November 2012

mcmillan litigation bulletin

dinner and drinks: BC court of appeal confirms nightclub accident not within scope of professional insurance

In what may be the final chapter of a very long and protracted legal proceeding, the British Columbia Court of Appeal recently issued its decision in *Poole v Lombard General Insurance*.[1] This is a case that has captured the attention of the legal community across Canada both for the nature of the claim – an articling student suing an associate at her law firm for injuries suffered as a result of a fall at a night club after a firm sponsored dinner – and for the quantum of damages awarded – almost six million dollars in future wage loss. While the facts of this case should serve as a warning to employers that they need to be aware of potential liability for the acts of employees at non-traditional work functions, the appeal should also be of some comfort to insurers providing professional insurance to employers. In *Poole v Lombard*, the appellate court held that any connection, however tenuous, between the event where the act occurred and the employment, was not sufficient to engage coverage under the law firm's insurance policy. The policy, which was more broadly worded than many, did not extend to acts by an employee while out for impromptu drinks with co-workers after a employer sponsored dinner.

[1] 2012 BCCA 434 [*Poole v Lombard*].

The accident on which this case is based, occurred over ten years ago on April 6, 2001, when an articling student struck her head on the floor after being knocked over by an associate of the firm while dancing at a local nightclub. At the time, the student and the associate were both part of a group of co-workers who had gone out for drinks after a dinner, sponsored by their law firm employer. The hearing of this matter was split into two separate trials. The first trial dealt with the accident itself, and the second trial dealt with insurance coverage. The appeal in *Poole v Lambard*, was in relation to this second trial.

At the first trial, the British Columbia Supreme Court found that the student had suffered a mild traumatic brain injury as a result of the accident on the dance floor and that she could no longer pursue her career as a lawyer. The court further held that the accident was caused solely by the negligence of the associate and awarded damages against the associate personally in the amount of $5,913,783.54. Notwithstanding this significant damage award, the associate had previously reached a settlement agreement with the student on the basis that he would pay $1,050,000, the limits on his home owners insurance policy, and agree to continue to pursue the action against his law firm's insurer. The student could therefore only collect the full amount of the judgment if it was held that the accident fell within the coverage of the law firm's professional insurance policy.

This set the stage for the second trial, which focused on the issue of whether the associate was entitled to coverage from the law firm's "professional package" insurance policy provided by Lombard General Insurance. This trial turned on whether the associate fell within the scope of one of two clauses in the contract of insurance. The first clause dealing with acts within the "scope of" or "course of" employment and the second clause dealing with acts with "respect to" employment.

At trial,[2] the court held that the two clauses needed to be read together, and that when read together, only the clause relating to the "scope of" or "course of" employment could apply. The court went on to consider whether the associate's actions fell within the "scope of" or "course of" his employment and found that they did not, noting that while there were some business reasons to sponsor the dinner, the events at the nightclub had "a far more tenuous connection" with employment, and that the evidence did not support any residual benefit to the employer from the attendance of its employees at the nightclub. Considering only the first more narrow clause, the court found that the associate did not fall within the scope of the law firm's insurance policy.

On appeal, the associate conceded that his actions in causing the accident were not within the "scope of" or "course of" his employment, but sought a finding that the second clause could apply and did provide coverage as his actions were with "respect to" his employment.

The court held that the trial judge had erred in law in determining that the two clauses should be read in conjunction. The appellate court confirmed that "the primary interpretive principle" set out by the Supreme Court of Canada in *Progressive Homes Ltd. v Lombard General Insurance Company of Canada*,[3] was that "when the language of the policy is unambiguous, the court should give effect to clear language, reading the contract as whole." While there was overlap between the two clauses, the wording was unambiguous, and the trial judge was incorrect in interpreting the clauses together rather than as stand-alone clauses.

The court then examined the meaning of the phrase with "with respect to" employment and held that it has a wider meaning that "in the course of" or "within the scope of" employment. The court

---

[2] 2011 BCSC 65.

[3] 2010 SCC 33.

rejected prior American[4] and UK[5] case law, which took a more stringent view of the connection to employment implied by the wording "with respect to", and took a more practical view, that:

[T]he phrase requires that a line be drawn on a commercially reasonable basis between what is essentially firm functions and what are essentially social functions – notwithstanding some weak connection between the latter and an insured's employment.[6]

The court went on to hold that contextual factors such as who was in attendance, where the incident took place, whether business was being discussed, time and place, and the likelihood of benefit to the employer were all relevant in this determination. While not legally binding, the court suggested that the dinner likely would have fallen within the scope of coverage, but that going to the night club did not as this had crossed the line into a purely social function.

At the end of the day, whether an insurer providing professional insurance to an employer will be liable for the acts of employees at a non-traditional work event will be a fact specific determination and differ depending on the policy and the event, but *Poole v Lambard* makes it clear that liability will not extend indefinitely and courts will likely take a practical commercially reasonable approach in determining whether the event is sufficiently connected to the employment relationship to engage coverage.

by Andrew Aguilar

---

[4] *Rayburn v MSI Insurance Company*, 624 NW 2d 878 (Wis CA 2000).

[5] *Tesco Stores Limited v Constable & Ors*, [2008] EWCA Civ 362.

[6] Supra note 1 at para 49.

For more information on this topic, please contact:

Vancouver Andrew Aguilar 604.691.6864 andrew.aguilar@mcmillan.ca

a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.