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LEGAL OBSERVER

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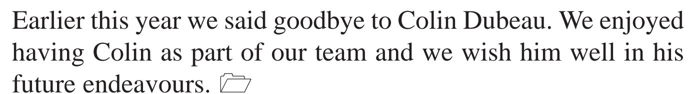
Happy Spring!

At long last spring has arrived and with it the latest edition of the *Legal Observer*.

Beginning with this issue, we will introduce you to the many different areas of litigation we work in. They include contract law, commercial disputes, professional liability and wrongful dismissal. During the past three years our lawyers have appeared before the Ontario Court of Appeal, the Federal Court of Appeal, the Supreme Court of Canada, the Gomery Inquiry, Parliament Public Accounts Committee as well as other administrative tribunals.

In addition to an article about dismissing employees on sick leave, we continue our series on evidence, we update you on some of the cases our firm has been involved with and we introduce you our newest lawyer, Juliet Knapton.

Earlier this year we said goodbye to Colin Dubeau. We enjoyed having Colin as part of our team and we wish him well in his future endeavours.



Herbison: The Sequel

In the fall of 2001 we told you about the case of *Herbison* v. *Lumbermens Mutual Casualty Company*. Our firm represented the insurer, Lumbermens Mutual. Since our original report, the case has been decided by the Ontario Court of Appeal.

Purpose and Causation

Ten years ago, the Supreme Court of Canada developed a test to be used in auto insurance cases to determine whether an auto insurance company will be responsible for damages arising from an auto accident.

The first part of the test involves determining whether the accident resulted from the ordinary and well-known activities to which automobiles are put. If the answer is yes, then the next question is whether the relationship between the injuries and the ownership, use or operation of the insured vehicle was the cause of the accident as opposed to merely incidental or fortuitous. These were the questions that had to be answered in the Herbison case.

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The Facts

At 6:00 a.m. on November 2, 1999, Herbison, Wolfe and several others went deer hunting. Because he suffered from heart problems, Wolfe drove his pick-up truck to the assigned hunting area. As he drove across the field, which led to the hunting station, Wolfe spotted what he thought was a deer.

Leaving the engine running, Wolfe got out of his truck and removed his encased hunting rifle from behind the driver's seat. He took it from its case and loaded a round in it. He stepped about three feet away from his vehicle and looked through the scope of his rifle. He observed a flash of white that he thought was a deer, and fired. Unfortunately the deer turned out to be Herbison. Wolfe's shot struck Herbison in the upper thigh, causing him serious injury. Herbison sued Wolfe.

The Trial Decisions

Decision #1

The trial judge concluded that the hunting accident occurred as a result of Wolfe's negligence in firing at a target he had not properly identified. Herbison was awarded damages in the amount of $832,272.00.

Decision #2

Herbison next had to sue Wolfe's insurance company to recover the damage award. Herbison argued that the insurance company should pay since his loss arose from the ownership or directly or indirectly from the use or operation of Wolfe's truck. Herbison

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was unsuccessful in this argument and his action against the auto insurance company was dismissed. Herbison appealed the decision.

The Court of Appeal

The majority of the Court agreed with Herbison, reversed the trial judge's decision and ordered the auto insurance company to pay Herbison his damages.

Mr. Justice Borins, on behalf of the majority, concluded that Wolfe's vehicle had been put to a known use, i.e. to transport people. Therefore it met the purpose aspect of the test. With respect to causation, the court concluded that any connection between the wrongdoer's vehicle, in this case Wolfe's truck, and the plaintiff's injuries, in this case Herbison's, would be sufficient to meet this part of the test. Underlying this reasoning was the court's finding that the legislature sought to provide injured persons with very extensive vehicle liability compensation.

The majority found support for their position in the legislative history of the *Insurance Act*. Mr. Justice Borins stated, *"In my view, an examination of the legislative history of s. 239(1) of the Insurance Act also reflects a deliberate legislative intent or purpose to broaden the scope of coverage."* He went on, *"Had the legislature intended s. 239(1) to operate narrowly, it would not have used 'indirectly', and instead of using 'arising from' it would have used narrower language, such as 'caused by.'"*

Madam Justice Cronk, the third member of the panel, wrote a dissenting judgement. She believed that the injury had to be related to the purpose for which the relevant vehicle was being used and in this case the transportation use of Wolfe's truck had been suspended at the moment of the shooting.

With respect to the causation component of the test, Madam Justice Cronk could not find that Herbison's injuries arose directly or indirectly from the use of Wolfe's truck. Shooting at the deer was an independent act which had no relevant connection to the latter's vehicle, particularly since the shooting took place after Wolfe had exited his truck.

Although there is a trend towards broadening auto insurance coverage involving a "different" type of auto accident these cases are not clear cut. Until the Supreme Court of Canada provides further direction, the results in such cases will depend on how a particular judge interprets the facts which led to the injuries.

Leave at the Supreme Court is pending.

JULIET L. KNAPTON

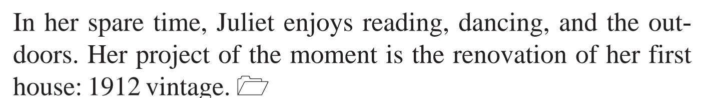
This past fall we welcomed Juliet Knapton to our legal team. Juliet received her LL.B. from the University of Ottawa, her undergrad from Queen's and High School teaching qualifications from Michigan State. During her last semester of law school, she attended the University of Witwatersand in South Africa and worked in a Legal Clinic in Johannesburg. Following her graduation, Juliet clerked for Mr. Justice Campbell of the Federal Court of Canada. She was called to the Bar in July.

While clerking for Mr. Justice Campbell, Juliet prepared memos and edited the reasons for more than 100 cases. The cases covered a broad spectrum of the law, including constitutional, immigration, intellectual property, aboriginal, tax and administrative law. She also assisted on case management, mediation and motions.

Over the coming months, Juliet will work closely with our senior litigator, Eric Williams. She will assist him in all areas of civil litigation.

Prior to embarking on her law career, Juliet led an adventure-filled life of writing, teaching and travelling. She has travelled in over 35 countries, and taught at international schools in Pakistan and Colombia and worked with many NGOs. During that time she developed solid public speaking, negotiation, advocacy and leadership skills.

In her spare time, Juliet enjoys reading, dancing, and the outdoors. Her project of the moment is the renovation of her first house: 1912 vintage.



CASE UPDATE

Zoe Childs, et al. v. Desmond Desormeaux, et al.

The Childs case was argued before the Supreme Court of Canada on January 18, 2006. At issue is whether a social host should be liable for the damages caused by one of its guests who drinks and then drives.

Eric Williams is counsel for the social hosts' insurer.

The Court reserved its decision.

Dismissing an Employee on Sick Leave

The general rule concerning the dismissal of employees is that employers are entitled to terminate the employment relationship as long as they have just cause for doing so or they have given the employee reasonable notice of the termination or payment in lieu of notice. But what happens in the case of an employee who is away on sick leave? Although the general rule still applies there are several pitfalls to be aware of.

Just Cause

The first and most important thing to remember in these situations are that neither illness nor disability amounts to just cause for termination. Just cause is generally reserved for instances of dishonesty, theft, gross insubordination or conflict of interest.

Frustration

Although the employer may not have just cause to terminate the employment relationship, an employee's illness or disability may nevertheless lead to what is called frustration of the employment contract. Frustration is a legal term that describes an event which was unforeseen at the time the parties entered into their agreement and which is uncontrollable. This unforeseen event makes it impossible for one of the parties to fulfil his/her duties under the contract.

In the employment scenario, if the employee's long term or permanent illness prevents him or her from returning to work in a timely fashion the employment contract may be frustrated. When the employment contract is frustrated, the employer is not required to give reasonable notice of the termination.

Human Rights

An important consideration when terminating an ill employee is human rights. If an employee is capable of performing the essential duties of his or her job, then the employee is entitled to equal treatment under the *Ontario Human Rights Code*. Further, employers have a duty to accommodate a person with a disability if doing so does not create an undue hardship for the employer.

Ultimatums

When dealing with an employee who is on sick leave, it is important that the employer refrain from giving the employee an ultimatum about returning to work. Telling an employee that he or she must return to work by a particular date could have unpleasant consequences for the employer. Not only might a court determine that the employee was wrongfully dismissed, but the damage award may be increased to reflect this treatment of the employee. The following are two cases which illustrate this point.

Zorn-Smith v. *Bank of Montreal*[1]

After 21 years with the bank, the employee was promoted to Financial Services Manager. However, the workload involved, combined with her family obligations, eventually led to the employee burning out. When she was able to return to the bank, the employee asked to be given a teller position. Although the bank was agreeable, it requested that she remain in the management position until she could be replaced. When she had still not been replaced after a year, the employee sustained a second burnout. Three months later the bank felt the employee should return to work. Based on her doctor's advice, the employee refused. The bank terminated her employment.

The trial judge concluded that the employee had been wrongfully dismissed and that the bank had abdicated its responsibility for the employee's condition. In addition to the 16 months notice that the employee was entitled to, the bank was ordered to pay the employee three months of disability benefits and $15,000 in aggravated damages. The aggravated damages were to compensate the employee for the bank's callous actions toward her.

Miller v. *Fetterly & Associates Inc.*

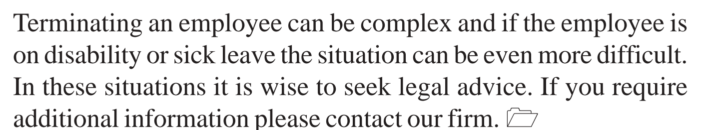
The employee had worked for the employer for 27 years. The employee suffered a nervous breakdown and was diagnosed with clinical depression. The employer advised the employee that if he did not return to work by a specified date his employment would be considered terminated. Based on his doctor's advice, the employee refused to return on that date.

The court found that the amount of time off required was not in itself sufficient to justify a conclusion that the contract of employment was frustrated or that the employee had renounced it. The court concluded that the employee was entitled to 17 months salary in lieu of notice.

Reasonable Notice

If an employer has neither just cause nor a frustrated employment contract, then the employee is entitled to reasonable notice before being terminated. To determine the amount of notice that is reasonable, including when dealing with employees on sick leave, consideration must be given to a variety of factors such as the length of employment, the position of the employee, the reason for the dismissal, the employee's compensation, and whether the employer acted in good faith and fairly.

Terminating an employee can be complex and if the employee is on disability or sick leave the situation can be even more difficult. In these situations it is wise to seek legal advice. If you require additional information please contact our firm.



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[1]Our firm represented the employee in this case, which was reported at [2003] OJ No. 5044. For a complete summary of this case see *Work Place Safety and Wrongful Dismissal: A New Chapter*, Winter 2004 which can be downloaded from our website.

Opinions and the Role of Expert Witnesses

...the subject matter of the inquiry must be such that ordinary people are unlikely to form a correct judgement about it, if unassisted by persons with special knowledge.

Bevan on Negligence

As a general rule witnesses cannot offer their opinion as evidence. Rather, they are restricted to relating facts within their knowledge, observation and experience. However, issues often arise which involve information that is outside the knowledge and experience of the judge or jury, in particular scientific and technical information. In such cases, expert witnesses may be called to provide information and opinions on the matter at issue. It is the role of an expert witness to explain to the judge and jury what is known about a particular area and to clarify that particular area.

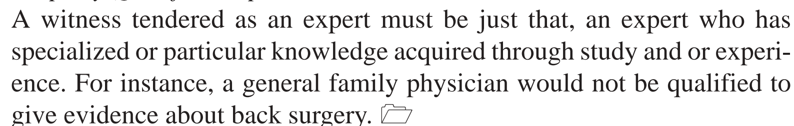
The type of issues where expert evidence may be important include medical malpractice, the calculation of loss of future income, reconstruction of a motor vehicle accident, or building design.

Mr. Justice Sopinka, on behalf of the Supreme Court of Canada, addressed the issue of the admission of expert evidence. He laid out four criteria to be applied in such situations.

Relevance
Not only must the expert evidence relate to a material fact in issue, but its value must be commensurate with the time involved in presenting the evidence. This assessment will be made by the trial judge who acts as the gatekeeper in these situations. This gatekeeper role is particularly important when one of the parties wishes to advance a novel theory.

Necessity in Assisting the Trier of Fact
Expert evidence should only be admitted *"when lay persons are apt to come to the wrong conclusion without expert assistance. . ."*

Absence of any Exclusionary Rule
Aside from the rule that excludes opinion evidence, the expert evidence must not contravene other exclusionary rules of evidence.

Properly Qualified Expert

A witness tendered as an expert must be just that, an expert who has specialized or particular knowledge acquired through study and or experience. For instance, a general family physician would not be qualified to give evidence about back surgery.

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*The articles in the Legal Observer are necessarily of a general nature and cannot be regarded as legal advice. Our firm will be pleased to provide additional details on request.