Liability Insurance Litigation Headlines – Fall 2010

$36-million nickel contamination award could have serious ramifications

In July 2010, Ontario Superior Court Justice Joseph Henderson awarded more than 7,000 Port Colborne house-holds a total of $36 million for diminished property values due to pollution. In Canada's first environmental class action trial decision from a common-law province, the nickel refinery of Inco Limited (now Vale) was found to have contaminated the area's lands with airborne metals, particularly nickel.

Households in the shadow of the plant were each awarded $23,000, while those living on the east sideof Port Colborne were each awarded $9,000 and on the west side, $2,500.

Inco refined nickel at the operation from 1918 to 1984 and has admitted to contamination by nickel, copper, cobalt and arsenic. An estimated 20,000 tonnes of nickel oxide, a carcinogen, was spread over the Port Colborne area during those years. In some locations, nickel exceeds 20,000 parts per million (ppm). Ontario's Ministry of the Environment considers the safe upper threshold for nickel in residential soils to be 200 ppm.

Beginning in the 1960s, Inco became one of the main landowners in the area in what many believed was an apparent attempt to buy contamination concerns. The company remediated some of the properties deemed to be the most contaminated.

In February 2001, retired truck driver Wilfred Pearson was the lead plaintiff in a class action lawsuit of 8,000 people seeking $750 million in damages to health, property value and quality of life. In 2002, that suit failed to be certified but it was subsequently modified to focus on the devaluation of property.

The second class action was certified on November 18, 2005 against initial defendants Inco, the Ontario Ministry of Health, the Ontario Ministry of the Environment, the Niagara Regional Health Department, the Niagara District School Board, the Niagara Catholic School Board and the City of Port Colborne.

The plaintiffs settled out of court with all defendants except Inco. In late June 2006, the Supreme Court of Canada dismissed Inco's efforts to stop the suit, which went to trial in October 2009.

The limitation period for such actions is normally six years, and the Inco plant stopped refining nickel in 1984. However, the plaintiffs argued that it was the public disclosure of a January 2000 Ministry of the Environment report on nickel contamination that negatively affected the values of class members' proper-ties. In February 2000, most real estate agents in the Port Colborne area started to insert clauses concerning nickel contamination into agreements of purchase and sale.

Vale argued that the Ministry of the Environment had conducted four previous tests of the air, vegetation and soil between 1972 and 1991, finding elevated levels of contamination in every analysis. While it was not clear whether landowners received copies of the reports, they were entitled to the results. Vale maintained that the notice period should have ended in 1990, six years after the plant ceased its nickel refining operation. The company also claimed that Municipal Property Assessment Corporation (MPAC) data from 1996 to 2008 was inconclusive regarding a drop in property values in Port Colborne.

The trial judge found in favour of the homeowners, noting that if real estate agents were not aware until January 2000 of the potential impact of nickel contamination on property values, it is extremely unlikely that most members of the public knew or ought to have known until at least that time.

Vale is expected to appeal the judgment. Many legal experts contend that if it is upheld, the decision will have a huge impact on companies that have been engaged in heavy industry over the past century. Any future environmental study that reveals remnants of past pollution could lead to new class action suits—even if, as in the case of Inco, the firm was not found to have violated environmental rules.

The Ontario Superior Court of Justice judgment can be found at http://www.canlii.org/en/on/onsc/doc /2010/2010onsc3 790/2010onsc3 790. html.

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Other recent judgments

Employer on hook for almost $6 million in lawyer's dance-floor fall

British Columbia Supreme Court Justice Stephen Kelleher recently awarded a 32-year-old B.C. articling student almost $6 million in damages and lost earnings after a co-worker accidentally pinned her to the floor at a nightclub.

In 2001, Michelle Danicek was dancing behind Jeremy Poole, her col-league at law firm Alexander Holburn Beaudin & Lang, at a Vancouver nightclub after a firm-sponsored dinner in a different location. Poole, 6'2" and 220 pounds, stumbled backward and fell onto Danicek, 5'4" and 110 pounds.

She hit the back of her head against the floor and had her chin pinned between Poole's shoulder blades. She lost consciousness briefly, witnesses said. Both had been drinking at the dinner and at the nightclub.

Danicek claimed that after the fall she experienced ongoing problems,including nausea, vomiting, persistent and severe headaches, and cognitive defects such as poor memory and illegible handwriting. After eight months' leave, she returned to work but had to take up to 30 pain-relief tablets a day to cope with her headaches.

Then in 2002, her car was hit from behind on the Lions Gate Bridge. Although she didn't take any time off work after the accident, her lawyers argued that she was on the road to a full recovery at the time and that the collision exacerbated her injuries, resulting in chronic and debilitating headaches. She ultimately left the firm in 2004, unable to work.

She filed one claim for $285,400 against Poole and one for more than $8 million against Pao Fu Li and Susan Shou Yee Li, the respective owner and operator of the car.

Danicek reached an agreement with Poole that decreased his liability and increased the liability of Alexander Holburn Beaudin & Lang, against which Poole made a third-party claim.

The two accidents were consolidated for trial.

Despite taking issue with Danicek's credibility, Justice Kelleher awarded her $559,220 in past income loss, $185,000 in non-pecuniary dam-ages and nearly $70,000 more in special damages and cost of future care in relation to the nightclub accident. Following witnesses' testimony that she was an incredibly promising young lawyer who excelled at both handling existing clients and finding new ones, he also awarded her more than $5 mil-lion in loss of earning capacity.

In relation to the motor vehicle accident, he awarded her $10,000 in non-pecuniary damages and $595 in special damages.

The trial will enter a second phase in November to determine whether the law firm, as host of the party, was liable. The Supreme Court of British Columbia judgment can be found at http://www.courts.gov.bc.ca/jdb-txt/ SC/10/11/2010BCSC1 111 .htm.

Employers only partially liable for bosses' bad behaviour

The Ontario Court of Appeal has recently overturned a lower-court award of more than $500,000 to a woman for abuse she suffered at the hands of her former boss.

In 2005, Marta Piresferreira, then in her early 60s, had worked for Bell Mobility for about 10 years. She had received mostly glowing performance reviews, but responded poorly to Richard Ayotte's management style. According to everyone in the department, Ayotte repeatedly found fault with his staff, intimidating them by yelling and swearing at them. In May 2005, he berated Piresferreira for failing to arrange a meeting with one of her clients. She tried to explain and attempted to show him a relevant e-mail on her Blackberry, but he shoved her in the shoulder, threatened her with a performance improvement plan (PIP), and told her to get out of his office.

Piresferreira returned to her desk in tears, then left. After a week-long scheduled holiday, she returned and met with Ayotte on the understanding that he would apologize. Instead, he presented her with the PIP, which she refused to sign. She contacted the human resources department and lodged a formal complaint against Ayotte for his assault and abusive conduct. Bell took little action against him and proceeded with the PIP, steps that amounted to wrongful dismissal in Piresferreira's opinion.

Piresferreira went on sick leave and eventually long-term disability, having been diagnosed with major depression, anxiety and post-traumatic stress disorder. She sued Ayotte and Bell in August 2005, claiming dam-ages for assault and battery, negligent and intentional infliction of emotional distress, past and future loss of income, and wrongful dismissal.

In 2008, Ontario Superior Court Justice Catherine Aitken awarded Piresferreira $45,000 for assault, battery, intentional and

negligent infliction of emotional distress, mental suffering and psycho-traumatic disability; $450,832 for loss of past and future income; and $5,123 in special damages.

In May 2010, the Court of Appeal for Ontario overturned the lower court ruling and awarded damages totaling $147,855: $15,000 for the battery, plus damages for breach of her employment contract of $87,855 in lost wages (based on a 12-month notice period), as well as $45,000 for the mental suffering she experienced because of the manner in which she was constructively dismissed.

The appeal court firmly closed the door on recognition at common law of a freestanding tort cause of action against employers for negligent infliction of mental suffering in the work-place.

According to Justices Russell Juriansz, Eleanore Cronk and Susan Lang, recognizing such a far-reaching duty would require courts to venture deeply into workplace operations and "require employers to take care to shield employees from the acts of other employees that might cause mental suffering"—not only at the time the employee is terminated, but throughout the employee's entire period of employment.

Justice Juriansz said that such a new cause of action is "unnecessary because if the employees are sufficiently aggrieved, they can claim constructive dismissal."

However, Piresferreira's lawyer, John Yach, said he will seek leave to appeal the decision to the Supreme Court, arguing that recognizing a cause of action for negligent infliction of mental suffering in the workplace accords with public policy. He pointed to recent amendments to Ontario's Occupational Health and Safety Act (Bill 168), which require employers to create and appropriately administer anti-harassment and anti-violence policies.

The Court of Appeal for Ontario decision can be found at http://www.ontariocourts.on.ca/decisions/2010/ may/2010ONCA0384.htm.

$5 million awarded to date in Chinese drywall suits

Between 2001 and 2007, hundreds of millions of sheets of defective drywall were imported from China into the U.S. to keep up with massive reconstruction efforts following a series of Gulf Coast hurricanes as well as building booms in other areas of the country.

Thousands of homeowners, mostly in Florida, Virginia, Mississippi, Alabama and Louisiana, began complaining of breathing problems, sore throat, bloody nose, eye irritation, fatigue, dizziness, insomnia and headaches.

The toxic drywall emitted hydrogen sulphide, sulphur dioxide and other gases, creating a "rotten egg" odour and causing damage to health and property. Industry watchers have suggested that as few as three sheets can be enough to render a home uninhabitable.

The off-gases also corrode exposed metals, resulting in scorched wiring behind plugs and switchplates; damaged coils in air conditioners; blackened jewelry, silverware and television cables; and premature failure of light bulbs, fixtures, appliances and other electrical equipment.

U.S. District Judge Eldon Fallon is presiding over more than 2,100 federal lawsuits homeowners have brought against manufacturers, distributors, suppliers and home builders.

In the first trial in April 2010, Fallon concluded that plaintiffs' homes must be gutted in order to replace all drywall, electrical wiring, heating and air conditioning equipment, broadloom, cabinets, trim work and flooring.

His findings, which are expected to set the standard for remediation of tainted homes, went further than recommendations made by the Consumer Protection Safety Commission.

He awarded seven Virginia families $2.6 million in damages. In addition to being liable for remediation, the defendant, Taishan Gypsum Co., was responsible for cleaning and airing the homes, as well as the post-cleanup environmental certification. The court also found that the plaintiffs could recover for the loss of personal property such as appliances, carpets, curtains and clothing; economic damages arising from the loss of use and enjoyment of the home; alternative living costs; and costs associated with foreclosures, bankruptcies and the reduction of property values.

Taishan did not participate in the initial litigation, but has since hired U.S. attorneys and filed an appeal to the decision.

Thousands of plaintiffs are also pursuing claims in state courts. In June, the first of these cases saw a Florida jury award Armin and Lisa Seifart $2.4 million in costs for gutting and renovating their $1.6-million house as well as damages for loss of enjoyment of their home and the stigma that might reduce its value.

An estimated million square metres of the noxious drywall arrived in Canada through Vancouver. Most was used in the B.C. lower main-land, but some may have reached the Prairies and southern Ontario. As yet, no lawsuits have been reported in this country.

"Accidental" ruling in blast won't stop actions against Sunrise Propane

According to a confidential report by the Ontario Fire Marshal's Office obtained by CBC News, the deadly 2008 explosion at Sunrise Propane in Toronto's north end was traced to a gas hose leak and an accidental mechanical failure, but the exact ignition cause may never be known.

The blast and subsequent fire at the propane fuel site damaged homes, businesses and schools in the surrounding area. Sunrise Propane employee Parminder Singh Saini died in the explosion, and firefighter Bob Leek died of a heart attack while battling the resulting blaze.

The report says an illegal tank to-tank transfer was in progress at the time of the accident, and a propane leak resulted from a hose failure.

Tank-to-tank or truck-to-truck transfers are both highly dangerous and illegal in Ontario. Sunrise had already been warned about the practice

.About six minutes before the explosion, the leaked liquid propane turned to vapour, which ignited, although the investigators said they didn't know why.

The report makes several recommendations:

- Improved standards for equipment and employees are needed.
- Consideration should be given to how much propane is stored at specific sites, citing congestion at the Sunrise location.
- Even though Sunrise did fit standard site criteria, more thought should have been given to whether its position so close to a residential area was appropriate.

Alfred Kwinter, who represents the Saini family, said the report "affirms everything we allege." Harvin Pitch, a lawyer in a class action suit against Sunrise, agreed: "It confirms our claim that these people allowed a dangerous operation."

In late November, Pitch and three other law firms will be in court to secure approval for the class action to proceed. It seeks $300 million from Sunrise Propane Energy Group, their landlord, cargo carriers and the Technical Standards and Safety Authority (TSSA).

"That it was accidental is of no consequence," Pitch said. "We never alleged someone lit a match."

Sunrise is also facing charges under the Occupational Health and Safety Act and the Environmental Protection Act.

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