



# INSURANCE

M A T T E R S

NOVEMBER 2005

## Breaches of the Automobile Insurance Contract

Rita R. Tripathy and Lisa M. Monteith

### INTRODUCTION

This article is intended to assist in determining what course of action should be taken in the face of a policy breach when dealing with automobile insurance claims from third parties.

There are provisions in the *Insurance Act*, R.S.A. 2000, c. I-3, designed to protect innocent third parties. As a result of these provisions, an insurer may be required to pay a claim directly to a third party and not be permitted to raise a breach of the insurance contract by the insured as a defence to making the payment. If an insurer is forced to make a payment in such a situation, the insurer will want to seek reimbursement of the amount paid from the insured. An insurer will often want to continue to defend the insured, even if there has been a breach of the policy, in order to minimize this liability to third parties.

— continued on page 2

Limitations of Actions Act – Applied to Conflicts of Laws .....	4
Jury Trials – Putting a Range to the Jury .....	5
Recent Alberta Whiplash Cases and Damages Awarded .....	6
Minors' Property Act – Revisions & Implications .....	10
Pitfalls of Global Risk Insurance policies.....	8
Contact the BD&P Insurance Team .....	Back Cover

– continued from cover

If an insurer continues to defend the insured when there is a known or suspected breach of the policy, this can amount to a waiver of the ability to rely on that breach to recover the amount from the insured. In this situation, an insurer will want to take steps to preserve any right to be reimbursed by the insured.

## CLAIMS BY THIRD PARTIES

### 1. Direct Action by Third Parties

The *Insurance Act* has a number of provisions to ensure third parties are compensated for their loss, and that they are paid quickly. Section 635 is an example of a provision that operates for the benefit of third parties involved in an automobile accident. If a third party has obtained a judgment against an insured, the third party can seek payment directly from the insurance company under s. 635(1) of the *Insurance Act*. Based on the requirements of this section, the third party must obtain a judgment prior to seeking payment directly from the insurance company. A settlement, reached either by the insured or by the insurance company on behalf of the insured, is not sufficient to meet the requirement of s. 635(1). The judgment will serve as evidence of the liability of the insurer, and the third party need not prove the liability again in the direct action to claim payment from the insurer. As such, insurers may want to be involved early in the proceedings even if they have no obligation to defend due to a breach of the contract by the insured. It is in their best interest to minimize the liability knowing the third party is able to come after them directly for payment.

The direct action against the insurance company available to the third party under s. 635(1), exists independently of the right of the insured to indemnity under the policy. Essentially, an insurance company may end up making a payment under a policy to a third party in a situation where a claim made by the insured would be denied.

### 2. Defences to Claims made by Third Parties

#### a. Defences to Total Claim

There are certain defences that are not restricted by the *Insurance Act* and can always be raised by an insurer to deny payment of a claim, even to third parties. These defences go to the root of the contract. Examples include proof that the policy never existed, that the policy expired prior to the accident, that the policy does not cover the loss claimed and that the driver is not covered under the policy. Such a defence would include a situation where someone was driving a vehicle without the owner's consent.

#### b. Defences That Cannot be Raised to Deny Claims under the Statutory Minimum Amount

There are certain defences that cannot be raised in relation to the statutory minimum

liability coverage, but can be raised for any amounts in excess of the minimum. The *Insurance Act* mandates that every automobile owner must have a minimum of \$200,000 in automobile liability insurance. The reasoning behind this is consistent with the objective of protecting third parties who are injured in an accident.

Section 635(4) of the *Insurance Act* limits the grounds on which an insurance company can refuse a claim made by a third party. An insurer cannot raise any act or default of the insured in contravention of the *Insurance Act* or a breach of a term of the policy in relation to the minimum coverage of \$200,000. For example, an act of the insured such as a misrepresentation, fraud, or a failure to report a change material to the risk cannot be raised as a defence to payment of a third party claim up to the statutory minimum. In addition, the *Insurance Act*, s. 614(3) requires an insured to co-operate with the insurer in the defence of any action or proceeding. The duty to co-operate includes a duty on the insured to give all material particulars within their knowledge bearing upon the accident to the best of their judgment and ability. A lack of co-operation must be substantial to constitute a breach and must involve some degree of bad faith or malice. Some examples of a breach of the duty to co-operate would include failure to report an accident, giving false testimony or making a wilfully false statement relating to a material fact.

A breach of the duty of good faith can also arise under common law because the nature of a contract of insurance between an insurer and an insured is one of utmost good faith. Actions of the insured amounting to fraud, deceit or misrepresentation can fall under this duty. A breach of this duty on the part of the insured constitutes an independent and actionable wrong for which damages can be awarded.

Insurers are further prevented under s. 635(5) from denying coverage on the basis that a breach of the policy renders the policy void *ab initio* i.e. as if the policy never existed. In other words, a third party claim can be denied if in fact an insurance policy never existed, but the claim cannot be denied where the policy existed but was found void due to a breach by the insured.

**The Insurance Act mandates that every automobile owner must have a minimum of \$200,000 in automobile liability insurance.**



### c. Defences That Cannot be Raised to Deny Claims in Excess of the Statutory Minimum Amount

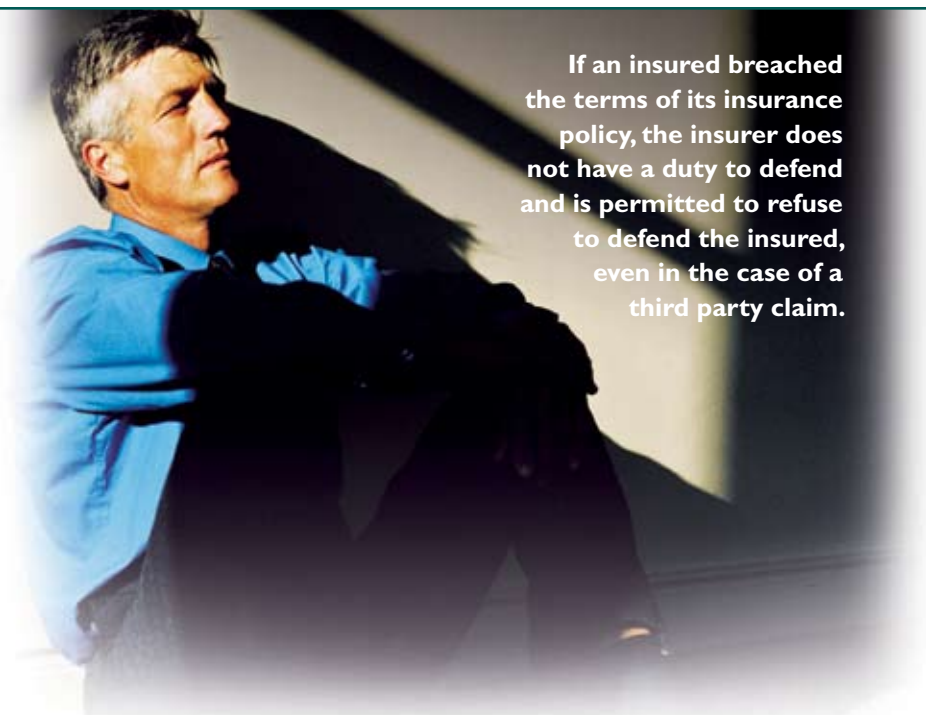
There are some defences that can **never** be raised against a claim from a third party, even in relation to insurance coverage in excess of the statutory minimum amount. For third party liability coverage in excess of the minimum, s. 635(11) operates notwithstanding s. 635(4) to permit the insurer to use certain defences in relation to the excess portion of the claim. However, s. 635(11) excludes from the permitted defences any breach listed in Statutory Condition #2 as follows:

- ▶ The insured was unauthorized or unqualified to drive or operate the automobile;
- ▶ The insured's license to drive or operate the automobile was suspended or the insured was prohibited from driving or operating an automobile under a court order;
- ▶ The insured was under the minimum age prescribed by law at which a license can be issued in the province in which he resided at the time of entering the contract;
- ▶ The vehicle was being used for illicit or prohibited trade or transportation at the time of the accident;
- ▶ The vehicle was being used in a race or speed test;
- ▶ The insured knew or permitted another person to do any of the above.

There is one other situation where the conduct of the insured cannot be used to deny coverage to third parties and that is the case of an impaired driver. There are specific exclusions for impaired driving in most automobile policies for loss or damage to the insured, but no such exclusion is provided in relation to third party claims. Prior to amendments to the *Insurance Act* in 1981, such an exclusion existed; however, the exclusion was removed primarily to facilitate payments to innocent third parties. Since 1981, impaired driving can no longer be used to deny payment of a third party claim in an automobile accident.

#### 3. Recovery from Insured

If an insurer is restricted from raising a defence as a result of the operation of s. 635 and consequently has to pay a claim to a third party that the insurer would otherwise not



**If an insured breached the terms of its insurance policy, the insurer does not have a duty to defend and is permitted to refuse to defend the insured, even in the case of a third party claim.**

have been required to pay, then the insurer can seek recovery from the insured. This right to recover from the insured is found under s. 635(13) of the *Insurance Act* and it is one of the rare instances where the insurance company is provided with a subrogated claim against its own insured.

### DUTY TO DEFEND AND THIRD PARTY CLAIMS

If an insured breached the terms of its insurance policy, the insurer does not have a duty to defend and is permitted to refuse to defend the insured, even in the case of a third party claim. However, given that under s. 635 the third party can get a judgment and come directly after the insurer to collect certain amounts under the policy, the insurer has an interest in being involved in the defence in order to limit liability to that third party.

The insurer has the option of denying coverage and applying to be added as a Third Party to the action. The right to be added as a Third Party is set out in s. 635(14) and the rights of the insurer are set out in s. 635(15). As a Third Party, the insurer can contest any claims made against the insured, deliver any pleadings in respect of such claims, have production and discovery, and examine and cross-examine witnesses. The insurer is essentially placed in a position of a defendant and has all of the same rights as the defendant.

### PRESERVATION OF THE RIGHT TO RECOVER FROM INSURED THROUGH A NON-WAIVER AGREEMENT

If an insurer decides to continue to defend a claim knowing or suspecting there has been a breach of the policy, this may amount to a waiver of the right to later use such breach as the basis to obtain reimbursement from the insured. The insurer may want to remain involved in the defence because there is not yet proof of the breach, or to minimize a third party claim that will have to be paid regardless of the breach. To preserve the ability to recover from an insured, a common practice in the insurance industry is to obtain a non-waiver agreement from the insured or to provide a reservation-of-rights letter. A reservation-of-rights letter is a unilateral declaration by the insurer that is not acknowledged by the insured and is therefore not as effective as a non-waiver agreement. A non-waiver agreement requires an acknowledgement by the insured of the terms of the continuing involvement of the insurer and as a result, it is more effective because it has been explained to the insured and the insured has agreed to the terms. The agreement should be fully explained to the insured and the insurer would be wise to advise the insured to seek independent legal advice as the courts may scrutinize the circumstances surrounding the execution of a non-waiver agreement.

A non-waiver agreement is also advisable in situations where the insurer wants to settle with a third party. There is some uncertainty in the law as to whether the amount paid by the insurer has to be paid under a judgment in order for the insurer to be able to recover the amount from the insured. In *Halifax Insurance Co. v. Williams* (1966), 58 D.L.R. (2d) 86 (B.C. Co. Ct.) the court decided that a judgment was required in order to use the provisions of the *Insurance Act* to recover from the insured. If there is no judgment, then reliance would be on the provisions of a non-waiver agreement or some other contract for the right to seek reimbursement. The insurer in *Williams* was unable to recover from the insured because the non-waiver agreement was signed under false pretenses and found to be void. There was nothing else the insurer could do to recover the amounts paid to settle the claim from the insured.

There are no Alberta cases on this issue. Given the uncertainty, if an insurer is seeking to settle a claim with a third party it is advisable to obtain a non-waiver agreement that includes a provision permitting the insurer to settle and still seek reimbursement from the insured. The insurer must still act in the best interests of the insured when settling the claim. Again, it would be wise to advise the insured to obtain independent legal counsel.

Some suggestions for a non-waiver agreement were provided by Nigel P. Kent, "Preventative Paperwork: Non-Waiver Agreements, Reservation of Rights Letters and the Defence of Claims in Questionable Coverage Situations" (1995) 13 Can. J. Ins. L. 53 as follows:

- it would be written in clear language and properly signed by the insured to facilitate proof of the agreement and its terms in the event a dispute arises;
- it would properly identify and refer to the policy, the insurer, the insured and the incidents/circumstances giving rise to the claim;
- it should contain an acknowledgement by the insured of the potential coverage problem necessitating the execution of a non-waiver agreement along with an acknowledgement that the insurer may later deny coverage and/or seek to recover

back any monies paid pursuant to the policy, any settlement of judgment, etc.;

- it should contain a request, or at least a consent by the insured, that the insurer and its representatives (adjusters, lawyers, etc.), at the latter's sole discretion, be permitted to investigate, negotiate, settle and/or defend all claims or actions arising from the loss without any waiver or estoppel respecting the coverage issue being thereby created;
- in motor vehicle cases involving out-of-province insurers, the agreement should contain an acknowledgement that any settlement of third party claims shall be deemed to be and will be treated in all respects as though it were a judgment against the insured of the sort contemplated by the particular province's legislation;

**To preserve the ability to recover from an insured, a common practice in the insurance industry is to obtain a non-waiver agreement from the insured or to provide a reservation-of-rights letter.**

- it would also contain an agreement by the insured that in any proceedings between the insurer and the insured to recover the monies referred to above, the insured will neither plead nor contend any waiver or estoppel on the part of the insurer; and
- it would impose an obligation upon the insured to repay all amounts paid by the insurer respecting claims, settlements or judgments in the event the insurer establishes that the policy affords no coverage in the circumstances (by virtue of policy breaches, exclusions or other circumstances disentitling the insured to claim indemnity under the same)

In addition to the wording requirements, Mr. Kent's article identifies certain conditions which must be met for the non-waiver agreement to be enforceable (at page 57). For example, the insured should not be under any legal disability, there should be no misrepresentations respecting the

purpose or effect of the agreement, and the agreement must be executed without duress. The agreement should be fully and properly explained to the insured and it is advisable to have the insured obtain independent legal advice. The non-waiver agreement can only be effective as against the signing parties, so if there is more than one potential insured to whom coverage will be denied (multiple insureds, unnamed insureds, employees, etc.), then all should be made parties to the agreement in the appropriate circumstances. The article further suggests that the adjuster obtaining the non-waiver agreement should make sure that the document is properly completed and should take careful notes of the circumstances surrounding the execution. Further, the article cautions that the non-waiver agreement might only maintain the status quo at the time of its execution and may not cover subsequent breaches or the later discovery of additional grounds for denying coverage.

## CONCLUSION

In conclusion, if an insurer is forced to pay a claim to a third party under a provision of the *Insurance Act* in a situation where the insured has breached some aspect of the insurance contract, the insurer is entitled to seek reimbursement from the insured for this payment. There are some breaches that can always be raised in relation to claims against third parties, some that can be raised only in relation to the portion of insurance in excess of the statutory minimum, and some defences that can never be raised. If an insured has breached the policy, there is no duty on the insurer to defend the claim, but an insurer may continue to defend in order to minimize the amount of the third party claim, knowing that the third party will be seeking payment directly from the insurer. It is advisable for an insurer to obtain a non-waiver agreement when there has been a policy breach, or a suspected policy breach, to preserve the right to reimbursement by the insured. The non-waiver agreement can also contain a clause permitting the insurer to settle the claim and then there is no question that the insured must reimburse the insurer even in the case of a settlement.

*A user friendly chart that addresses a number of automobile policy breaches is available upon request.*

## Limitations of Actions Act Applied to Conflicts of Laws

The *Limitations Act*, R.S.A. 2000, c. L-12 (the “Act”) was proclaimed in force on March 1, 1999 and replaced the *Limitation on Actions Act*, R.S.A. 1980, c. L-15. The Act brought in fundamental changes to the law of limitations in Alberta. Since the Act came into force, the Alberta courts have interpreted several sections of the Act and in this edition of *On Record*, we look at a conflict of laws situation.

Section 12 of the Act states that the limitations law of Alberta shall be applied when a remedial order is sought within Alberta, notwithstanding that in accordance with the conflict of law rules, the claim will be adjudicated under the substantive law of another jurisdiction. The issue of how this section applied to an action arising from a Californian accident, causing injury to an Albertan who sued in Calgary, was the subject of *Castillo v. Castillo* (2004), 357 A.R. 288 (C.A.)

While residents of Alberta, the Plaintiff wife and Defendant husband were involved in a motor vehicle accident in California. The wife filed her personal injury claim in Alberta within the Alberta two-year limitation period, however the Defendant husband alleged that her claim was barred by the one-year limitation period under California law.

The common law had been settled in the Supreme Court of Canada decision in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 which held that it was the law of the place of the tort that governed in terms of the

limitations issue. This would mean the wife’s action would have been brought out of time. The Plaintiff in the *Castillo* case argued that section 12 of the Act changed the law as set out in *Tolofson*, arguing that if the suit was brought properly in Alberta, the Californian limitation law was irrelevant.

The Court of Appeal did not accept the Plaintiff’s argument, holding that there must be clear and unambiguous language in the statute to make any alteration to the common law. The Court of Appeal was of the view that section 12 would apply in circumstances where the foreign jurisdiction had a longer limitation period, i.e. three years, in which case the Plaintiff would have to bring its action in Alberta within Alberta’s two-year limitation period. The Court of Appeal was clear in stating that section 12 does not purport to remove defences that constitute part of the substantive law of the place of the tort, and the one-year limitation would be such a defence. Accordingly, the husband was successful in arguing that his wife, the Plaintiff, was out of time.

Leave to appeal to the Supreme Court of Canada, [2004] S.C.C.A. No. 433 has been granted and we will report further in a subsequent issue. In the meantime, Plaintiffs will have to be guided by the limitation period in the place of the tort or by the Alberta limitation period, whichever is sooner.

In a recent jury trial in Medicine Hat, that of *Proctor v. Johnson* [2004] A.J. No. 257 (Q.B.), the jury awarded general damages of \$100,000.00 to a plaintiff for what appears to have been a moderate whiplash injury. This was so despite the fact that the credibility of the Plaintiff was in issue at trial. Counsel for the both sides had agreed not to put a range of general damages to the jury in advance of their deliberations.

The unsatisfactory result for the Defendant in this case raises the issue of whether it might be more appropriate to be able to put a range of general damages to the jury.

The law was settled until recently in Alberta. The case of *Pendergras and Presley v. McGrath and Tilden Rent A Car Co.* (1988), 86 A.R. 291 (C.A.), application for leave to appeal dismissed (1988), 92 A.R. 320n, had held that a trial judge may not give any guidance to a jury assessing damages in a civil case except to set out the upper limit of an award for general damages in “catastrophic” cases. Mr. Justice Rooke, however, in the case of *Nguyen v. Collette* [2002] A.J. No. 1153 (Q.B.) indicated his belief that it was time for the law of Alberta to change, stating that juries should be given guidance on an appropriate range of damages. Mr. Justice Rooke’s view was discussed in at least two subsequent decisions, namely *Hollebeke v. Breeze* [2003] A.J. No. 347 (Alta. Q.B.) and *Ginter v. Sidhu* [2003] A.J. No. 434 (Q.B.), wherein both judges disagreed with Mr. Justice Rooke and in any event, felt bound by the Alberta Court of Appeal’s decision in *Pendergras*.

Mr. Justice Rooke’s decision provides an analysis of the arguments for and against the guiding of the jury. Some of the reasons supporting the argument not to provide a range to the jury are that to do so would remove the jury’s function, would substitute the judge’s own opinion for theirs, and would invite appeals of jury instructions. Another argument against putting the range to the jury is to the effect that if the range is too broad, its value is limited and if the range is too narrow, the jury’s role is reduced if not eliminated. (McMahon J. in *Ginter*)

Mr. Justice Rooke spoke of several arguments in favour of giving juries guidance, particularly, the ensuring of assessability,

# Jury Trials

## Putting a Range to the Jury

By Perminder K. Basran



uniformity and predictability in the process, the risk of appeal of awards made without guidance which can make the jury’s work pointless, and the familiarity with U.S. awards which tend to be larger and more publicized than Canadian awards which may result in misapprehensions of an appropriate Canadian award or result in an inappropriate reaction against large awards. Mr. Justice Rooke favours Saskatchewan’s practice where the judges have the right (but not requirement) to give guidance to the jury in the assessment of non-pecuniary loss.

In both the *Hollebeke* and *Ginter* decisions, the judges were of the view that by imposing a range of damages on the jury, the

community view of the value to be placed on any particular injury would be lost and that the jury’s assessment of damages, unless amounting to an error in law, should not be subject to judicial guidance.

The damages award in *Proctor v. Johnson* certainly shows the risk of not putting a range to the jury but it is a gamble that can go either way. If one wants more certainty in the outcome, then putting a range to the jury would be more desirable. However “the jury is still out” as to whether a Defendant’s request to put a range to the jury will even be accepted in Alberta and we anticipate further judicial discussion of the historical practice.



## Recent Alberta Whiplash Cases and Damages Awarded

---

In *Chriqui v. Duke*, 2004 Carswell 788 (Q.B.) (WLeC), the plaintiff was injured when her car was struck from behind by a van travelling at very high speed. The plaintiff claimed damages for multiple sclerosis, depression and whiplash. The plaintiff provided limited affirmative evidence and failed to show causation of the multiple sclerosis. She suffered from whiplash symptoms for approximately 6 years, however those systems were diminishing over time. The court considered several factors in gauging the severity of the whiplash, including her infrequent treatment, ability to cope without prescribed medication, performance of sedentary work, and the diminishing severity of the injuries over time. \$40,000 in general damages were awarded for moderate whiplash, distress, apprehension and stress.

---

In *Barriffe v. Janiten*, 2003 CarswellAlta 1862 (Q.B.) (WLeC), the plaintiff suffered moderate neck and back sprains and mild TMJ in a motor vehicle accident in 1994. He had a history of lower back pain dating from 1987. As a result the court held that only the neck injury resulted from the accident, but the plaintiff completely failed to mitigate his damages by exercising, working, or seeking psychological treatment. Moreover, his credibility was damaged due to a number of factors, including a video of him performing hard labour, his increasing exaggeration of injuries and contrived pain responses. The court awarded general damages for pain and suffering in the amount of \$30,000 and, due to his failure to mitigate, past loss of income only up to 1997.

---

In *Reimer v. Polgar*, 2005 CarswellAlta 444 (Prov. Ct.) (WLeC), a 34-year-old mother suffered whiplash in a motor vehicle accident occurring on March 10th, 2004. Prior to this accident she had been involved in a motor vehicle accident on May 26th, 2003 in which she suffered whiplash. Doctors testified that by the time of the second accident, the plaintiff had recovered to within 80% of her pre-2003 condition and that the 2004 accident caused only mild whiplash syndrome. For four to five months she experienced fairly acute pain and discomfort and then began to improve. The court awarded general damages consisting of \$16,500 for the 11 months since the accident as well as \$3,000 for intermittent pain likely to be suffered in the future.

In *Sluth v. Kostyniuk*, 2004 CarswellAlta 1836 (Q.B.) (WLeC), a vehicle struck the plaintiff from behind as he was walking on the sidewalk. The plaintiff suffered from whiplash for 18 months and since the accident has complained of lower back pain. During the course of the trial evidence was produced that showed the plaintiff performing hard manual labour. In calculating general damages the court considered the short-term nature of the mild whiplash, long term but minor ongoing back pain, and the future potential impact of the herniated disc. General damages of \$40,000 were awarded.

---

In *Lynne v. Taylor*, 2004 CarswellAlta 862 (Q.B.) (WLeC), the plaintiff, who had been seriously injured in a 1990 motor vehicle accident, sustained injuries in a 1996 motor vehicle accident. The court felt that the plaintiff's upper back, neck, and lower back injuries from the 1990 accident were all aggravated in the 1996 accident. General damages were awarded in the amount of \$60,000 for the exacerbation of previous injuries and as well as 4% permanent disability.

---

In *Larsen v. Bell*, 2004 CarswellAlta 846 (Q.B.) (WLeC), the 47-year-old plaintiff was involved in two vehicle accidents 23 months apart. The second and more serious accident aggravated the whiplash injuries sustained in the first. The plaintiff claimed damages for whiplash as well as fibromyalgia. The court held that the plaintiff failed to prove that the accident caused the fibromyalgia and awarded \$40,000 for the mild whiplash only. The court admitted this was high for a mild whiplash but felt the plaintiff was entitled to a reward at the higher end of the scale for mild whiplash because, due to her fibromyalgia, she was affected more than the ordinary person.

---

In *Teichgraber v. Gallant*, 2003 CarswellAlta 56 (Q.B.) (WLeC), a 32-year-old graphic design artist was involved in a minor collision. He experienced headaches, pain at the base of his neck, difficulty sleeping and depression. The judge noted in his decision that the plaintiff, during trial, had overstated his personal income, had carefully considered his answers to fairly simple questions, and did not call any character witnesses. The court found that the accident did not materially contribute to the plaintiff's chronic pain and depression, but that he was entitled to damages for mild to medium whiplash in the amount of \$17,000.

---

In *Bouchard v. Sherwood Park Finishing (1984) Ltd.*, 2003 CarswellAlta 373 (Q.B.) (WLeC), the plaintiff suffered fairly severe whiplash, headaches, chronic pain and depression resulting from a motor vehicle accident. Immediately after the accident the 44-year old plaintiff changed each of his medical caregivers. The court found him to be absent credibility and because the opinions of the plaintiff's medical experts were based solely on his subjective complaints, the court found their testimony of limited use. In the end the court awarded \$30,000 in general damages.

---

In *Pfob v. Bakalik*, [2003] A.J. No. 1204, 2003 ABQB 819, the 45-year-old contract courier was involved in a motor vehicle accident. He suffered a lower back injury that resolved in five months, a chronic and serious whiplash injury, myofascial pain syndrome and mild depression and anxiety. Although the plaintiff substituted chiropractic treatment for physiotherapy because he could not afford both, the court felt that he had sufficiently mitigated his damages. The \$40,000 general damages awarded reflected the plaintiff's lifestyle changes, chronic pain for five years, and long term pain resulting from the accident.

---

In *D.G. v. Farooqui*, [2003] A.J. No. 1707 (Q.B.), the 53-year-old plaintiff suffered chronic pain, headaches and inability to work as a result of a motor vehicle accident. Doctors testified that she suffered, at minimum, a soft tissue whiplash that would be resolved within a matter of months. The court found the Plaintiff to be an unreliable witness who over-exaggerated the extent of her injuries and who suffered from secondary gain issues. The court also held that although the plaintiff was psychologically vulnerable prior to the accident, she was generally physically healthy. However, and perhaps surprisingly, the court did say at the end of the day that the accident materially contributed to the Plaintiff's current injury and awarded general damages in the amount of \$50,000.

---

In *Roth v. Fischer*, [2003] A.J. No. 1272, 2003 ABQB 729, a 1995 accident left the plaintiff with soft tissue injuries to the neck as well as myofascial pain. She had been working as a bartender and waitress but due to the injuries was forced to give up the jobs. The Plaintiff experienced sharp pain, light-headedness and pain in her neck and shoulders. It was argued that these symptoms were merely a function of aging and not a result of the accident. However, the court rejected this argument and awarded \$65,000 in general damages based on her restrictions and difficulties performing housekeeping chores.



## Pitfalls of Global Risk Insurance policies

by Michel Bourque and Brandon Barnes

It is common practice for multi-national corporations to insure their operational risks with one or several global insurance policies regardless of the geographical (or jurisdictional) location of those risks. These so-called “umbrella policies” have the obvious benefit of achieving an economy of scale, but may be subject to hefty fees if the insurance provider is not an authorized Canadian or Albertan insurer, thanks to little-known provisions of the federal *Excise Tax Act* and the *Alberta Insurance Act*.

Under the *Excise Tax Act*, a Canadian business that enters into, or renews, an insurance contract with a foreign provider is subject to an excise tax. The tax is 10% of the net premiums from the immediately previous calendar year. A foreign provider is defined as one that is not licensed under the laws of Canada or any province or territory.

Exceptions exist for insurance considered unavailable within Canada, provided the policy was issued after February 1973. In addition, life insurance, accident and disability insurance, marine insurance and sickness insurance are all excluded as are some policies covering

nuclear-related risks. These exemptions render the obligation to pay excise tax irrelevant for most Canadians in their personal capacity. However the exemptions fail to protect the majority of commercial insurance policies from paying tax, except if it can be shown that the insurance is not available in Canada.

The *Alberta Insurance Act* contains an even more onerous provision. The *Insurance Act* specifically denies insurers the ability to cover risks located in the province without obtaining a license. It also prohibits, generally, contracting with a provider who is not registered in Alberta.

An exception to this rule is provided by Section 61 of the *Insurance Act* provides an exception to this rule. This section allows a contract for insurance with a foreign provider if the insured pays to the Minister of Finance a fee equal to 50% of the premiums under the policy at issue and complies with a few other minor requirements. A penalty must also be paid if the insured fails to pay the fee within 30 days of entering into the contract. The *Insurance Act* does not provide any means of requesting a waiver or leniency in paying

the fee or penalty. No exceptions to the fee exist for insurance on risks occasionally (as opposed to ordinarily) found in Alberta, and only policies on motor vehicle liability are excluded.

The *Insurance Act* provides a possible means around paying the fee in Section 63. A foreign provider can offer their products through “special brokers” who, as the title suggests, must be specially licensed to offer insurance from unauthorized carriers. Special brokerage levels—but does not eliminate—the competitive advantage the *Insurance Act* gives to domestic insurers, whose clients need not pay additional fees.

The policy behind either provision is unclear, and these rules are frequently overlooked by multinationals shopping for insurance on the international market. A continued unknown is whether the word “premium” in either the *Excise Act* or the *Insurance Act*, represents the total amount paid to the umbrella insurer, or simply the amount payable with respect to the domestically located risks. These provisions certainly present a potentially harsh penalty to corporations caught unaware.

by *Perminder Basran*

**I**n December 2004, members of the BD&P Insurance Team successfully defended Earls (Westhills) Restaurant in a slip and fall action by a Plaintiff whose claim was entirely dismissed.

## FACTS

A court order, confirmed by the Alberta Court of Queen's Bench, The facts of the case involved an elderly widowed Plaintiff, who was walking on the sidewalk adjacent to Earls' patio in Westhills. Her son and daughter-in-law were walking in front of her, all three walking single file. Immediately prior to the fall, the Plaintiff's daughter-in-law called out a warning to the Plaintiff that the sidewalk was narrow. The Plaintiff then put her left hand up, intending to steady herself by putting her hand on glass or a window that she mistakenly believed was beside her. In fact there was no window there and the Plaintiff toppled over the patio railing, landing on the patio floor.

## EVIDENCE

At trial the Plaintiff argued that the sidewalk was too narrow and the lighting was poor, causing her to believe there was a window beside her when she reached out her hand to try to balance herself.

The Defendant called an engineering expert to show that the sidewalk was approved by the City of Calgary, was in compliance with the Alberta Building Code and the lighting around the patio was adequate.

The Defence also called a number of witnesses from Earls, such as servers, managers and other staff, to give evidence with respect to Earls' system of inspection relating to the sidewalks and the restaurant in general. Approximately 20 to 25 members of Earls' staff walked along that particular sidewalk daily and were requested to look for debris, snow, ice, problems with cars or anything else that could affect customers. In addition, Earls kept a detailed logbook relating to any occurrences, including complaints about the exterior of the premises.

## DECISION OF THE COURT

The Court accepted that Earls had an adequate system of inspection in place. The Court also accepted the Defendant's argument that the Plaintiff's son and daughter-in-law had walked past the area without difficulty, and had in fact alerted the Plaintiff of the perceived problem such that the Plaintiff had "notice" of the situation.

In the end, the Court found that the Plaintiff had not established negligence on the part of Earls, and concluded that this was a "simple accident, which occurred without the fault of the Defendant".

## DOUBLE COSTS ARGUMENT

The Defendant was able to successfully avail the "double costs" rule pursuant to Rule 174(1.1) of the Alberta Rules of Court. This rule indicates that if the Plaintiff's action is dismissed entirely, the Defendant is to be awarded double costs unless there is "special reason" not to do so.

At the conclusion of trial Plaintiff's counsel attempted to argue that because the Plaintiff was a widow and was 77 years old at the time of trial, double costs would be an undue hardship for her. However, the Court held that this argument did not constitute "special reason" as contemplated by the Rules of Court.



# Slip and Fall on Restaurant Premises



## Contact the BD&P Insurance Team

<b>Perminder K. Basran</b>	(403) 260-0261 .....	pkb@bdplaw.com
<b>Donald J. Chernichen, Q.C.</b>	(403) 260-0101 .....	djc@bdplaw.com
<b>Bob H. Graham</b>	(403) 260-9473 .....	rhg@bdplaw.com
<b>Douglas A. McGillivray, Q.C.</b>	(403) 260-0349 .....	dam@bdplaw.com
<b>Robert O. Millard</b>	(403) 260-5719 .....	rom@bdplaw.com
<b>Melissa D. Moulton Tennison</b>	(403) 260-9471 .....	mdm@bdplaw.com
<b>James D. Murphy</b>	(403) 260-0152 .....	jdm@bdplaw.com
<b>Patricia E. Olyslager</b>	(403) 260-0367 .....	polyslager@bdplaw.com
<b>Gina A. Ross</b>	(403) 260-0342 .....	gar@bdplaw.com
<b>Jeff Sharpe</b>	(403) 260-0176 .....	jes@bdplaw.com
<b>Richard F. Steele</b>	(403) 260-0151 .....	rfs@bdplaw.com
<b>David H. Strand</b>	(403) 260-0259 .....	dhs@bdplaw.com
<b>Rita R. Tripathy</b>	(403) 260-0235 .....	rrt@bdplaw.com
<b>Kevin Tuohy</b>	(403) 260-0299 .....	kjt@bdplaw.com
<b>Grant Vogeli</b>	(403) 260-0171 .....	lgv@bdplaw.com
<b>Jeffrey B. Weidman</b>	(403) 260-5722 .....	jbw@bdplaw.com
<b>Shannon L. Wray</b>	(403) 260-0245 .....	slw@bdplaw.com

*If you would like any further information on any members of our team, such as a more detailed resume, please feel free to contact the team member or the writer directly. You may also refer to our website at [www.bdplaw.com](http://www.bdplaw.com).*



o n r e c o r d

**Insurance Matters, Editors-in-Chief**

Donald J. Chernichen, Q.C., [djc@bdplaw.com](mailto:djc@bdplaw.com).....(403)260-0101

Rita R. Tripathy, [rrt@bdplaw.com](mailto:rrt@bdplaw.com).....(403)260-0235

**Insurance Matters, Editor**

Joan D. Bilsland, [jdb@bdplaw.com](mailto:jdb@bdplaw.com).....(403)260-5706

**Insurance Matters, Managing Editor**

Rhonda G. Wishart, [rwishart@bdplaw.com](mailto:rwishart@bdplaw.com).....(403)260-0268

**Contributing Writers and Researchers:**

Rita R. Tripathy, Perminder K. Basran, Michel Bourque,  
Brandon Barnes, Lisa M. Monteith, Kirk Lamb,  
Katie Seymour and Laura Gill.

INSURANCE MATTERS AND OTHER ISSUES OF  
**ON RECORD** ARE AVAILABLE ON OUR WEB SITE  
**WWW.BDPLAW.COM**

*For a complete list of authorities used in drafting these  
articles please contact the Editor.*

**Contact**

For additional copies, address changes, or to suggest articles for future  
consideration, please contact our Catherine Leitch in our Marketing  
Department at (403) 260-0345 or at [cat@bdplaw.com](mailto:cat@bdplaw.com).

**General Notice**

**On Record** is published by BD&P to provide our clients with timely  
information as a value-added service. The articles contained here should  
not be considered as legal advice due to their general nature. Please  
contact the authors, or other members of our insurance team directly for  
more detailed information or specific professional advice.