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DECEMBER 2015

Withdrawing an Admission; No Consent When $23 Million is in Question

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A Partner in our Insurance Defence Group, Sudevi specializes in the defence of professional liability (pharmacists, lawyers and independent adjusters), in addition to occupiers and motor vehicle liability matters.

Withdrawing admissions can be a much more arduous process, if the consent of the other side is not provided. Why would a party not consent? When $23 million in insurance policy limits is at issue. In this case, the argument being advanced was that withdrawal of the admission reduced the insurance policy limits available to respond. With the withdrawal of the admission, the policy limits reduced to $2 million for the primary defendant. That is a big difference and why this battle was fought before a Master and then appealed to a Judge.

Law Governing the Withdrawal of an Admission

Withdrawals of admissions are governed by rule 51.05 of the *Rules of Civil Procedure*. The section states that "an admission in a pleading may be withdrawn on consent or with leave of the Court". The applicable test is laid out in the decision in *Antipas v. Coroneos*, a 1988 decision of the Ontario High Court which sets out the 3 part test:

1. The proposed amendment raises a triable issue;
2. The admission was inadvertent or resulted from wrong instructions; and
3. The withdrawal will not result in any prejudice that cannot be compensated for in costs

In *Stickel v. Lezzaik*, the Court assessed the factors to be considered when withdrawing an admission. Master Sproat (now Master Jean) initially heard the motion. The motion was argued on behalf of the Defendant Coventry Connections Inc. (hereinafter "Coventry") by Mark B. Harrington, of Torkin Manes' Insurance Defence Group, who assumed carriage of the action due to previous counsel being in a conflict position, which is discussed below.

In 2001, the Plaintiff, was injured while a passenger in a taxi driven in Ottawa by the Defendant Lezzaik (hereinafter "taxi driver"). The taxi

carried the banner of BlueLine Taxi Co. Limited (hereinafter "BlueLine"). The taxi allegedly rear ended an unidentified vehicle and the Plaintiff claimed that he was seriously injured in the collision. Eventually, **evidence came forth that the taxi driver owned the taxi**. Furthermore, the driver was deemed a "dependent contractor' by BlueLine. BlueLine was amalgamated into Coventry and hence, Coventry took the lead in defending the actions.

The taxi driver had his own automobile liability insurance coverage of $2 million. However, BlueLine had two insurance policies; a $23 million coverage for commercial general liability and a fleet policy for automobile liability insurance. Because the taxi driver had his own automobile insurance, **he was not an insured under the fleet policy**. Therefore, the employment status of the taxi driver was an important factor. Was he an employee or not? If he was an employee, then the $23 million commercial general liability policy could be accessed. Based on the information eventually obtained from BlueLine, it was determined by defence counsel that the taxi driver was not an employee and therefore, Coventry wanted to withdraw this admission that had been made in one of its defences to the action. Not surprisingly, the Plaintiff refused to provide consent for the motion.

There were two actions; one being the Main Claim and the second being a claim filed by the Plaintiff's former spouse and child (hereinafter the "Family Claim"). In the defence to the Main Claim, the admission had been made that the taxi driver was an employee of Coventry. However, in the Family Claim, the individual's status as an employee was **specifically denied**. Accordingly, the further argument advanced was that the withdrawal of the admission was being made to ensure that there was no conflicting pleadings.

Based on the test in *Antipas*, the parties agreed that the proposed amendment raised a triable issue. However, Master Sproat also did consider the issues of inadvertence and prejudice.

Inadvertence

In terms of inadvertence, in the affidavit filed to support the motion, it was stated that the admission was made inadvertently, as a result of the partner with carriage of the action, missing the admission being made in the defence. Furthermore, the discovery evidence also indicated that the admission was not substantiated. Therefore, **it was decided that the admission was inadvertent.**

Prejudice

The argument that was advanced by the Plaintiff was that if the admission was withdrawn, then there may be lesser insurance monies responding to the claim. Master Sproat stated that:

> In my view, the unavailability of additional insurance limits is not prejudice that is properly relied upon in the context of this motion

Furthermore. examinations for discovery of the Defendants had not been completed and therefore, the Plaintiff would still have an opportunity to examine the relationship between the taxi driver and Coventry.

A novel argument was also advanced that the affidavit of the partner, who missed the admission in the defence to the Main Action, should be disregarded, as the partner was in a conflict when speaking to both Coventry and the taxi driver about the admission. The Plaintiff therefore argued that the taxi driver's position was potentially prejudiced and accordingly, the first part of the test regarding prejudice was met. Master Sproat stated that this argument could not prevail for the following reasons:

1. The prejudice must be to the Plaintiff;
2. Given that the taxi driver was not opposed to the motion, he was not advancing any actual prejudice

Accordingly, Master Sproat concluded that given the lack of prejudice to the Plaintiff or even the taxi driver, the opposition to the motion fails.

However, given the policy limits at

stake, which were responding to the Plaintiff's $15 million claim for damages, the decision was appealed.

Appeal

The motion was appealed to the *Ontario Superior Court of Justice* and was heard by Justice Perell. He noted that in the original Statement of Claim, the Plaintiff did not allege that the taxi driver was an employee of BlueLine. However, he noted that there "were other ways to prove Coventry is culpable" outside of the taxi driver being deemed an employee of Coventry, such as vicarious liability.

Justice Perrel stated from the onset that he did not see any error in the Master's reasoning. He did not find the partner's affidavit to breach privilege, because the disclosures made had already been disclosed at the examination for discovery and contained factual and non-privileged information.

He concluded in stating that the onus was on Coventry to show that the withdrawal would not result in any prejudice, pursuant to rule 51.05, rather than the reverse, in rule 26.01. Justice Perrel concluded that Coventry met the onus of showing that there was no prejudice and the Plaintiff did not meet the onus of rebutting the absence of prejudice. Accordingly, the appeal was dismissed.

Therefore, this decision demonstrates that admissions can be wrought with issues, especially when taking into account which insurance policy responds, as a result of the admission. However, the unavailability of additional insurance limits does not demonstrate prejudice, when meeting the three prong test for withdrawal of admissions.