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Innocent landowners responsible for environmental cleanup, court rules

In one of the scariest court decisions of recent years, the Ontario Divisional Court has ruled that innocent landowners can be held responsible to remedy contamination caused to their properties by a neighbour.

Back in December, 2008, Thompson Fuels filled the fuel oil tanks at the Hazel St. home of Wayne and Liana Gendron in the city of Kawartha Lakes (Lindsay). Subsequently, several hundred litres of the oil leaked from the basement of the house onto city property.

After noticing the leak, Wayne Gendron informed his insurance company. They hired D.L. Services to remediate the contamination. D.L. soon discovered that the oil had travelled into the storm sewers and was winding up in Sturgeon Lake.

When the Ministry of the Environment (MOE) heard about the spill, they sent a provincial officer to visit the site. The officer formally ordered Gendron to assess the extent of the spill, eliminate any adverse effects, and restore the natural environment.

Environmental remediation is hugely expensive. Three months later, Gendron's insurance coverage ran out, and the ministry was notified. Since Gendron did not have the financial resources to continue the remediation work, cleanup efforts were discontinued. By this point, the Gendron property itself had been remediated, but contamination on the adjoining city property still had the potential to adversely impact Sturgeon Lake.

In March, 2009, the MOE issued an order to the city requiring it to take all necessary steps to prevent discharge of contaminant and to remediate its own property.

The city appealed the MOE order to the Environmental Review Tribunal but it was dismissed in July, 2010. The city then launched a further appeal to the Divisional Court, claiming it shouldn't have to clean up contamination on its own property since it was an innocent party and hadn't caused the pollution in the first place. The case came before a three-judge panel of the court last May.

The stated purpose of the Environmental Protection Act is "for the protection and conservation of the natural environment." Under the legislation, a provincial officer may order anyone who owns property to prevent, reduce or eliminate contamination, whether or not that person caused the contamination.

Before the Gendron case got to court, the city had performed all the remediation work required, making the appeal proceedings to determine responsibility moot. In an unusual move, the court decided to hear the appeal anyway, citing the public interest in clarifying future contamination cases.

The issue for the Divisional Court was whether the review tribunal was correct in refusing to hear evidence of who was responsible for the spill. Essentially, the tribunal's position was that it didn't matter who caused the spill. The most important goal is to protect the environment.

Writing for the Divisional Court, Justice Harriet Sachs ruled that the review tribunal was correct and that it was reasonable for it not to hear evidence showing it was not responsible for the oil spill in the first place. At the tribunal, no one disputed the fact that the city was an innocent party when it came to the contamination.

As a result, the Divisional Court has now underscored the law that innocent parties may be forced to cover the costs of pollution caused to their land by a neighbour. The fact that the innocent party here was a municipality does not change the importance of the ruling — innocent parties are responsible for cleaning pollution on their properties, no matter who caused it.

The remediation costs of the Kawartha Lakes cleanup are still up in the air. The city is suing the MOE, the homeowners, the cleanup company and others in order to recover its costs.

The big issue here is insurance protection. Most homeowner policies exclude some or all coverage for pollution conditions, but now that the bar has been raised significantly, homeowners will be looking to their insurers for protection from a Kawartha Lakes-type scenario.

What do you think? Should innocent owners have to face bankruptcy when their neighbour causes pollution?

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Kawartha Lakes (City) v. Gendron et al, 2012 ONSC 2035 (CanLII)

CITATION: Kawartha Lakes (City) v. Gendron *et al*, 2012 ONSC 2035

LINDSAY COURT FILE NO.: 111/10

DATE: 20120330

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SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
The Corporation of the City of Kawartha Lakes	)	Christine G. Carter, for the plaintiff
	)	
	)	
Plaintiff	)	
	)	
- and -	)	
	)	
	)	
Wayne Gendron, Liana Gendron, Doug C. Thompson Ltd., Her Majesty the Queen in Right of Ontario, Technical Standards and Safety Authority, D.L. Services Inc., R. Ian Pepper Insurance Adjusters Inc., Farmers Mutual Insurance Company and Les Reservoirs D'Acier de Granby Inc.	)	William G. Scott for the defendants, Farmers Mutual Insurance Company, Paul Tushinski, Esq., for the defendant Doug C. Thompson Ltd., operating as Thompson Fuels, H. Klein for the defendant, Ian Pepper Insurance Adjusters Inc, Tamara Farber and John R. Tidball for the moving party, D.L. Services Inc. No one appearing for the defendants: Her Majesty the Queen in Right of Ontario, the Technical Standards and Safety Authority, Les Reservoirs D'Acier de Granby Inc.
	)	
Defendants	)	
	)	
	)	**HEARD:** January 12, 20 and Feb 13th, 2012
	)	
	)	

MacDougall, J.

REASONS FOR RULING

Background

On December 18, 2008 the defendant Thompson Fuels (Thompson) delivered approximately 700 litres of furnace oil to the home of the defendants Wayne and Liana Gendron (the homeowners).

On the same day, Wayne Gendron determined that the oil was leaking from the furnace oil tank. He notified Thompson, which in turn notified the defendant, the Technical Standards and Safety Authority (TSSA). TSSA visited the site on December 22, 2008 and issued a remediation order.

On December 29, 2008 the homeowners reported the spill to their insurers, the defendant, Farmers Mutual Insurance Company (Farmers).

On December 30, 2008 Farmers assigned the matter to the insurance adjuster, the defendant R. Ian Pepper Insurance Adjusters Inc. (Pepper).

Pepper consulted the defendant, D.L.Services Inc. (DLS) to investigate the cause of this spill and assess its remediation.

On December 30, 2008, DLS determined that oil had migrated onto adjoining property and had entered Sturgeon Lake. On the same day DLS notified the Ministry of the Environment (MOE). The plaintiff has joined Her Majesty, the Queen in Right of Ontario as a party defendant.

DLS provided a preliminary estimate that the cost of remediation would exceed the homeowners' $1 million policy limits with Farmers.

From January to June 2009, DLS was actively engaged in remedial activities both on the homeowners' property and off-site involving various measures in and on the shoreline of Sturgeon Lake.

On or about March 20, 2009 DLS and Pepper notified the MOE that the homeowners' policy limits had been exhausted.

On March 23, 2009, the MOE issued an order for the plaintiff, The City of Kawartha Lakes (the City) to remediate the contaminated public property.

In response to the issuance of the Provincial Officer's order against the City, the City commenced an appeal before the Environmental Review Tribunal which was subsequently dismissed. The City has sought judicial review of the Tribunal's decision in the Ontario Divisional Court which is still outstanding.

The City initiated investigative and remedial efforts on its property and retained the services of Golder Associates Ltd. on or about March 29, 2009.

The Court Action

The Plaintiff's Claim

On July 30, 2010 the City commenced this action against multiple parties, including:

- the Gendron's, [the homeowners];
- Thompson Fuels [the fuel supplier];
- Her Majesty the Queen [the Minister of Environment];
- TSSA, [the province's Technical Standards and Safety Authority];
- DLS [the remediation contractor retained by Farmers and/or Pepper to remediate the spill at the Gendron property];
- Pepper [the insurance adjuster retained by Farmers to provide adjusting services in connection with the spill];
- Farmers [the Gendron's insurers]; and,
- Granby [the fuel tank manufacturer]

For our purposes at this point, the relevant portion of the plaintiff's Statement of Claim are:

Paragraph 1:
The plaintiff claims:
(a) compensation in the amount of $1 million from the owner of the pollutant and persons having control of the pollutant pursuant to section 99 of the Environmental Protection Act, R. S. O. 1990, c.E 19 for costs incurred in remediating the oil spill originating from 93 Hazel St., Dunsford, Ontario.(The homeowners' property)

(b) Recovery of all costs incurred in remediating the oil spill originating from 93 Hazel St., Dunsford, Ontario;

Paragraph 39:
The defendants, as the owners of the pollutant or the persons having control of a pollutant that is spilled and that causes or is likely to cause an adverse effect, are jointly and severally liable to the City in that they failed, and continue to fail, to carry out their duty pursuant to section 93 (1) of the EPA, i.e. "forthwith to do everything practicable to prevent, eliminate and ameliorate the adverse affect and to restore the natural environment", which duty became effective immediately upon the Defendants' knowing, or when they ought to have known, that a pollutant was spilled and was causing or was likely to cause an adverse effect.

Paragraph 40:
The defendants Gendrons, Thompson Fuels and Les Reservoirs d'acier de Granby Inc. are strictly liable in nuisance. The Gendron defendants, the TSSA, Thompson Fuels, DLS, Ian Pepper, the MOE, and Les Reservoirs d'acier de Granby Inc. are also liable in negligence for causing the spill or failing to respond to the spill in a timely manner causing the City to incur remediation costs.

Paragraph 41:
The City had no opportunity to prevent the furnace oil from making its way into Sturgeon Lake, whereas Thompson Fuels, the homeowner, TSSA and the Ministry of the Environment were all aware that a spill occurred on private property and could/should have ensured that the spill remained contained on private property.

Paragraph 42:
Each of the homeowner, Thompson fuels and/or the manufacturer of the tank bear responsibility for causing the spill.

Paragraph 43:
Each of the homeowner, Thompson Fuels, the homeowners' insurance adjuster, the Ministry of the Environment and TSSA had an opportunity to prevent the fuel oil from reaching Sturgeon Lake, greatly reducing the remediation costs and virtually eliminating the need for an order being issued against the taxpayers of the City.

Farmers served its Statement of Defence and by way of Notice of Motion dated November 14, 2011. Farmers brought a Summary Judgment motion, returnable January 12, 2012, requesting the dismissal of the City's claim against Farmers, including all across-claims.

By way of a Notice of Cross-motion dated December 15, 2011, the City moved to amend its Statement of Claim to include Farmers in paragraph 40, and to add the words "and/or cost efficient" so the amended paragraph would read:

> The defendants Gendrons, Thompson Fuels and Les Reservoirs d'acier de Granby Inc. are strictly liable in nuisance. The Gendron defendants, the TSSA, Thompson Fuels, DLS, Ian Pepper, the MOE, Farmers Mutual and Les Reservoirs d'acier de Granby Inc. are also liable in negligence for causing the spill or failing to respond to the spill in a timely and/or cost efficient manner causing the City to incur remediation costs.

Subsequently, DLS and Pepper also brought motions for Summary Judgment seeking an order that the City's claim against them also be dismissed.

The parties have not conducted Examinations for Discovery and the exchange of documents has not been completed.

The Plaintiff's request for the amendments

The plaintiff 's first submission is that the motion for leave to amend was brought before the close of pleadings and technically, the plaintiff does not require the consent of the parties or leave of the court to amend its pleadings pursuant to Rule 26.02 (a) of the *Rules of Civil Procedure*. Plaintiff's counsel states that pleadings did not close until December 23, 2011 and the plaintiff's motion to amend was brought on December 15, 2011.

The respondents did not directly respond to this proposition as their submissions focused on other arguments summarized below.

Although plaintiff's counsel appears to be correct, nevertheless, all counsel dealt with the underlying issues raised by the respondents and for practical reasons I will proceed to deal with those issues. Even if no leave is necessary because pleadings have not closed, the issues raised by the respondents would likely be before the court on a rule 21.01 (1)(b) motion to strike out the amended pleading as disclosing no reasonable cause of action.

Plaintiff's counsel submits that :

i) the effect of the addition of the words "*Farmers Mutual*" simply provides an alternative ground for relief against that defendant;

ii) the addition of the words, "*and/or cost-efficient*" do not amount to pleading a new or separate cause of action. It is simply a *clarification* or *a particular* of the negligence originally pleaded.

The responding defendants, Farmers, DLS and Pepper all oppose the plaintiff's amendment request.

They submit that the request to add the words: "*and/or in a cost efficient manner*" in paragraph 40:

i) amounts to a new cause of action and is not a *clarification* or further *particular* of negligence;

ii) as a new cause of action, as the plaintiff was aware of the underlying facts as of April 2, 2009, more than 2 years before the amendment request, therefore the proposed amendment is barred by the *Limitations Act, 2002;*

iii) further, the proposed amendment is not tenable at law.

The defendant Farmers also contends that, unlike the other defendants named in paragraph 40, the plaintiff had not alleged negligence against Farmers and that the only claim brought against Farmers is the statutory claim in paragraph 39 of the Statement of Claim, under the provisions of section 93(1) the*Environmental Protection Act* dealing with *"the owners of the pollutant* or *a person having control of a pollutant…".*

Farmers also argues that this proposed negligence claim is a new cause of action and is outside the limitation period. Further, this claim of negligence is not tenable at law as Farmers does not owe a duty of care to the City.

Analysis

Rule 26.01 provides that an amendment is to be permitted even in the face of unfairness and prejudice unless the prejudice cannot be compensated for in costs or an adjournment. The court is entitled to inquire into the merits of the proposed amendment to ensure that it at least meets a basic threshold of legal soundness, that is the amendment is tenable in law.

The responding defendants did not raise the issue that, if the amendments were allowed, they would be prejudiced in a way that couldn't be compensated by way of costs.

Firstly, does the proposed addition of the words, "*and/or cost efficient",* amounts to a *further particular* or *clarification* of negligence or does the addition of these words raise a new cause of action?

The jurisprudence on this issue requires an analysis as to whether all of the material facts have already been pleaded, and, if so, there is no "new cause of action". In other words, where the factual matrix has not changed, there is no new cause of action. See: *Gladstone, Denton, Ivany, and Silveria.* [1]

In the recent decision in *1309489 Ontario Inc, v. BMO Bank*[2], Lauwers J. helpfully summarized the applicable principles on this issue with which I agree and adopt. Although that was a motion brought by the defendant to strike out the plaintiff's Statement of Claim under Rule 21.01(1) (b), the discussion is applicable to our case. In summary form, at paragraphs 11 and following [Case citations omitted]:

> i) In a motion to strike a pleading as disclosing no cause of action under rule 21.01(1)(b), the moving party must show that it is "plain, obvious and beyond doubt that the claim will not succeed" at trial.
>
> ii) The Statement of Claim must be read generously to allow for drafting deficiencies; and if the claim has some chance of success, it must be permitted to proceed. The threshold for sustaining a pleading on a rule 21 motion is not high.
>
> iii) "Cause of action" can mean the factual matrix out of which the claim arises, or the legal nature of the claim. The trend of the cases favours the broader, factually oriented approach to the meaning of "cause of action". This is a more functional approach that is also consistent with a purposive approach to the interpretation of limitations legislation.
>
> iv) An overly technical approach to the definition of the term "cause of action" would produce results inconsistent with the Supreme Court's policy direction. Further, re-establishing the "forms of action" in the guise of construing the term "cause of action" in a more technical, legal sense would be inconsistent with the policy thrust that led to the abolition of the forms of action.
>
> v) When the defendant's claim is that the amendment raises a new cause of action after the limitation period has expired, then the court's usual analytical approach is to consider the constituent elements of the alleged new cause of action to see if the facts as originally pleaded, or as better particularized in the proposed new pleading, could technically sustain that cause of action.

In reviewing the Statement of Claim, I find that it is clear and obvious that the City has alleged that as a result of an oil spill that migrated from the homeowners' property and onto public property, the City was required to incur costs to complete the remediation that was not completed by the remediator, DLS retained by the homeowners' insurers' adjuster, because the homeowners' policy limits had been reached.

Among other allegations, the City claimed in paragraph 40 that the homeowners, TSSA, Thompson Fuels, DLS, Ian Pepper, the MOE, and the fuel tank manufacturer, Granby, were negligent, causing the City to incur remediation costs. The particulars of negligence currently pleaded was that they caused the spill or failed to respond to the spill in a timely manner.

I am not of the opinion that, as the responding defendants contend, the "factual matrix" pleaded only relates to the "delay issue" and not to the "remediation issue". I find that the responding defendants are attempting to place too narrow an interpretation on the pleading.

In paragraph 30 of the Statement of Claim, although the respondents are not specifically named, the plaintiff does raise a factual issue that if the homeowner, TSSA and the MOE had acted differently the cost of remediating the spill would then have been in the range of $1,000,000, well within the homeowners' insurance limits.

In paragraph 34 the plaintiff alleges that DLS on March 28, 2009 had advised the City that it was still being paid by the homeowners' insurers and that [insurance] funds were still available for cleanup. Paragraph 43 states that each of the homeowner, Thompson Fuels, Pepper, the MOE and the TSSA had an opportunity to prevent the fuel oil from reaching Sturgeon Lake, greatly reducing the remediation costs and virtually eliminating the need for an order being issued against the taxpayers of the City.

In paragraph 45 the claim states the damages to the City were caused by the wrongful acts *of the defendants, their servants and agents*. The claim does set out more specifically what those wrongful acts by several of the Defendants consisted of, including statutory breaches under the EPA, nuisance and negligence.

In paragraph 40, the plaintiff pleads negligence against the named defendants which caused the City to incur remediation costs. The pleading provides particulars of that negligence that the named defendants either caused the spill or failed to respond to the spill in a timely manner.

In giving the pleading a generous reading, as required, I find that adding the words "*and/or in a cost effective*" [manner] is a further particular of negligence which allegedly caused the City to incur remediation costs. In my view, this particular act of negligence is still within the factual matrix of the City claiming they suffered damages as result of incurring remediation costs which the City alleges it would not have had to incur but for the alleged negligence of the named defendants.

As stated in *Cahoon*[3], the Supreme Court of Canada made it clear that the "factual situation which gave the plaintiff a cause of action was the negligence of the defendant which caused the plaintiff to suffer damage. This single cause of action cannot be split to be made the subject of several causes of action".

The provision of appropriate particulars does not amount to the assertion of a new cause of action. See: *Silveira* and *Ivany*.[4]

Applying the presumptive approval test for amendments to pleadings, the request to add the words "*and/or cost-efficient*" in paragraph 40 will be allowed.

Having found this requested amendment does not assert a new cause of action, it is not necessary to deal with the limitation issue as it relates to this amendment.

Turning next to the second requested amendment, to include the defendant, Farmers as a named defendant in paragraph 40.

As described earlier, the plaintiff has made allegations against all defendants without specifically naming them and in other paragraphs makes more specific claims against certain named defendants.

In paragraph 39 of the claim, the plaintiff pleads a statutory breach of duty claim under the EPA against all defendants.

Paragraph 1(c), without reference to the defendants, claims for: *recovery of all costs incurred in remediating oil spill originating* from the homeowners' property. Again in paragraph 45, the Statement of Claim states that, *the damages to the City were caused by the wrongful acts of the defendants, their servants and agents*.

It is clear that the pleading, as it exists, alleged that Farmers, among others, was also responsible for the fact that the City was required to incur costs in remediating the oil spill.

Giving a fair reading to the pleading, in my view, it is clear that the City is blaming *all* the defendants for having to incur the remediation costs expended because of the homeowners' offsite insurance limits were apparently reached before the remediation was complete and, as the homeowners did not have the resources to complete the remediation, the MOE ordered the City to complete the remediation.

In *Denton*[5], the plaintiff had originally alleged negligence and the request to amend the claim to add an allegation of trespass was allowed after the limitation period had expired. At para: 8, Grange J. stated:

> I am not sure that the mere pleading of an alternative ground for relief arising out of the same facts constitutes the raising of a new cause of action -- see *Canadian Industries Ltd. v. Canadian National R. Co.*, [1940] O.W.N. 452, [1940] 4 D.L.R. 629, 52 C.R.T.C. 31 [affirmed 1941 CanLII 16 (SCC), [1941] S.C.R. 591, [1941] 4 D.L.R. 561, 53 C.R.T.C. 162], where an amendment in a contract action was permitted to claim relief in negligence based upon the same facts upon the ground that such new claim did not create a new cause of action, but merely an alternative claim with respect to the same cause.

In *Randolph*[6], Lane J. allowed an amendment alleging negligence in a claim originally based on breach of fiduciary duty. He stated that "the new plea is of a different legal conclusions drawn from the same set of facts".

With respect to Farmers, I find that what is being proposed is an alternative theory of liability based on the same factual matrix.

As noted above, the responding defendants also contend that the proposed amendment does not raise a reasonable cause of action as they do not owe a duty of care to the plaintiff. I propose to deal with the "duty of care" issue in the Summary Judgment motions. Accordingly, I would grant the amendment sought by the plaintiff to add Farmers as a named defendant in paragraph 40 of the Statement of Claim.

As well, as I have found that adding Farmers as a named defendant arises out of the same factual matrix, it is not necessary to consider the limitation argument

I will now turn to the Summary Judgment motions brought by the defendants Farmers, Pepper and DLS.

The Summary Judgment Motions

i) Thompson Fuels' request for a stay or adjournment

The Defendant, Thompson Fuels did not take a position on the statutory claims argument brought by the plaintiff under the EPA, however, Thompson Fuels is opposing DLS's motion for Summary Judgment on the negligence issue.

Part way through this hearing, Thompson Fuels brought a motion asking the court to either stay or adjourn these Summary Judgment motions submitting that they are "premature and should not proceed until documents have been fully exchanged and Examinations for Discovery have been completed". I reserved ruling on Thompson Fuels' request. Considering my rulings on the Summary Judgment motions, that request turned out to be moot.

ii) The Plaintiff's Claims of Breach of Statutory Duty

The moving parties, on the Summary Judgment motions, the Applicants, Farmers, Pepper and DLS, all seek an order dismissing the Plaintiff's claim alleging that they were in breach of their duty under the provisions of the *Environmental Protection Act*, (EPA) in that they were "*owners of the pollutant*" or were "*the person having control of the pollutant*".

Section 91 of the EPA defines *"owner of a pollutant"* as follows:

> *"owner of the pollutant" means the owner of the pollutant immediately before the first discharge of the pollutant, whether into the natural environment are not, in a quantity or with the quality abnormal at the location were the discharge occurs, and "owner of a pollutant" has a corresponding meaning.*

The definition of a person "*having control of a pollutant* "under section 91 (1) of the EPA is as follows:

> *"the person having control of the pollutant" means the person and the person's employee or agent, if any, having the charge, management or control of a pollutant immediately before the first discharge of the pollutant, whether into the natural environment are not, in a quantity or with the quality abnormal at the location where the discharge occurs, and "person having control of the pollutant" has a corresponding meaning.*

Section 93 (2) of the EPA provides that:

> *The duty imposed by subsection (1) comes into force in respect of each of the owner of the pollutant as the person having control of the pollutant immediately when the owner or person, as the case may be, knows or ought to know that the pollutant is spilled is causing or likely to cause an adverse affect.*

Farmers served the City with a "Request to Admit" a list of facts. The City did admit, among other things, that the oil tanks were on the homeowners' property and that at no time before or at the time of the spill did Farmers own the oil contained in the tanks.

Farmers also filed affidavit material that at no time before or at the time of the spill did Farmers or any of its employees or agents have charge, management or control of the tanks or have charge, management or control of the oil.

The City admitted that the oil leaked from the homeowner's fuel tank on or about December 18, 2008 and that the homeowners only notified their insurers, Farmers, on approximately December 29, 2008.

The City has not filed any materials that contradict the evidence filed on behalf of Farmers on this issue.

Pepper filed affidavit materials attesting to the fact that Pepper was not an *owner of the pollutant* or did it *have control of the pollutant* in response to the City's statutory claim under Part X of the EPA. The City has not filed any evidence challenging this.

Pepper has also presented evidence that it was retained by Farmers on December 30, 2008 to adjust the oil spill and that immediately thereafter, Pepper retained DLS to remediate the spill and retained DLS to investigate the spill. Pepper and a representative of DLS were at the homeowners' property on December 30, 2008, at which time it was observed that the oil spill had already migrated onto surrounding property and into Sturgeon Lake.

Also, on December 30, 2008 a representative of DLS attended the site and commenced an investigation into the cause of the oil spill.

The City has not presented evidence challenging this information.

The City has admitted that DLS did not cause the spill.

On the evidence before me, it cannot be said that Farmers, Pepper or DLS *caused* the oil spill nor were any of them the "*owner of the pollutant" (the oil that was spilled)* as defined in the EPA.

On a summary judgment motion, the court in *Transamerica* stated that each side must put its best foot forward with respect to the existence or non-existence of material issues to be tried. This principle has recently been quoted with approved in the Ontario Court of Appeal case of *Combined Air*.[7]

On the material before me the City has not produced any cogent evidence to seriously challenge the position of the applicants on this issue.

The City's statutory claim under Part X of the EPA based on the undisputed evidence that each of Farmers, Pepper or DLS were not the "*owner of thepollutant*" and "*did not control the pollutant*", will be dismissed as having no chance of success.

iii) The City's Claims of Negligence

Turning next to the City's negligence claims. The Applicant Defendants, Farmers, Pepper and DLS all submit that there is no recognized duty of care between an insurer and third-party claimant, and that there is no duty of care owed by the insurer's agents to a third party claimant and that therefore, the City's claim of negligence against each of them is not tenable at law.

In order to ground a claim for negligence, there must be a duty of care between the tortfeasor and the party claimed to be harmed. A duty of care rises when there is reasonable foreseeability of harm in light of a proximate relationship between the parties. See: *Elliott*[8]

Counsel for the Applicant Defendants refer to several cases that dealt with that issue.

In *Silverado Restaurant*[9], Pierce J. was dealing with claims brought by a lawyer's client against the lawyer's professional negligence insurer where she reviewed several cases that raised a similar issue.

At paragraph 32 Pierce J. stated that there was no proximity between the parties and therefore no duty of care between an insurer and a party adverse in interest to the insured. Without a contractual relationship, there was no duty of care to a third-party. The insurer's duty of care is confined to the insured. Were it not so, there would be far-reaching liability to third parties, making it impossible for an insurer to gauge its risk when agreeing to ensure.

In *Overload*[10], the plaintiff sought to recover from the insurer of the wrongdoer for "its breach of duty" in failing to settle the claim *reasonably* so that the excess insurers would not have had any claim against it. The British Columbia Court of Appeal in dismissing the plaintiff's claim, held that an insurer is not obliged to minimize the liability of a party "adverse to an interest or to protect his interest".

In *Karamanolis*[11], the plaintiff was injured by the negligence of the operators of a go-cart track. An action against the operators succeeded and the operator's insurer paid to the plaintiff the full amount under the operators' liability insurance policy. The plaintiff brought an action against the insurer for the excess amount of the judgment alleging that it ought to have advised the operators to settle within the policy limits or, alternatively, that it ought to have offered adequate insurance or ought to have advised the operator to obtain adequate insurance. On the motion to strike out the Statement of Claim as disclosing no cause of action, Katzman J. (as he then was) in, granting the motion, held that the insurer owed no duty to the plaintiff, and the plaintiff in any event, suffered no loss on account of the failure to settle within the policy limits.

In *Elliott*[12], the plaintiff's home, which was insured under a policy of insurance with their insurer, was destroyed by fire. Initially, the insurer, relying on investigations and reports by their investigator and experts which accused the plaintiffs of arson, denied coverage. The plaintiff brought a successful action against their insurer for their losses and also brought an action for damages against the insurer's experts and agencies for failure to exercise proper care in investigating and reporting in respect of the fire loss.

The court found the issue raised to be a novel one as a duty of care in such a situation had not been authoritatively recognized before. Therefore, whether a duty of care existed had to be analyzed using what is now referred to as the *Anns* test,(or the *Anns/Kamloops* test).

The court in *Elliott* found that there was foreseeability and sufficient proximity to make it just and fair to impose a *prima facie* duty of care owed to the insured by an investigator retained to investigate the cause of the loss on behalf of the insurer. There was also found to be a close causal link between the alleged negligence and the damage allegedly sustained. The court, in turning to the second main step of the *Anns* test as to whether that *prima facie* duty of care should be negated for policy reasons, determined that, for two main policy considerations, it would be unwise to recognize a duty of care proposed. Firstly, the plaintiffs had a contractual remedy on the insurance policy, which remedy would include a claim for aggravated and punitive damages. Secondly, imposing the proposed duty would distort the legal relationships among the insurer, the insured and the investigators which could potentially undermine the ability of the insured and the insurer to properly deal with insurance claims.

The Applicant Defendants contend that our case is very similar to the *Elliott* case and the same result should apply. Otherwise, as counsel for the Applicant Defendants submit, if the City is to succeed with respect to its claim of negligence against these responding Defendants, the court with have to decide to extend the categories of duty of care which exist under the common law to include this type of relationship.

In reply, the Respondent Plaintiff states that, as the case involves multiple parties and voluminous documents, a full appreciation of the interaction

between those parties cannot be fully appreciated as to whether a duty of care exists on a Summary Judgment motion.

Further, the relationship between the insurance adjuster, Pepper and the insurer, Farmers has not been fully explored as the exchange of documentation has not been completed and Examinations for Discovery have not been held. As the relationship between the adjuster and the insurer has not been fully explored, therefore the issue of their negligence cannot be fully appreciated without a complete record.

The Respondent Plaintiff also submits that in any event, each of, the homeowners' insurer, Farmers, the insurance adjuster, Pepper and the remediation contractor, DLS, owed the City, as an adjoining property owner, a duty of care with respect to the remediation carried out on the City's property.

In addition, if the court conducts the *Anns* analysis and finds a *prima facie* duty of care, the second stage of that analysis will involve "policy considerations" that are best understood in the context of the relationships between all parties and cannot be fully appreciated without a complete record.

The Duty of Care issue

In considering the arguments on this issue in the context of a Summary Judgment motion seeking a dismissal of the City's claim against the Applicant Defendants, the question is: can a full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial? See: *Combined Air Mechanical*[13].

In considering whether the duty of care being challenged is a novel one and subject to the *Anns* analysis, it should first as a preliminary point, be determined whether it is within one of the categories that have been established or within a category, analogous to an established category. See*: Douglas*[14] at para.14.

If that is so, it is not necessary to go on at all since the *prima facie duty* is posited and overriding policy reasons for denying such a duty do not normally exist. It is only if there is an open or unsettled issue that the *Anns* analysis is required. Analogous duties need not be tested by the *Anns* analysis either. See:*Hill*[15] at para.19 and Linden Feldthusen *Canadian Tort Law* 9th ed. (Toronto: LexisNexis, 2011) at 304 & ff.

In the circumstances in this case, the Applicant Defendants contend that the case law confirms that an insurer does not owe any duty of care to a third party.

The Applicant Defendants, Pepper and DLS contend that if Farmers does not owe a duty of care to the City, then as agents for Farmers, they would likewise not owe a duty of care to the City.

Apart from the issue as to whether the insurer or its agents owe a duty of care to a third party, in my view, it is *arguable* that the duty of care issue in these circumstances can be considered from an addition context.

As a result of the MOE's order against the insured homeowners, the remediator, DLS was retained by the homeowners' insurer and/or the insurer's agent adjuster to remediate the public lands affected by the oil spill. This required DLS to go onto the City's property to try and effect a remediation of the oil spill that originated on the homeowners' property. DLS was directed by Pepper and/or Farmers in this regard. In those circumstances, can it be said that, given that the remediator has been retained by the homeowners' insurer/ adjuster and paid by the insurer, that the law is clear that the remediator 's contractual duty is only to the insurer/adjuster and maybe to the homeowner? Or is the law clear that any duty to the neighbour [the City] is limited to allegations of *malfeasance* but there would be no duty for *nonfeasance* to the property owner on whose lands the spill has migrated to, and where the remediator's offsite work is taking place?

Given the case law presented , I am satisfied that when viewed from this perspective, this case can be considered a "novel case" and the duty of care issue does not fall within an established category or within a category analogous to an established category. Accordingly, the *Anns* analysis would be required.

In that regard, I also need to be guided by what Feldman J.A. stated in *Hasket*[16] as to the proper approach for applying the *Anns* test in the context of a Rule 21 motion that would also be applicable to these Summary Judgment motions. The issue at this stage is not *whether* duty of care will be recognized; rather, the court applies the two-stage analysis to determine whether it is plain and obvious that no duty of care *can be* recognized. Feldman J.A. also considered the proper approach to dealing with policy concerns that might exclude liability, that if it is not plain and obvious, the issue will be determined at trial.

The question then becomes, is it *plain and obvious* that there is no *prima facie* duty of care owed by the Applicant Defendants to the City in these circumstances?

There are two steps in the *Anns* analysis. The first step containing two aspects- *foreseeability* and *proximity*, and the second step involving a policy analysis.

In the first step, the question is whether there a sufficiently close relationship between the parties so that, in the reasonable contemplation of the defendant(s), carelessness on its part might cause damage to that person?

Dealing first with *reasonable foreseeability*. I am satisfied that should DLS as agent for Farmers and Pepper in responding on behalf of the insured homeowners' requirement to comply with the MOE order to remediate the public lands, acted carelessly with respect to the remediation of the City's lands, that the City would be harmed. I find therefore that Farmers, Pepper and DLS could foresee that they would create a risk of harm to the City if the remediation of the City's property was done carelessly.

Turning next to *proximity*. The proximity analysis involves deciding whether, despite the reasonable foresight of harm, it is unjust or unfair to hold the defendant's subject to a duty because of the absence of any relationship of proximity between the plaintiff and the defendant(s). The factors to consider here are expectations, representations, reliance, assumed or imposed obligations, physical closeness ("propinquity") and the property or other interests involved. This is not a checklist, but a collection of relevant considerations which must be weighed and assessed in the particular circumstances of the case. See *Cooper*[17].

In the circumstances of this case, it is arguable that, given that the MOE had ordered the homeowners to remediate the public lands that were adjacent to the homeowners' land and that the homeowners' insurers had retained a remediator for that purpose and that the homeowners' insurance policy had an offsite limit of $1M and that the remediator spent several weeks on the City's property performing remediation services, there is sufficient proximity to make it just and fair that *a prima facie duty* of care could be imposed on the Applicant Defendants to the City.

Accordingly, I find that it is not plain and obvious that no duty of care *can* be recognized in these circumstances.

In any event, as noted by the Supreme Court in *Odhavji Estate**[18]*, foreseeability and proximity normally should be characterized as triable issues.

The second stage of the *Anns* test requires a consideration of whether any *prima facie* duty of care should be negated for policy reasons. I have no hesitation in determining that this issue, in the circumstances of this case and considering the limited the material before me on this issue, must be left to be decided by the trial court.

Considering that this is at a very early stage of the litigation in that documents have not been fully exchanged and Examinations for Discovery have not been completed, I am not able to have a full appreciation of the evidence and the issues to make dispositive findings on the negligence claim with respect to whether the moving parties have a duty of care to the City.

The Applicant Defendants' motions for Summary Judgment on the City's negligence claims against them are therefore dismissed.

As decided earlier in these reasons, the City's statutory claims under the Environmental Protection Act against Farmers, Pepper and DLS are dismissed.

If there is an issue of costs, any party seeking costs will provide brief written submissions (not exceeding 7 pages) within 15 days and any responding party or parties to reply within 10days, likewise, no longer that 7 pages

"The Honourable Mr. Justice B. MacDougall"

DATE RELEASED: March 30, 2012

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[1] See: *Gladstone v. Canadian National Transportation Limited,* 2009 CanLII 38789 (ON SCDC), 2009, CanLII 38789 (ON SCDC); *Denton v. Jones (No. 2)*, 1976 CarswellOnt 363, 3 C.P.C. 137, 14 O.R. (2d) 383; *Ivany v. Financiere Telco*, 2011 CanLII ONSC 2785; and see *Silviera v. Regional Municipality of York*, 2010 ONSC 969 (CanLII), 2010 ONSC 969 (CanLII)

[2] *1309489 Ontario Inc, v. BMO Bank,* 107 O.R. (3d) 384

[3] *Cahoon v, Franks*, 1967 CarswellAlta 48; 60 W.W.R. 684; 1967 CanLII 77 (SCC), [1967] S.C.R. 455; 63 D.L.R. (2d) 274

[4] See: *Silviera* and *Ivany*, *supra*

[5] See *Denton, supra*

[6] See *Randolph v. Graye,* [1995] O.J. No. 777

[7]*Combined Air Mechanical Services Inc. v. Flesch,* 2011 ONCA 764 (CanLII), 2011 ONCA 764

[8] *Elliott v. Insurance Crime Prevention Bureau,* 2005 NSCA 115 (CanLII), 2005 NSCA 115(CanLII), (2005); 236 NSR (2d) 104

[9] *1013952 Ontario Inc. (c.o.b. Silverado Restaurant and Nightclub) v. Sakinofsky,* [2009] O.J. No. 4158 (S.C.J.)

[10] *Overload Tractor Services Ltd. v. British Columbia (Insurance Corp. of British Columbia)* , [1989] B.C.J. No. 1445 B.C.C.A.; [1998] B.C.J. No. 94

[11] *Karamanolis v. Prudential Insurance Co.* (1983) 42 O.R. (2d)

[12] See *Elliott v. Insurance Crime Prevention Bureau, supra*

[13] See *Combined Air Mechanical Services Inc. v. Flesch, supra*

[14] See *Douglas v. Kinger* , 2008 ONCA 452 (CanLII), 2008 ONCA 452 (CanLII)

[15] *Hill v. Hamilton-Wentworth Regional Police Services Board* , [2007] S.C.J. No. 41

[16] *Hasket v. Equifax Canada* 2003 CanLII 32896 (ON CA), (2003), 63 O.R. (3d) 577 (C.A.)

[17] *Cooper v. Hobart*, [2001] S.C.J. No. 76

[18] *Odhavji Estate v. Woodhouse*, [2003] SCJ No. 74