

## Another Victory

We welcome Jaye Hooper back from maternity leave and are thrilled to welcome baby Megan to Williams McEnery!

Two years ago, we introduced you to one of our clients, Reg Ward. Reg has been involved in an epic battle with Manulife for a number of years. But at last this battle has come to a close. Although Reg won the fight at trial, Manulife was unwilling to concede defeat. Shortly before Christmas the Ontario Court of Appeal confirmed Reg’s position. Reg is one of the good guys, which makes this victory all the more gratifying.

When faced with a catastrophic personal injury there is often a tendency to look to an array of parties in an attempt to make someone pay. *Who is Responsible?* introduces you to just such a case. This is the sad story of a young teenage girl who was left a quadriplegic following an accident in her family’s pool. The case of *Walford et al. v. Jacuzzi Canada Ltd. et al.* reviews the applicable law in these situations.

Finally, if you are a first time home buyer you should know that the Ontario government has extended its **Land Transfer Tax Refund Program** to include resale homes. We will provide additional information about the changes in the next newsletter. ☞

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## David 2 - Goliath 0: The Epilogue

In the fall of 2006, we reported on a complex commercial case where Eric Williams and Jaye Hooper of our firm represented the plaintiff, Reg Ward, in *Ward v. The Manufacturers Life Insurance Company*, (2006) 19 B.L.R. (4th) 68; (2006) 38 C.C.L.I. (4th) 238; (2006) 148 A.C.W.S. (3d) 834

### The Facts

Reg Ward had a family insurance business in Cobourg, Ontario and, in 1997 after thirty years of faithful and productive service with Manulife and its predecessors, his contract was terminated. At the age of 63, Reg had to return to full-time work in order to support his family and was facing a lengthy and protracted legal battle with Manulife.

Shortly after termination, Manulife froze his retirement account, claiming that he owed them money. Manulife claimed that, some ten years earlier, Reg had sold some of its products (vanishing premium policies), and that the sale of those products had been called into question when Manulife was sued in a class action. Manulife claimed Reg owed it money for the sale of those policies.

Reg sued Manulife for all of his retirement monies to trial together with an order of payment of monies into the future. He asked for fiduciary damages for ruining his retirement and his health. He also asked for punitive damages against Manulife for its outrageous conduct in an attempt to ruin his reputation in the community and for its attempt, through secret meetings with the Ontario Insurance Commission, to have his life insurance sales license removed. The latter would have effectively

rendered him unable to earn any income. Manulife retained Toronto solicitors (Cassels Brock) and fought every aspect of the case. Over 80,000 documents were produced. The trial took place in Picton, Ontario in May 2006 and lasted five weeks and included numerous witnesses and thousands of pages of exhibits.

By way of counterclaim, Manulife claimed damages in the amount of \$650,000 being monies that Manulife said it would not have had to pay in the class action but for Reg negligently selling their “vanishing premium policies”.

Vanishing premium policies were designed by the insurers. Many insurers sold these types of policies. The premiums were designed to “vanish” after a certain number of years. By the early 1990’s, vanishing premium policies did not work, primarily because of the downturn in the economy. Many life insurers in Canada and the U.S. were sued. All settled. This was the only known case of an agent being pursued for the fault of the insurance company.

### The Trial

At trial, Reg Ward was completely vindicated. Justice Power of the Superior Court of Justice delivered 86 pages of reasons in which he described Reg Ward as a “scapegoat”. He awarded Reg all of his retirement monies to trial and made an order that they had to be paid into the future. He further awarded him \$150,000 damages for ruining his retirement and causing his health to deteriorate. Finally, in a rare move in a commercial case, he ordered Manulife to pay Reg \$250,000 punitive damages.

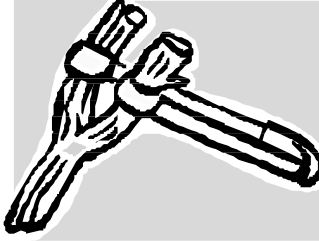
**“it takes an exceptional person to maintain this sort of litigation...”**

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The punitive damage award was meant to punish Manulife for its course of deliberate and high-handed conduct toward Reg Ward. Following termination, Reg's clients were assigned to five other insurance agents. Ninety-five percent of his clients answered a survey that they would rather have Reg as their agent. Manulife responded by suggesting that Reg Ward had been terminated for misconduct and promised other agents that Manulife would run Reg out of business and transfer his retirement commissions to them. The trial judge found this conduct to be evidence of bad faith. The trial judge also pointed to Manulife's attempt to have Reg's license removed by the Ontario Insurance Commission. In analyzing Manulife's conduct, the trial judge noted, "*the term bully comes to mind*".

**The Appeal**

Following release of the decision of the Superior Court of Justice, Manulife changed lawyers to another Toronto firm, Bennett Jones. Jeffrey S. Leon, who is recognized as one of the best commercial appellate lawyers in Ontario, took over the reins.

An appeal is not a new trial, but a review of the evidence at trial and the reasons of the trial judge to see if there are any errors that require correction by the appellate court.

The appeal was heard in Toronto by a panel of three judges. The court ordered this appeal expedited because of Reg's health and age. At the time of the hearing of the appeal, he was 73 years old and still working to support his family.

Manulife appealed every aspect of Justice Power's findings and conclusions. Because of the extent of the decision being appealed and the length of the trial record, the Court of Appeal ordered a two-day hearing for the appeal. This is an extremely long hearing for an appeal in this day and age.

Manulife argued that Reg was not entitled to his retirement monies, for the past or the future. It also argued that the trial judge was wrong in dismissing the claim of negligence against him in the sale of vanishing premium policies. Manulife argued that it should not have damages for ruining Reg's retirement because it was entitled to act in its own interests and did not have to consider Reg's interests. Finally, Manulife tried to explain the conduct that gave rise to the punitive damages by suggesting that

it was only doing what it was entitled to do in order to protect its policyholders.

The unanimous decision of the Court of Appeal was delivered on December 14, 2007. All of Manulife's arguments, with the exception of a minor argument with regard to costs, were dismissed. Madam Justice Weiler noted: "*the trial judge's reasons....demonstrate a strong command of the trial record and contain a detailed analysis of the evidence*". The Court found no errors in the trial judge's decision. With regard to punitive damages, she noted that the trial judge had found "*a continuing course of conduct on the part of Manulife to methodically and deliberately destroy Ward's reputation within the community*".

The appeal court concluded that although punitive damages are awarded in commercial situations only in exceptional cases, the trial judge's award of punitive damages met the objectives for such an award as set out by the Supreme Court of Canada. These principles are:

- Punishment on the misconduct,
- Deterrence in relation to others in similar situations in the future,
- Denunciation, and
- Condemnation.

To our knowledge, this is the second highest punitive damages award in a commercial context in Canada.

**Conclusion**

Manulife will not seek leave to appeal to the Supreme Court of Canada. The case has now been resolved. It would have been highly unlikely that the Supreme Court of Canada would have given leave in any event. Reg has finally put this matter behind

him, received his retirement monies (and more) and is hoping to enjoy the rest of his retirement with his wife, Dorothy, and his children and many grandchildren.



Eric Williams notes "*it takes an exceptional person to maintain and continue this sort of litigation for over eight years against a determined opponent with unlimited funds*".

We were pleased to support Reg and his family in this litigation and to seek justice in a situation where the fight was long and the stakes were high. ☐

**Injustice anywhere is a threat to justice everywhere**

**Martin Luther King Jr., Letter from Birmingham Jail, April 16, 1963**

## Who is Responsible?

A pool can provide hours of pleasure for the whole family. However, it only takes an instant for things to go very wrong. In such cases, who must shoulder the blame? The Ontario Court of Appeal was asked to consider this question in the case of *Walford et al. v. Jacuzzi Canada Ltd. et al.*<sup>87</sup> O.R. (3d) 281 (C.A.).

### The Facts

Marion Walford decided to buy a slide for her family's 4 foot deep pool. She found a used slide that she thought would be reasonable for the size of pool she had. To ensure it would be safe, she took it to Pioneer Pools, the store she had been dealing with for two years. She asked an employee if it would be "all right" or "okay" to use the slide with her pool. She was assured that it would be "no problem". The employee noted that a few parts for the slide were missing and told her to go to another Pioneer Pools' store to buy them. At this second store, Mrs. Walford again asked if it was okay to attach the slide to her pool and the sales associate said it was.

Once the slide was installed, Mrs. Walford instructed her children to go down "feet first" or on "their bums". Her almost 16 year old daughter, Correena, decided that since she had gone down on her belly at water parks, that she could do the same on this slide. Unfortunately, she hit her chin on the bottom of the pool, breaking her neck, and rendering her a quadriplegic. The Walfords sued a number of parties, including the manufacturers of the pool and slide, the people who sold her the slide and Pioneer Pools.

### The Trial

To determine if any of the parties were liable for the damage suffered by Correena, the trial judge had to determine if any of the defendants had been negligent and whether that negligence was the cause of Correena's accident. Specifically, the trial judge had to consider whether the defendants owed a duty of care to Correena and whether that duty had been breached by their failure to meet the standard of care required of them.

After reviewing the facts, the trial judge concluded that there was no liability on the part of any of the defendants named in the lawsuit.

With respect to Pioneer Pools, the only party that the Walfords appealed against, the trial judge found that there may have been a special relationship giving rise to a duty of care based on Mrs. Walford's trust in the store personnel and her seeking their advice. However, the trial judge found that the store had met the prevailing standard of care as set out by the U.S. Consumer Product and Safety Standards (CPSS).

### The Court of Appeal

The only issue on appeal was whether Pioneer Pools breached a

duty of care to the Walfords by telling Mrs. Walford that it was "okay" and that there would be "no problem" with installing the slide on their 4-foot-deep above ground pool, without warning her of the potential for catastrophic injury, and if so, whether that breach caused or contributed to the damage that Correena Walford suffered.

### Duty of Care

The majority of the court agreed with the trial judge that there was a sufficiently close relationship between Mrs. Walford and Pioneer Pools to create a duty of care. Mrs. Walford had been a customer of the store for two years and she trusted the store employees for help and advice about her pool. Further, there were no policy reasons to negate this duty of care.

Although Mrs. Walford did not specifically use the word "safety" when asking the Pioneer Pools' staff for advice, the court felt it is clear that by asking a vendor of pool supplies whether it is "okay" to install a slide with a specific pool, that safety is the motivation for the question.

### Standard of Care

The appellate court concluded that the trial judge was entitled to use the CPSS as the relevant standard of care. However, the trial judge had misunderstood the standard as set out in the CPSS. While the accepted standard for pool slides involved a consideration of minimum pool depths, it

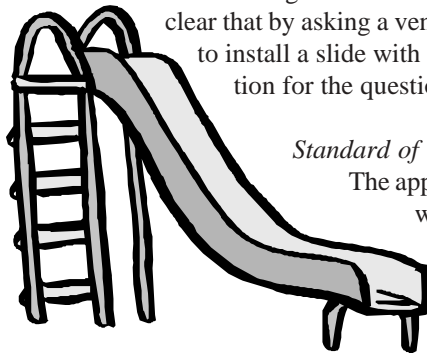
also included such things as the mandatory provision of information concerning the extreme and non-obvious danger of paralysis if a pool slide is used improperly.

Based on this, Justice Feldman, writing for the majority, concluded that, "As Mrs. Walford reasonably viewed Pioneer Pools' employees as pool experts whom she trusted and who were prepared to provide her with advice about her slide, they were obliged to provide a non-negligent answer in accordance with the duty to warn. That their motive, as found by the trial judge, was only to sell pool parts and not to mislead, does not absolve them from this duty of care."

Pioneer Pools was negligent and had breached its duty of care by failing to warn Mrs. Walford of the hidden danger of catastrophic injury from installing this particular slide in her pool.

### Causation

Applying the "but for" test, the Court next considered whether this breach of duty was the cause of Correena's injuries. The uncontroverted and unchallenged evidence was that Mrs. Walford would



**WHO IS - continued from page 3**

not have installed the slide if Pioneer Pools had warned her about the inherent dangers of doing so. Accordingly, "but for" Pioneer Pools' employees failure to warn of the possible dangers, Mrs. Walford would not have erected the slide and Correena's accident would not have happened.

*Contributory Negligence*

Although Correena could not have reasonably known that her behaviour was as reckless as it turned out to be, the Court did recognize that her decision to disregard her mother's rules for using the slide had contributed to her injuries. Based on this carelessness, Correena was found to be 20 per cent liable for her injuries.

**The Dissent**


Justice Rouleau disagreed with his colleagues and wrote a dissenting opinion. In essence, he found that since Mrs. Walford had not specifically asked about the danger associated with the slide, Pioneer Pools was not negligent in its duty of care. Rather, the employees had simply answered the questions posed, answers which met the CPSS guidelines. Justice Rouleau also found that Pioneer Pools, who neither manufactured nor sold this

particular slide, had not held itself out to be an expert on slides.

Further, he agreed with the trial judge that Mrs. Walford was aware that the slide could be dangerous if misused and that even if warnings had been given, the accident would still have occurred.

**A Warning**


The result in this case may seem harsh, considering Pioneer Pools did not sell the slide, did not hold themselves out to be experts in the pool slide business and that Mrs. Walford could have been clearer in her queries. However, the appellate court's decision should be taken as a warning that businesses should ensure that their employees are careful in how and what information they provide to their customers. It would be wise to ask clarifying questions so that businesses and their staff know what advice they are being asked for. If they are unsure of an answer they need to make it clear to the customer that they do not know and that the customer should not rely on the information.

If you are a customer or a client, it is important to be clear about the type of advice or information you are seeking so that the store or business can properly address your concerns. 

## The Half Century Challenge

On January 17<sup>th</sup>, senior partner Mark Charron hit the half century mark. To celebrate, he decided to do something he'd never done before - he went BLONDE!

In a saner act, he made a \$500 donation to Harvest House Ministries to commemorate this milestone. The mission of Harvest House Ministries is to rehabilitate young men who are chemically dependent, to instill in them self discipline, and to reintegrate them into society by an inner change brought about by faith.

He challenges all of you turning 50 this year to match his act of charity. As for colouring your locks, he leaves that up to you. 



**Trust us,  
it's definitely blonde!**



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