

JURY DIRECTIONS AND PUNITIVE DAMAGES IN A FIRE LOSS CLAIM

by Michael Teitelbaum

In *Pereira v. Hamilton Township Farmers' Mutual Fire Insurance Co.*, a decision released on April 19th, 2006, the Ontario Court of Appeal addressed a number of issues arising from a fire loss under a commercial property policy. In particular, the Court considered the directions that should be provided to a jury regarding the defences of misrepresentation, (pursuant to Statutory Condition 1 of the Fire Statutory Conditions), and a policy exclusion. The Court also provided the latest judicial comment on the potential size of punitive damage awards.

Background

Three actions arose out of a fire on August 13th, 1993 that destroyed an industrial building and two residential units located on its second storey. The Plaintiff insureds claimed for the loss of the building, loss of contents, loss of income with respect to a farming business said to be operating at the premises, and punitive damages. The jury awarded damages for all of these claims including a total of \$2.5 million in punitive damages.

The insurer appealed on the grounds that (1) the jury was

misdirected in respect of (a) Statutory Condition 1 and (b) the "shut-down" exclusion in the policy; (2) willfully false statements were made in the Proofs of Loss vitiating the insureds' claims pursuant to Statutory Condition 7; (3) there was no evidence of an income loss in respect of the mushroom growing business that was being, or was to be, carried on at the premises; and (4) there was no basis upon which the jury could award punitive damages or, in the alternative, the quantum of punitive damages awarded was irrational and excessive.

Borins J.A., on behalf of a three-member panel, allowed the insurer's appeal and ordered a new trial. The Court found that the trial judge had misdirected the jury in respect of the misrepresentation and "shut-down" exclusion clause defences. The Court also found the quantum of the punitive damage award was "irrationally high".

Misrepresentation in the Insurance Application

On February 10th, 1993, the insureds' insurance broker, Doug Clarke, spoke with the insurer's agent, Kim Thompson. Thompson testified that Clarke had told her

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Noteworthy

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that the insureds had “just finally got back into business” and that insurance was required. Insurance coverage was afforded based on this representation and an earlier assessment of the property by the insurer. There is no dispute that there were no mushrooms grown between February 10th, 1993 and August 13th, 1993, the date of the fire. The vehement disagreement between the parties was on the question of how the events that occurred during that period should be characterized. The insurer’s position was that the lack of activity at the location demonstrated that it was completely shut down, with the insured performing only minor repairs to the general premises consistent with maintaining the value of the property. The insureds pointed to evidence they say indicated the location was being prepared to grow mushrooms which showed that the farm was “in business”.

The insurer’s position was that the “back in business” statement was a misrepresentation in breach of Statutory Condition 1.

The Court agreed with the insurer’s contention that the trial judge made three errors in the instructions provided to the jury, together with two related errors.

First, the instructions may have left the jury with the impression that some element of dishonesty or intention to mislead was required before a misrepresentation would be established. This is wrong in law, and also confused the issue that the jury had to decide. Statutory Condition 1 is engaged by innocent misrepresentations

where, as here, the representation alleged is a positive statement. No element of fraud or deceit need be shown in such circumstances.

Secondly, the trial judge erred in allowing the insureds’ suggestion that there might be an obligation on the insurer to conduct a “proper” field investigation. This position is also wrong in law and the trial judge should have instructed the jury accordingly. Relying upon the decision of Lane J. in *Silva v. Sizoo*, [1997] O.J. No. 4910, the Court held there is no general duty owed by an underwriter to an insurance applicant to conduct a reasonable investigation or otherwise to act as a reasonably competent underwriter. The insured may not shift the burden of truthfulness upon it into a burden of distrust and additional inquiry on the part of the insurer.

There were no circumstances here that disclosed the need to make further inquiry. The insurer was entitled to rely on the statement from the insureds’ agent that the farm had “just finally got back into business”, particularly because it came from an insurance agent, who would have known that the status of the farm was important.

Similarly, the trial judge had also put to the jury the insureds’ position that they did not know that the status of the business was relevant and that the insurer had a duty to inform the applicant about what information was or was not relevant and material during the application process. The Court held that this position was also wrong in law and on the facts. Therefore, this related error should not have been

part of the instruction to the jury.

The Court noted that the “duty of utmost good faith between parties to an insurance contract requires the applicant to disclose all material facts to the insurer” and that a “fact will be material where, if properly disclosed, it would influence a reasonable insurer either to decline the risk or to accept a different risk, e.g., to charge a higher premium”.

The third error was that the trial judge failed to instruct the jury that the statement by Clarke was attributed by law to the insureds.

The final, related error was that the trial judge failed to provide a clear picture to the jury of what they must determine in order to decide the misrepresentation issue. The issues were “whether the representation ‘back in business’ was made; whether, if made, it was attributable to the [insureds]; whether the statement was false in fact; and, whether the representation was material to the insurer’s decision to provide coverage”. This oversight reflected the broad problem with the jury charge; namely, “the trial judge’s instructions did not respect the proper roles of judge and jury” as they “consistently left the jury to decide competing legal propositions put forward by the parties”. Questions of law fall solely within the purview of the judge and cannot be left for the jury to determine.

The Court observed that as a result of the instructions given by the trial judge on the misrepresentation defence, the jury could well have believed that

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it had no fewer than five separate avenues by which to find in favour of the insureds; namely, (a) there was no fraudulent intent in making the “back in business” statement, (b) the insurer had failed to conduct a proper field investigation, (c) the statement was made by the agent and not the insured, (d) the insurer had failed to tell the insured that the status of the business was material to the risk being assumed, or (e) the statement was true, because the farm was in fact “back in business”.

The first four possibilities were not available in law, but it “seems likely that the jury may well have proceeded along one of these four paths, as each presented a straightforward route to a finding against the insurer that did not require the jury to examine the conflicting and controversial evidence relating to whether the [insureds] were back in business on February 10, 1993”. Borins J.A. continues: “I say this because the jury was obviously totally unimpressed by the appellant insurer, as is clear from the answers to the questions and the quantum of punitive damages awarded. A clear and complete instruction would have communicated to the jury that the only live issue between the parties . . . was whether the representation was true”.

The Court found that the jury was “deprived of the ability to perform ‘the judicial duty assigned to them’”.

The judge’s charge was “materially deficient” because it “failed to set out for the jury the points that it had to determine in

order to resolve the misrepresentation issue” and because of the “failure to resolve the other legal issues for them”. The “issue was very simply - whether or not the representation was true”. The trial judge’s instructions “unnecessarily confused and complicated the jury’s determination of this issue”.

As the Court was not persuaded that a “properly-instructed jury would inevitably have found in its favour and that this Court should therefore substitute a verdict in favour of the [insurer]”, and because the misdirection led to a substantial wrong or miscarriage of justice, a new trial was ordered.

The “shut down” Exclusion Clause

This exclusion provided that the policy “does not insure loss of or damage to . . . property at locations which to the knowledge of the insured, are vacant, unoccupied or shut down for more than thirty (30) consecutive days . . .”. The insurer’s position was that the farm had been shut down for at least the entire period between February and August, 1993 and that any damage to the property was therefore not covered. In the trial judge’s jury charge, the jury was left to determine whether the phrase “shut down” is ambiguous and whether to interpret it against the insurer.

As with the concerns relating to the jury charge on the misrepresentation issue, the same concern existed here as to whether the trial judge resolved the legal issues concerning the construction of the exclusion,

including whether the term was ambiguous and whether the *contra proferentem* rule should apply.

The Court found that the trial judge erred in the instructions given on this defence. The interpretation of a contract is a question of law and it is for the judge to determine and resolve the proper interpretation for the jury. The application of *contra proferentem* is a principle of contractual interpretation and, as such, it is also a question of law. Accordingly, as a matter of law, the trial judge should have instructed the jury on the interpretation of the exclusion and told it to decide on the evidence whether the farming operation was in fact shut down.

The Court observed that having been told that they could interpret the contract against the insurance company, the jury may simply have done so without giving due consideration to the competing evidence.

While not strictly necessary, the Court also relied on the errors in respect of the directions given about the exclusion to support its finding that a new trial was required.

Punitive Damages

Citing *Whiten v. Pilot Insurance Co.* (2000), 209 D.L.R. (4th) 257, the Court noted that an “award of punitive damages can only be made where the trier of fact concludes that the defendant has committed an independent actionable wrong and that the defendant’s conduct has been reprehensible, high-handed or

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malicious, such that it departs to a marked degree from ordinary standards of decent behaviour”.

The Court observed that there were facts here on which a properly instructed jury “could conclude that an award of punitive damages was warranted” [original emphasis]. It could be argued that the insurer “pre-judged the merits of the claim and conducted a somewhat biased investigation”. In light of this and other evidence, the Court noted that the question of punitive damages is “likely to be a live issue at the new trial”.

The Court strongly noted, however, that the quantum awarded was “another matter entirely”. The \$2,500,000.00 award was “grossly excessive” and “irrational”. This amount exceeded by a factor of 2.5 the \$1 million award in *Whiten*, which Justice Binnie said was at the “upper end” of the permissible range. Moreover, the “conduct here was not nearly as egregious as was that in *Whiten*”.

In order to avoid a repetition, the Court suggested that counsel and

the trial judge at the new trial “would be well advised to offer a range to the jury of the quantum of punitive damages that might be appropriate, if indeed the jury decides to award punitive damages at all”. While stating that it would not be appropriate for the Court of Appeal to suggest the range of punitive damages, Justice Borins comments that it “should be clear from what I have said that they do not come close to justifying a punitive damage award at the upper limit of \$1,000,000 suggested by *Whiten*”. The Court goes on to state its suggestion that a range be provided does not indicate its view is punitive damages are necessarily appropriate or should be awarded here. This is obviously up to the jury at the new trial. Rather, this is “offered as guidance to assist the parties in achieving a result that falls within the ambit of established legal principles”.

Comment

The Court’s findings and comments regarding appropriate instruction to the jury highlight the importance of discerning and

providing for the jury’s appropriate role in addressing factual, and not legal, issues.

The Court’s comments on the upper limit for a punitive damage award take cognizance of the Court’s remarks in *Whiten* which have, to some degree, gone unnoticed to date. The Court delineates that there is essentially an upper limit for a punitive damages award in Canada. It will be interesting to see whether the Court’s suggestion that the range of a possible punitive damage award should be provided to the jury is taken up beyond the case at hand, or if it is even done here.

Section 118 of the *Courts of Justice Act* provides that in an action for damages for personal injury, the Court may give guidance, and the parties may make submissions, to the jury on the amount of damages. This section would not apply in the circumstances of this case and as Justice Borins is careful to indicate, he is not suggesting that there is any obligation on the parties to provide a range of what could be awarded for punitive damages.