CUPE local and City of Montreal to pay $2 million in slip-and-fall class action

In early December 2004, when a severe ice storm turned Montreal into a giant skating rink, Local 301 of the Canadian Union of Public Employees (CUPE) staged a week-long illegal walkout and refused to salt or sand the roads and sidewalks. As a result, hundreds of residents slipped and fell, some suffering severe injuries. About 70 Montrealers joined a class action suit against the union, initiated by lead plaintiff Grace Biondi.

Biondi was on her way to a doctor's appointment when she fell and smashed her face on the ice. She had severe headaches for months afterward, forcing her to miss work. Another claimant underwent seven knee surgeries and lost her job because of the resulting absences. A pharmacist who required three wrist surgeries had to learn to write with his other hand.

The notoriously militant union local was protesting a new dispatch system introduced by the city. Workers defied a back-to-work order issued by the Essential Services Council and even mixed up the keys to the salt trucks to prevent any efforts to make the streets safer.

Quebec Superior Court Justice Danielle Grenier found in favour of the claimants and ordered the union to pay $2 million in damages to the victims.

In her blistering 55-page judgment, Grenier dismissed the union's claim that the strike was a "spontaneous" action to protest the new system, describing the testimony in defence of the strike as "unbelievable."

"The conduct of the union was, without a doubt, reprehensible on many levels," she said. "By its reckless behaviour and its staggering indifference, it took the people of Montreal hostage for a week."

She ordered the City of Montreal to pay 50 per cent of the award, noting that municipal officials had waited until a weekend in December, when staffing was low and the weather was unpredictable, to implement a system known to be unpopular with workers.

Both organizations say they will appeal the decision.

Some legal experts are concerned about the ramifications of the award if it is upheld. Donald Bisson, a lawyer with McCarthy Tétrault LLP in Montreal who defends against class actions, said the ruling has "huge implications" because it automatically presumes that anyone who fell in downtown Montreal during the weekof the strike fell because of the lack of ice-clearing, and does not allow for other factors—for example, impairment or inappropriate footwear.

"What's disastrous for the defence . . . is that this could be transferred to other cases," he said. "Just think about a drug case, a drug that is supposedly not working or has side effects." He argued that other factors, such as taking too high a medication dose or not following the instructions, could be pushed aside if the logic of the ice-clearing ruling were applied to such cases.

Other recent judgments

Court dismisses injured hockey player's claim against helmet manufacturer

The Supreme Court of British Columbia has ruled that a hockey player who suffered a traumatic brain injury cannot claim against Bauer Nike Hockey Inc., the manufacturer of the helmet he was wearing, or the Canadian Standards Association (CSA).

All amateurs playing organized hockey in Canada are required to wear a CSA-approved helmet. The CSA, a not-for-profit membership-based association serving business, industry, government and consumers in Canada, is responsible for setting the minimum standards for impact resistance of ice hockey helmets in Canada and for certifying those that meet the standard.

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In 2004, 17-year-old Darren More was playing organized hockey in Esquimalt, near Victoria, when he hit the boards with his back and the back of his head. The helmet he was wearing, the Bauer HH5000L, met or exceeded the applicable standards and was certified by the CSA.

More suffered a subdural hematoma, fell into a six-week coma, and was left with brain injuries that will require him to have 24-hour-a-day supervision for the rest of his life.

He and his family sued Bauer Nike and the CSA for $10 million, claiming that the company had manufactured an unsafe helmet and the CSA had failed to implement adequate safety standards.

They alleged that the design of the helmet did not offer a reasonable level of safety for rear impacts. They also charged that the CSA negligently issued "Certified Hockey Helmet" labels to Bauer to affix on its helmets, when it knew or ought to have known that these labels would lead users to believe that the helmets would protect against the risk of serious head injury.

The defendants pointed out that other labels on the helmet stated that severe head and brain injuries could occur despite wearing it. For example, the owner's information that was originally attached to the chin strap said, "This helmet affords no protection from neck, spinal, or certain types of brain injuries including those that may be caused by rotational forces. Severe head, brain, and spinal injuries including paralysis or death may occur despite using this helmet."

Mr. Justice Malcolm Macaulay dismissed the case. He said Bauer did have a duty to design products to minimize the risks arising from their intended use and the loss that could result from reasonably foreseeable mishaps involving the product. However, the company did not have to use the safest design available as long as the design was reasonable in the circumstances.

He also said the CSA owed a duty of care to More because it was reasonably foreseeable that a wearer of a mandatory certified hockey helmet might suffer harm if the CSA set the certification standard unreasonably low. Nevertheless, the rear impact design features of the helmet did not contribute to More's injury at all. This unfortunate accident may have occurred because More was predisposed to such injury.

The judge ruled that there was insufficient evidence for a finding of negligent misrepresentation because the CSA warning labels on the helmet were not misleading and More did not rely on them in any event. It was not established that any statement or omission on the part of the CSA contributed in any way to More's injury.

To read the Supreme Court of British Columbia judgment, go to http://www.courts.gov.bc.ca/jdb-txt/SC/10/13/2010BCSC1395.htm.

$34-million settlement for Dallas Cowboys employees injured in collapse

In May 2009, the Dallas Cowboys' tent-like practice structure near Dallas, Texas collapsed during a thunderstorm, injuring 12 people. Most seriously hurt were scouting assistant Rich Behm, who was paralyzed, and special teams coach Joe DeCamillis, who sustained a broken neck.

The two recently reached settlements with Summit Structures LLC and parent company Cover-All Building Systems, with Behm receiving about $19.5 million and DeCamillis about $4.5 million. In addition, companies held by team owner Jerry Jones—Blue Star Development Co. and Cowboys Center Ltd.—agreed to pay each man $5 million in cash and benefits.

Frank Branson, the attorney rep-resenting the men, said he'd never heard of a "larger recovery for two individuals" in similar legal cases. The two continue to work for the Cowboys, and Branson said the Jones family and the Cowboys have treated them like family since the collapse.

Trials against the Jones companies were scheduled for the fall of 2010 and the winter of 2011. The suits claimed that facility owner Blue Star Development Co. and landowner Cowboys Center Ltd. failed to have their collapse expert review final repair plans. Summit's engineering errors contributed to the collapse, according to a National Institute of Standards and Technology report. The federal agency warned that thousands of similar structures remain in use around the world and need to be checked for problems.

Heating oil spill not covered by homeowner's policy

In November 2008, while retired lawyer Brian Corbould was at his principal residence in Vancouver, a fuel company delivered oil to an above-ground tank that Corbould had installed at his vacation property in Anglemont, B.C. two years earlier. The tank sprang a leak and most of its contents spilled out, soaking into the ground around and under the cottage.

Corbould had an all-risks residential policy from BCAA Insurance, and he had informed the insurer that the main heating source for the cottage would be an oil furnace. After the spill, he made a claim for $200,000 to cover the cost of remediating the soil and removing and reinstalling parts of the building in order to re-landscape.

BCAA denied the claim, citing an exclusion that stated:

We do not insure:

- *Loss or damage caused by contamination or pollution, or the release, discharge or dispersal of contaminants or pollutants.*

According to the policy, "pollutants" meant any solid, liquid, airborne, gaseous or thermal irritant or contaminate, including smoke, vapour, soot, fumes, acid, alkalis, chemicals and waste.

Corbould argued that he was a non-commercial, residential homeowner who was not in the business of generating contaminants and who was operating a heating system as he had advised his insurer. He further claimed that the so-called pollution exclusion clause did not exclude liability for the unintended results of the normal operation of the heating system. To interpret pollutants to include something that occurred during the intended and normal use of the dwelling's heating system failed the common-sense test for determining what is "pollution."

The insurer argued that the escape of fuel oil into the property was clearly within the plain and ordinary meaning of contamination and/or pollution as referred to in the policy.

Supreme Court of British Columbia Justice Jon Sigurdson dismissed Corbould's suit, agreeing with BCAA that the exclusion applied.

"Reading the exclusion clause narrowly, I nevertheless conclude that the plain and ordinary meaning of the words in the exclusion clause is that an oil leak of this magnitude on the plaintiff's property is damage to the property caused by contamination or pollution or amounts to the release, discharge or dispersal of contaminants or pollution on the plaintiff's property," he said. "A leak of heating oil into the ground appears on its face to fall squarely within the meaning of the exclusion. I expect a reasonable informed person would consider a spill of approximately 950 litres of heating oil to constitute contamination or pollution."

To read the Supreme Court of British Columbia judgment, go to http://www.courts.gov.bc.ca/jdb-txt/SC/10/15/2010BCSC1536.htm.

Supreme Court interprets defective workmanship as an "accident" under commercial policy

B.C. Housing Management Commission (BCHMC) hired Progressive Homes as a general con-tractor to build four condominium housing complexes. After completion, BCHMC sued Progressive Homes, claiming breach of contract and negligence on the grounds that water leaking into all four buildings had caused rot, infestation and deterioration. The buildings were considered to be hazardous and to pose a substantial physical danger to the health and safety of the occupants.

Progressive Homes had secured several commercial general liability insurance policies with Lombard General Insurance Co. of Canada. The policies required Lombard to defend and indemnify the contractor when it was legally obliged to pay damages because of property damage caused by an occurrence or accident.

Lombard argued that it did not have a duty to defend because the claims were not covered under the insurance policies. The insurer said that "property damage," as defined in its commercial liability policy, can-not result from damage arising from another part of the same building—

it is limited to damage caused to third-party property and cannot apply to damage arising from the insured's own work.

The insurer claimed that Progressive Homes was negligent in its construction of the housing units and that it breached its contract with BCHMC. Progressive Homes argued that the inadequate construction was completed by subcontractors.

British Columbia courts ruled that Lombard did not have a duty to defend, agreeing with the insurer that defective

construction is not an "accident" unless it causes damage to the property of a third party.

Supreme Court of British Columbia Justice Bruce Cohen found that the court could not artificially divide the insured's work into its component parts for the purpose of establishing resulting property damage.

Court of Appeal for British Columbia Justice Catherine Anne Ryan, writing for the majority, said the underlying assumption of insurance is that it is designed to provide for "fortuitous contingent risk." In her view, damage resulting from faulty workmanship could not be considered fortuitous.

The Supreme Court of Canada disagreed, ruling that Lombard had a duty to defend.

"I see no limitation to third-party property in the definition of 'property damage,'" said Justice Marshall Rothstein. "Nor is the plain and ordinary meaning of the phrase 'property damage' limited to damage to another person's property."

Rothstein also found that dam-age resulting from faulty workmanship could be considered "fortuitous."

"Fortuity is built into the defini-tion of 'accident' itself as the insured is required to show that the damage was 'neither expected nor intended from the standpoint of the insured,'" he said. "This definition is consistent with this court's core understanding of 'accident': 'an unlooked-for mishap or an untoward event which is not expected or designed.' . . . When an event is unlooked for, unexpected or not intended by the insured, it is fortuitous. This is a requirement of coverage; therefore, it cannot be said that this offends any basic assumption of insurance law.

"There is no reference to intentional conduct by Progressive which would suggest that the property dam-age was expected or intended. The pleadings allege negligence, which, on its face, suggests that the dam-age was fortuitous. . . . If at trial it emerges that the damage was expected or intended by Progressive, then Lombard would not be required to indemnify Progressive. However, the duty to defend only requires a possibility of coverage and I am satisfied that possibility is made out in this case."

To read the Supreme Court of Canada judgment, go to http://scc.lexum.umontreal.ca/en/2010/2010scc33/2010scc33.html.