



May 27, 2004

COURT OF APPEAL - MOTOR VEHICLE OWNER'S LIABILITY AND CONDITIONAL CONSENT

On May 5, 2004, the Alberta Court of Appeal rendered a decision in the case of Mugford v. Kodiak Construction Ltd., 2004 ABCA 145 (Alta. C.A.). This case reviewed vicarious liability of a motor vehicle owner under section 181(b) of the Highway Traffic Act, R.S.A. 1980 c. H-7 (now section 187(2) of the Traffic Safety Act, R.S.A. 2000, c. T-6) for losses and damages caused while the vehicle is in the possession of another person with the owners consent.

In this case, Kodiak, the vehicle owner, provided an employee, Weber, with a company vehicle for use during the course of his employment. Weber had endorsed a form acknowledging that the vehicle was not for personal use.

The trial judge found that Weber had breached the company policy as he was using the vehicle for personal matters at the time of the accident, and further was impaired by alcohol. The trial judge further held that the existence of consent under 181(b) was to be determined at the time of the accident, as such, found there was no express consent to operation of the motor vehicle, and no resulting liability to Kodiak.

However, the Court of Appeal disagreed with the trial judge's application of section 181(b). The Court reviewed the historical evolution of the provision, the specific wording, along with the public policy reasons behind vicarious liability of vehicle owners. The Court held that section 181(b) does not permit "conditional consent". The Court found that to allow the section to be interpreted in this fashion would lead to absurd results, and further, that public policy demanded protection of the general public by imposing upon the owner of a motor vehicle the responsibility of careful management and the assumption of risk of those who are entrusted its use. Further, the Court noted that the section's purpose is to broaden the vicarious liability of the owner, since it is the owner who is more likely to have assets and insurance to which the innocent victims can look for compensation.

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McLennan Ross LLP
Legal Counsel



November 24, 2004

COURT OF APPEAL ENLARGES ENTITLEMENT UNDER THE "OLD" FATAL ACCIDENTS ACT

On October 7, 2004, the Alberta Court of Appeal released the decision of Ferraiuolo v. Olsen, 2004 ABCA 281 (Alta. C.A.). That case examined section 8(2)(c) of the Fatal Accidents Act, R.S.A 1980 c. F- 4 as amended by Fatal Accidents Amendment Act, S.A 1994 c. 16. (the "FAA").

Section 8(2)(c) of the FAA conferred on certain surviving children - minors and those under 26 who are unmarried and not living with a cohabitant - the right to damages in the sum of \$25,000 for grief and loss of care, guidance and companionship when their parent is killed by a wrongdoer. The amount payable is fixed once liability is established; it is not contingent on proof of loss.

The key issue raised on the appeal was, simply stated - does s. 8(2)(c) of the FAA contravene constitutionally guaranteed equality rights under s. 15(1) of the Charter of Rights and Freedoms by denying to other children, because of their age and marital status, this same level of damages - indeed any damages at all - for grief and loss of guidance, care and companionship on wrongful death of their parent?

Ferraiuolo, who was 57 and married, claimed damages under s. 8(2)(c) of the FAA for grief and loss of guidance, care and companionship on behalf of himself personally. At trial, Ferraiuolo contended that this section discriminated against him on the grounds of both age and marital status - he was over 26 and married when his mother died - and was therefore unconstitutional. To remedy the claimed breach of s. 15(1) of the Charter, he argued that the court should strike out both the age and marital status limitations.

In fact, subsequent to his mother's death, the age limitation was removed by legislative amendment (see Justice Statutes Amendment Act, 2002, S.A. 2002, c. 17, s. 2(c)). Single children of any age now receive the amount prescribed by statute on wrongful death of a parent. Thus, as matters stand today, the only group of children unable to recover damages for grief and loss of guidance, care and companionship when their parent is killed by a wrongful act are children 18 and over who are married or living with a cohabitant. However, the New FAA only applies to those claims arising after the coming-into-force date of the legislation, that is November 1, 2002, and as such, did not apply to Ferraiuolo's claim which arose prior.

The trial judge found that s. 8(2)(c) was not discriminatory. Accordingly, there was no breach of s. 15(1). The trial judge reasoned that the impugned legislation did not deny human dignity nor stereotype those excluded from the legislation. Instead, the trial judge determined that s. 8(2)(c) was ameliorative legislation designed to benefit those most dependent on, and vulnerable to, a parent's death - the young and single. He therefore dismissed Ferraiuolo's claim for damages of \$25,000 for grief and loss of guidance, care and companionship rising out of his mother's death. Ferraiuolo appealed this aspect of the trial judge's decision.

Reversing the learned trial judges decision, the Court of Appeal concluded that the impugned legislation was discriminatory and violated s. 15(1) of the Charter.

The Court found, among many other things, that the effect of the legislative scheme was to completely deprive those in the claimant's group of any compensation for grief on the wrongful death of a parent. In its reasons, the Court stated that denying any claim for grief trivializes the loss a child feels where the parent-child bond has been broken by another's tortious conduct. Preventing those in the claimant group from seeking redress for wrongs done to them and attaching no legal recognition to the grief inflicted on them leads to a loss of self-worth and lack of empowerment.

The Court also found that the legislation compounded the survivor's grief and sense of injustice through its failure to value the parent's life that has been lost. Where a parent has been wrongfully killed, a child must deal not only with the loss of a parent, the child must also cope with the fact that a parent has died a violent death through the fault of another. This may well magnify the grief felt by the child. Worse yet, a child in the claimant group is left with an understandable sense of injustice knowing that no compensation is even payable by the wrongdoer for the grief suffered by the child.



Further, the claimant group (those 26 years of age and older) will generally have parents who are older. Therefore, the Court found that denying the claimant group redress for the wrong done sends a signal that the lives of older victims count for less in our society. This cannot be consistent with human dignity or with the affirmation of the value of human life. Allowing all surviving children, irrespective of marital status or age, to recover for the grief suffered on wrongful death of their parent, constitutes a tangible recognition by society of the harm caused by wrongful acts. It also holds accountable those responsible for perpetrating the wrongful acts. Acknowledging the harm caused to others and accepting responsibility for that harm are important values in a civil society.

As a result, the Court found that the impugned legislation was discriminatory and violated s. 15(1) of the Charter. The section was therefore amended to read, "\$25,000 to each child of the deceased person."

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McLennan Ross LLP
Legal Counsel



February 2, 2005

NEW MINORS PROPERTY ACT PROCLAIMED IN ALBERTA

On January 1, 2005, a new Minors Property Act, S.A. 2004 c. M-18.1 (the "Act") was proclaimed in force in Alberta. The new Act substantially alters the role of the Public Trustee with respect to personal injury settlements for minors.

Under the new Act, the authority to approve such settlements rests exclusively with the Court of Queen's Bench. Section 4 of the Act defines the framework for confirming settlements by application to the Court with 10 days notice to the Office of the Public Trustee. Under the new system, if a representative applies for settlement of a minor's claim, the Court may confirm the settlement if, in the opinion of the Court, it is in the best interests of the minor to do so. The Public Trustee may appear and give submissions, but is not obligated to do so. However, the Public Trustee must be represented, or have expressly declined to be represented. The Public Trustee may apply to rescind or vary any order confirming settlement if not provided with the requisite notice.

Most importantly, the settlement is only binding on the minor if it has been confirmed by the Court. If not approved, there exists the risk that the minor will later repudiate the settlement and reinstate the underlying claim. Also note that if the minor is 14 years of age or older, they must consent to the application confirming settlement (or the Court must dispense with their consent).

Any money payable to a minor under a settlement that has been confirmed must be paid to (a) a trustee appointed by the Court who is authorized by the appointment to receive the money; (b) the Public Trustee; or (c) if the settlement does not exceed \$5000.00, as otherwise directed by the Court.

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McLennan Ross LLP
Legal Counsel



February 2, 2005

SUPREME COURT OF CANADA DISMISSES LEAVE TO APPEAL APPLICATION: OWNERS LIABILITY AND CONDITIONAL CONSENT

On January 6, 2005, the Supreme Court of Canada dismissed the application of Kodiak Construction Ltd. for leave to appeal the May 5, 2004, Alberta Court of Appeal decision of *Mugford v. Kodiak Construction Ltd.*, 2004 ABCA 145 (Alta. C.A.). That case reviewed vicarious liability of a motor vehicle owner under section 181(b) of the Highway Traffic Act, R.S.A. 1980 c. H-7 (now section 187(2) of the Traffic Safety Act, R.S.A. 2000, c. T-6) for losses and damages caused while the vehicle is in the possession of another person with the owners consent.

Kodiak, the vehicle owner, provided an employee, Weber, with a company vehicle for use during the course of his employment. Weber had endorsed a form acknowledging that the vehicle was not for personal use.

The trial judge found that Weber had breached the company policy as he was using the vehicle for personal matters at the time of the accident, and further was impaired by alcohol. The trial judge further held that the existence of consent under 181(b) was to be determined at the time of the accident, as such, she found there was no express consent to operation of the motor vehicle, and no resulting liability to Kodiak as owner.

However, the Court of Appeal disagreed with the trial judge's application of section 181(b). The Court reviewed the historical evolution of the provision, the specific wording, along with the public policy reasons behind vicarious liability of vehicle owners. The Court held that section 181(b) does not permit "conditional consent". The Court found that to allow the section to be interpreted in this fashion would lead to absurd results, and further, that public policy demanded protection of the public by imposing upon the owner of a motor vehicle the responsibility of careful management and the assumption of risk of those who are entrusted with use and operation of their vehicle. Further, the Court noted that the section's purpose is to broaden the vicarious liability of the owner, since it is the owner who is more likely to have assets and insurance to which the innocent victims can look for compensation.

For a complete copy of this decision please go to our website www.mross.com and click on Publications/Articles & Media/Insurance - *Mugford v. Kodiak Construction Ltd.*

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McLennan Ross LLP
Legal Counsel



February 18, 2005

SUPREME COURT OF CANADA TO HEAR CASE ON SOCIAL HOST LIABILITY

On February 17, 2005, the Supreme Court of Canada granted leave to appeal in the matter of Childs v. Desormeaux, [2004] O.J. No. 2065 (Ont. C.A.), and as such, will hear argument on the issue of social host liability later this year.

In that case, the Defendant, Desormeaux, attended a New Year's Eve "bring your own alcohol" party hosted by Zimmerman and Courier. Desormeaux consumed a great deal of alcohol, became impaired, and left to drive home. His vehicle struck another automobile in which the Plaintiff, Childs, was a passenger. Childs was rendered a paraplegic and brought an action for damages against Desormeaux and the social hosts, Zimmerman and Courier.

The Ontario Court of Appeal upheld the trial judge's decision dismissing the claim against the social hosts, for the following reasons:

1. the party hosted by the defendants, Courier and Zimmerman, was a BYOB party. Thus, the social hosts did not provide, nor did they serve, the alcohol consumed by Desormeaux;
2. there was no evidence to suggest that the social hosts knew how much alcohol Desormeaux drank while at the party; and,
3. most importantly, there was no evidence that the social hosts knew that Desormeaux was impaired when he drove away from the party.

The Court of Appeal also stated that their decision should not be interpreted to mean that social hosts are immune from liability to innocent third party users of the road for damages caused by impaired guests who drive a car. On the contrary, the Court did not foreclose the possibility of social host liability particularly when it is shown that a social host knew that an intoxicated guest was going to drive a car and did nothing to protect innocent third parties.

The Supreme Court's decision in Childs v. Desormeaux is expected to further define the boundaries of social and commercial host liability in Canada, and will be the subject of a future email alert.

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McLennan Ross LLP
Legal Counsel



March 18, 2005

SUPREME COURT OF CANADA: RELIEF FROM FORFEITURE PROVISIONS CAN APPLY TO BREACH OF A STATUTORY CONDITION.

On February 24, 2005, the Supreme Court of Canada issued reasons for judgment in the matter of Marsh v. Halifax Insurance Co., [2005] S.C.J. No. 7. That case dealt with the vacancy conditions of a fire insurance policy.

Ms. Marche and Mr. Fitzgerald purchased a home and converted it to two apartments. The house was vacant for four months before a tenant moved in. The house was destroyed by fire. They had insured the house with the Halifax Insurance Company. Halifax denied their claim for the fire loss. The insurer maintained that the prior four month vacancy amounted to a change material to the risk which invalidated coverage pursuant to Statutory Condition 4 of Part VII (Fire Insurance) of the Insurance Act (N.S.). Halifax Insurance said the owners should have advised them of the prior vacancy and claimed that failure to do so amounted to a change material to the risk which invalidated coverage.

The trial judge found that, assuming the insured had breached Statutory Condition 4 by not advising the insurer of the earlier vacancy, the insured should be relieved from the consequences of that breach under s. 171 of the Act, which states that a policy condition is not binding on the insured if a court holds it to be "unjust or unreasonable". The Court of Appeal reversed the decision on the ground that s. 171 did not apply to statutory conditions, but applied only to contractual conditions.

The Supreme Court of Canada overruled the Court of Appeal, and reinstated the trial judges decision. The SCC held that Section 171 of the Insurance Act applies to statutory conditions that are unreasonable or unjust in their application. Section 171's purpose is to provide relief from unjust or unreasonable insurance policy conditions and should be given a broad interpretation, which included application to the Statutory Conditions.

In light of the finding that s. 171 applies to statutory conditions, the SCC held there was no reason to interfere with the trial judge's conclusion that if the insurance contract was void by reason of Statutory Condition 4, the court should relieve against that result under s. 171 on the ground that the vacancy had been rectified prior to the loss.

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McLennan Ross LLP
Legal Counsel



March 18, 2005

COURT OF APPEAL: INSURER CANNOT WAIVE PRIVILEGE OVER INSURED'S COLLISION STATEMENT

On February 6, 2005, the Alberta Court of Appeal issued reasons in *Auer v. Lionstone Holdings Inc.*, 2005 ABCA 78 (Alta. C.A.) examining waiver of the insured's statutory privilege attaching to mandatory collision statements provided under the Motor Vehicle Administration Act, R.S.A. 1980, c. M-22 (now the Traffic Safety Act, R.S.A. 2000 c.T-6).

In May 1999, the respondent/defendant, Devries, was attempting to make a left turn when he collided with the appellant/plaintiff, Auer, who was driving a motorcycle. Auer suffered serious injuries. At the scene, Devries gave a statement to the police.

During settlement discussions, the Defendant's statement was released by his insurer. At discovery, the Defendant refused to answer any questions regarding the statement. The Plaintiff brought an application compelling the Plaintiff to answer questions regarding the Statement on the basis that any privilege had been waived by production of the statement by the insurer. The Plaintiff argued that an insurer has actual, implied or ostensible authority to waive privilege without the Defendant's consent.

However, the Court of Appeal found that the statement was privileged and that privilege was not lost by release of the statement by the insurer. The Court stated that nothing in the relevant legislation gives the insurer express authority to waive the privilege without consent of the Defendant. Nor do the insurer's statutory powers give the insurer implied authority to waive the privilege.

The "mischief rule" requires a court to consider the social context to determine the mischief that the legislation is intended to cure. The purpose of the privilege is to ensure that drivers give frank and honest statements to the police concerning the cause of accidents. That purpose would be seriously undermined if the privilege could be waived by an insurer without the driver's consent.

The Court stated that the fact that an insurer cannot waive the privilege without the driver's consent does not undermine the insurer's powers under the Insurance Act to negotiate and settle claims. In that process, it may be appropriate for an insurer to share the driver's privileged statement with a party that is adverse in interest. If negotiations fail, however, the statement is still not, in the words of s. 11(3)(b), "admissible in evidence for any purpose in a legal proceeding arising out of the accident" If the Legislature had intended to give insurers the right to waive the driver's privilege over the statement, presumably it would have said so at the same time as it authorized the statement's release to insurers.

Therefore, *Auer v. Lionstone Holdings Inc.* stands for the proposition that privilege over collision statements may only be waived by the party who gave the statement. The insurer has no actual, or implied, authority to waive privilege without the Defendant's consent.

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Legal Counsel



March 18, 2005

SUPREME COURT OF CANADA: LUMP SUM SETTLEMENT OF LONG-TERM DISABILITY BENEFITS ARE TAXABLE UNDER THE INCOME TAX ACT.

On February 25, 2005, the Supreme Court of Canada rendered its decision in *Tsiaprailis v. Canada*, [2005] S.C.J. No. 9. The Plaintiff, Tsiaprailis, was badly injured in a motor vehicle accident and received long-term disability benefits under her employer's insurance policy. After eight years, the insurer terminated her benefits. Tsiaprailis sued the insurer for a declaration that she was entitled to a continuation of these benefits. Tsiaprailis and the insurer settled and Tsiaprailis received a lump sum payment of \$105,000 after signing a release in which the insurer denied all liability.

The Minister of National Revenue reassessed Tsiaprailis to include the full settlement amount as income. The Tax Court of Canada, however, set aside the Minister's decision, and held that the lump sum settlement was not taxable. The Federal Court of Appeal allowed the Minister's appeal on the basis that the portion of the lump sum payment was attributable to benefits arrears was made to replace monies "payable ... on a periodic basis ... pursuant to a disability insurance plan" and was therefore taxable under s.6(1)(f) of the Income Tax Act.

Tsiaprailis appealed the Federal court of Appeal's decision, she argued that the payment was not made pursuant to a disability plan; rather, that it was made pursuant to an agreement that settled a disputed obligation.

The majority of the Supreme Court of Canada dismissed Tsiaprailis' appeal. The majority held that the taxability of settlement monies will depend on the nature of the settled interest. The test to be employed is twofold:

1. What was the payment intended to replace?
2. Would the replaced amount have been taxable in the recipient's hands?

In this case, the evidence was clear that part of the settlement monies was intended to replace past disability payments and such payments, had they been paid to Tsiaprailis, would have been taxable under s.6(1)(f).

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McLennan Ross LLP
Legal Counsel



May 25, 2005

INSURED SUBMITS FAKE RECEIPTS - SUPREME COURT OF CANADA DISMISSES CLAIM

On March 7, 2005, the Supreme Court of Canada issued written reasons in the matter of *Alavie v. Chubb Insurance Co. of Canada*. In that case, the insured appealed an order granting the insurer's motion for summary judgment and dismissing the insured's claim against the insurer for recovery of losses arising from the theft of personal property.

Following the theft at her residence, the insured submitted a loss claim under a tenant's policy of insurance issued to her by Chubb. Her claim was in the total amount of \$950,000 and included losses in the amount of \$50,000 relating to the theft of eight pieces of artwork. In attempting to substantiate the value of the stolen artwork, the insured provided Chubb with false invoices. When the invoices were challenged by Chubb, the insured represented that they were genuine invoices and that they reflected true values for her artwork as established by prior bona fide sales as reflected in the invoices. The appellant maintained this position when questioned under oath during the discovery process, until she was compelled by court order to disclose the names of the purchasers omitted from the invoices. Only then did she admit that the invoices and her prior representations concerning their validity were false.

The Supreme Court upheld the prior Courts' dismissal of the insured's claim in its entirety. The Court stated that it has long been established at common law that a fraudulent insurance claim by an insured results in no recovery by the insured under the applicable insurance policy. In addition, in this case, the Court noted that the policy contained an express contractual condition stating that no coverage was provided under the policy if the insured intentionally concealed or misrepresented any material fact relating to the policy, either before or after a loss.

The Court concluded that the appellant was disentitled by her admitted conduct to any recovery under the policy, both under the applicable common law rule and by virtue of the terms of the insurance policy.

The insured argued that her misrepresentations were not "material". In her submission, "materiality" required that she inflate the value of her claim. While the invoices were false, they only sought to justify the legitimate value of her artwork, which was a small part of her overall loss.

The Court held that the interpretive issue raised by the appellant concerning the meaning of "materiality" under the policy and the applicable common law rule did not arise in this case because the appellant's fraud and misrepresentations related directly to the value of her loss claim. The appellant owed a duty of utmost good faith to her insurer. By her wrongful conduct, the appellant breached this duty in her dealings with the insurer. As a result, no evidence of the value of any part of her claimed loss, even if now adduced, could be trusted or accepted by the insurer or the Court.

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McLennan Ross LLP
Legal Counsel



June 21, 2005

ALBERTA COURT OF APPEAL REVERSES LANDMARK SEATBELT DECISION

On May 24, 2005, the Alberta Court of Appeal reversed the landmark decision of *Chae v. Min*. The appellant, Chae, was injured in a motor vehicle accident. Chae was a front seat passenger and was thrown from the vehicle when it failed to negotiate a turn. At trial, Chae was found 75% contributorily negligent for his damages because he failed to wear a seat belt. Chae appealed the finding of contributory negligence and the assessment of damages on the grounds that the trial judge failed to apportion liability using the correct test.

The day of the accident, Chae and the two respondents, Min and Oh, drank two jugs of beer amongst the three of them at a lounge. They left in Oh's vehicle, with Min driving and Chae in the front passenger seat. The car failed to negotiate a curve on the highway and slammed into a ditch, injuring all three. An accident reconstructionist estimated the vehicle left the highway at a speed between 65 - 87 kilometers per hour, where the posted speed was 50 kilometers per hour.

The trial judge found that Chae was not wearing an operational and available seat belt at the time of the accident, and that had Chae been wearing his seat belt, he would have suffered only minor injuries. Further, the trial judge found that he and his friends had been drinking at a lounge, they were returning home on a rural, unlit road late at night and Chae was unfamiliar with the driving ability of the driver. She apportioned 75% of the damages sustained to him and 25% to the driver.

The Court of Appeal found that the trial judge had focused almost entirely on Chae's conduct, overlooking the numerous and serious breaches of the driver of the vehicle.

Applying the comparative blame- worthiness approach, the Court of Appeal held that the driver's conduct was a greater departure from the standard of care of a reasonable person and clearly more blameworthy. Accordingly, liability was apportioned 75% against the driver and 25% against Chae.

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McLennan Ross LLP
Legal Counsel



December 5, 2005

COURT OF APPEAL ORDERS NEW TRIAL IN HANKE V. RESURFICE CORP.

On November 7, 2005, the Alberta Court of Appeal ordered a new trial in the matter of *Hanke v. Resurface Corp.*, [2003] A.J. No. 946 (Alta. Q.B.).

Hanke is a product liability action against the manufacturer of an ice re-surfacing machine (Resurface Corporation), and the distributors of that product, (LeClair Equipment Ltd.) arising from a machine sold to and put in service by the City of Edmonton. The Plaintiff, Hanke, was an arena attendant who was injured when a gasoline explosion occurred on January 8, 1995 while he was preparing to operate the machine to re-surface the ice at a city arena where he was working for the City of Edmonton as an arena operator. The claim advanced alleges liability of the manufacturer and the distributor for design defects in the machine, as well as failure to warn of known dangers or dangers that should have been known.

There were two similar tanks at the rear of the machine, one for gasoline and one for hot water. The tanks were adjacent to one another. The experts testified that the explosion and fire were caused by hot water being inserted through a hose into the gasoline tank, where it vapourized into the surrounding atmosphere and was ignited by a nearby ignition source.

The trial judge found that the hose was inadvertently placed into the gasoline tank. However, he concluded that it was Hanke's carelessness that caused the accident. The trial judge did not consider the expert and lay evidence lead in relation to the contribution of the design of the machine to the accident.

The Court of Appeal overturned the trial Judge's decision. As Hanke's act of inserting or leaving the hose in the gasoline tank may have contributed to the explosion, the material contribution test should have been used rather than the but for test of causation used by the trial judge. The trial judge further erred in considering only Hanke's actions, and not the manufacturer or distributor's actions, in determining causation. The trial judge failed to adequately address certain factors, including the location and colour of the tanks, in finding it was not foreseeable for a worker to put the water hose in the gasoline tank. A new trial was ordered.

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McLennan Ross LLP
Legal Counsel



December 5, 2005

ALBERTA SET TO PASS *MATERNAL TORT LIABILITY ACT*

On November 30, 2005, the *Maternal Tort Liability Act* (Bill 45) (the “Proposed Act”) passed third reading in the Legislative Assembly of Alberta. The effect of the Proposed Act is to make a mother liable to her child for injuries suffered by the child on, or after birth, that were caused by the mother’s use or operation of a motor vehicle during pregnancy if, at the time of the use or operation, the mother was insured under a contract of automobile insurance. The liability of the mother imposed by the Proposed Act is limited to the amount of insurance money payable under the mother’s policy that the child can recover as a creditor under section 635 of the *Insurance Act*, R.S.A. 2000 c.l-3.

The Proposed Act is intended to partially unseat the decision of the Supreme Court in *Dobson (Litigation Guardian) v. Dobson*, [1999] 2 S.C.R. 753 (S.C.C.). In *Dobson*, the defendant mother was involved in a motor vehicle accident when she was 27 weeks pregnant suffering extensive injuries which resulted in her child be delivered by Caesarian section later that day. The child also suffered pre-natal injuries which caused permanent physical and mental impairment. The child brought an action in negligence for damages against the mother.

The Supreme Court held that such an action could not be advanced for reasons of public policy. The policy concerns related to privacy and autonomy rights of women and the difficulties inherent in articulating a judicial standard of conduct for pregnant women. Therefore, the duty of a mother to her foetus was left to continue as a moral obligation, already freely recognized and respected, without compulsion by law. The Court suggested that an imposition of any other duty was for legislators.

The effect of the *Maternal Tort Liability Act* is to impose limited liability, which will require the mother’s insurer to respond to claims brought for damages suffered by a child while in utero, if arising out of a motor vehicle accident

Please note that as of the writing of this article, the Bill has not been given Royal Assent, and as such, is not yet law in Alberta.

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McLennan Ross LLP
Legal Counsel



May 6, 2006

SCC SAYS SOCIAL HOSTS NOT LIABLE

Across Canada, people were eagerly awaiting the SCC decision in *Childs v. Desormeaux* which considers what, if any, responsibilities social hosts have to third parties arising from alcohol consumption by guests in the host's home.

Family BBQs, dinner parties and Christmas gatherings could have changed dramatically if it was found hosts had a responsibility to monitor guests' alcohol consumption and, in the larger picture, had to bear responsibility to some unknown third party if that person was injured by the actions of a guest who left the party intoxicated.

Social hosts can now breath a sigh of relief as the SCC ruled today that social hosts do not owe a duty of care to members of the public who may be injured by a guest's actions. The *Childs* case arose after Desormeaux left a 1999 New Years Eve party and drove while intoxicated. Desormeaux had a head-on collision, killing a young man and injuring Childs who was rendered a paraplegic. Childs sued Desormeaux and the hosts of the party claiming the hosts had a responsibility to her to ensure that Desormeaux did not drink and drive.

Both the Ontario Trial Court and Court of Appeal dismissed Child's claim. The trial judge held that while a person in the position of the social host may have foreseen that Desormeaux might cause an accident and injure someone, the policy considerations were too great to make a ruling that social hosts were liable to third parties. The Court of Appeal dismissed Child's appeal but for a different reason. The Appeal Court held that there was not even an initial duty of care on the part of the social hosts to third parties. Unless social hosts were actively encouraging the consumption of alcohol and creating the risk that gave rise to the accident, the host could not be found liable.

The SCC agreed with the previous Ontario decisions and dismissed Child's further appeal. Social hosts were distinguished from commercial hosts, such as bars and restaurants, who clearly have a duty to monitor alcohol consumption by their patrons. Commercial hosts have a duty to third parties who may be injured if an intoxicated patron leaves the premises and is involved in an accident.

The SCC noted that at most house parties, no one is relying on hosts to monitor alcohol consumption. People must be responsible for their decisions and actions, not the hosts. The SCC did leave the door open to find social hosts liable in circumstances where the host is involved in increasing the risk of a third party being injured. For example, if a host continues to serve alcohol to a visibly inebriated guest knowing that guest will be driving home, that may be a situation where the host owes a duty of care to a third party. However, the issue of policy considerations in making social hosts liable would still have to be determined.

The SCC found that "a party where alcohol is served is a common occurrence, not one associated with unusual risks demanding special precautions."...Further, "private social hosts are not acting in a public capacity and, hence, do not incur duties of a public nature."

While there remains the possibility of a social host being held responsible to a third party, the SCC has stated that without more, simply hosting a party where alcohol is served will not create that liability.

This alert is a general overview of the subject matter and cannot be regarded as legal advice. Please contact Alexis Moulton at amoulton@mross.com, Chad Brown cbrown@mross.com, or any other member of our Insurance Practice Group for further advice on this or any other topic.

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June 7, 2006

No DUTY To DEFEND CLAIMS OUTSIDE OF POLICY PERIOD – SUPREME COURT

On June 1, 2006 the Supreme Court of Canada released its decision in the case of *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada* dealing with the issue of an insurer's duty to defend.

These are the facts:

- From 1913 until 1958, the Jesuits operated a residential school.
- In 1988, the Jesuits purchased a comprehensive general liability policy from Guardian Insurance Co. of Canada, providing for errors and omissions insurance with respect to professional services.
- In January 1994, the Jesuits received a letter from counsel on behalf of Peter Cooper, a former student at the residential school, advising that he intended to hold the Jesuits responsible for physical and sexual abuse he suffered during his years as a student at the residential school.
- In March 1994, counsel on behalf of the Jesuits contacted Guardian Insurance, their insurer, and reported Mr. Cooper's claim. At that time, counsel for the Jesuits indicated that the Jesuits might be facing other similar claims in the near future and provided the names of nine other potential victims.
- In September 2004, Guardian refused to renew the Jesuits' policy. Following the expiration of the policy, approximately 100 additional claims were made against the Jesuits.

The issue before the Supreme Court of Canada was whether Guardian had a duty to defend the Jesuits in relation to the claims arising out of the operation of the residential school. The Supreme Court determined that the policy in question was a claims-made policy. In short, the insurer had a duty to defend only claims actually made during the policy period.

In deciding that Guardian Insurance only had a duty to defend the claim of Mr. Cooper, the Supreme Court determined that in order to constitute a "claim" and thereby engage the insurer's duty to defend, there must be a communication by a third party during the policy period of an intention to hold the insured responsible for damages.

In considering whether an insurer's duty to defend has been triggered, an insurer should be mindful of whether the policy in question is a claims-made policy. If so, the question becomes whether or not a claim has been made within the effective period of the policy, thereby triggering the duty to defend.

According to this case, a claim arises where a claimant has communicated, during the coverage period, either directly or indirectly, their intention to hold the insured responsible for damages suffered. If such a communication has occurred, a claim has been made and the duty to defend is triggered.

This alert is a general overview of the subject matter and cannot be regarded as legal advice. Please contact Michelle McCaffery at mmccaffery@mross.com Dave Risling at drisling@mross.com, or any other member of our Insurance Practice Group for further advice on this or any other topic.

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