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WHEN IT COMES TO DEFENCE COSTS, FIRST LAYER IS USUALLY THE PAYER

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In a world of increasing business risks, insureds often purchase one or more layers of excess coverage to secure additional protection from the unknown. Such layering of coverage, however, can trigger disputes between primary insurers and excess insurers.

In the recent decision of *ACE INA Insurance v. Associated Electric & Gas Insurance Services Ltd.*, 2012 ONSC 6248, the Ontario Superior Court of Justice considered the issue of when an excess liability insurer would have an obligation to contribute to defence costs which are often borne by the insurer at the primary layer.

In the *ACE INA Insurance* decision, the Ontario Superior Court of Justice found no equitable duty to contribute to defence costs on the part of the excess insurer where the excess insurer provided an "indemnity policy" rather than a "liability policy".

In this case, Toronto Hydro was insured by a CGL policy issued by ACE and an excess policy issued by AEGIS. Toronto Hydro's liability arose out of an explosion that occurred in the underground parking area of a high-rise residential apartment building in Toronto, Ontario. Although there was no express wording in the AEGIS excess policy requiring the insurer to contribute to defence costs, ACE brought an application to obtain a declaration that AEGIS had a duty to pay defence costs pursuant to the doctrine of equitable contribution.

In defending the application, AEGIS took the position that its policy was an "indemnity policy" rather than a "liability policy". Under its policy, AEGIS limited its indemnity obligation where there was other insurance, and limited its

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duty to indemnify to defence costs incurred by the insured, thus excluding those incurred by a third-party such as ACE. On this point, AEGIS argued that because defence counsel had been appointed by ACE rather than the insured, AEGIS had no obligation to pay defence counsel's fees.

There was a specific exclusion in the AEGIS policy for defence costs included "in other valid and collectible insurance", such as the ACE policy. As ACE had admitted that it had a duty to defend, was required by its policy to pay for defence costs and did so, it was AEGIS's position that the defence costs at issue were "included in other valid and collectible insurance" and were, therefore, specifically excluded under the AEGIS policy.

Finally, AEGIS argued that if AEGIS were required to contribute to the defence costs, there would be a serious prejudicial effect to the insured, as there would be less coverage available for damages and settlements. Under the ACE policy, defence costs were in addition to the policy limits and were unlimited. However, payment of defence costs eroded the limits of the AEGIS policy.

Justice C.J. Brown reviewed the policy wording and held that the AEGIS policy, by its specific wording, had limited its liability to indemnify the insured for the sums which the insured would become legally obligated to pay as damage and defence costs incurred by the insured, excluding expenses which are included as other valid and collectible insurance. The Court also made mention of the jurisprudence relied upon by the parties in which the Courts have consistently held that there can be no equitable obligation to contribute to defence costs, where the excess policy precludes a duty to defend.

Not surprisingly, the Court was also mindful of the impact that an imposition of an equitable duty to contribute would have on the insured. Although not a party to the application, the Court considered the prejudice to Toronto Hydro, were AEGIS required to contribute to defence costs. Having considered these issues, the Court held that the circumstances did not warrant or justify the imposition of an equitable duty to contribute on the part of AEGIS.

The policy wording is typically a key determinant of who will succeed on a coverage dispute. A Court will rely on the specific wording of the policy to determine the intentions of the parties at the outset with a plain reading of the document. This case confirms that an excess insurer will not be required to contribute to defence costs where the indemnity policy specifically excludes defence costs "included in other valid and collectible insurance", and such other valid collectible insurance is indeed available. Often protective of the rights of an insured, this Court was especially not prepared to erode the limits of the excess insurance policy where the primary policy provides for defence costs in addition to the policy limits.

QUANTUM OF DAMAGES

Injury	Non-Pecuniary	Total	Paragraph
Brain injury	$210,000	$1,633,034	¶M-2709
Neck injury	$50,000	$138,085	¶M-2712

RECENT CASES

Full-Text Decisions

Applicant Did Not Prove That Deceased Had Manifest Intent To Revoke Life Insurance Beneficiary Designation

Superior Court of Quebec, July 9, 2013

The applicant moved for a declaratory judgment seeking to determine her status and the status of her brother-in-law, who was the respondent, in respect of the life insurance proceeds of her late husband; she also sought to be declared the sole beneficiary of all life insurance policies of her husband. The deceased enrolled in a workplace insurance plan in

2007 and designated his brother as the beneficiary. That same year, the deceased and the applicant began cohabiting, and they married in 2010. They also had a son. The couple executed new wills in 2010, and the deceased's will purported to bequeath the proceeds of insurance policies to the applicant. The applicant submitted that their reciprocal wills reflected their intention to leave everything to each other. However, the respondent maintained that the real intention for making the wills was to designate a legal guardian for their son in the event something happened to both of them. The respondent stated that the deceased intended to leave him the proceeds so that he would have the means to fulfill his role as his nephew's guardian.

The motion was dismissed, and the respondent was declared the sole beneficiary of the life insurance policies. The issue was whether the revocation of beneficiary in the deceased's will was valid. Both parties agreed that because the will did not expressly identify policy numbers, the Court would have to analyze the circumstantial and extrinsic evidence to determine the deceased's intent. The Court found that the applicant did not establish that the deceased's intent was manifest that she be the sole beneficiary of his policies. The Court accepted that the likely reason for the wills was to appoint a guardian for their son in the event something happened to both his parents. This intention was further confirmed a few days after signing the wills, when the deceased added his son as beneficiary of his health and dental coverage, but did not execute a revocation of beneficiary in respect of the life insurance proceeds.

Blasi v. Di Ielsi, [2013] I.L.R. ¶I-5465

Insurer Failed To Show No Genuine Issue for Trial in Relation to Insured's Failure To Notify of Material Change to Risk

Ontario Superior Court of Justice, July 5, 2013

The plaintiff was seriously injured while he was a passenger in an automobile. The vehicle was being driven by a student driver who was a client of Diamond Driving School, of which the plaintiff was the owner. The accident occurred when an uninsured vehicle being pursued by police crossed into the path of the plaintiff and his student. The student car was insured by the defendant Aviva Canada Inc. ("Aviva"), but it was insured as a personal vehicle and not for business purposes. The plaintiff commenced two actions against Aviva. In the first, he claimed uninsured and underinsured coverage for tort liability; and in the second, he claimed statutory accident benefits. Regarding the first action, Aviva submitted that the plaintiff breached a statutory condition for failing to inform of a material change in risk. In the second action, Aviva made similar submissions. The defendants brought summary judgment motions seeking the dismissal of the two actions.

The motions were dismissed. Although section 234(3) of the *Insurance Act* expressly states that the statutory conditions do not apply to uninsured coverage under section 265, Aviva argued that statutory condition 1(1) applied to uninsured coverage because of the joint operation of various provisions of the *Insurance Act*. The Court found this reasoning was inconsistent with results reached in two other court decisions. Statutory condition 1(1) does not apply to uninsured coverage unless it is incorporated in the insurance contract; in this case, it was not so incorporated. But regarding underinsured coverage, the Court found that the same reasoning did not apply. Breach of statutory condition 1(1) would entitle Aviva to deny underinsured coverage. The plaintiff failed to report a change in risk material to the contract, but the question of whether he intended to do this was better left to a trial judge. As such, Aviva had not shown that there was no genuine issue for trial in each of the two actions.

Sobolewski v. Aviva Canada Inc., [2013] I.L.R. ¶I-5466

Insurer and Province To Pay Solicitor-Client Costs for Unfair Behaviour With Respect to LTD Plan

Court of Queen's Bench of Alberta, August 16, 2013

The applicant was successful on judicial review of a decision to terminate his long-term disability ("LTD") benefits; he now sought solicitor-client costs on the basis that party-party costs were not sufficient in the circumstances. The respondents were the applicant's employer (the province) and the administrator of the employer's LTD plan. The applicant argued that the circumstances included the nature of the litigation, the conduct of the respondent insurer and province, which included the insurer's misconduct in administering the LTD plan, and the applicant's being forced into

litigation to defend his livelihood and benefits. At trial, the Court found that the appeal board in this case made its decision without jurisdiction or, in the alternative, breached its duty of fairness by addressing an issue to which the applicant was not given an opportunity to respond. Further, the Court found the decision was unreasonable for various reasons.

The application was allowed. Generally, solicitor-client costs are only awarded in exceptional circumstances and generally only for conduct in the course of the litigation. However, in situations of judicial review, the courts have noted that the history of prior proceedings might be relevant in a determination on solicitor-client costs. The Court decided it would be appropriate to exercise its discretion in this case and award solicitor-client costs, due to the exceptional circumstances. To begin, the legislative scheme in place that required judicial review to enforce the contractual right to disability benefits was unique. In addition, if the applicant could have sued civilly, he could have sought punitive damages. Further, contracts of disability insurance are intended to be "peace of mind" contracts, and if they are breached, plaintiffs typically seek damages for mental distress. The Court also accepted that the applicant was forced to commence litigation; his source of income was cut and the appeal process worsened the situation. The Court hoped that this award would deter the respondents from unfair behaviour in the future.

Meleshko v. Alberta, [2013] I.L.R. ¶I-5470

Subrogating Insurer Proved Other Party and Its Insurer Were Liable for Water Damage to Insured's Basement

Superior Court of Quebec, August 8, 2013

An underground irrigation system sprung a leak, causing water to seep into a homeowner's basement. The plaintiff, Chubb Insurance ("Chubb"), was the homeowner's insurer. It indemnified him for the damage and became subrogated in his rights to $146,000. The defendant SES Intégration Inc. ("SES") sold and installed the sprinkler system, and maintained the system every spring and fall. The defendant Lombard General Insurance ("Lombard") was SES's liability insurer. The defendant in warranty, Ipex Inc. ("Ipex"), was the manufacturer of the polyethylene pipe used in the garden. The cause of the pipe leak was not certain, but several theories were advanced, including that the pipe was damaged after freezing the previous winter, was struck by a garden tool, or had a material defect.

The action was allowed against the defendants and dismissed against the defendant in warranty. If Chubb proved on a balance of probabilities that the pipe's failure was caused by freezing to the pipe, SES would be liable because it maintained the system. If the failure was also due to a latent defect in the pipe, the legal presumption of liability would apply to SES as a professional seller and to Ipex as a manufacturer. However, if the pipe was damaged by a gardening tool, SES, Lombard, and Ipex would not be liable. The Court found that freezing was the most probable cause of the pipe's failure. The evidence did not permit a conclusion that the pipe failure was a result of blows from a tool or that the pipe had a latent defect. Therefore, SES and Lombard were responsible for the damage to the homeowner's property. The claim against Ipex failed.

Chubb Insurance Co. of Canada v. SES Intégration Inc., [2013] I.L.R. ¶I-5471

Successful Defendants Entitled to Costs While Decision Was Under Appeal

Ontario Superior Court of Justice, August 14, 2013

The plaintiffs moved for an order staying the fixing of costs of the action until such time as the judgment had been satisfied or the issue of the defendant Hoang's insurance coverage had been decided. At a jury trial, the defendant Hoang was found liable for the accident involving his son, and damages of approximately $830,000 were awarded. The other defendants were found not liable. The plaintiffs then appealed the decision, and Hoang commenced an action, which was still in its early stages, against his insurer. He had not personally paid the judgment, and submitted he did not have the financial means to do so. The other two defendants had made offers to settle, and after trial they requested payments of costs on the basis that their offers were more generous than the jury's findings. The plaintiffs argued that it was premature to deal with costs for various reasons. In turn, the defendants each argued that there was no reason not to deal with them, and if appealed, they could be dealt with at the same time as the appeal on the merits was heard. The defendants submitted that the ability of a party to pay costs was only one issue to be

considered when fixing costs.

The motion was dismissed. The fact that the verdict was being appealed was no reason to delay issuing costs, nor was the fact that the defendant Hoang's coverage issues remained outstanding. Neither was a reason for departing from the usual practice of fixing costs after an event. The Court noted that it was reasonably clear to all parties prior to trial that it was possible that a finding of liability would be made against Hoang, with his insurer taking an off-coverage position. The Court concluded that there was no prejudice to the plaintiffs in dealing with costs. Because the verdict was under appeal, there was no chance that the judgment would be paid in the near future, even without regard to the coverage issues. The successful defendants were not parties to the other actions dealing with coverage, and therefore there was no compelling reason to force them to wait for the outcome of the other actions prior to having their issues of costs determined.

Hoang v. Vicentini, [2013] I.L.R. ¶I-5475

Other Insurance Decisions

- **Insurer Successful in Application To Examine Second Representative of Plaintiffs**
  Acciona Infrastructure Canada Inc. v. Allianz Global Risks US Insurance, [2013] I.L.R. ¶I-5467, Supreme Court of British Columbia (August 2, 2013)
- **Proceedings for Costs in Fast Track Actions Should Be Discouraged**
  Christen v. McKenzie, [2013] I.L.R. ¶I-5468, Supreme Court of British Columbia (July 24, 2013)
- **School Board Permitted To Intervene in Appeal Regarding Subrogation Rights**
  Hammond v. DeWolfe, [2013] I.L.R. ¶I-5469, Court of Appeal of Alberta (August 14, 2013)
- **Affidavit Evidence as to Identity of Driver Was Sufficient To Dismiss Application for Dismissal**
  Anhalt v. Flowers, [2013] I.L.R. ¶I-5472, Supreme Court of British Columbia (August 1, 2013)
- **Various Interpreter Fees Incurred Prior to Commencement of Action Were Found To Be Recoverable Costs**
  Ma v. Coyne, [2013] I.L.R. ¶I-5473, Court of Queen's Bench of Alberta (August 9, 2013)
- **Self-Represented Plaintiff Attempted To Amend Her Amended Statement of Claim**
  Spicer v. CAA Insurance, [2013] I.L.R. ¶I-5474, Ontario Superior Court of Justice (August 8, 2013)
- **Plaintiff Able To Prove She Was "Totally Disabled" but Only for a Specified Period of Time**
  Fedyk v. Insurance Corp. of British Columbia, [2013] I.L.R. ¶I-5476, Supreme Court of British Columbia (August 13, 2013)
- **Non-Party Witness Entitled to Copy of Her Statement Even Though Protected by Litigation Privilege**
  Minnie v. Insurance Corp. of British Columbia, [2013] I.L.R. ¶I-5477, Supreme Court of British Columbia (August 23, 2013)
- **Insurer's Examination for Discovery of Plaintiff Was Permitted To Continue**
  Li v. Oneil, [2013] I.L.R. ¶I-5478, Supreme Court of British Columbia (August 12, 2013)

Torts — Motor Vehicle

Owner of Stolen Vehicle Not Liable for Accident or for Husband's Actions in Vehicle Being Stolen at Gas Station

Court of Queen's Bench of Alberta, August 14, 2013

The applicant's vehicle was involved in an accident. She had given permission to her husband to drive it, but when he briefly left the vehicle while at a gas station, it was stolen. At the time of the accident, the driver was the defendant Al Karawi, now deceased. The applicant was named as a defendant in six separate actions arising from the accident. She sought summary judgment dismissing the actions against her on the basis that there was no merit to the claims

against her. The plaintiffs argued that the applicant, as owner, was vicariously liable for the negligence of her husband in respect of the theft of the vehicle.

The application was allowed, and the actions were dismissed. The Court found it clear that the applicant was not liable for the deceased driver's actions, because neither she nor her husband gave him consent to possess or drive the vehicle. With respect to the issue of vicarious liability, the Court stated that to prove this liability, the applicant's husband had to be the applicant's agent or employee under section 187 of the *Traffic Safety Act*. The Court noted that the plaintiffs' losses or damages occurred at the time of the accident, which occurred four days after the vehicle was stolen. At that time, the applicant's husband was not a person who was driving the vehicle or in possession of it. Therefore, even if the applicant's husband was negligent in allowing the van to be stolen, the applicant was not vicariously liable to the plaintiffs.

Mohamed v. Alberta (Public Trustee), [2013] I.L.R. ¶M-2707

Plaintiff Cyclist Bore 65% Fault for Being Hit by Truck

Supreme Court of British Columbia, August 27, 2013

The plaintiff was cycling in a curb lane when he collided with a truck that was turning right. The truck's driver testified that he signalled his intention to turn and did not notice the plaintiff before, during, and immediately after the accident — the plaintiff was dragged until bystanders alerted the driver. The plaintiff was seriously injured and sought damages. The defendants, who were the driver and the truck's owner, argued that the plaintiff was responsible for the accident because he overtook a truck on the right when it was unsafe to do to. Video evidence was presented at trial from a nearby grocery store's surveillance camera. Both the driver and the plaintiff claimed the traffic light at the intersection was red immediately prior to the accident. The video showed that the light was green for several seconds before the accident occurred. The video also made clear that the plaintiff was cycling hard and fast as he approached the intersection in tandem with the truck.

The action was allowed in part. The defendant driver had a duty of care of a reasonably prudent commercial truck driver, which included giving a high level of attention to the likelihood of others beside the truck, the truck's blind spots, and the gravity of potential harm. The plaintiff's standard of care was that of a reasonably competent cyclist, which included paying attention to the size, speed, and possible travel of other vehicles. Having regard to the above, the Court concluded that both parties were negligent in failing to meet the required standard of care. The defendant driver was the dominant driver, and he should have kept a more vigilant lookout in the period leading up to the turn. However, the plaintiff erred in attempting to pass a right-turning truck when there was little margin for error. In assessing the parties' relative blameworthiness, the Court found the truck driver 35 per cent at fault and the plaintiff 65 per cent responsible.

Nelson v. Lafarge Canada Inc., [2013] I.L.R. ¶M-2708

Substantial Possibility Existed That 16-Year-Old Plaintiff Would Have Achieved More-Than-Average Income But For Accident

Supreme Court of British Columbia, August 26, 2013

The plaintiff was 16 years old when she was struck by the defendant driver in a marked crosswalk. The defendant admitted liability on the second day of trial. After the accident, the plaintiff was induced into a coma for three days and was hospitalized for a week. The primary issues before the Court were the degree of cognitive and other forms of psychological impairment suffered by the plaintiff, the resulting impact on her future employment prospects, and the degree of ongoing care she would require for rehabilitation assistance and child care assistance. Evidence portrayed the plaintiff prior to the accident as a young person who displayed unusual initiative, diligence, and independence. Post-accident, the plaintiff alleged she became withdrawn and interacted with people differently.

The action was allowed. The experts agreed that the plaintiff suffered a moderate to moderate-severe brain injury. They also agreed that the accident occurred at a critical time in her development, occurred at a time where it negatively impacted on her educational and vocational potential, and affected her ability to establish her own self-identity. As a

result, the plaintiff now led an extremely solitary existence. The Court accepted that the plaintiff remained diagnosable with cognitive impairments. In assessing non-pecuniary damages, the Court found that the accident injuries fundamentally transformed and diminished the plaintiff's life: she became solitary, and she failed or struggled in her academic endeavours. The Court awarded $210,000 for non-pecuniary damages. Regarding future wage loss, the Court questioned whether the plaintiff would have gone to university, which the Court felt was unduly emphasized. Noting that there were many roads to financial success, the Court concluded that there was a substantial possibility that the plaintiff would have achieved some form of employment that paid more than the average income earned by women holding a university degree. The Court did agree that the plaintiff's ability to go to university had diminished. It also accepted that the plaintiff would likely be limited to part-time work in the future. The Court assessed her future wage loss at $800,000.

Payne v. Miles, [2013] I.L.R. ¶M-2709

Other Motor Vehicle Tort Decisions

- **Defendant's Request To Compel Plaintiff To Attend Functional Capacity Evaluation Was Denied**
  Jackson v. Yusishen, [2013] I.L.R. ¶M-2710, Supreme Court of British Columbia (August 7, 2013)

- **Plaintiffs Who Were Injured While Riding in a Towed Vehicle Were 25% Contributorily Negligent**
  Tabor v. Bridge, [2013] I.L.R. ¶M-2711, Supreme Court of British Columbia (August 8, 2013)

- **Plaintiff's Sick Bank Time Compensated at Gross Wage Loss Amount Instead of Net Amount**
  DeGuzman v. Ge, [2013] I.L.R. ¶M-2712, Supreme Court of British Columbia (August 12, 2013)

Torts — General

Lawyer Liable for $232,000 in Giving Away Proceeds of Sale of Plaintiff's Property

Supreme Court of British Columbia, August 30, 2013

This was an assessment of damages pursuant to the direction of a Court of Appeal decision. A couple had been estranged for many years, and the husband had moved back to India. While the estranged husband was in India, the wife, with the help of a lawyer, sold the family home, which was under the husband's name only. The lawyer gave the proceeds of the sale to the wife, with the knowledge that the property had been under the husband's name. When the husband returned to the country, he commenced an action against his wife, his son, and his wife's lawyer. The Court of Appeal found that the lawyer owed a duty of care to the plaintiff (see ¶G-2449).

Judgment of $232,200, plus interest, was granted to the plaintiff against the defendant lawyer. The onus rested on the plaintiff to demonstrate that but for the lawyer's negligence, he would not have suffered the loss he claimed. The Court noted that when the proceeds of sale were transferred into the defendant lawyer's trust account, the lawyer deducted his fees and then paid the balance to the wife. However, the vesting order in place at the time gave him the authority to approve the statement of adjustments but not the authority to deduct his fees or pay the balance to the wife. The Court found that the lawyer could not use as a defence the family law argument that the wife probably would have been entitled to 50 per cent of the proceeds. Therefore, the Court found the plaintiff was entitled to judgment for the amount received into the lawyer's trust account. Turning to the plaintiff's argument for loss of opportunity in relation to the housing market, the Court accepted that if the plaintiff had known of the existence of the sale proceeds, he would have invested them in purchasing a residence. However, because the residence that had been purchased by his wife was now vested in his name, the loss was nominal. The Court also awarded overall general damages of $120,000 and attributed $40,000 to the lawyer. While a greater amount of the plaintiff's distress was caused by the actions of the wife, the lawyer's negligence contributed to it in a significant way.

Dhillon v. Jaffer, [2013] I.L.R. ¶G-2534

Defendants in Product Liability Action Successfully Disputed Some Claimed Costs

Ontario Superior Court of Justice, August 19, 2013

The issue before the Court was the costs portion of a product liability case. The plaintiffs alleged that the male plaintiff was injured while doing dishes, washing what was known as a Visions Dutch Oven. The product allegedly failed, and broke and severely lacerated the plaintiff's wrist. The plaintiffs commenced negligence and breach of warranty claims against the defendants. The litigation lasted 10 years, culminating in a jury trial. The jury found that the defendants were liable in negligence for failure to adequately warn and that the plaintiff was 25 per cent contributorily negligent. The jury rejected the additional allegations of negligent design, negligent manufacture, and breach of warranty. With respect to damages, the jury declined to award amounts under certain heads of damages, and awarded far less than what the plaintiffs claimed in respect of others. Nonetheless, the plaintiffs were awarded over $1.1 million, less the 25 per cent contributory negligence. The defendants disputed various aspects of the plaintiffs' requested cost recovery.

Costs of $544,590.81 were awarded to the plaintiffs. The Court agreed with the defendants that costs should not be awarded on a substantial indemnity basis, as the amount awarded at trial fell between each party's offer to settle. In addition, the alleged "vigorous opposition" mounted by the defendants was not egregious enough to constitute misbehaviour warranting imposition of an elevated cost award. The Court next turned to the plaintiffs' argument they were entitled to a "premium" to recognize the complexity and importance of the issues before the Court. The Court again agreed with the defendants that such an award was not appropriate in the circumstances. The Court described the plaintiffs' result as very good but not spectacular or extraordinary: the jury rejected three of four grounds of liability and found contributory negligence. The Court then addressed the defendants' argument that the costs sought should be subject to an overall reduction of 25 per cent in accordance with the 25 per cent contributory negligence finding. This was a matter of the Court's discretion. The approach to determining such a reduction should be a detailed and reasoned one, and should question whether there was any purpose or rationale for making the proposed reduction, such that its imposition would be just. The Court concluded it would not be just in the circumstances.

Stilwell v. World Kitchen Inc., [2013] I.L.R. ¶G-2535

Securities Dealer Ordered To Pay Punitive Damages Awards

Supreme Court of Nova Scotia, August 7, 2013

This decision was part of a complex series of related actions involving many parties since 2001. The plaintiff ("NBF"), a securities dealer, commenced an action for unpaid margin debt arising from the collapse of a company ("KHI"). The defendants, which included executives and shareholders of KHI, former shareholders, and others, counterclaimed, alleging the vicarious liability of NBF for the actions of its employee (a broker) in artificially manipulating KHI's share prices. One defendant executive of KHI also commenced an action against an investment firm for breach of contract and negligence. NBF admitted that it failed to adequately supervise its employee, but submitted that the loss occurred because KHI was improperly funded. NBF also disputed that its employee's actions were unlawful or caused the losses. Punitive damages were also in issue.

The plaintiff's action was allowed in part; the defendants' counterclaim was allowed in part; and the action against the investment firm was dismissed. The Court found that NBF's employee breached not only his duty and standard of care in contract but also his fiduciary duty, and NBF breached its duty and standard of care in failing to adequately supervise its employee and uncover his conflicts of interest. The Court noted that the employee had been disciplined by the securities industry previously. In discussing punitive damages, the Court referred to the principles in *Whiten v Pilot Insurance*, [2002] I.L.R. ¶I-4048. The Court referred to the employee's behaviour as a "very serious breach of a fiduciary duty", and the employer's failure to monitor him as "more than a minor glitch or aberration. It [... was] a major failing." The need to deter others and to recognize that NBF should not benefit from the misconduct of its broker resulted in the Court's awarding punitive damages of $200,000 against NBF. Similarly, in respect of different defendants, the Court commented that the vulnerability of those defendants resulted in NBF benefiting from the fact that many others had dropped out of the litigation. The Court found that NBF, which was a substantial national institution, persisted in an "outrageous manner" in contesting these defendants' claim even though NBF had

acknowledged its liability to them. This defendant group was also awarded $200,000 in punitive damages against NBF.

National Bank Financial Ltd. v. Potter, [2013] I.L.R. ¶G-2536

Other General Tort Decisions

- **Insurance Brokers Were Not Negligent in Placement of Coverage**
  Midas Investment Corp. v. Dominion of Canada General Insurance, [2013] I.L.R. ¶G-2533, Ontario Superior Court of Justice (July 22, 2013)

- ***Limitation of Actions Act* Not Applicable Where Misleading Information Was Given to Applicant**
  Sochasky v. Winnipeg (City of), [2013] I.L.R. ¶G-2537, Court of Queen's Bench of Manitoba (August 19, 2013)

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