Ontario Trial Lawyers Update

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March 23, 2015

Case Summaries

CORRECTION: By unfortunate circumstance, in the February 17th edition of this newletter, an incorrect link was assigned to the summary of *Lloyd v. Napanee*, 2015 ONSC 761. Find the full case here.

In the March 16th newsletter, *Letang v. Hertz* was incorrectly cited, and should have read: 2015 ONSC 72

Blake v. Dominion of Canada General Insurance Company
2015 ONCA 165

Released March 13, 2015

This is an appeal from the trial decision dismissing Ms. Blake's claim for caregiver benefits and extra-contractual damages. The Court of Appeal dismissed the appeal and ordered costs against her. Ms. Blake raised four main grounds of appeal: The trial judge erred in 1) finding that her claim was statute-barred; 2) refusing to read all the evidence she proffered at trial; 3) holding that she had failed to meet the test of entitlement and by applying the wrong legal test; and 4) dismissing her extra-contractual claims.

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Ms. Blake submitted an application for accident benefits on December 30, 2002. After paying caregiver benefits throughout 2003, the Defendant sent Ms. Blake an OCF-9 advising Ms. Blake that she did not qualify for future caregiving benefits effective January 31, 2004. Ms. Blake did not seek mediation. Between 2004 and early 2005, she submitted three more applications for caregiver benefits and expenses. The Defendant's denial on November 26, 2004 for some of the further submissions led Ms. Blake's counsel, Mr. Ferro, to apply for mediation. The mediation was held on March 10, 2005 and the parties settled part of the dispute. By OCF-9 dated March 12, 2005, the Defendant explained that it made an error in judgement in approving some of her expenses and would pay the settlement in good faith, but confirmed that she was not entitled to caregiver benefits between November 12, 2004 and January 11, 2005. Further correspondence between Mr. Ferro and the Defendant ensued, leading to further submissions of expenses and a failed mediation. The Statement of Claim was issued on May 30, 2007.

The Court of Appeal noted that FSCO decisions have held that the resumption of payment of benefits by an insurer after an initial denial of benefits negates the denial previously issued. However, in this case, the Court found that even if the Defendant's mistaken agreement to pay Ms. Blake at the March 10, 2005 mediation re-set the limitation clock, that agreement was followed immediately by a clear repetition by the Defendant, in its March 12, 2005 OCF-9, of its original position that caregiver benefits ended on January 31, 2004. As her claim was not issued until 2007, the Court held that her action was statute-barred. The Court further held that the submission of new applications for caregiver benefits following a clear refusal does not re-start the limitation clock.

The Court of Appeal's comments on the remaining grounds of appeal are helpful with respect to proper management of a trial, but will not be summarized in detail here. The Court held that the trial judge did not err in the evidence rulings at trial. The trial judge ruled that the items within the two-volume document brief filed as Exhibit 1 would not become evidence unless the item was specifically referred to during trial. Further to this ruling, the trial judge dismissed Mr. Ferro's motion, during his closing submission, to reopen the Plaintiff's case and call additional witnesses. The Court of Appeal rejected Ms. Blake's argument that the

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trial judge erred in failing to apply the material contribution test on the basis that she did not make any submissions on the test of causation at trial. Finally, the Court of Appeal held that the trial judge applied the right principles and considered the appropriate evidence in dismissing Ms. Blake's extra-contractual claims.

Read the full decision on CanLII

Conidis v. Tait
2015 ONSC 1558

Released March 10, 2015

This is a motion for summary judgment seeking an order dismissing the dental negligence claim as statute-barred. The Defendant inserted a permanent lower bridge in August 2007 and upper bridge in August 2008. Correspondences were exchanged between November 2 and 4, 2010, one of which requested that the Defendant provide the Plaintiff with an itemized list of dental work that "had to be re-done". The Defendant denied that any of the dental work needed to be "re-done". The Defendant stopped treating the Plaintiff after November 4, 2010. The Plaintiff saw a new dentist in late May 2011 who recommended that both bridges be removed due to fractured roots and necessary extractions. Shortly thereafter, she sought reimbursement/compensation from the Defendant for the new dental work. The Statement of Claim was issued on June 10, 2013.

Diamond J. was not prepared to find that the Plaintiff had knowledge of the facts to support a cause of action during the correspondences of November 2010, although he thought it was debatable. Diamond J. noted that although there was no direct evidence from the new dentist on the motion about their conversation, the acts undertaken and the words chosen by the Plaintiff after the meeting of late May 2011 evidenced the Plaintiff's belief that the Defendant caused the problems with her faulty bridges. Diamond J. held that by June 6, 2011 (and likely earlier), the Plaintiff considered herself to have a "claim" against the Defendant which she was prepared to "walk away from" in exchange for monetary reimbursement. As a result, Diamond J. granted summary judgment dismissing the Plaintiff's action and ordered costs against her in the amount of $7,500.

Read the full decision on CanLII

Saisho v. Loblaw Companies Limited
2015 ONCA 172

Released March 17, 2015

The Appellants appeal the trial judgment dismissing their action against the Respondents. Mr. Saisho, now deceased, was 90 years of age in December 2007 when he was injured at Westfair Bulk grocery store in Thunder Bay. Tragically, as a result of his injuries, Mr. Saisho was confined to the hospital from the accident date to the date of his death on January 18, 2010. The evidence was that cashiers do not assist customers in loading their own purchases into their carts at this store. At the time, Mr. Beardy and Mr. Sakakeep were shopping for groceries together at the store, but with separate carts. At the checkout, although they paid separately, Mr. Beardy loaded Mr. Sakakeep's groceries into the same cart after he had finished loading his own. The cart was overloaded to the point that Mr. Beardy was unable to see anything directly in front of him. As Mr. Beardy proceeded to leave the store, he felt a "bump". Unfortunately, the "bump" was his cart striking Mr. Saisho, who moved very slowly with the assistance of a cane, as his helper had already gone ahead to load their groceries into the car. The trial judge concluded that the store policies in respect of general health and safety and the directions given to employees to take action if they saw a hazard "were adequate and reasonable" in all the circumstances.

The Appellants submitted that there ought to have been a specific policy dealing with overloaded shopping carts. The Court of Appeal concluded that evidence adduced at trial showed that employees were well aware that overloaded carts presented a hazard and should intervene if they saw one. The Court held that to require a standard that would specifically address the problem of overloaded carts would be to require a standard of perfection and that is not what the law requires. The Court found the policy in place to be reasonable. The Appellants submitted that if the Court found the policy reasonable, then the Respondents breached the standard of care because the employees did not intervene. The cashier called at trial, Ms. Tait, who was a cashier at a different aisle, testified that she had "a glance" of the overloaded cart while ringing in another customer, but thought that Mr. Beardy's cashier saw it. Based on the evidence, the trial judge found that Mr.

Beardy's cashier likely did not and that it was reasonable for Ms. Tait not to have intervened at the time. The Court of Appeal concluded the trial judge was entitled to make that finding and dismissed the appeal.

Read the full decision on CanLII

Summaries provided by **Nga Dang**, OTLA member and lawyer practising with Singer Kwinter Personal Injury Lawyers.

Know of a case that should be included here?
Please submit it with a link to the decision to:

Will Campbell, *OTLA Digital Media Coordinator*
WCampbell@otla.com.

New on the Blog:

Show Me the Policy, Honey! Why is Uber Keeping its Insurance Details a Secret?

Ride-sharing/technology startup Uber maintains that it has sufficient insurance to protect drivers and passengers, but refuses to produce the paperwork to prove it. In fact, they're fighting in court to keep it sealed. This week on the Blog, OTLA Director Laura Hillyer warns that Uber's insurance coverage is anything but certain on OTLABlog.com

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