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Contract law blockbuster leaves counsel with lingering questions

'Good faith' duty will spur litigation, lawyers predict

CRISTIN SCHMITZ
OTTAWA

The Supreme Court's groundbreaking recognition of a "general organizing principle of good faith contractual performance" —including a new common law duty not to lie, deceive or actively mislead—will spur litigation, counsel predict.

Lawyers say Justice Thomas Cromwell's 7-0 judgment in *Bhasin v. Hrynew* [2014] S.C.J. No. 71 is among the most important contract law cases in the past 20 years. It adds to the fundamental principles of Anglo-Canadian contract law by bringing it closer to the civil law of Quebec and to the law of contracts in most American states.

"In Quebec and virtually all of the other common law jurisdictions there is a general duty of good faith in contract—that is, you have to take into account the legitimate expectations of your counter-party in executing a contract—that [had] not been the law in common law Canada," said Neil Finkelstein of McCarthy Tétrault, calling it a "huge" decision.

Brandon Kain, left, and Neil Finkelstein, partners in the litigation group with McCarthy Tétrault, successfully represented appellant Harish Bhasin in a groundbreaking contract law case. They are seen above in the firm's Toronto offices. MATTHEW SHERWOOD FOR THE LAWYERS WEEKLY

Finkelstein, who represented successful appellant Harish Bhasin, said he foresees litigation to determine "what is the scope of 'having regard to the other party's legitimate expectations' because obviously a contracting party is still entitled to take into account his own interests. He doesn't have a fiduciary obligation to take into account the other side's interests. And so the question is how far does that have to go?"

Finkelstein's co-counsel, Brandon Kain, noted that the court has said parties cannot contract out of the "minimum core requirements" of the new duty of honest contractual performance. However, "Parties can inform what the content of the duty of good faith will require,

McCamus, Page 10

Court upholds $1.15 million damages award

MICHAEL BENEDICT

A recent $1.15 million damages award from the Court of Appeal for Ontario is not only a North American first, but a "robust" affirmation of broad jury discretion, according to practitioners and academics.

In the case, Lanny Stilwell was rinsing a Visions Dutch Oven pot in the sink of his Beamsville, Ont., home in September 2000 when it broke into four sharp pieces. One of the shards sliced his right arm at the wrist, severing an artery in two places along with all of the tendons and nerves connected to his hand. Stilwell, a former forklift operator, lost 3.5 litres of blood and required 200 stitches to reattach his hand. The injury left him in pain and disabled.

In *Stilwell v. World Kitchen Inc.* [2014] O.J. No. 5242, a three-member Ontario high court panel saw no reason to overturn the jury verdict that was based on a failure to provide an adequate warning, upholding the trial judgment with one exception. The appeal court reversed the trial judge's $25,000 aggravated damages award on the grounds that the judge did not properly instruct the jury on such damages.

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News

Appeal: Route to SCC seen as particularly tough

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The jury made its decision despite any evidence that a failure to warn contributed to the incident or would have modified Stilwell's behaviour. Instead, the jury award rested on an inference that Stilwell's common-law partner would not have purchased the Dutch Oven if its packaging had displayed a prominent warning.

According to the appeal court: "The jury, like any trier of fact, was permitted to make inferences based on the evidence. Specifically, it was open to the jury to infer that Ms. Neale would not have purchased the product had she been adequately warned."

There was, indeed, a warning against breakage if the product was subject to hard impact, but this caution was found in the manual's "remember" section, rather than in the booklet's warning section or on the outside of the box.

Writing for the unanimous court, Justice C. William Hourigan said: "There was an available inference that she would not have purchased the cookware had she been adequately warned that the combination of an internal stress and an impact while caring for the product… could cause catastrophic failure, exposing the user to risk of significant injuries."

University of Windsor law associate dean Reem Bahdi said the case — the first time anyone has successfully sued World Kitchen and Corning Incorporated for one of more than 2,000 reported incidents in more than three decades involving its glass cookware — delivers a clear message to manufacturers.

"Where and how one communicates to the consumer is important," Bahdi said, "not just the substance of that communication."

She added, "You have to put your warning in a place that is meaningful for consumers when they make the decision to buy, and say what risks are involved."

Clearly, the jury felt that Stilwell, who had never cared for the Dutch Oven before, probably banged or dropped the product and assessed him 25 per cent responsibility for the accident, a conclusion his lawyer did not appeal.

> "[The ruling is a] significant move in assisting plaintiffs to establish causation by inference. The decision confirms a robust inferential approach to fact-finding.
>
> **Craig Brown**
> Thomson Rogers

"We respected and accepted the jury's decision in this regard," said Michael Smitiuch, who has represented Stilwell, except for the appeal, since the case was launched a dozen years ago.

(Smitiuch said much of the delay was a result of World Kitchen being in bankruptcy protection for some time and difficulties in determining whether the Dutch Oven was manufactured in the United States or France.)

One lesson from the case, said Smitiuch of Smitiuch Injury Law in Toronto, is "perseverance can be rewarded." Another, he said, is that the Court of Appeal decision affirms that "you can have a product liability case without a product" since the Dutch Oven had been discarded long before the action was commenced, although the couple retained other pieces in the Visions Cookware set.

Craig Brown, a partner with Toronto personal injury firm Thomson Rogers, said the appeal court ruling was a "significant move in assisting plaintiffs to establish causation by inference." Said Brown: "The decision confirms a robust inferential approach to fact-finding."

Justice Hourigan rejected the respondents' argument that there was no evidence of causation between the alleged failure to warn and the incident.

"A civil jury's verdict should be set aside only where it is so plainly unreasonable and unjust that no jury reviewing the evidence as a whole and acting judicially could have arrived at the verdict."

Justice Hourigan added: "While a different jury, or a judge sitting alone, may have drawn different inferences and reached different conclusions, I am not satisfied that the verdict is plainly unreasonable and unjust or that, in reaching it, the jury was not acting judicially."

A Toronto lawyer for World Kitchen, Paul Pape of Pape Barristers, said he is "very, very disappointed" in the judgment and that leave to appeal to the Supreme Court of Canada is under consideration. Erika Chamberlain of Western Law in London, Ont. said that could be a tough slog.

"The Court of Appeal has clearly affirmed the jury's right to make its finding of fact, unless it's plainly unreasonable," Chamberlain said. "That's a very high threshold."

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Synnott: Court-appointed experts 'not feasible'

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over the other because it all depends on the circumstances of the case, said Synnott.

"You can't impose one model over another because it won't work," said Synnott. "The ideal model is the panel of three experts but it would be onerous in terms of costs and the delays that it can engender. It's a model best suited for cases where there is a lot of money at stake."

Igartua, while pleased overall with the working group's recommendations, said she had hoped they would be bolder and recommend that experts be chosen by the courts.

"I would have liked to have seen this duel of experts be banished from the courts," said Igartua, adding that in more complex cases a panel of three experts is ideal. She would also have liked to have seen the panel urge lawyers to divulge the number of experts solicited to put an end to the growing issue of "shopping for experts."

Both suggestions are not feasible, said Synnott. There is nothing wrong or unethical for a lawyer to consult as many experts as they wish, and sometimes lawyers will consult different experts to address different issues, he pointed out.

"The Barreau is against the notion of having the courts impose their experts," said Synnott. "We are in a system where parties are masters of their case and it is they who decide what (evidence) is presented to the courts. The courts decide according to the evidence that is presented."

The working group's recommendations are "certainly a step in the right direction" for people who have the means to hire experts, said Robert Tétrault, a law professor at the Université de Sherbrooke who has examined the issue of medical expertise. However, "the basic problem has yet to be resolved. There is an imbalance in the justice system in that experts are not available for people who do not have the means."

> "One of the problems with many career experts is that they abandon their medical activities. Now, it is our belief and one that is shared by all, that if one abandons one's medical practice, you lose your expertise. One is precisely a medical expert because one has clinical experience.
>
> **Yves Robert**
> Collège des Médecins du Québec

The Barreau and the Collège, acknowledging that hiring an expert can be prohibitive for many citizens, has urged the provincial government and the medical organizations that represent doctors in labour negotiations to come to an "equitable" agreement standardizing experts' fees, "or for the government to legislate the matter," said Robert.

Now that the report is out, Chénier said there is one piece of the puzzle that needs to be addressed — judges, who have to show much less deference to medical experts and be more sceptical of their opinions, said Chénier.

"The courts are not as demanding of the opinions issued by experts as they should be," added Chénier. "Each judge in each case should really judge if the expert has done his work well, and not show too much deference. They have to be more demanding."

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