A Review of Significant Insurance Law cases from British Columbia and beyond
By Mark M. Skorah, QC and Julie K. Lamb

A. Introduction

The courts of this province were asked to adjudicate a number of insurance disputes in 2014. As well, the courts in other provinces rendered some important judgments. This chapter highlights just some of the significant cases in British Columbia and other jurisdictions.

B. Liability Insurance

In *Kozel v. Personal Insurance Co.*, [2014] O. J. No. 753, the Ontario Court of Appeal dealt with a case in which a driver was denied both defence and indemnity for a claim that arose while she was in Florida. The car she owned and was driving hit and seriously injured a motorcyclist. At the time her licence to drive had expired and it was for that reason that the insurer denied both a duty to defend and a duty to indemnify.

On October 7, 2011 the license had expired. The accident occurred February 16, 2012, about four months later. On February 19, 2012 on her return to Ontario the plaintiff Kozel, renewed her license without difficulty.

In Ontario, licenses must be renewed every five years on the insured's birthday. Vehicle insurance itself is required to be renewed each year on or before that same birthday. The plaintiff had purchased a new car September 24, 2011 and had given the dealer an envelope which she had received some time in August relating to her insurance. When she got it she did not open it and put it away. She looked at it at the dealer and thought that it related to insurance for the vehicle but said that she missed the notice to renew her license which was contained in that same envelope.

Kozel applied for a declaration that there was a duty to defend and a duty to indemnify. The applications Judge held that the insurer owed both duties. That judge said that the offence of driving without a valid license was one of strict and not absolute liability which meant that a due diligence defence was available to Ms. Kozel. He held that she had exercised due diligence and that while her "actions do not amount to the perfect diligence of the ideal citizen they are a far cry from... complete passivity".

The applications judge also held that the insured was not entitled to relief from forfeiture under section 129 of the *Insurance Act*, R. S. O. 1990, c. 1.8 because that provision pertained to the imperfect compliance with the terms of the policy with respect to actions taken or not taken after losses occurred. The judge also held that the insured was not entitled to relief from forfeiture under section 98 of the *Courts of Justice Act*, R.S.O 1990 c.43 because the clause in question was a fundamental term or condition precedent for the policy.

The statutory condition provided:

> "the insured shall not drive or operate or permit any other person to drive or operate the automobile unless the insured or other person is authorized by law to drive or operate."

The Court of Appeal upheld the applications judge's Order but for different reasons.

The Court of Appeal rejected the defence of due diligence. The respondent, at the time of the accident, was 77 years old. She had had a license since she was 17 or 18 and had never renewed late. However the Court said that there was no evidence that she did anything to even consider her driver's license renewal. The failure to examine the contents of the envelope was not due diligence. Reasons related to health problems amongst her family members lacked specificity and could not be considered as a reason excusing her behaviour.

However, the court fully explored the question of relief from forfeiture. The end result is that relief from forfeiture became in this case a very strong weapon in the arsenal of an insured.

The court pointed out at paragraph 31 that in exercising its discretion to grant relief from forfeiture, a court must consider three factors: (i) the conduct of the applicant, (ii) the gravity of the breach, and (iii) the disparity between the value of the property forfeited and the damage caused by the breach: *Saskatchewan River Bungalows Ltd v. Maritime Life Assurance Co., [1994] 2 S.C.R. 490*, at 504.

The Court considered *Stuart v. Hutchins* (1998), 40 O.R. (3d) 321 (CA) which held that relief remained available under section 129 of the *Insurance Act* when the insured's breach constituted imperfect compliance with the policy term. However the court in *Stuart* held that a breach consisting of noncompliance with the condition precedent to coverage prohibited the availability of relief against forfeiture under section 129. In *Stuart* the court also held that even if section 98 of the *Courts of Justice Act* was available it could not extend beyond the reach of section 129. The Ontario Court of Appeal said that "the courts have interpreted *Stuart* as having decided that section 98 has no application to instances of noncompliance with a condition precedent."

The respondent Kozel conceded that section 129 of the *Insurance Act* is of no assistance in this case.

The Ontario Court of Appeal went on to hold that the breach was imperfect compliance rather than noncompliance with a condition precedent to coverage. The Court referred to the decision of the Supreme Court of Canada in *Falk Bros. Industries Ltd. v. Elance Steel Fabricating Co.*, [1989] 2 S.C.R. 778. The Court also referred to the decisions in *Canadian Newspapers Co. v. Kansa General Insurance Co*. (1996), 30 O.R. (3d) 257 and *Colliers McClocklin Real Estate Corp. v. Lloyd's Underwriters*, 2004 SKCA 66 in holding that the breach of statutory condition 4(1) was not noncompliance with a condition precedent. The Court stated that "there are no grounds to believe that 4(1) is a fundamental term or that the respondent's breach of it was of a fundamental nature".

The court then referred to *Marche v Halifax Insurance Co.*, 2005 SCC 6 for the Court's statement that a policy condition is not binding on the insured if the court finds it "unjust or unreasonable" and said that that extended as well to statutory conditions. On that basis the Court was able to narrow the effect of *Stuart.*

> "In light of *Marche* I believe the decision in *Stuart* should be given a narrow application. A court should find that an insured's breach constitutes

> noncompliance with the condition precedent only in rare cases where the breach is substantial and prejudices the insurer. In all other instances, the breach will be deemed imperfect compliance, and relief against forfeiture will be available."

The court then went on to say that relief against forfeiture was available under section 98 of the *Courts of Justice Act* and that an insurance statute does not occupy the field of equitable relief, and the statutory standards operate as a floor, rather than the ceiling, for the insurance industry.

The court then reviewed the three-part test outlined above and found that the insured's conduct was reasonable. The court held that the breach was not of great magnitude and on the third factor held that proportionality weighed in favour of the insured. It found that the failure to grant relief might cause the insured to lose $1 million in insurance coverage while the breach of the statutory condition caused no prejudice to the insurance company. Presumably that was on the basis that Kozel was still able to drive and that she had been easily able to renew her licence.

In *Precision Plating Ltd. v. Axa Pacific Insurance Company*, 2014 BCSC 602, the plaintiffs sought a declaration that the insurer was obligated to defend claims by third parties arising out of a fire at the insureds' premises. The case turned on the interpretation of the pollution exclusion clause and considered the doctrines of nullification and reasonable expectations.

Precision Plating ran an electroplating business out of a commercial strata unit owned by the principals of the company. Precision Plating was the named insured under a commercial general liability policy, and the principals were additional named insureds.

A fire occurred at the Precision Plating premises that activated the unit's sprinkler system. Water from the sprinklers caused chemical vats on site to overflow.

The owners and occupiers of adjacent strata units filed four separate lawsuits claiming damage from chemical fumes and chemicals emanating from the Precision Plating premises as a result of the fire.

The insurer denied coverage for the claims on the basis of an exclusion for:

> "... Property Damage caused by, contributed to by or arising out of the actual, alleged or threatened discharge, emission, dispersal, seepage, leakage, migration, release or escape at any time of Pollutants".

"Pollutants" was defined in the policy to mean:

> "any solid, liquid, gaseous or thermal irritant or contaminant, including but not limited to smoke, odour, vapor, soot, fumes, airborne or waterborne particles, acids, alkalis, chemicals, sewage, micro-organisms and waste...."

Although the insurer said that the policy covered damage caused by fire, the court found ambiguity in the coverage provided in the circumstances, as the exclusion appeared to exclude damage caused by smoke, soot, thermal irritant or "liquid...contaminant" -- all common consequences of a fire.

The court reviewed the case law on nullification and concluded that the exclusion clause applied literally excluded coverage for many of the common consequences of fire. The court then applied the doctrine of reasonable expectations and found as follows:

> (a) pollution that is caused by a fire fails the common sense notion of "pollution" in its ordinary sense;
>
> (b) to apply an exclusion intended to bar coverage for claims arising from environmental pollution to the escape of substances caused by a fire is to deny the history of the exclusion, the purpose of CGL insurance, and the reasonable expectations of policyholders in acquiring the insurance;
>
> (c) there is nothing in this case to suggest that the damage claimed by the third parties resulted from business activities of the Insureds that made it an active industrial polluter of the natural environment. Put simply, the Insureds did not discharge or release smoke, fumes or chemicals as a manufacturer discharges effluent, overheated water, spent fuel and the like into the natural environment. It was discharged or released as a result of a fire. The history of the exclusion demonstrates that it would produce an unfair and unintended result to conclude, in the context of a CGL policy, that substances that escape due to fire constitute "pollution".

As a result, the court found that:

> "it cannot have been in the objectively reasonable expectations of the parties to exclude coverage for third party claims arising from the escape of substances caused by a fire."

The insureds argued further that the exclusion should not be binding on them, based on s. 32 of the *Insurance Act*, R.S.B.C. 2012, in that the exclusion is "unjust and unreasonable". The Chambers judge did not address this argument in detail, but said:

> "[s]uffice it to say that for the same reasons as already discussed I find the pollution exclusion to be unjust or unreasonable insofar as it purports to exclude coverage for most of the consequences of fires in circumstances where the Insurer has conceded the exclusion does not apply to typical fire damage".

The order that there is a duty to defend is under appeal.

In *Simpson Wigle LP v Lawyers' Professional Indemnity Company*, 2014 ONCA 492, the plaintiff law firm had a professional liability policy with a limit of $1M per claim and an annual aggregate of $2M. They brought an application seeking a declaration that the underlying action against it included two claims as opposed to one. The policy provided that all "claims which arise from a single or related error(s), omission(s), or negligent act(s), shall be considered a single claim". The law firm appealed a lower court decision that one lawsuit involving the same parties arose from related alleged errors and negligent acts.

The facts in the underlying claim revealed that the firm and its partners acted in a number of capacities for related clients.

The law firm acted for two brothers who co-owned some businesses. One brother had Parkinson's disease. The law firm drew up a power of attorney naming the other brother as attorney and a nephew as alternate attorney.

Mr. Wigle and the CIBC brought an application seeking to have the first brother declared incompetent and to appoint Mr. Wigle and CIBC as Committee of the first brother's estate and person. The law firm acted as counsel on that application. The existence of the powers of attorney was disclosed, but they were not attached to the materials before the court. The second brother declined to act as Committee, but the fact that the nephew was alternate attorney was not disclosed to the court. The CIBC and Mr. Wigle were appointed as Committees, and charged Committee fees over the next number of years.

When the second brother died, Mr. Wigle's law partner acted as executor, and Mr. Wigle acted as solicitor to the estate. A number of properties owned by both brothers were sold in deals negotiated by Mr. Wigle.

When the first brother died, his estate brought an action against the law firm alleging that significant fees would have been avoided if the nephew had been appointed as Committee. There were other allegations relating to conflict of interest by preferring the estate of the second brother to the first.

The court of appeal found that the chambers judge erred in finding that the claims for payment of Committee fees were not covered based on an exclusion relating to fees paid to the insured. The court found that the claim was not for disgorgement of legal fees paid, but rather was a claim in negligence for recovery of fees that would not have been paid if the nephew had been appointed Committee.

After reviewing the relevant case law, the court of appeal said this on the issue of whether there was one claim or two:

> [70] From these cases, I conclude that in determining whether the two claims in the Statement of Claim arise from "related" errors, omissions or negligent acts, the court should be informed by the dictionary meaning of the word "related": two or more errors, omissions or negligent acts are "related" when there is a sufficient association or connection between them, reading the Policy as a whole and bearing in mind its objective. In determining whether there is a sufficient association or connection, the court must consider the similarities and differences between the nature and kind of the alleged misconduct which underlies each claim, and the kind and character of the losses for which recovery is sought in each claim. It will be noted that I have not included differences in timing between the two sets of allegations, as the court did in Dunn. The reason is the wording of Part V(b)(ii) which, it will be recalled, specifically provides "regardless of … the time or times the error(s), omission(s) or negligent act(s) took place."

In reviewing the pleadings, the court found that the claims were very similar at a general level (involving the same parties, the same solicitor-client relationship, and the same claim general approach). When the allegations were reviewed closely, two different claims emerge: one for the wrongful appointment of Committee, and the other for allegedly negligent mishandling of the first brother's estate by reducing its value through improvident transactions. The court of appeal concluded that these two claims were sufficiently different in kind and quality and could stand independently of each other such that they were not "related" for the purpose of the policy.

In *Westaqua Commodity Group Ltd. v. Sovereign General Insurance Co.* [2014] B.C.J. No. 284 the Supreme Court was concerned with a claim by Westaqua for the costs incurred by Westaqua's customer for the destruction of contaminated feed. Westaqua had obtained the feed from suppliers in China and were in the business of supplying it to manufacturers of food for pets and other animals. Westaqua supplied some of the contaminated feed to Skretting, a company which manufactured and sold fish food world-wide. Westaqua did not know that the product was contaminated. There was no issue with respect to the product which had been made into feed by Skretting because those claims had been settled.

This claim was about product which had not been made into feed and which had to be destroyed. Skretting claimed the costs of that from Westaqua. Sovereign denied that claim when it was tendered to them by Westaqua, their insured.

The Court was well aware that this was a claim for indemnity rather than for a duty to defend and as such it required proof by the insured beyond the possibility that it might fall within coverage.

The insurers first position was that there was no damage because the product, not having been used in fish food could not have caused damage.

The policy provision with respect to Property Damage read as follows:

> **"Property Damage"** means:
>
> (a) Physical injury to tangible property, including all resulting loss of use of that property; or
>
> (b) Loss of use of tangible property that is not physically injured.

Steeves J. held that subsection (b) applied. In doing so he relied on the reasons of Rothstein J in *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada,* [2010] 2 SCR 245 at paragraphs 38 and 39.

The insurer also argued that there was no occurrence within the meaning of the policy.

An "occurrence' was defined in the Policy as: "… an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

Again Steeves J turned to *Progressive Homes* and found that the meaning of "accident" applied here as well. That is that it was an event causing property damage neither expected nor intended by the insured. Rothstein J had gone on to say in *Progressive* "…the accident need not be a sudden event. An accident can result from continuous or repeated exposure to conditions."

However, the insured Westaqua could not prove there was an occurrence for a different reason. While it was clear that there was contamination it was not at all clear how that had happened and there was no evidence to prove what event, if any, led to the contamination.

The claim was dismissed.

C. Property Insurance

In *Acciona Infrastructure Canada Inc. v. Allianz Global Risks US Insurance Co.,* [2014] B.C.J. No. 2137 Skolrood J. dealt with a claim arising under a course of construction policy of insurance. A new patient care facility was being built at Royal Jubilee Hospital in Victoria, British Columbia. The defendant insurers had issued a Course of Construction insurance policy. When the concrete slabs over-deflected and exhibited cracking, a great deal of repair work was required to the slabs and other parts of the project. The plaintiffs claimed almost $15 million and recovered $8.5 million dollars. The insurers denied the claim saying both that the claims were outside the insurance provisions and were not fortuitous.

The court found that the over-deflections and cracking were caused by the failure of the form work/reshoring procedures to account for the unusually thin design of the slabs and held that this was faulty workmanship. The design of the slabs by itself was not found to be the cause. Instead it was the formwork.

The case is an important one for its treatment of several points, perhaps most of all the exclusion. However it had to deal with two points before reaching the exclusion.

The court began by revisiting the principles of contractual interpretation with respect to insurance policies.

The court then had to deal with the argument by the insured that the policy contained no express requirement of fortuity. The insured argued that in *Progressive Homes* the Supreme Court of Canada had required the court to heed the specific language of the insurance policy, thus arguing that if fortuity was not spelled out in the contract then fortuity was not necessary. The court said with respect to that

> "In my view, while there is no doubt that the modern approach to the interpretation of insurance contracts demands that the language of the policy take precedence, I do not read *Progressive Homes* as obviating the argument that loss or damage must be fortuitous in order to trigger coverage. That again is the very essence of insurance."

He also found that the concept of fortuity was built into the policy in any event by the use of the word "risks" in describing the perils insured. The court found that "risk" underscores "that the

policy is intended to insure against possible occurrences, as distinct from certain events or intended consequences."

In the end Skolrood J. found that the loss was fortuitous and overcame the insurer's argument that a builder's risk policy does not extend to mistakes in construction. This argument was based on two American authorities. The Court recognized that *Progressive Homes* had rejected the insurers' argument that faulty workmanship could never be fortuitous.

The Court then had to find that there was damage instead of defects within the meaning of the policy. It found that certainly some degree of deflection and cracking is expected in slabs but the results in this case extended well beyond that and had rendered the facility unfit for its intended purpose. That fact was key in distinguishing it from previous authority.

The main issue in the case was whether the damage claimed was excluded pursuant to clause 5(b) of the policy. That clause said:

> "This Policy does not insure:
> …
> (b) all costs rendered necessary by defects of material workmanship, design, plan, or specification, and should damage occur to any portion of the Insured Property containing any of the said defects the cost of replacement or rectification which is hereby excluded is that cost which would have been incurred if replacement or rectification of the Insured Property had been put in hand immediately prior to the said damage.
>
> For the purpose of this policy and not merely this exclusion it is understood and agreed that any portion of the Insured Property shall not be regarded as damaged solely by virtue of the existence of any defect of material workmanship, design, plan or specification."

The Court recognized that:

> "the wording of clause 5(b) is taken from a standard exclusion provision developed by the London Engineering Group ("LEG"). This particular clause is commonly known as LEG 2/96 which LEG titles Model "Consequences" Defects Wording."

This case is the first Canadian case to consider and interpret LEG2/96. The insurers argued that the policy insured against damage resulting from the defects but not the cost to remedy the defect itself. They said that only consequential damage was covered. But in any event the insurers argued that the cracking and over-deflection are the result of a defect in design and thus excluded.

The Court held that this was a defect in workmanship within the meaning of 5(b). But having said that the Court did not accept that all of the claim was excluded. Instead, it found that the intent of the clause was to exclude those costs rendered necessary by one of the named defects but that it was limited to the costs "which would have been incurred if replacement or

rectification of the Insured Property had been put in hand immediately prior to the said damage."

The Court then found that there was little proof of those costs but that they would have been minimal.

While not all the claim was allowed that was more due to points specific to the case. The broader principles as they relate to the law of construction and insurance are very important.

In *Berlo v Aim Underwriting Ltd.*, [2014] O.J. No. 3885, Mitrow, J. dealt with whether the crash of a plane was an accident within the meaning of the policy of insurance. The case had been through trial and appeal and the appellate court had allowed the insurer's appeal and remitted it for a new trial. This was that second trial.

The case is an excellent and thorough review of the law relating to the meaning of "accident" in a policy of insurance and also how the law is to be applied to a factual situation.

On August 24, 2009 the plaintiff tried to take off with only one functioning engine in his twin-engine aircraft and crashed during that takeoff attempt. Damage to the aircraft was agreed to be $140,000. There were no personal injuries. The insurer denied on two bases. First, that the occurrence was not an accident and second that the plaintiff was in breach of the condition of the policy for failing to minimize the loss once the risk materialized.

The facts are reviewed very thoroughly but the essential point was that the plaintiff believed that taking off with one functioning engine was reasonable and could be accomplished.

The policy provided as follows:

> "Occurrence - This means an accident, or continuous or repeated exposure conditions, which results in injury during the term of the Policy, provided the injury is accidentally caused..."

The term "accident" was not defined in the policy.

The court extensively reviewed the law with respect to the meaning of the word "accident" and began with *Canadian Indemnity Co. v. Walkem Machinery & Equipment Ltd. [1976] 1 S.C.R. 309*. In that case the Supreme Court of Canada rejected the analysis of Guy J. A. in *Marshall Wells*. Guy, J.A. had said "the test of what is unexpected is whether the ordinary reasonable man would not have expected the occurrence...." The Supreme Court of Canada said that that definition was too narrow because it would result in an insured being denied recovery if the occurrence was the result of a calculated risk or dangerous operation. Instead the court said it applied to "any unlooked for mishap or occurrence."

This case is notable for the thoroughness of its analysis of various cases which followed on from *Walkem* including *Stats v. Mutual of Omaha Co.*, [1978] 2 S.C.R. 1153 and *Cooperative Fire & Casualty Co. v. Saindon*, [1976] 1 S.C.R. 735 as well as *Cooperators Life Insurance Co. v. Gibbens*, 2009 SCC 59.

The court went on to conclude at paragraph 87 that “the plaintiff's decision to attempt a single-engine takeoff was foolish -- it was bad judgment -- it amounted to negligence." However the court went on to find that:

> “it cannot be said, on the facts, the plaintiff realized the danger of his actions and deliberately assumed the risk; nor can it be said that the plaintiffs conduct rose to a level of recklessness or culpability such that the occurrence was no longer an accident."

The argument over the failure to minimize damage related to the following clause:

> “You must protect your craft from any further loss or physical damage. Any loss or physical damage due directly or indirectly to your failure to protect your aircraft shall not be recoverable under this policy."

The evidence in this regard was that the aircraft yawed to the right then went into the grassy infield area as well as hitting a taxiway marker before taking off. The argument was that the plaintiff could have and should have stopped the aircraft. The court found that was not possible and held that that clause did not apply.

In *Coburn v. Family Insurance Solutions*, 2014 BCCA 73, the court of appeal confirmed that the owner's daily attendance at the dwelling to carry out renovations did not make him an occupant for the purposes of the vacancy exclusion in a rented dwelling policy. The long-term tenant had moved out with no intention of returning, and the new tenant had not taken up occupancy when the fire loss occurred. There was no coverage under the policy as the premises were vacant for more than 30 days prior to the loss. The house was not the owner's "habitual place of abode" as he returned home every night except one when he stayed over at the rental house. This was not enough to make him an occupant of the rental dwelling.

The Ontario Superior Court of Justice considered the insured’s obligation to avoid further loss and the doctrine of imminent peril in *Mississippi River Power Corporation v Municipal Electric Association*, 2014 ONSC 3784. The power corporation suffered a loss when defective welds in penstock #2 (a pipe that conveyed water to the turbine) failed, which the insurer covered. The power corporation then checked and repaired the welds on penstock #1 as it was manufactured at the same time in the same way. The insured sought a declaration of coverage for the cost to repair the faulty welds on penstock #1 and for the resulting business interruption.

The power corporation sought coverage for the cost of the repair to penstock #1 based on statutory condition 9 in the policy, which required the insured to "take all reasonable steps to prevent further damage" not only to the damaged property but also “to prevent damage to other property insured”. The insurer argued that there was no fortuitous loss or damage giving rise to coverage but rather the costs arose as a result of the insured's decision to take preventative measures that were not required nor covered under the terms of the policy.

The policy did not insure against:

> Any defect or fault in material, workmanship, or design. However, if insured loss or damage directly results as a consequence of the defect or fault in material,

> workmanship, or design excluded above, the Company shall be liable for said consequences. The Company shall be liable for only those costs which are in addition to the costs of rectifying such defects or fault had the loss or damage not occurred.

The court found that the policy did not intend to cover the cost of repairing defects, before or after a loss. As a result, the cost of repairing the defective welds was not covered under the policy.

As for the application of statutory condition 9, the court found that the insured had an obligation to mitigate a loss that had already happened, but it had no obligation to minimize a risk that had yet to materialize.

The insured argued that its business interruption claim ought to be covered under the principle of imminent peril. As articulated in *Canadian General Electric Company v. Liverpool and London & Global Insurance Co.*, [1981] 1 SCR 600, this principle applies when an operating peril that is covered by the policy will inevitably cause damage unless something is done. Damage suffered when taking preventative measures are covered by the policy. The insured argued that the failure of penstock #2 meant that there was an imminent peril of damage to penstock #1, which necessitated the repairs, which in turn caused the business interruption loss.

The court rejected this argument. There was no imminent peril operating that required the insured to react at the time it did. At best, collapse of penstock #1 was likely, but it was not inevitable. Although the insured's decision to repair the welds on penstock #1 was reasonable, there was no coverage for the cost of those repairs or the consequential business interruption loss.

The application of the mechanical breakdown and pollution exclusions in a property policy was in issue in *O'Byrne v Farmers' Mutual Insurance Company*, 2014 ONCA 543. The Ontario Court of Appeal dismissed the insurer's appeal from a finding of coverage under an all risk property policy for a significant spill of furnace oil. The tenant had inserted a piece of cardboard between a set of contacts to bypass a thermostat, which would ordinarily turn the furnace on and off. This caused the furnace to run more or less continually. The trial court found on a balance of probabilities that it was the bypass and high heat which caused the ignition to fail to re-ignite, which led to the oil overflowing.

The insurer argued that the trial judge made three errors: refusing to dismiss for failing to deliver a proof of loss; failing to apply the "mechanical breakdown or derangement" exclusion; and failing to apply the pollution exclusion.

The evidence established that the insurer had waived the requirement for a proof of loss.

The insurer sought to rely upon the exclusion for:

> “loss or damage directly or indirectly caused by, resulting from, contributed to or aggravated by: …e) centrifugal force, mechanical or electrical breakdown or derangement in or on the ‘premises.’”

The insurer argued that the exclusion captured multi-causal losses where one of the causes is mechanical breakdown or derangement. The appellate court found that there was no multi-causal loss but rather a chain of events triggered by the tenant's insertion of the piece of cardboard. The fact that the ignition failed does not engage the mechanical exclusion. The ignition failure was not a cause of the loss but rather something that happened when the tenant interfered with the proper operation of the furnace. The court found that the "mechanical defect" exclusion applies when there is an internal problem or defect in the machine.

The pollution exclusion excluded:

> "loss or damage caused directly or indirectly by any actual or alleged, spill, discharge, emission, dispersal, seepage, leakage, migration, release or escape of 'pollutants', nor the cost or expense of any resulting 'cleanup'", but the exclusion does not apply "if the spill, discharge, emission, dispersal, seepage, leakage, migration, release or escape of 'pollutants' is the direct result of a peril not otherwise excluded by the policy". A "pollutant" was defined to mean "any solid, liquid, gaseous or thermal irritant or contaminants including odour, vapour, fumes, acids, alkalis, chemicals and waste".

The Court of Appeal found that on a plain reading of the policy wording, the pollution exclusion required another operative exclusion to apply to the loss. Otherwise, the exception to the pollution exclusion results in coverage. The court's finding that the mechanical breakdown exclusion did not apply was enough to dismiss the appeal.

The Court of Appeal went on to refer to the distinction identified in *Corbould v. BCAA Insurance Corp.*, 2010 BCSC 1536, between the interpretation of a pollution exclusion in a property policy and a liability policy. The Court of Appeal recognized that the interpretation of the pollution exclusion in an "all-risks" property policy might "engage different considerations" than a similar exclusion in a liability policy, and for that reason the principles identified in *Zurich Insurance v. 686234 Ontario Inc.*, (2002) 62 O.R. (3d) 447 (C.A.) are not directly relevant.

In *Rolston (c.o.b. Little City Fashions) v Canadian Northern Shield insurance Co.* [2014] B.C.J. No. 1444, Dley J. heard a claim which arose from the destruction by an intentionally set fire of the building housing Little Cities Fashions.

The parties all agreed that the fire was intentionally set. The case revolved around whether it could be proven that the insureds were complicit in the setting of the fire. The court found on a balance of probabilities that either Ms. Ralston or her husband Mr. Van Dukkumburg caused the fire. In doing so the Court recognized that the insurer did not have to prove they actually set if it were proven that they had caused someone else to do so.

There was no direct evidence that they did so. The court looked to the motive and opportunity which the insured had. The finances of Little City were in poor shape. It was operating in the red. As to opportunity, the fire originated on the top on the second floor. That floor was separated from the main floor by a locked gate the keys to which were hanging on the wall inside the door to the store's main floor. There were no signs of forced entry to the gate and the lock itself was never found. The court looked to various pieces of evidence including absence of anyone else

who would have had the opportunity. A significant fact in the Court's consideration was the failure of the insureds to answer the telephone when the alarm monitoring firm telephoned their home moments after the alarm was raised.

The claim was dismissed

In *Whitworth Holdings Ltd. v Axa Pacific Insurance Company* [2014] BCJ 1696 Madam Justice Harris heard a summary trial application brought by the insurers in which they sought to dismiss the insured's claim under an all risk property insurance claim. The Court allowed the application and dismissed the claim. The court characterized the principal issue as follows "whether the property insurance policy provides coverage for the loss or damage, claimed by the plaintiff in respect of on premises pollutant cleanup, beyond the maximum $25,000 provided by an extension of coverage for pollutant cleanup."

On July 31, 2010 fires substantially damaged the insured's building in Kelowna.

The fire also spread to and damaged the adjacent three-story structure on the next property. That property had businesses which contained welding supplies, irrigation supplies and chemicals, pesticides and herbicides. The latter three were in the business owned by Univar Canada Ltd. Chemicals escaped causing pollution damage on the insured property. The insured plaintiff sued Univar. The insurer offered payment of over $5 million but took the position that the pollution cleanup was limited to $25,000. The insured could not sign the documents required to accept the insurer's payment because they felt it would or might prejudice their claim against Univar who had pleaded a failure to claim under the policy for pollution damage.

RELEVANT PROPERTY POLICY PROVISIONS

Under section 3 of COM-2000A, "Insured Perils" is stated as follows:

> This Form, subject to all terms, limitations, exclusions and conditions of the Policy, and in conjunction with all applicable terms, provisions and conditions of form COM-3, insures against all risks of direct physical loss of or damage to the insured property.

5. POLLUTION EXCLUSION CLAUSE:

Unless otherwise indicated elsewhere in the Policy:

a) This Policy does not insure against direct or indirect, damage, cost or expense arising out of the clean-up, removal, containment, treatment, detoxification, decontamination, stabilization, neutralization, or remediation resulting from any actual, alleged, potential, or threatened spill, discharge, emission, dispersal, seepage, leakage, migration, release, or escape of pollutants, <u>but this exclusion does not apply to physical loss or damage, to the property insured, caused directly by an insured peril</u>, rupture of pipes or breakage of apparatus, not otherwise excluded elsewhere in the Policy, theft or attempt thereat, or accident to

transporting conveyance. Damage to pipes caused by freezing is insured provided such pipes are not otherwise excluded elsewhere in the Policy.

b) Further, this Policy does not insure against direct or indirect loss, damage, cost, or expense, for any testing, monitoring, evaluation or assessing of an actual, alleged, potential, or threatened spill, discharge, emission, dispersal, seepage, leakage, migration release or escape of pollutants.

Subject to all other terms and conditions stated in this Policy, this Form also provides the following Extensions of Coverage. If, for any given extension, a Limit of Liability or amount of insurance is specified in the Declarations, the Insurer shall not be liable for more than the limit or amount so specified in respect of any one occurrence unless otherwise specifically state. In the event that coverage provided under any extension is more specifically and separately insured elsewhere in this Policy, then the relevant extension under this Section 6 shall not apply. Unless noted to the contrary, the amount of insurance shown for each extension is the Insurer's maximum limit of liability in any occurrence.

On "Premises" Pollutant "Clean-up": The insurance under this Form is extended to insure up to a maximum of $25,000 for the cost or expenses incurred by the Insured to engage in "Clean Up" from land or water, at "Premises", but only if the spill, discharge, emission, dispersal, leakage, release or escape of pollutants:

i. arises out of loss of or damage to insured property on "Premises" and for which insurance for such loss or damage is afforded under the Form to which this extension is attached; and

ii. is sudden, unexpected and unintended from the standpoint of the Insured; and

iii. first occurs during the Policy Period.

The Insurer shall not be liable under this Extension 6 e) [sic] for:

(1) expenses for "Clean Up", away from or beyond "Premises", arising out of any spill, discharge, emission, dispersal, leakage, release, or escape of pollutants on or emanating from "Premises", or which began prior to the Policy Period;

(5) more than the "Limit of Liability" specified in this Extension 6 (e).

The court agreed with the plaintiffs' submission that the property insured was not restricted to the building itself but also included the land. The term property was not defined in the policy.

The defendant's position was that the exception was simply there to ensure this coverage for fire damage but not for cleanup of pollutants where there's no direct damage caused by fire. The court spent a great deal of time thoroughly analyzing the law with respect to the words "caused directly by an insured peril".

The court concluded that the words referred to meant "capturing the sense in which an event leads straight or immediately to its consequence".

D. Motor Vehicle Insurance

In *Stroszyn v. Mitsui Sumitomo Insurance Company Limited*, 2014 BCA 431, the B.C. Court of Appeal decided a case in which the liability of a lessor was considered. Mr. Stroszyn was injured in an accident. He sued, and his damages were agreed at $1.6 million. The responsible driver, Mr. Chen, was insured by ICBC. He was driving a vehicle owned by Honda Finance Inc. and leased to Mary Chen. She carried $1 million Third Party Liability limits as required by the lease agreement. Honda Finance had an excess insurance policy with $9 million limits. ICBC paid its limits of $1million.

The Court considered two issues, which it called the Lessor Cap Issue and the Excess Coverage Issue.

With respect to the Lessor Cap Issue the Court was dealing with section 82.1 of the Insurance (Vehicle) Act which has the effect of capping that liability with respect to lessors. It states:

> (1) In an action to recover for loss or damage to persons or property arising out of the use or operation of a leased motor vehicle on a highway in British Columbia, the maximum amount for which the lessor of the motor vehicle is liable, in that lessor's capacity as lessor of the motor vehicle is the amount determined under subsection (2).
> (2) The maximum amount for the purposes of subsection (1) is the greatest of the following amounts:
> (a) $1 000 000;
> (b) the amount established, or determined in the manner prescribed, by regulation;
> (c) the amount of third party liability insurance coverage required by law to be carried in respect of the motor vehicle.

The Court reversed the decision below and held that the payment by ICBC reduced Honda's liability by the amount of the payment. The Court reasoned that it was a payment by one joint tortfeasor which benefits all. The payment reduced Honda's liability to zero.

On the Excess Coverage Issue the Court was dealing with a policy which on its face only applied to Honda Canada. However the statutory provision said

> [45] Section 61(1)(a) provides:
> 61 (1) An optional insurance contract may only
> (a) extend coverage that is specified in a certificate or a policy to a limit that is in excess

> of that provided by the certificate or policy for every insured, and, except as provided under subsection (1.1), on the same terms and conditions …

[46] Section 61(1.1) provides:

> (1.1) Subject to subsections (1.2) and (2) and the regulations, an optional insurance contract referred to in subsection (1) (a) may prohibit a specified person or class of persons from using or operating the vehicle, exclude coverage for a specified risk or provide different limits of coverage for different persons or risks or classes of persons or risks.

[47] Section 61(1.2) and (2) provide:

> (1.2) An optional insurance contract may not, in respect of third party liability insurance coverage,
>
> > (a) prohibit a person who is living with and as a member of the family of
> >
> > > (i) the owner of the vehicle, and
> > >
> > > (ii) in the case of a leased motor vehicle, if the policy was purchased by the lessee, of the lessee of the motor vehicle,
> >
> > from using or operating the vehicle, or
> >
> > (b) exclude or provide different limits of coverage for that person.
>
> (2) A prohibition, an exclusion or a limit referred to in subsection (1.1) is not binding on the insured unless the policy has printed on it in a prominent place in conspicuous lettering the words "This policy contains prohibitions relating to persons or classes of persons, exclusions of risks or limits of coverage that are not in the insurance it extends".

The Court held that because the policy was an optional policy it extended coverage to all those insured by the underlying policy on the same terms because it did not contain the mandatory statutory language. As a result, coverage extended to the driver of the leased vehicle.

In *Ngo v Luong* 2014 BCSC 516, the plaintiff and defendant were B.C. residents traveling in Saskatchewan in a B.C. insured vehicle when they were involved in a single vehicle accident. The question before the court was whether the Saskatchewan no-fault system applied or whether the passenger could sue the driver in B.C. As the substantive law of the jurisdiction where the accident happened applies, the issue was whether the Saskatchewan *Automobile Accident Insurance Act,* R.S.S. 1979 was substantive law or procedural.

The plaintiff argued that an amendment enacted in 2002 giving Saskatchewan residents the option of opting out of the no-fault system by filing an election before a motor vehicle accident happened transformed the *AAIA* from substantive law to procedural as it gave Saskatchewan residents a choice as to how to proceed with a claim. The court disagreed. The *AAIA* defined the rights of those involved in a motor vehicle accident. It did not simply determine how to enforce those rights. The plaintiff's tort action was statute-barred.

D. Life and Disability Insurance

In *Industrial Alliance Insurance and Financial Services Inc. V. Brine,* 2014 NSJ No. 328 Bourgeois J. of the Nova Scotia Supreme Court dealt with the claim by an insured under a disability policy. The Court awarded $62,036 in damages for breach of contract, $30,000 for mental distress arising from the breach of contract, $150,000 in aggravated damages, and $500,000 in punitive damages. He allowed the insurers counterclaim to the extent of $210,000 of the $280,000 claim.

Mr. Brine claimed against National Life (the predecessor to Industrial Alliance) for breach of contract and breach of its duty of the most good faith.

Brine was 65 years age of age at the time of trial. He was a career police officer. After serious issues at Ports Canada, he ended his employment in early 1995. He suffered depression. His disability coverage came into place on August 1, 1995 and was stopped on October 1, 1998. In December 1995 National Life had begun rehabilitation services having assessed Brine and determined that services of a rehabilitation counselor might be of assistance to him. In June 1998 rehabilitation services were discontinued by National Life.

In 1998 Brine received lump-sum payments from CPP and public service superannuation. National Life set off the overpayment of $99,506.64 by reducing Brine's monthly disability payments to zero until the overpayment was extinguished.

In July 1999 Brine declared bankruptcy and National Life filed a proof of claim for $62,036.81. National Life also took the position that that survived Brine's bankruptcy because his failure to disclose receipt of those funds which constituted a breach by one acting in a fiduciary capacity. In 2004 Mr. Brine also received a settlement from a complaint filed against his former employer with the Canadian Human Rights Commission. The settlement was $280,000.

The case began when the insurer claimed for an overpayment. Brine filed a defense and counterclaim. Finally, the insurer claimed to set off more than $300,000 for the settlement received by Brine referred to above.

As of July 30, 1998 Brine believed that National Life was not going to enforce repayment in spite of the money he had received.

The court's review of the voluminous evidence is thorough. Suffice to say the judge accepted most of Brine's evidence saying in part his evidence had to be seen in light of his depression. He did not find the witnesses for the insurer, particularly Ms. Antonini and Ms. Jako, persuasive.

In addition, the insurer received a report from a Dr. Rubens in April 2003 which was not disclosed until the eve of the trial in November 2013 some 10 years later. That fact factored into his reasoning.
The judge relied on *702535 Ontario Inc. v. Non-Marine Underwriters Lloyds, London, England,* (2000) 184 DLR (4^{th}) 687 as saying that the insurer had an obligation to be prompt and fair in its assessment of the claim. He assessed the duty of good faith in light of that case as well as *Whiten*. In that regard he referred to *Boehm v. Cardinal Insurance*, (1994) 18 0.R. (3d) 663. He

also referred to *Saskatchewan Government Insurance v. Wilson*, 2012 SKCA 106 for the idea that a denial of coverage which is ultimately found to be incorrect by the courts will not of necessity be found to be a breach of the duty of utmost good faith.

In July 1998 the insurer sent a letter to Brine saying that he should ignore their earlier letter. In that earlier letter they had said they would require repayment of the overpayment. Taking the two letters together Brine argued that the insurer was estopped from seeking repayment or criticizing him for not repaying. The court did not find that there was estoppel first because the latter letter was not meant to affect their legal relationship and second because Brine did nothing to his detriment in relying on it.

The court did find that the bankruptcy extinguished the overpayment in that Brine was not a fiduciary and did not owe a fiduciary duty to the insurer (which would have been required for the debt to survive).

The court held that there were general damages available for the breach of "peace of mind" contracts which were separate from aggravated or punitive damages. In that regard it relied on *Fidler v The Sun Life Insurance Company of Canada*, 2006 SCC 30.

Applying the law to the facts the court held at paragraph 268 that while the upfront clawback of the overpayment was incorrect it was not a breach of the duty of utmost good faith. The Court also agreed that the insurer was not obligated to rehabilitate Brine. However the court went further in its analysis because National Life did decide, although they did not need to do so, to offer rehabilitation services. Having done so the decision to discontinue rehabilitation and not to recommence it was a breach of the duty of utmost good faith.

The court was also much troubled by Dr. Rubens' report and what Sun Life did with it. It felt that Mr. Brine was entitled to a copy of it. As well the Court went to some length in saying that there was absolutely no explanation for withholding the report for more than a decade. The court went on to say that it must "conclude that the report was purposefully withheld as it, at a minimum, would have triggered renewed requests for rehabilitation, and at worst, provided evidence supportive of Mr. Brine's claim to provide such services. National Life did not want to face the consequences which would have arisen from a timely disclosure in April of 2003. Instead, it chose the latest possible opportunity to disclose, days before trial, effectively preventing Mr. Brine exploring the possible ramifications of the report."

With respect to the counterclaim the court did conclude that the insurer had a right of subrogation but in allowing the claim for set off it deducted the fees paid by Mr. Brine from the $280,000 recovered. The balance of $210,000 was going to National Life.

The case is an important addition to the law with respect to bad faith claims, particularly in the context of disability insurance.

A disability insurer will not always be exposed to punitive damages even if it mishandles a claim. In *C.P. v. RBC Life Insurance Company*, 2014 BCSC 117, the plaintiff sought punitive damages and damages for mental distress against her disability insurer for terminating her residual disability benefits claim. The insurer admitted that it mishandled her claim, but denied

that a claim for punitive damages had been made out and disputed the amount claimed for mental distress.

The plaintiff's disability policy provided indemnity whenever she was prevented from earning 80% of her usual earnings by reason of partial disability due to injury or illness. The plaintiff was a medical doctor who suffered from depression and anxiety. She was off work completely from December 2005 to March 2006. After an initial denial, the insurer paid benefits until 2009 for the plaintiff's reduced earnings due to her psychiatric condition.

In July 2009, the plaintiff notified her insurer that she intended to return to work full-time the following month. The claims handler wrote to the plaintiff advising that the insurer would pay residual disability benefits based on her April 2009 income through to the end of August 2009 without needing proof of actual income and then her claim would be closed. The defendant had a policy for doing so where there was a reasonable prospect that the insured would return to full-time work, but the claims handler did not follow the insurer's protocols designed to ensure the approach was reasonable.

The plaintiff was voluntarily committed for two weeks in October 2009. Benefits ought to have been re-instated but were not. There was some delay in paying benefits until April 2010, when the plaintiff had two more psychiatric-related hospitalizations, one as a result of a suicide attempt.

The trial judge found the plaintiff's expert evidence that the suicide attempt and other hospitalizations were attributable to the defendant's conduct was unreliable as the opinions were based on the plaintiff's evidence, and she was not an entirely credible witness.

The plaintiff sought punitive damages of $1.3M to $1.6M based on the present value of the average benefits paid over the period January 2009 to September 2010 for the remaining period of coverage under the policy. The court found sloppiness on the part of the disability insurer could give rise to damages for mental distress but not punitive damages without more. There was no evidence that the claims handlers acted with improper motives.

The plaintiff submitted that damages for mental distress should be $50,000 to $100,000 if punitive damages were awarded and $100,000 to $200,000 if punitive damages were not awarded on the basis that the plaintiff would have loss of peace of mind if there was no message of deterrent to the insurer. The court rejected the submission, as "[t]he law does not compensate for that which a plaintiff wishes the law was but is not."

The court did find that the defendant's actions "would have caused a reasonable person mental distress beyond reasonable norms". Damages of $10,000 for mental distress were awarded.

This case and *Brine* are interesting to compare.