

Employer, workers' compensation agency held liable for negligent advice

The tort of negligent misrepresentation is often associated with the duty of care said to be owed by professionals, such as doctors, lawyers and accountants, to persons relying on their advice to their detriment. However, a recent decision of the Newfoundland Court of Appeal demonstrates that employers and workers' compensation agencies can also be held liable for negligent statements that cause financial loss to those relying on them. The Supreme Court of Canada denied leave to appeal this decision on September 29, 2005.

The case, *Mandavia v. Central West Health Care Institutions Board* (March 9, 2005), concerned a salaried physician who became permanently disabled due to a workplace injury. Mandavia's contract provided that, in the event of a workplace injury, his workers' compensation benefits would be supplemented by the employer to make up the difference between the amount he received in benefits and his net salary until he reached 65 years of age.

In 1993, on the advice of his employer and the provincial workers' compensation commission (the Commission), Mandavia decided to retire. What he was not told was that his retirement pension would be set off against his workers' compensation benefits, effectively eliminating the latter. When Mandavia discovered the truth, he brought an action against the employer and the Commission, claiming that he would not have applied for retirement benefits had he realized that it would have such an impact on his workers' compensation benefits.

COURT: NEGLIGENT MISREPRESENTATIONS MADE BY EMPLOYER AND COMMISSION

The Newfoundland Court of Appeal upheld the trial judge's finding that the tort of negligent misrepresentation had been made out. To establish negligent misrepresentation, the following elements must be present:

1. There must be a duty of care based on a "special relationship" between the person making the representation and the person receiving it;
2. The representation in question must be untrue, inaccurate or misleading;
3. The person making the representation must have acted negligently in making it;
4. The person receiving the representation must have relied, in a reasonable manner, on it; and
5. The reliance must have been detrimental to the person receiving the representation in the sense that damages resulted.

Duty of Care

To find that a duty of care exists, one must answer two questions:

1. Is there a sufficient relationship of proximity between the parties that the person making the representation would reasonably contemplate that carelessness on his or her part might cause damage to the person receiving it, in which case a *prima facie* duty of care arises?
2. If so, are there any policy considerations that should limit or negate that duty?

The employer did not contest that it owed a duty of care to Mandavia, but the Commission argued that the proximity between its staff and Mandavia was insufficient for the Commission to know that any carelessness on its part could cause damage to him. The Court rejected this argument, noting that the person who gave advice to Mandavia had been held out by the Commission as an expert on benefits and that she was aware of the Commission's policy on the setoff of pension benefits against workers' compensation. The policy was not published and Commission employees were, therefore, the only source of this information, making it reasonable for Mandavia to rely on the advice.

Inaccurate representation

The Court held that, in failing to advise Mandavia that his retirement income would be set off against the workers' compensation benefits, the employer and the Commission had given him inaccurate information. In this regard, the Court noted that misrepresentation does not require a positive misstatement; silence regarding material facts can be just as harmful as mistaken information.

Negligence in making representation

The Court held that the Commission advisor must have realized that Mandavia was under a serious misapprehension as to his benefit entitlement if he accepted the retirement pension, and that failure to advise him of the consequences of retiring would be detrimental. With respect to the employer, the Court held that, by failing to consult with the Commission regarding the advice it had given to Mandavia, it had failed to take reasonable steps to ensure that its advice was accurate.

Reasonable reliance

The Court ruled that it was reasonable for Mandavia to have relied on the advice given by the employer and the Commission. In each case, the persons giving the advice had skill in advising about the benefits at issue.

Whether reliance caused damage

By following the negligent advice given to him, the Court ruled, Mandavia had relinquished his contractual rights to have his workers' compensation benefits topped up to the level of his net salary.

In the result, the employer and the Commission were each held 50 per cent liable for Mandavia's losses.

In Our View

While this case may seem to be a cause for concern because it means that employers owe a duty of care to employees and must exercise caution in making certain representations to them, it also may be of benefit to employers in certain circumstances. For example, it is not uncommon for employers to receive questionable advice from workers' compensation agencies. This decision suggests that, when employers rely on such advice to their

detriment, they may be able to sue those agencies in tort.

For further information, please contact **Colleen Dunlop** at (613) 940-2734.

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