

WorkplaceNL

Health | Safety | Compensation

January 22, 2019

Internal Review Decision

Mr. Denis J. Fleming
Cox & Palmer
Suite 1000, Scotia Centre
235 Water Street
St. John's NL A1C 1B6

Dear Mr. Fleming:

Re: [REDACTED]

I have reviewed in accordance with section 46 of the *Workplace Health Safety and Compensation Act* (herein referred to as the "Act"), the submissions of all interested parties as to whether an action by [REDACTED] the (Plaintiff) against [REDACTED] (First Defendant) and [REDACTED] (Second Defendant) is prohibited by section 44 of the Act.

Background Information

On April 26, 2010, the Plaintiff was injured while working as a Pipefitter with [REDACTED]. The Plaintiff reported in the Form 6, "Workers Report of Injury" that at the time of the injury he was standing about 30 feet from an excavator that was removing a 24 foot culvert from a tandem truck with a sling. As the Second Defendant proceeded to remove the culvert from the truck, the culvert swung back towards the excavator. The Second Defendant then extended the boom of the excavator with the culvert attached sending it in the direction of the Plaintiff. According to the Plaintiff, the culvert struck him in the midsection causing him to be taken back about 5 feet and then hit the ground. The Plaintiff also reported that the culvert rested on top of him and that the supervisor and coworkers then came to assist him. According to the First Defendant's report, work was taking place in the town [REDACTED] and that the Plaintiff injured his midsection and chest when the Second Defendant made a corrective action to control the pipe being moved.

Following the review by one of WorkplaceNL's Intake Adjudicators, the Plaintiff's claim for compensation was accepted on May 10, 2010, for a left hip/mid-low back/soft tissue/inflammation/mechanical back pain injury. On July 23, 2010, WorkplaceNL received an "Election Form-Motor Vehicle Accident" wherein the Plaintiff, represented by Mr. John M. Babb Q.C. of Babb Law Office, elected not to claim compensation. Mr. Babb indicated that the Plaintiff's injuries were due to a motor vehicle accident and as such, the Plaintiff would be commencing an action privately in damages for personal injury and loss sustained in the said motor vehicle accident.

A statement of claim was issued by the Plaintiff on April 13, 2012, against [REDACTED] and [REDACTED]. On July 11, 2013, you requested on behalf of [REDACTED] and [REDACTED] that WorkplaceNL determine, pursuant to section 46 of the Act, whether the action brought by the Plaintiff against your clients is prohibited by section 44 of the Act. A copy of the July 11, 2013, submission was provided to the Plaintiff. A rebuttal submission was provided by the Plaintiff on September 20, 2013. Your reply submission was received October 4, 2013. In response to my request for clarification regarding the location of the excavator and the dump truck at the time of the incident, a submission was provided by the Defendants on July 10, 2018. Also a submission was provided on behalf of the Plaintiff on July 27, 2018. The Defendants provided a response on August 3, 2018. The response to the Plaintiffs August 3, 2018, correspondence was provided by the Plaintiff on August 10, 2018.

Legislation and Policy

The *Workplace Health Safety and Compensation Act* states:

Section 2(1) In this Act

(j) "employer" means an employer to whom this Act applies and who is engaged in, about or in connection with an industry in the province and includes

- (i) a person having in his or her service under a contract of hiring or apprenticeship, written or oral, express or implied, a person engaged in a work in or about an industry within the scope of this Act,
- (ii) the principal, contractor and subcontractor referred to in section 120,
- (iii) in respect of an industry referred to in subparagraph (i) a receiver, liquidator, executor, administrator and a person appointed by a court or a judge who has authority to carry on an industry,
- (iv) a municipality,
- (v) the Crown in right of Canada where it may in its capacity of employer submit to the operation of this Act,
- (vi) the Crown and a permanent board or commission of the Crown where the province may in its capacity of employer submit itself or a board or commission to the operation of this Act, and
- (vii) in respect to the industry of fishing, whaling or sealing, the managing owner or person operating a boat, vessel or ship employed or intended to be employed in the industry;

(z) "worker" means a worker to whom this Act applies and who is a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise, and includes

- (i) in respect of the industry of fishing, whaling or sealing, a person who becomes a member of the crew of a boat, vessel or ship under an agreement to prosecute a fishing, whaling or sealing voyage in the capacity of a person receiving a share of the voyage or is described in the Shipping Articles as a person receiving a share of the voyage or agrees to accept in payment for his or her services a share or portion of the proceeds or profits of the venture, with or without other remuneration, or is employed on a boat, vessel or ship provided by the employer,
- (ii) a person who is a learner, although not under a contract of service or apprenticeship, who becomes subject to the hazards of an industry for the purpose of undergoing training

or probationary work specified or stipulated by the employer as a preliminary to employment,

- (iii) a part-time or casual worker, and
- (iv) an executive officer, manager or director of an employer.

Section 19. (1) The commission has exclusive jurisdiction to examine, hear and determine matters and questions arising under this Act and a matter or thing in respect of which a power, authority or distinction is conferred upon the commission, and the commission has exclusive jurisdiction to determine

- (a) whether an injury has arisen out of and in the course of an employment within the scope of this Act;
- (b) the existence and degree of impairment because of an injury;
- (c) the permanence of impairment because of an injury;
- (d) the degree of diminution of earning capacity because of an injury;

(4) The decisions of the commission shall be upon the real merits and justice of the case and it is *not* bound to follow strict legal precedent.

Section 43 (1) Compensation under this Act is payable

(a) to a worker who suffers personal injury arising out of and in the course of employment, unless the injury is attributable solely to the serious and wilful misconduct of the worker; and

(b) to the dependents of a worker who dies as a result of such an injury.

Section 44. (1) The right to compensation provided by this Act is instead of rights and rights of action, statutory or otherwise, to which a worker or his or her dependents are entitled against an employer or a worker because of an injury in respect of which compensation is payable or which arises in the course of the worker's employment.

(2) A worker, his or her personal representative, his or her dependents or the employer of the worker has no right of action in respect of an injury against an employer or against a worker of that employer unless the injury occurred otherwise than in the conduct of the operations usual in or incidental to the industry carried on by the employer.

No Compensation

Section 44.1(1) Section 44 shall not apply where the worker is injured or killed

(a) while being transported in the course of the worker's employment by a mode of transportation in respect of which public liability insurance is required to be carried; or

(b) as a result of an accident involving the use of a motor vehicle by the worker or another person, in the course of the worker's employment.

(2) In subsection (1) "motor vehicle" means

(a) a motor vehicle

(i) registered under the Highway Traffic Act, or

(ii) authorized under section 12 or 17 of the Highway Traffic Act to be operated on a highway in the province without being registered under that Act,

whether or not it is being operated on a highway; or

(b) another motor vehicle while being operated on a highway in the province and

for the purpose of this definition "highway" means a highway as defined in the Highway Traffic Act.

Section 46 Where an action in respect of an injury is brought against an employer or a worker by a worker or his or her dependent, the commission has jurisdiction upon the application of a party to the action to adjudicate and determine whether the action is prohibited by this Act.

Position of Defendants

The Defendants [REDACTED] and [REDACTED] are seeking a determination pursuant to section 46 of the *Act*, that section 44.1 (1) of the *Act* does not apply in the case of [REDACTED] injury and action. Therefore the Defendants maintain that [REDACTED] is barred from maintaining the action pursuant to section 44 of the *Act*.

The Defendants put forth that there is no question that the worker's injury occurred while he was engaged in the course of employment and that each of the defendants named in the action qualify as either an employer or worker under the *Act*. As a result unless there is an exception to the statutory bar, the action by the [REDACTED] is barred pursuant to the *Act*.

The Defendants position is that the only possible exception to the statutory bar in this case is found in section 44.1 of the *Act*. This section applies to accidents that occur while workers are being transported in the course of the worker's employment by mode of transportation in respect of which public liability insurance is required to be carried or suffers injury as a result of an accident involving the use of a motor vehicle. The Defendants maintained that neither of these exceptions apply in this case.

There was a Reply Submission provided by the Plaintiff. In rebuttal to the Plaintiff's argument that the dump truck which delivered the culvert is a motor vehicle, the Defendants submit that the presence of the dump truck at the accident scene is irrelevant to whether the statutory bar applies. The dump truck had delivered the culvert to the site and was parked awaiting removal by the excavator. The excavator had removed the culvert out of the truck prior to striking the Plaintiff. The Defendants submit that the presence of the dump truck at the accident scene is irrelevant to whether the statutory bar applies.

It is the position of the Defendants that the purpose of section 44.1 "Exception to the Statutory Bar" is to remove from the Worker's Compensation system, claims in which there is recoverable automobile insurance. As such a common sense reading of the section holds that the negligent operation of the "motor vehicle" has to cause or contribute to the accident for the exception to the statutory bar to apply.

The Defendants submit that at the time of the accident, the excavator was being used as a piece of construction equipment; not as a motor vehicle. Therefore the exemption found in section 44.1 (1) (b) of the *Act* does not apply and the claim is subject to the statutory bar.

The Defendants' position is that the case law on multipurpose vehicles shows that equipment/motor vehicles are often transporting something when an accident occurs. This fact does not mean that the equipment is operating as a motor vehicle.

The Defendant points out that the Plaintiffs have argued that a finding that an action is barred in this case would create an exception for all actions involving heavy equipment. The Defendant puts forth that this is not correct. The Defendants argue that the excavator was being used to lift a culvert as opposed to a means of transportation. The Defendants have put forward that in the circumstances in this case at the time of [REDACTED] injury, the excavator was being used as a piece of equipment; not, as a motor vehicle.

In the Defendants' submission it is contended that legislative documents and WorkplaceNL documents confirm that the purpose of the legislative intention behind the exception contained in section 44.1 of the *Act* was to allow workers or WorkplaceNL to gain access to mandatory automobile insurance. The Defendants provided the history of the development, purpose and intention of section 44.1(1)(b) to only apply where there is a workplace accident covered by mandatory automobile insurance. As the excavator was not covered under mandatory automobile insurance coverage for [REDACTED] or [REDACTED] actions, the circumstances of this case are not meant to be captured by section 44.1 (1)(b).

The Defendant's submitted if section 44.1 (1) (b) provides an exception to the statutory bar in circumstances where the employer or another worker would not be covered by mandatory motor vehicle liability policy, employers and workers would be exposed to judgments against them by workers. This would compromise the entire worker's compensation system and cause employers to question why they are forced to pay into the system in the first place. The Defendants maintain that this section must be interpreted only to apply where there is a workplace accident covered by automobile insurance. In such a case, it will be the automobile insurer who ultimately pays; either because the worker elects to sue or, if the worker elects to receive benefits from WorkplaceNL, then WorkplaceNL sues in the worker's name. Where there is a workplace accident not covered by automobile insurance, the exception found in section 44.1 (1) (b) cannot come into play and no right of action can exist against the employer or another worker.

Also in the Reply Submission the Defendants argued that the Plaintiffs argument that barring the Plaintiff's action would leave an injured worker inadequately protected and would create a gap in the system, is not supported. The Defendants submitted that the historical trade off at the root of the Worker's Compensation system provides significant obvious benefits to workers. There is no gap in the system as a finding that the statutory bar applies would leave the Defendant with the ability to receive the benefits he is entitled to under the *Act*. If [REDACTED] action is found to be barred, [REDACTED] would have the ability to apply for benefits under the *Act*.

Position of the Plaintiff

In the Plaintiff's submission it is argued that [REDACTED] injuries are not covered by the statutory bar as found in section 44 of the *Act* which prohibits actions against employers and their workers. The position is put forth that section 44.1 of the *Act* allows exceptions to the

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statutory bar and therefore [REDACTED] commenced an action in the Supreme Court of Newfoundland and Labrador-General Division, against [REDACTED] and [REDACTED]

Regarding section 44.1, it is put forth by the Plaintiff that this section of the *Act* applies as [REDACTED] accident involved the use of a motor vehicle, and that [REDACTED] injuries were caused directly by the use of an excavator and/or a dump truck which fit the definition of a motor vehicle in accordance with the *Highway Traffic Act NL*. That definition of a motor vehicle includes a vehicle propelled, driven or controlled otherwise than by muscular power, other than a trailer or a vehicle running upon fixed rails. It is put forth that the dump truck and excavator in this case were neither trailers nor vehicles running upon fixed rails, and therefore, they were motor vehicles that fit under the definition of "motor vehicle" in accordance with the *Highway Traffic Act*.

The definition of a vehicle was put forth from the Black's Law Dictionary 9th Edition where "vehicle" is defined as an instrument which conveys people or things by land, air or water. The Plaintiff put forward that the excavator and the dump truck were being used as motor vehicles as they were used to convey the culvert.

The position of the Plaintiff contends that on the date of injury of April 26, 2010, both [REDACTED] and the driver of the dump truck, who were employees of [REDACTED] were performing their duties of employment in a negligent and/or wanton and/or careless fashion. As a result it is contended that [REDACTED] was struck by the culvert and sustained personal injuries and damages.

It is argued by the Plaintiff that pursuant to the *Insurance Act NL*, the no-fault insurance scheme (workers compensation) does not apply to motor vehicle accidents involving vehicles that are required to be registered under the *Highway Traffic Act*. The Plaintiff refers to the excavator and/or dump truck that were present at the scene of the incident where [REDACTED] was injured as examples of such vehicles. The Plaintiff maintains that it would be unjust to workers if their actions against an employer were prevented due to a narrow interpretation of section 44.1(1) that would exclude most vehicles that are often used in the course of employment and/or vehicles that have the sole purpose of being put to use during the course of employment. The position presented is that this would create a situation where workers are inadequately protected against workplace accidents, in particular, workers in construction environments where heavy machinery is used.

The Plaintiff puts forth the position that the exception to the statutory bar should especially apply to vehicles often used in the course of employment or vehicles that are solely used in the course of employment such as excavators and/or dump trucks. It is maintained that precluding these vehicles from exemption from the statutory bar would provide a large exception that would be unjust and contrary to the purpose of the *Act* and provide unfair protections to the employer instead of protecting the interests of the workers.

Regarding the definition of motor vehicle, the Plaintiff's position is that it would be necessary to use the definition of motor vehicle as it is found in the *Highway Traffic Act NL*, and to interpret the word "use" using plain language meaning in interpreting section 41.1 (1). In relation to 44.1, the Plaintiff states that any ambiguity or doubt that arises when ascertaining that whether a worker's injuries were caused by the use of motor vehicle should be interpreted in favour of the worker using these definitions in interpreting the *Act*. To not do so is benefiting the employer unjustly leaving the worker without recourse by which to recover for his injuries and damages. It

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is contended that "use" will not have to be broadly interpreted in [REDACTED] situation as the plain language meaning will suffice.

Also the Plaintiff's submission indicates that regarding the interpretation of section 44.1(1) of the Act, it is necessary for WorkplaceNL to adopt the proposed approach that corresponds with what the purpose of the Act is: to afford protections to workers and promote safety in the workplace. "The Commission should recognize this purpose and recognize its importance rather than strictly interpreting the Act to the detriment of the worker and the unequal benefit of the employer." It is also argued that the excavator and the dump truck should have been covered by a mandatory automobile policy. The Plaintiff submits that the action taken against the employer should not be statute barred.

Reasoning and Analysis

[REDACTED] (First Defendant) and [REDACTED] (Second Defendant) are the applicants in this case. The matter before me as a result of the application by the Defendants is to determine whether the action of the Plaintiff against the Defendants is barred by the provisions of the Act. As provided by section 46 of the Act, WorkplaceNL has the authority upon the application of a party to the action to adjudicate and determine whether the action is prohibited by the Act. I have reviewed and considered the written submission of the Defendants, the Rebuttal Submission by the Plaintiff, the Reply Submission of the Defendants, and the responses by the parties to my July 3, 2018, request for clarification.

Section 44(1) of the Act provides the statutory bar to actions of the worker against an employer for an injury which arises out of and in the course of the worker's employment. There is an exception to this provision of the Act. Section 44.1(1) states that section 44 shall not apply where the worker is injured or killed while being transported in the course of the worker's employment by a mode of transportation in respect of which public liability insurance is required to be carried. Section 44 shall also not apply where the worker is injured as a result of an accident involving the use of a motor vehicle by the worker or another person, in the course of the worker's employment.

In making the determination I have considered a number of issues which include:

1. Was [REDACTED] a "worker" within the meaning of the Act?

From my review of the facts in this case, [REDACTED] was employed as a Pipefitter with [REDACTED] when he was struck in the midsection by the culvert. [REDACTED] is a worker within the meaning of section 2 (1) (z) of the Act.

2. Was [REDACTED] a "worker" or "employer" within the meaning of the Act?

From my review of the facts in this case, [REDACTED] was employed as the Excavator Operator with [REDACTED] when he removed a culvert from a dump truck and the culvert struck [REDACTED] in the midsection. [REDACTED] is a worker within the meaning of section 2 (1) (z) of the Act.

3. Was [REDACTED] an "employer" within the meaning of the Act?

According to WorkplaceNL records, [REDACTED] is a registered employer in the province of Newfoundland and Labrador. In accordance with section 2 (1) (j) of the Act [REDACTED] is considered an employer within the meaning of the Act.

4. Did [REDACTED] injuries arise out of and in the course of his employment?

The parties agree that the Plaintiff was in the course of his employment as a Pipefitter when the culvert was being put in place. Work was being completed by the Plaintiff for the employer and the injury came about as a result of the employment as the Plaintiff was injured in the completion of his duties. [REDACTED] claim was initially accepted by WorkplaceNL as it was determined that [REDACTED] injuries arose out of and in the course of employment. [REDACTED] elected to not claim compensation.

5. Did [REDACTED] injuries result from an accident involving the "use of a motor vehicle"?

Section 44(1) of the Act provides the statutory bar to actions of the worker against an employer or another worker for an injury which arises out of and in the course of the worker's employment. Section 44 (2) of the Act states that a worker has no right of action against an employer or against a worker for an injury that occurs while carrying out operations usual in or incidental to the industry carried on by the employer. This provision promotes a fundamental aspect of the Worker's Compensation system known as the "*Historic Trade-Off*" as outlined in Pasiechnyk v. Saskatchewan (Worker's Compensation Board (1997) 2 S.C.R. 890 and Reference Re: Workers' Compensation Act, 1983 (Nfld.) (Piercey Estate v. General Bakeries Limited).

In this particular case, it must be determined if the exception as stated in section 44.1 of the Act applies. Section 44.1 (a) applies to accidents that occur while the worker is being transported in the course of the worker's employment by a mode of transportation in respect of which public liability insurance is required to be carried. This section is not applicable in this case.

Section 44.1(1)(b) states that section 44 shall not apply where a worker is injured as a result of an accident involving the use of a motor vehicle by the worker or another person, in the course of the worker's employment.

Section 44.1 (2) states:

In subsection (1) "motor vehicle" means

- (a) a motor vehicle
 - (i) registered under the *Highway Traffic Act*, or
 - (ii) authorized under section 12 or 17 of the *Highway Traffic Act* to be operated on a highway in the province without being registered under that Act, whether or not it is being operated on a highway; or
- (b) another motor vehicle while being operated on a highway in the province and

for the purpose of this definition "highway" means a highway as defined in the Highway Traffic Act.

[REDACTED]

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Facts

The statement by [REDACTED] owner of [REDACTED] provided February 20, 2013, indicates that the company is a heavy civil contractor completing work in the province of Newfoundland Labrador. [REDACTED] confirmed that [REDACTED] was a pipefitter/laborer that did work for the company for 4 to 5 years and was injured on the worksite in [REDACTED]. [REDACTED] was not on-site at the time of the incident. In his November 28, 2013 statement [REDACTED] stated:

"On the site at the time of the incident we were using a 2009 excavator. The excavator has metal tracks and is floated from job site to job site by using a flatbed. The excavator is not licensed for the road and does not require an automobile policy. Our supervisor on-site at the time was [REDACTED] and the operator was [REDACTED]."

The witness statement from [REDACTED] [REDACTED] employee, signed February 25, 2013, confirmed that on or about April 26, 2010 work was being completed in [REDACTED]. [REDACTED] confirmed that the company had a 30 inch diameter pipe on the back of a tandem dump truck and the plan was to remove the culvert with a sling attached to the excavator. There were 3 pipes. A sling would be placed in the center of the pipe and the excavator would remove the pipe. It was confirmed that [REDACTED] was the operator of the excavator and that the excavator itself had been floated by flatbed trailer to the site. [REDACTED] in his role as pipefitter was assisting with the removal of the pipe from the dump truck. [REDACTED] wrote:

"[REDACTED] was foreman for the crew. There was (sic) about 3 pipes in total and they were to take them from the truck and lay them on the ground. [REDACTED] knew the other workers were in the area. He was moving the pipe out of the truck the pipe started to come towards him. He corrected it to keep it away from the excavator. The pipe swung a little and [REDACTED] tried to stop it and the pipe hit him around the midsection. It hit him from around his legs up to his chest area. [REDACTED] should have let the pipe hit the ground. [REDACTED] fell to the ground I was called to the area. [REDACTED] was in some pain and had to go to the hospital in [REDACTED]. He was examined and released that day. We completed accident investigation form. [REDACTED] missed work after the incident and hasn't returned since. There would have been no one else in the area at the time. In taking the pipe out of the truck, the excavator would be on the side and lifted out over the top and swing it out to be laid out on the ground. I would suggest the pipe was about 6 meter lengths. The pipe would be laid on the ground and placed in the ditch for placement. The pipe that was removed was actually the corrugated culverts. They are approximate 30 inches diameter and 6 meters in length."

The Witness Statement from [REDACTED] confirmed that he was operating a 200 John Deere excavator and that he had a Class I Heavy Equipment Operator's License. He indicated that there were several workers on the site including [REDACTED] and [REDACTED]. [REDACTED] indicated that he was using the excavator to fill in some areas with gravel and at one point during the day the dump truck arrived carrying a piece of galvanized culvert approximately 20 feet long and 3 feet in diameter. He was requested by the site supervisor to get the excavator in position by the dump truck so the workers could hook a chain around the culvert and then onto the bucket of the excavator. Once the excavator was in place the workers got in the rear of the dump truck to place a chain around the culvert.

"They then had me lower my bucket close to the culvert and they then hooked the chain through a steel pin in the bucket. I was then instructed to raise my bucket slowly to get the chain taut (sic), which I did. The workers then got out of the dump and I was instructed to swing my bucket moving away from the dump truck so I could lay the culvert on the ground. The truck was approximately 10 feet high so as I lifted the culvert I would estimate it to be 15 feet off the ground. It, the culvert was now vertical to the ground and as I swung my machine slowly away from the truck and started to lower my bucket, the culvert was slightly swinging back and forth as I lowered it to the ground. When I had the culvert approximately 4 feet from the ground, I suddenly noticed worker [REDACTED] reach out to hold the culvert. I guess this was to steady the culvert, although I did not need or see this as necessary. When [REDACTED] reached for the culvert I was surprised and I then saw the culvert strike him in the belly area. He fell to the ground and I believe it was more of the weight of the culvert pushing into the ground rather than a violent hit. As the pipe moved away from [REDACTED] I immediately let it land on the ground."

Mr. Fleming, representative for the Defendants, advised that he had spoken to [REDACTED] who was a superintendent of [REDACTED] regarding the location of the excavator at the time of the incident. The excavator was located on the side of the roadway, partially on the shoulder of the road, and at all times inside a fully cordoned off construction zone. He indicated that the excavator has steel tracks instead of wheels and had been floated to the job site.

The Plaintiff provided a hand-drawn picture indicating the presence of 2 excavators at the site. Only one excavator was removing the pipe from the dump truck. The Plaintiff indicated that the excavator that was removing the pipe was situated fully in the westbound lane of traffic. The Plaintiff maintains that the excavator was completely on the paved portion of the roadway as the dump truck was situated in the eastbound lane of traffic of the roadway. There was a flag person present.

It is clear from the evidence that the excavator moved alongside the dump truck in order to remove the culvert from the dump truck and position the culvert in the ditch. The witness statements confirm that the excavator was alongside the dump truck with the arm and bucket in operation. After lifting the culvert with the excavator arm and bucket, the operator was in the process of laying the culvert on the ground when the Plaintiff was hit with the culvert.

Case Law and Submission

Section 19 (4) of the *Act* states the decisions of WorkplaceNL shall be upon the real merits and justice of the case and is not bound to follow strict legal precedent. While WorkplaceNL is not bound to follow strict legal precedents, I have reviewed the cases submitted to determine relevance and applicability to the case at hand.

Weir's Construction Ltd v. Warford 2003 Carswell Nfld 172 NL Court of Appeal

The worker was injured in the course of his employment as a car mechanic with Weir's Construction when the vehicle on which he was working rolled on top of him. The WorkplaceNL Internal Review Specialist provided a broad meaning to the word "use", and concluded that action was not barred.

The Court's ultimate conclusion was that the Review Specialist had been patently unreasonable when he felt he was compelled to follow a line of insurance cases that mandated a broad interpretation of the word "use". The Court of Appeal held that it is necessary to adopt a purposive approach to statutory interpretation. The Court adopted the approach to statutory interpretation where the words of an Act are to be read in the entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the objective of the Act and the intent of Parliament.

Analysis

In this case, the Court of Appeal was clear that in determining whether the exception found in section 44.1 (1) (b) of the Act applies to a given fact situation, WorkplaceNL should examine the purpose of the Act in general and section 44.1 (1) (b) in particular.

Amos v. Insurance Corp. of British Columbia

A motorist was attacked by a gang while he was driving. One of the gang members shot and seriously injured the motorist while he was escaping in his vehicle. The motorist applied for benefits under his Automobile Insurance policy. The claim of the motorist was denied; therefore, the motorist subsequently appealed to the Supreme Court of Canada. The Court determined the motorist was driving his van down the street which was an ordinary and well-known use of an automobile. In making this determination, the Court applied a two-part test: (1) did the accident result from the ordinary and well-known use of an automobile, and (2) is there a causal relationship between the motorist's injuries and the ownership, use or operation of the vehicle. The Court determined that driving a van down the street was an ordinary and well-known activity to which automobiles are put and the injuries were causally connected with the ownership, use and operation of the vehicle. Therefore, the motorist was entitled to insurance benefits.

Analysis

In the Amos case, the injuries or damages were determined to be as a result of the use of a motor vehicle. The motor vehicle in question was an automobile (motor car) designed to carry people. Amos deals with entitlement to motor vehicle insurance benefits under the *Insurance (Motor Vehicle) Act* of British Columbia. In this case, it was determined that the motorist's driving, was an ordinary and well-known activity, to which automobiles are put. The motorist's injuries were considered to be causally connected with the ownership, use and operation of the vehicle.

The Amos case does not involve an interpretation of the *Workplace Health, Safety and Compensation Act*, or similar legislation from another workers' compensation jurisdiction and does not involve a multi-use vehicle. In this case automobile insurance was carried on the vehicle which was being driven as a motor vehicle at the time of the injury. This does not involve the use of a multipurpose vehicle.

Citadel General Insurance Co. v. Vyttingham

The injured motorists were seeking insurance coverage under their own automobile insurance policy. The Plaintiffs in this case were seriously injured when boulders were dropped overhead on their car as they passed through the underpass. The tortfeasors had transported boulders to

the overpass with their car. In order to recover under the Policy, the injuries had to arise "*directly or indirectly from the use or operation*" of the tortfeasor's automobile.

The Supreme Court applied the two-part purpose and chain of causation test. The Court found that the purpose test was satisfied since transportation is what motor vehicles are used for. However, the Court held that the chain of causation had been broken by an intervening act of negligence. The Court found that the rock throwing was an activity entirely severable from the use or operation of the tortfeasor's car. The Court held that there was no coverage under the policy.

Herbison v. Lumbermens Mutual Casualty Co.

In this case, a hunter accidentally shot a member of his hunting party while driving his truck to his designated hunting spot. It was just before sunrise and the hunter, believing he saw a deer in his headlights, got out of his truck and shot the other hunter.

The issue before the Supreme Court was whether the injury sustained by the other hunter arose "*directly or indirectly from the use or operation*" of an automobile. The Court applied a two-part test that had been traditionally applied by the Court. The Court concluded that although the purpose test was satisfied, since the truck was being driven at the time of the shooting, the chain of causation test had not been satisfied and ruled that the Policy did not apply. The Court concluded that there had been an intervening act of negligence that had been the cause of the accident – that being the shooting itself. The Court held that this act was independent of the use and operation of his truck.

The Court distinguished this case from the facts in the *Amos* case on the basis that this case was not a no-fault benefit case involving the interpretation of a statute.

Analysis (Citadal and Herbison) cases

In both these cases, it was determined that there was an intervening act of negligence responsible for the "*accident*" and the Court concluded that the act was independent of the use and operation of the motor vehicle. This is not the negligent use of a motor vehicle. I find both scenarios, that being the dropping of boulders onto a highway and the shooting, are not similar to the case at hand. These cases did not involve multi-use vehicles and are not similar.

Harvey v. Shade Brothers Distributors Ltd.

An individual filled the tank of the domestic oil heating plant, and continued to pump oil into the premises, thereby causing damage. The oil was conveyed from the delivery tank truck (a motor vehicle) by means of a hose and pump, the power for the operation of which was supplied by the truck's engine. The truck was stationary at the time. It was concluded that the motor vehicle was being used as a tank and a pump and the accident was not one in which a motor vehicle was involved. The court said that the test to be applied when considering the character of the multipurpose article at any given time is the purpose for which at that time, it was being used.

F.W. Argue Ltd. v. Howe

A delivery person overfilled an oil tank from a tank truck. The oil ignited, causing extensive damage to the customer's premises. It was determined that the damage was caused by the use

or operation of the fuel pump mounted on the motor vehicle when the motor vehicle itself was stationary. The Court determined that the vehicle was being used as something other than a motor vehicle at the time of the accident.

Lanteigne v. Nova Scotia (Workers' Compensation Appeals Tribunal)

The worker was injured when a boom truck toppled onto its side. The injured worker was in the steel bucket at the end of the boom. The Appeal Tribunal held that while the accident involved a motor vehicle, the vehicle was not being used as a motor vehicle at the time of the accident. The Nova Scotia Court of Appeal upheld the decision.

A Dixon Cable Laying Co. Ltd. v. Osborne Contracting Ltd.

A backhoe was being used to fill a trench in which cable had been laid for the British Columbia Telephone Company. In the process, the backhoe went out of control and damaged the cable. The backhoe was considered a motor vehicle under the Motor Vehicle Act. The question was whether the limitation period under the Motor Vehicle Act applied. In order to apply, the damages had to be occasioned by a motor vehicle. The Court held that the backhoe was being used as a shovel and was not being used as a motor vehicle. The Court further stated that it did not matter that the vehicle was stationary or operational in determining use of the vehicle.

Analysis of the (Harvey, Argue, Lanteigne, and Dixon) cases

The cases provide guidance on how the Courts have viewed multi-use vehicles. In the above cases the injuries and damages were determined not to be as a result of the use of a motor vehicle. In these cases the Courts distinguish between when the vehicle was being used as a motor vehicle versus when it was being used as equipment. In the above cases the injuries or damages were determined not to be as a result of the use of a motor vehicle.

Archean Resources Ltd. v. Newfoundland (Minister of Finance)

This case involved a dispute concerning smelting royalties between Archean Resources Ltd. and the Government of Newfoundland. The Court of Appeal provided guidance when determining the objective of legislature in accordance with its true meaning.

The Court noted that every provision of an Act is to be considered "remedial" and to interpret it so that it "best" ensures the attainment of its "objects" according to its "true" meaning. The Court noted that when arriving at the "true" meaning of the surrounding text, interrelation of other related statutes, the social and legislative context in which the provision was enacted, other extrinsic aids must be consulted during the process of determining the "true" meaning of a particular statute.

Rizzo and Rizzo Shoes Ltd. (Re)

In this case Rizzo and Rizzo Shoes Limited had declared bankruptcy and when a receiving order was made with respect to the firm's property, the firm's employees lost their jobs. Proof of outstanding termination or severance pay owing to former employees under Employment Standards Act (ESA) was provided to the Trustee by Ontario's Ministry of Labour. The trustee in this case disallowed the claims of the employees on the grounds that the bankruptcy of the employer does not constitute dismissal from employment and accordingly created no entitlement to severance, termination or vacation pay under the ESA.

The appeals court found that termination as a result of an employer's bankruptcy gives rise to an unsecured claim provable in bankruptcy pursuant to section 121 of the *Bankruptcy Act* for termination and severance pay in accordance with the subsection 40 and 40 a of the ESA. The court stated that the use of legislative history as a tool for determining the intent of legislature is appropriate.

Analysis of Archean of the (Archean Resources and Rizzo and Rizzo Shoes) cases

The Archean Resources and the Rizzo and Rizzo Shoes cases provide guidance in statutory interpretation. The cases confirm that when reviewing a particular provision of an Act, such as section 44.1(1)(b) the entirety of the surrounding text, objectives, interrelation of provisions, social and legislative intent of the Act must be considered when determining the "true" meaning of section 44.1.

Keddy v. Workplace Health, Safety and Compensation Commission (New Brunswick)

In this case Ms. Keddy was at work when she cut off part of her finger with a saw. The surgeon amputated the tip of her finger. She attended the hospital for pain treatment. She alleged that the nurse had administered an injection near the sciatic nerve, causing more pain. Ms. Keddy brought an action against the nurse and hospital. The nurse applied for a determination as to whether Ms. Keddy's action was barred under s. 11 (1) of the *Worker's Compensation Act*. The Tribunal held that the injection resulted from Ms. Keddy's work-related injury in that the injury and treatment were connected because without the injury, Ms. Keddy would not have needed treatment. Ms. Keddy appealed and the appeal was dismissed. It was determined that workers injured while receiving treatment for work related injuries are acting within the course of their employment at the time of suffering the subsequent injury. The court held that a sufficient causal connection between the initial and subsequent injury exists in that the latter is a necessary incident of the former. They stated that this conclusion is consistent with the objective of the no-fault compensation scheme.

Analysis

The court commented on section 11(1.1) which deals with the exception to the statutory bar in the New Brunswick legislation. The New Brunswick Court of Appeal stated:

"As is well known, s. 11(1.1) provides for an exception for injuries arising from accidents involving the use of a motor vehicle where private insurance coverage is required."

Newfoundland and Labrador (Attorney General) v. Newfoundland and Labrador (Information and Privacy Commissioner)

In this case, an employee requested information from the Department of Justice. The Department of Justice refused the request claiming that the records were subject to solicitor-client privilege. The employee made a request to the Privacy Commission where the Privacy Commissioner's Office requested that the Department of Justice produce records for the purpose of verification of the claim that the records were subject to solicitor-client privilege. The Department of Justice denied the request indicating that s.52(3) of the Access to Information and Protection of Privacy Act (ATIPPA) did not circumvent this privilege. The Court found that production of the records to the Privacy Commissioner was not required. Upon appeal of this finding, the Newfoundland Labrador Court of Appeal, found that section 52 was unambiguous

and explicitly permitted the privacy Commissioner to abrogate a claim to solicitor-client privilege in order to verify the legitimacy of such a claim in the discharge of his statutory mandate.

Analysis

In this case the Court of appeal, to assist in the process of interpreting ATIPPA, used statements from the Newfoundland Labrador House of Assembly and a report prepared by a review committee, determining that such sources of legislative history "may be relied upon by a court in determining the proper interpretation of the statute."

Diamond Estate v Robbins

In this case there had been in an accident between two motor vehicles in February 1998. One of the drivers (David Diamond) was killed in the accident. The estate of Mr. Diamond commenced an action in which Diamond and others sought relief in respect of injury caused by the alleged negligence of Robbins, the other driver involved in the accident. Robbins denied the allegations of negligence and stated that the accident was caused by the negligence of the late David Diamond. After retaining additional counsel in 2003, application was made requesting leave to file a counterclaim in the within action. Mr. Robbins was granted leave to file a counterclaim.

Analysis

In this case, to assist in interpreting the Limitation Act, the Court referred to the Newfoundland Law Reform Commission reports as evidence of context, legislative purpose and textual meaning.

Walsh v. Marwood Ltd.

In this case, a Forklift Operator was unloading lumber from a trailer and an employee was injured when a load of lumber fell off the forklift and fell on the employee. The injured worker elected to receive benefits from the Workers' Compensation Board. The worker subrogated his rights, and the Board brought an action against the employer. There was a potential exception to the statutory bar if the injury involved a motor vehicle; however, the Supreme Court determined that the forklift was not operating as a motor vehicle at the time of the accident but was being used as a piece of industrial machinery. Any movement underway along the ground was incidental to the job of removing wood from the trailer. Even if the forklift was a motor vehicle, it was not being "driven" and as such the accident did not result from driving a motor vehicle registered or required to be registered, therefore, exception to the statutory bar did not apply. The court stated that the relevant question is how the forklift was being used at the time of the accident.

Analysis

In this case, while the phrase "*driving a motor vehicle*" was the legislation at issue, and it is more restrictive than the Act's "*use of motor vehicle*", I find that this case does have applicability to the case at hand. While the forklift was not stationary, it was being used to lift lumber as opposed to being used as a means of transportation. The court noted that any movement was incidental to removing the wood.

Analysis

A review of the facts of this case confirms that on April 26, 2010, [REDACTED] was injured while working as a Pipefitter/Labourer. [REDACTED] was employed by [REDACTED] and working at several sites in the town of [REDACTED]. The Plaintiff has argued that the excavator and dump truck were being operated in a negligent manner and as a result, [REDACTED] experienced injuries.

Section 44 (2) of the Act states that a worker has no right of action against an employer or against a worker for an injury that occurs while carrying out operations usual in or incidental to the industry carried on by the employer. In order for action to be able to proceed, an exception as stated in section 44.1 of the Act would need to apply.

Section 44.1(1)(b) states that section 44 shall not apply where a worker is injured as a result of an accident involving the use of a motor vehicle by the worker or another person, in the course of the worker's employment. The definition of a motor vehicle put forward by the Plaintiff from the Black's Law Dictionary 9th Edition where "vehicle" is defined as an instrument which conveys people or things by land, air or water.

The definition which is applicable in this case is contained in section 44.1 (2) of the Act. Section 44.1 (2) (a) provides that in subsection (1) "motor vehicle" means (i) a motor vehicle registered under the *Highway Traffic Act*; (ii) authorized under section 12 or 17 of the *Highway Traffic Act* to be operated on a highway in the province without being registered under that Act, whether or not it is being operated on a highway; or (b) another motor vehicle while being operated on a highway in the province. Section 2. (oo) of The Highway Traffic Act states, "motor vehicle" means a vehicle propelled, driven or controlled otherwise than by muscular power, other than a trailer or a vehicle running upon fixed rails. The Highway Traffic Act in section 2 (ffff), "vehicle" means a device in, upon or by which a person or thing may be transported or drawn upon a highway, but does not include devices used exclusively upon fixed rails.

Case law supports that when an accident involves the use of multipurpose machine/equipment WorkplaceNL must determine the true character and the purpose for which it was being used at the time of the accident.

Since the dump truck is registered under the Highway Traffic Act, I find the dump truck meets the definition of "motor vehicle" under section 44.1 of the Act. However, at the time of [REDACTED] injury the dump truck was parked at the site holding the culverts for unloading. At the time of the accident the dump truck was not in motion and the purpose for which it was being used was to hold the culverts. The dump truck was not being used as a "motor vehicle" at the time of the accident; it was being used as equipment.

Regarding the excavator, the worksite at the time was the two lane highway which the employer has confirmed and a flag person was present to allow traffic through the site. The excavator can be classified as a motor vehicle in the Highway Traffic Act and it appears that the excavator was located at least partially on the highway. However, it was not registered under the Highway Traffic Act at the time of the accident. The excavator had steel tracks instead of wheels and had been floated to the worksite. The weight of evidence supports that the excavator was being used as a piece of construction equipment at the time of the accident. Its intended use was to clear the site, and at the time of the accident it was being used to unload the culverts from the dump truck. In this case the movement of the excavator along the ground to its position on the roadway was incidental to the job of removing the culvert from the dump truck. The excavator

was located alongside the dump truck for the purpose of removing the culvert from the truck. The excavator which has steel tracks had been floated to the site and was being utilized as a piece of construction equipment, not as a motor vehicle, at the time of the accident.

As the excavator was being used as a piece of construction equipment, performing its intended use in unloading the culvert which was being replaced in the ditch, it was not being used as a motor vehicle.

Since the dump truck and the excavator were being used as equipment at the time of the accident, the accident did not involve the use of a motor vehicle. Therefore the exemption found in section 44.1 (1) (b) of the *Act* does not apply in this case.

The Plaintiff argues that equipment such as excavators and/or dump trucks should not be excluded from the interpretation of the *Act* as motor vehicles. This argument maintains that to exclude certain equipment from for the purpose of 44.1 would leave a gap in protecting the worker and would leave the worker without recourse to properly compensate for injuries sustained as a result of the negligent use of a motor vehicle. The Plaintiff maintains that it would be unjust to workers if their actions against an employer were prevented due to a narrow interpretation of section 44.1(1) that would exclude most vehicles that are often used in the course of employment and/or vehicles that have the sole purpose of being put to use during the course of employment. The Newfoundland Court of Appeal has addressed the statutory bar in reference re: *Workers' Compensation Act, 1983 (NFLD)*, ss. 32, 34 1987 67 NFLD & PEIR16 (NL CA). The court acknowledges the historic trade off and states:

"The workers and their dependents to whom the *Act* applies are deprived of the benefits which might otherwise be available to them but have all the benefits available to them under the *Act*. The legislature has ordained that some will receive more, some will receive less, than they otherwise might. This is the manner that has been chosen to structure the social regime of Worker's Compensation."

.....

"The workers compensation scheme provides a stable system of compensation free of the uncertainties that would otherwise prevail. While there may be those who receive less under the *Act* than otherwise, when the structure is viewed in total, this is but a negative feature of an otherwise positive plan and does not warrant the condemnation of the legislation that makes it possible. Judicial deference to the legislative will is required here."

As noted there is a historical trade off at the root of the Worker's Compensation system which provides benefits to workers in exchange for employers being protected from suit. [REDACTED] has access to the Worker's Compensation system. This claim for compensation had been accepted by WorkplaceNL who determines eligibility to access to benefits and services for an injured worker.

Both parties have made submissions regarding mandatory auto insurance. Extrinsic evidence has been provided regarding the intention of the legislature. However, since this decision has been made on the basis of the purpose of the use of the multipurpose vehicles, it is not necessary to address the issue of the requirement for mandatory auto insurance.

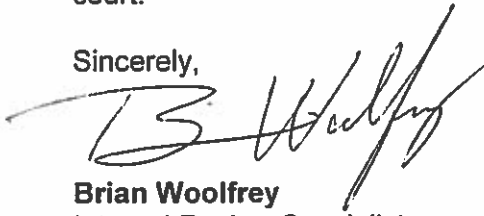
January 22, 2019

Section 19. (1) provides WorkplaceNL with exclusive jurisdiction to examine, hear and determine matters and questions arising under this Act and a matter or thing in respect of which a power, authority or distinction is conferred upon on it, and WorkplaceNL has the exclusive jurisdiction to determine whether an injury has arisen out of and in the course of an employment within the scope of this Act. Section 43 of the Act provides that compensation under this Act is payable to a worker who suffers personal injury arising out of and in the course of employment. I find that [REDACTED] injury arose out of and in the course of his employment and did not involve the use of a motor vehicle by the worker or another person in the course of his employment.

Determination

The action by [REDACTED] brought against [REDACTED] and [REDACTED] is statute barred. Attached is a certificate which may be filed with the court.

Sincerely,



Brian Woolfrey
Internal Review Specialist

- c. Paula Fudge, Administrative Officer-Internal Review Division
John Babb, Babb Law Office