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Spring Has Sprung

Spring is when life's alive in everything.


Christina Rossetti (1830 - 1894)

A watershed in the career of every lawyer is to have a case he or she was involved with reported by one of the law report publications. Cases that are published in these report series are generally considered to be significant and often advance a particular area of the law. Our own Eric Williams has been involved in more than 100 cases that have found their way into these publications.

Beginning with this edition of the *Legal Observer* we will highlight some of our firm's reported cases. Our first case, *Coutanche et*

al. v. Napoleon Delicatessen et al., involves a topic we looked at in the fall edition of the newsletter - limitation periods.

Cost is a key aspect of litigation. The litigation process can be an expensive proposition particularly if it proceeds all the way to trial. In *How Much Does a Lawsuit Cost?* we provide a brief overview of the subject of costs.

Finally, we continue our evidence series by canvassing a topic you often hear about, but may not fully understand - hearsay evidence. 

Limitation Periods: What is the Start Date?

In the fall 2004 edition of the *Legal Observer* we introduced you to the issue of limitation periods and specifically to the *Limitations Act, 2000*. You will recall that a limitation period is the maximum time which one can wait before commencing a legal action. If a claim is not filed within this time, the right to sue is lost.

Our firm was involved in an interesting case that turned on the issue of limitation periods. Eric Williams acted as co-counsel for plaintiffs in the case of *Coutanche et al. v. Napoleon Delicatessen et al.*¹, which was recently reported in the Ontario Reports. This case focussed on when a limitation period starts to run, and specifically the issue of discoverability.

What generally triggers the limitation clock to start ticking is when the accident occurs, the contract is breached, the person is slandered, etc... However there are times when the actual damage

sustained by the plaintiff will not become known for some time maybe even after the limitation period has expired. For those cases, the court has developed the discoverability rule. In other words *a cause of action will not arise until the plaintiff has actually discovered or ought reasonably to have discovered the facts leading to the remedy sought.*

In Ontario, the provincial government incorporated the discoverability rule into the *Limitations Act, 2000*.

- 5. (1) A claim is discovered on the earlier of,
 - (a) the day on which the person with the claim first knew,
 - (i) that the injury, loss or damage had occurred,
 - (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
 - (iii) that the act or omission was that of the person against whom the claim is made, and
 - (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
 - (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause

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LIMITATION - continued from page 1**The Case - Chronology of Events**

Coutanche's son spent the evening at several bars, including the local college bar. After being ejected from the defendant delicatessen, he had a cab take him to HWY 401. Shortly thereafter, he was struck and killed while walking along the highway.

Within a few months of the accident, two drivers who may have hit Coutanche's son were identified, and this information was made known to her then solicitor. The information was made known to Coutanche herself by at least September 1999, 11 months after the accident.

In February 2000, the Gaming Commission conducted a hearing into the conduct of the college bar. In May 2000 the Commission released its decision.

On February 22, 2002, the Coutanche family finally issued a claim pursuant to the *Family Law Act*. They subsequently brought a motion for a declaration that the two year limitation period set out in the Act had not expired. In the alternative, they sought to extend the limitation period. In support of her request, the mother indicated that she had been unaware of the limitation period and that in any event she believed she had to wait until after the Gaming Commission's decision before doing anything.

The Motion

The judge who heard the motion concluded that in the circumstances, the discoverability rule applied. She found that these peculiar circumstances fell within the apparent grounds for relief to extend the limitation prescribed by the *Family Law Act*. She also found that the delay was incurred in good faith. The limitation period was extended.

The Appellate Decision

The defendants in the case appealed this decision extending the limitation period. The Court ordered that all issues relating to the Coutanches' request for an extension of the limitation period in

respect of the college were to be adjourned to the trial. Their request for an extension of the limitation period in respect of the drivers, pursuant to the *Family Law Act*, was also adjourned to the trial. The balance of the appeal against the drivers was allowed and that portion of the claim was dismissed.

In coming to this decision the Court applied the discoverability rule, indicating that *the issue on discoverability is when the plaintiffs learned that they had a cause of action against the defendants, or when, with reasonable diligence, they ought to have done so*. Since the Coutanches had the relevant information about the drivers by September 1999 there could be no application of discoverability to delay the commencement of the running of the limitation against them. Although time could possibly be extended pursuant to section 2(8) of the *Family Law Act*, the reasons for the delay and whether the drivers would be prejudiced by such an extension would be decided at trial.

In the case of the college, the discoverability rule could possibly delay the commencement of the limitation period. There was an arguable case that until the Gaming Commission's hearing, or perhaps even until it issued its reasons, the facts against the college were not sufficiently known. Therefore this issue would also be determined by at trial.

The Court of Appeal stated that Coutanche's awareness of the limitation period did not affect the discoverability of the cause of action, since discoverability applied to knowledge of the facts not to knowledge of the law. However, the Court did acknowledge that this ignorance of the law was a possible factor in the good faith analysis under section 2 (8) of the *Family Law Act*, which could also be used to extend the limitation period.

The Moral

The moral of the story is that if you are involved in something that you think might turn into a lawsuit, you would be wise to seek the advice of a lawyer sooner rather than later. This is particularly true since the passage of the new *Limitations Act 2000*, which sets most limitation periods at two years. ☞

Hearsay or Not? Admissible or Not?***Dalrymple v. Sun Life Assurance Company of Canada, (1966), 56 D.L.R. (2d) 385***

- The plaintiff sued B, alleging that B defamed him when he spoke ill of him to K and that K repeated the statement to X.
- K testified concerning B's statement. Is K's testimony hearsay? Is it admissible? It is not hearsay evidence because K heard the statement directly from B therefore it is admissible.
- X testified concerning B's statement. Is X's testimony admissible? Is it hearsay? It is hearsay evidence since X heard the statement second hand from K and therefore not admissible.

Messere v. Carlone (1975), 11 O.R. (2d) 511 (C.A.)

- The plaintiff pedestrian sued the defendant driver for damages after being struck by him.
- At the scene, the defendant told the investigating officer that an unknown motorist had forced him onto the sidewalk.
- The officer was called by the plaintiff to give evidence. He was not asked about the defendant's statement.
- On cross-examination the officer was asked about the statement. Is the statement admissible?
- No. The statement was hearsay evidence because the defendant sought to elicit the statement as truth of the fact. ☞

How Much Does a Lawsuit Cost?

I was never ruined but twice: once when I lost a lawsuit, and once when I won one.

Voltaire

A lawsuit can be a costly undertaking - whether you win or lose. The obvious cost involves the fees you will pay to your lawyer. And while a successful party is, in theory, entitled to recover his or her costs from the other side, in practice, a full recovery of costs is rare.

Courts are given the authority, pursuant to the *Courts of Justice Act*, to award costs of a litigation to one or more of the parties.

131. (1) *Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.*

The general rule is that the successful party will be awarded costs, subject to any offers to settle, and is entitled to collect those costs from the losing party. When awarding costs the court has the discretion to choose from two different scales: partial indemnity (formerly party and party costs) or substantial indemnity (formerly solicitor-clients costs).

Fixing Costs

Costs on a partial indemnity basis are by far the most common and may amount to as much as 60% of one's actual legal fees and disbursements. One of the objectives of allowing only partial recovery is to deter the bringing of modest or trivial claims to court. Costs on a substantial indemnity basis, which amounts to almost 100% recovery, are used to show the court's disapproval with the conduct of a party or a lawyer.

When fixing costs, the court may take into consideration any of the following factors:

- the result in the proceeding,
- any written offer to settle,
- the amount claimed and the amount recovered in the proceeding,
- the apportionment of liability,
- the complexity of the proceeding,
- the importance of the issues,
- the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding,
- whether any step in the proceeding was
 - improper, vexatious or unnecessary, or
 - taken through negligence, mistake or excessive caution,
- a party's denial of or refusal to admit anything that should

have been admitted,

- whether it is appropriate to award any costs or more than one set of costs where a party
 - commenced separate proceedings for claims that should have been made in one proceeding, or
 - in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different solicitor.

The Ontario case of *Russett v. Bujold*¹ provides an overview of the type factors that are taken into account in making a costs award, as well as the sort of items that will be compensated. In addition, this case is an example of a recent trend of cost awards exceeding the damage award.

Russett v. Bujold

The litigation arose following a crash between Mrs. Russett's vehicle and a tractor-trailer driven by Bujold. Although the tractor-trailer, which had been turning out of a gas station, ran into Russett, Bujold and the other defendants chose to play hardball, even disputing liability. As a result, Russett was required to put together extensive evidence, including that of numerous experts. Russett and her husband were a couple of modest means. In fact, during the six and a half years of the litigation, they were able to pay their lawyer and her small firm only \$17,000.

It was not until 11 days into the trial that the parties were able to reach a settlement in the amount of \$435,000.

When it came to the costs award, Russett's counsel submitted a bill of costs ranging from \$578,600 on a substantial indemnity basis plus a premium to \$461,970 on a partial indemnity basis. The court eventually fixed the costs at \$415,215.67 on a substantial indemnity basis. Disbursements were fixed at \$142,950 and included expenses with respect to travel and accommodations.

The judge concluded that costs should be awarded on the higher substantial indemnity basis for a number of reasons including:

- the defendants failure to admit liability, which ultimately increased the complexity of the litigation,
- the defendant's position on causality with respect to Russett's chronic pain,
- the challenge to Russett's credibility,
- the knowledge that the Russetts were not wealthy,
- the offers to settle (three by the Russetts and one by Bujold),
- that one of Russett's offers was close to the final settlement,
- the stress put on Russett.

see **COSTS** page 4

HEARSAY EVIDENCE

Evidence n. Facts or signs on which a conclusion can be based.
Webster's II New Riverside Dictionary

Hearsay is probably the one rule of evidence that everyone has heard of - but what is hearsay and why is it generally not admissible as evidence?


According to the authors of *The Law of Evidence in Canada*¹, hearsay consists of written or oral statements, or communicative conduct made by persons otherwise than in testimony at the proceeding in which it is offered. They go on to explain that such statements or conduct are inadmissible when they are tendered either as proof of their truth or as proof of assertions implicit therein.

The rule against allowing hearsay evidence stems from its inherent unreliability, the inability to test the truth of this evidence through cross-examination and the prejudice it could wreak on the person against whom it is being used.

While the general rule is that hearsay evidence is inadmissible, like many legal rules, there are exceptions. For instance if the hearsay evidence was a declaration against interest it would be allowed, as would be spontaneous statements and dying declarations.

To determine whether particular evidence is hearsay, you must consider the reason for offering the evidence. And to determine whether the hearsay evidence is admissible you must consider the reliability of the evidence as well as how necessary the evidence is to prove a particular fact in issue. For instance:


- I saw Joe trip Jane - not hearsay and therefore admissible
- Steve told me he saw Joe trip Jane - hearsay if the evidence is being offered to prove that Joe tripped Jane and therefore not admissible
- Joe told me he tripped Jane - hearsay but admissible because it is an admission against Joe's interest.

Take our hearsay quiz on page 2 and test your newfound knowledge. 

¹Sopinka, Lederman, and Bryant, *The Law of Evidence in Canada*, Butterworths, 1992, at 156.

COSTS - continued from page 3

In addition, the court awarded Russet a \$25,000 premium. A premium essentially recognizes that the services rendered are deserving of something over and above the hourly rate. In this case the premium recognized the fact that the law firm had to carry the litigation because of the Russetts' weak financial situation.

Despite what should have been a fairly straightforward claim and the reasonably modest settlement, the legal fees were substantial. Therefore one must always bear in mind that commencing a legal action is not for the faint of heart. 



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