceed Despite Expiry of Limitation Period.

On January 16, 1999, the Plaintiff suffered injuries when he slipped and fell down a set of stairs. Five days later, he consulted a lawyer regarding the incident. Unfortunately, due to his lawyer's inadvertence, the Statement of Claim was issued three days after the expiry of the six-year limitation period. The Plaintiff's cause of action had been discovered before the enactment of the *Limitations Act, 2002* and hence the former six-year limitation period applied in this case.

The Defendants brought a motion for summary judgment to dismiss the action on the basis that it was statute-barred. For his part, the Plaintiff sought a declaration that the limitation period did not start to run until at least three days after the accident (being the earliest date that the Defendants could reasonably be identified).

The Ontario motions judge refused to dismiss the action and instead exercised judicial discretion to allow the claim to go forward for the following reasons: The Defendants' ability to defend the case had not been prejudiced, as they had been put on notice of the claim in February 1999 and had conducted an extensive investigation. In addition, special circumstances justified permitting the claim to proceed, including the solicitor's inadvertence and the fact that the delay was a mere three days.

While allowing the action to go forward, the motions judge did not accept the Plaintiff's submission that his cause of action did not arise until he could reasonably identify the Defendants. Rather, the Court concluded that his cause of action arose when the accident occurred. The Plaintiff was aware that he was injured and that someone else could be responsible. As such, he possessed sufficient facts from which he could allege negligence.

In this case, the fact that the delay was only three days, and that the Defendants were able to commence their investigation within a month of the accident were clearly persuasive factors in favour of the Plaintiff's bid to maintain his claim. However, the case would likely have been decided differently if the Defendants had never been given notice and were prejudiced in their ability to defend a claim that had arisen more than six years earlier.

This case serves as an important reminder that limitation arguments are never fool-proof, even when a statutory limitation period has already expired. The Courts may, in special circumstances, and in the absence of prejudice to the Defendant, exercise their discretion to permit a Plaintiff

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to go forward notwithstanding an expired limitation period.

## 2. Insurance – Duty to Defend – "Other Insurance" Clauses.

In the 2006 decision of *McKenzie v. Dominion of Canada General Insurance Co*., the Superior Court of Justice ruled that if "other insurance" clauses in two applicable insurance policies are irreconcilable and effectively cancel one another out, then both insurers are liable and are required to share the obligation.

The case arose from a boating accident resulting in two fatalities and serious injuries sustained by two other individuals. The boat operator, M, sought coverage under three separate policies of insurance: (1) a Boat Owners policy issued by State Farm to the owner; (2), a personal liability Umbrella policy also issued by State Farm to the owner; and (3) a Home Owners policy issued by Dominion to M's father.

The two insurers disputed the order in which, and the extent to which, the policies indemnified M, as well as the extent to which they created a duty to defend. A motion was therefore brought by State Farm on M's behalf to determine the issues.

On hearing the motion, the Court concluded that the Boat Owners policy was primary in this case and that the Umbrella and Home Owners policies were excess.

Both the Umbrella and Home Owners policies contained "other insurance" clauses, providing that each would cover the loss only if there was no other applicable insurance. Although drafted slightly differently, the clauses were irreconcilable and therefore cancelled one another out.

In the result, the motions judge ruled that the Boat Owners policy covered M to its policy limits in accordance with its terms. However, beyond that limit, the Umbrella and Home Owners policies were required to contribute equally to the applicable limits of each policy or until none of the loss remained.

With respect to the duty to defend, State Farm was required to defend M under the Boat Owners policy until it had paid for the damages up to its coverage limit. Neither Dominion nor State Farm (under its Umbrella policy) had any obligation to defend M so long as the Boat Owners policy was providing primary insurance and still owed a duty to defend. However, once primary limits were exhausted, the insurers under the Umbrella and Home Owners policies were required to share defence costs equally.

As an Insured, when an accident or occurrence takes place, there may be several insurance policies that could be called upon to respond to the loss. Consequently, it is always prudent to promptly put all potentially applicable insurers on notice of the claim. Your insurance broker or solicitor can assist you in that process. The issue of which insurer may ultimately have a duty to defend and/or indemnify can always be addressed subsequently. However, early

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reporting will avoid the danger of having a claim denied on the basis of late notice.

## 3. Negligence - Supreme Court of Canada Re-Affirms the "But For" Test to Determine Causation.

Earlier this month, the Supreme Court of Canada released its decision in *Resurfice Corp. v. Hanke*, re-affirming the "but for" test as the proper test for determining causation in negligence actions.

H, the operator of an ice-resurfacing machine, was badly burned when hot water was accidentally poured into the gasoline tank of the machine, releasing vapourized gasoline, which was then ignited by an overhead heater, causing an explosion and fire. H sued the manufacturer and distributor of the ice-resurfacing machine for damages. He alleged that the gasoline and water tanks were similar in appearance and placed close together on the machine, making it easy to confuse the two tanks.

H's case was dismissed at trial, as the trial judge found that H had failed to establish that the accident was caused by the negligence of either Defendant. First, H had not established that it was reasonably foreseeable that an operator of an ice-resurfacing machine would mistake the two tanks. Second, he had not shown that the Defendants caused the accident.

On appeal by H, the Alberta Court of Appeal ordered a new trial, concluding that the trial judge had erred in his analysis with respect to both foreseeability and causation.

On further appeal by the Defendants, the Supreme Court of Canada allowed the appeal and restored the trial judgment, dismissing H's action against the manufacturer and distributor of the machine. In doing so, the Supreme Court re-affirmed the "but for" test as the primary rule for determining causation.

In order to succeed in a claim for negligence, a Plaintiff must establish causation. The "but for" test requires him to show that "but for" the negligent act or omission of each Defendant, the injury would not have occurred. Only once that burden has been met, is it appropriate for the Court to engage in the exercise of apportioning liability as between multiple Defendants.

The "but for" test recognizes that compensation for negligent conduct should only be made where a substantial connection between the injury and the Defendant's conduct is present. The rule also ensures that a Defendant will not be liable for the Plaintiff's injuries where they may very well be due to factors unconnected to the Defendant and not the fault of anyone.

The Supreme Court also concluded that the Court of Appeal had erred in finding that the trial judge should have applied the "material contribution" test to determine causation. The Court went on to say that the "material contribution" test only applied in exceptional cases, where (i) factors outside

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of the Plaintiff's control made it impossible for him or her to prove negligence under the basic "but for" test; (ii) the Defendant had breached a duty of care owed, thereby exposing the Plaintiff to an unreasonable risk of injury; and (iii) the Plaintiff had suffered that form of injury. An example of where it might be necessary to invoke the "material contribution" test (rather than the "but for" test) would be where two bullets are carelessly fired by two individuals, and it is impossible to determine which caused the injury.

Determining causation can be an extremely complex matter or a simple exercise, depending on the facts at hand and whether there are multiple potential sources of injury. Nonetheless, the Supreme Court's decision re-affirming the "but for" test brings further clarity to this area of the law and makes it clear that the Court should only apportion liability, as between Defendants, if the Plaintiff has cleared the first hurdle and established causation.

## 4. Regulatory Matters – Recent Changes to PEO's Discipline Process.

Previously, PEO did not always insist on recovering its costs in negotiated plea bargains or in penalty submissions before the Discipline Committee. Similarly, it did not always seek publication of members' names in cases where there was a finding of guilt.

This is no longer the case, as a result of recent policy changes made by the PEO in late 2006. Now, in all cases where a member has been found guilty of professional misconduct, the PEO Registrar will make costs submissions to the Discipline panel and will seek to recover its reasonable costs arising from the Complaints and Discipline processes. The Registrar will also request publication with names in all cases where there is a finding of guilt.

The recent policy changes instituted by PEO have also abolished the use of one-member Discipline panels, which were first introduced in late 2005 to adjudicate matters involving an agreed statement of facts, a guilty plea, and a joint submission on penalty. As a result of these recent changes, a three-member panel will now be used in those kinds of cases, whereas a full panel consisting of five members will be convened for all other Discipline Committee hearings.

For more information regarding PEO Complaints and Discipline matters, please contact Gary Gibbs at (416) 361-0024, ext. 222.

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