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SOMETHING TO PROVE:
The Impact of the Burden of Proof in Property Damage Claims

By: Pamela D. Seguin, B.Sc., LL.B.

One Queen Street East, Suite 2000, Toronto ON M5C 2W5
Phone: (416) 361-3200 · Fax: (416) 361-1405 · Email: pseguin@cozen.com

I. INTRODUCTION

Establishing whether the plaintiff or defendant has the burden of proof in a civil action can mean the difference between winning and losing a case. In a subrogated claim for property damage it is usually the plaintiff, the insurance company suing in its insured's name, who has the burden of proving that a defendant is responsible for the loss. However, the burden of proof is ultimately determined by the facts of each case and there are important exceptions to the general rule that the plaintiff has this burden. Subrogation professionals will benefit by being alert to those situations in which it may be the defendant, rather than the plaintiff, who has something to prove.

II. WHAT IS NEGLIGENCE?

The most commonly raised allegation in property damage claims is that of negligence. Negligence is legally defined as the failure to use reasonable care. A person is considered negligent at law if he or she fails to act as a reasonable and prudent person and causes harm as a result. In other words, a negligent person has done something which a reasonable person would not do or has failed to do something which a reasonable person would do, which results in damage or loss.[1] In order to succeed in a negligence action, the plaintiff must show the following:

[1] *Arland and Arland v. Taylor,* [1955] O.R. 131 (Ont. C.A.).

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1) **A Duty of Care** - A duty of care arises when the defendant can foresee that his or her failure to act as a reasonable person will expose another to a risk of harm.

2) **A Breach of this Duty** – The defendant failed to act as a reasonable person would have acted in the same circumstances.

3) **Damages & Causation** – The defendant's negligent act has caused the plaintiff to suffer damage. In other words, but for the defendant's negligence, the damage would not have occurred. A defendant is usually only held liable for reasonably foreseeable damages, however the law recog nizes that damage can be physical, economic or psychological.

It is usually, but not always, the plaintiff who must prove to a court that *more likely than not*, a defendant has been negligent.[2] If the evidence shows that it is just as unlikely as likely that a defendant has been negligent, a plaintiff has not proven its case. Furthermore, it is not uncommon in property damage claims that the cause of a loss is equivocal. Consider the facts of *Canadian National Railways Co. v. Hammil*:[3]

The plaintiff sent a refrigerated railway car to the defendant to be loaded with potatoes. Before the defendant could finish loading the railway car, a fire occurred which destroyed the potatoes and damaged the car. Unfortunately, there was no evidence showing how the fire might have started except for the plaintiff's unsupported suggestion that the defendant's employees may have been smoking cigarettes while loading the car. The defendant denied all liability on the basis that it was just as likely that the fire started accidentally as by its negligence.

On the facts of this case, it would be extremely difficult for the plaintiff to convince a court that more likely than not, the fire was caused by the defendant's negligence because no one knew what caused the fire. However, if this were a case where the defendant had the burden of proof, then the plaintiff could relax – the defendant would have to show that more likely than not, it had not been negligent and did not cause the fire. The lack of evidence would become the 'defendant's problem'. In other circumstances, a defendant may be responsible for the damage even where it can prove that it was not negligent.

It is important for subrogation professionals to be aware of cases where the burden of proving a case may rest with a defendant, rather than a plaintiff. A claim for property damage that initially appears weak or that seems to be based on little or no evidence may actually give rise to excellent recovery prospects.

2 In other words, the plaintiff must prove its case on "a balance of probabilities", or show that it is at least 51 per cent likely that a defendant has been negligent.

3 (1973) 43 D.L.R. (3d) 731 (P.E.I.S.C.).

III. CIRCUMSTANCES AFFECTING THE BURDEN OF PROOF

A. Bailment

"Bailment" is a legal relationship that arises when a person, the "bailee" agrees to hold property belonging to another, the "bailor", for a certain period of time and then return the property to the owner once that time has elapsed. When a person accepts payment for holding another's property, they are held to a higher standard of care than a "gratuitous bailee" who holds property for another without benefit. A bailee who accepts payment is required to take the same care of the property in his or her possession as would a reasonable and prudent owner and will be responsible for any damage to the property caused by his or her negligence.

A bailee is not an insurer of property in his or her possession. However if the property is damaged, then the bailee is presumed to be responsible for the loss unless he or she can prove that the loss or damage was not caused by his or her negligence. This is essentially the reverse of the typical negligence action described above where the plaintiff must prove on a balance of probabilities that the defendant was negligent. The law's rationale for placing the onus on the bailee is simply that as the person in charge of the property, the bailee is the one who has the best information about the loss. As a result, the bailee should have the burden of explaining himself when the property is damaged.[4]

The case of *Hammil,* above, is an example of a bailment. The bailment was created when the defendant took possession of the plaintiff's railway car for the purpose of loading it with potatoes. Accordingly, the plaintiff did not have to prove that the defendant had been negligent and that this caused the fire. Instead, it was the defendant who had to prove that the fire was not caused by its own negligence. The defendant could not give a sufficient explanation for the cause of fire and was accordingly held liable for the full amount of damages.

B. Carriage of Goods

A "carrier" is a party who contracts to transport goods. The common law distinguishes between a "common" carrier who carries goods for everyone on regularly scheduled routes and a "private" carrier who reserves the right to reject unattractive offers to carry goods. In either instance, a carrier has a duty to transport goods safely from the place of shipment to the place of delivery.

In common law, a private carrier will be regarded as a bailee for any damage to property that has been entrusted to him for transit. However, a common carrier is liable almost to the degree of an insurer of the cargo. Regardless of whether a common carrier has caused the loss, he or she will be liable for damage to the cargo during transport unless he or she can establish that the loss falls within a relatively few classes of exemptions, as follows:[5]

4 *"The Ruahehu"* (1925), 21 Ll. L. Rep. 310.
5 *George C. Anspach Co. v. Canadian National Railway Co.,* [1950] O.R. 317 (Ont. H.C.).

1) Damage caused by an **"Act of God"**, an event that is beyond the carrier's power to predict or control;

2) Damage caused by a **"public enemy"** (i.e. an act of terrorism);

3) Damage caused by the **fault of the owner**, such as the owner's failure to properly pack the goods before transport; or

4) Damage caused by **natural deterioration** of the goods.

The policy reasons for imposing this level of liability on carriers are similar to those in cases of bailment. The carrier, as the party in possession of the goods, has the sole opportunity to protect the goods and has all the evidence about how the loss occurred.[6]

However, the liability of carriers has been modified by various provincial and federal statutes which, depending on the context, may replace the common law. These statutes tend to broaden the categories of exemptions available to a carrier to exclude, for example, liability for damage resulting from riots or strikes, quarantine or the authority of law. These statutes may also impose monetary limits on a carrier's liability based on the number of packages being carried or the weight of the goods. Carriers may also further attempt to limit their liability by contract. As a result of the complexities of this area of law, the advice of a lawyer who is experienced in handling carrier claims is usually necessary.

C. Nuisances

A person may commit a legal nuisance when he indirectly causes physical injury to another person's land or interferes unreasonably with that person's use or enjoyment of their land. The question that is asked in a nuisance case is: "Is the defendant using his property in a reasonable manner, having regard to the fact that he has a neighbor?" In determining what constitutes "unreasonable" interference, courts have considered the following factors:[7]

1) The **severity** of the interference, having regard to its nature, duration and effect;

2) The **character of the locale**;

3) The **usefulness of the defendant's conduct;** and

4) The **sensitivity** of the property or use interfered with.

6 McNeil, J., "Motor Carrier Cargo Claims", (Toronto: Carwsell, 1986) at p. 4.

7 *Ontario Ltd. v. Huron Steel Products (Windsor) Ltd.* (1992), 9 O.R. (3d) 305n (C.A.) (Q.L.) at 5 of 20; *Rideau Falls Generating Partnership v. Ottawa (City),* [1999] O.J. No. 1066 (C.A.) at para. 6.

Examples of common nuisances include vibrations caused by construction work that damages the foundation of nearby buildings, or damage caused by burst water or sewage pipes. If a plaintiff can establish that a defendant has created a nuisance, the defendant may be liable for resulting damages even if the defendant has not been negligent. Importantly, negligence is not a prerequisite to proving nuisance. Negligence examines the *reasonableness of a defendant's conduct*, whereas nuisance law only considers whether the *effect* of the defendant's conduct, *from the plaintiff's point of view*, is reasonable in the circumstances.[8]

D. Dangerous Activities

Where a person engages in an activity that is hazardous or inherently dangerous, that person may be absolutely liable for any resulting damage. All the plaintiff is required to demonstrate is that it has suffered loss at the hands of the defendant and, unlike in a case of bailment, the defendant cannot excuse itself on the basis that it took every possible precaution to prevent the damage from occurring.

A classic example used to illustrate absolute liaiblity is that of the owner of a tiger rehabilitation center. Notwithstanding that the owner buys the strongest tiger cages available, erects 'state of the art' tiger-proof fencing and hires experienced tiger keepers to watch over the animals, if a tiger should accidentally escape, the owner is liable for any and all damages that result. Another example is that of a factory-owner who houses dangerous chemicals in his warehouse and carefully ensures that the storage of the chemcials accords with all industry guidelines. If the chemicals somehow escape from their containers, the owner is still liable for the damage. The absence of negligence is not a defence.

The law imposes this absolute liability in situations that are inherently dangerous in order to discourages reckless behavior and unnecessary loss by forcing potential defendants to take every possible precaution. It also has the effect of simplifying litigation and allowing a plaintiff to become whole more quickly.

IV. SUMMARY

In property damage claims where there is little or no evidence as to what has caused a loss, a subrogating insurance company may nevertheless have an excellent opportunity to recover against a potential defendant. A defendant who was in possession of the plaintiff's property as a bailee or carrier at the time of loss may have to prove that it was not responsible for the plaintiff's loss or that it satisfies an exception to liability. The common rationale for calling on a defendant to account for loss in these cases is that the defendant, as the party with control of the goods at the relevant time, will have the best knowledge of events leading up to the loss and the opportunity to have taken precautions to prevent the damage from occurring.

8 *Pugliese et al. v. National Capital Commission et al.* (1977), 17 O.R, (2d) 129 (C.A.) (Q.L.) at 22-3 of 26: A negligent act may, however, be a constituent element of a nuisance, or may itself constitute a nuisance; *Huron Steel*, *supra* note 7 at 10 of 20.

Alternatively, where a defendant's actions or conduct have the effect of damaging the plaintiff's property, a plaintiff may be able to hold a defendant liable even without proving negligence. If the defendant's actions are inherently dangerous or interfere unreasonably with the plaintiff's property, the defendant may be liable. In order to obtain optimal recovery in subrogated property claims, legal counsel must be alert to potential theories of liability that arise on the facts of each case. Cozen O'Connor's expertise in dealing with all forms of property damage disputes can be deployed for the benefit of your company to assist in the recovery of subrogated claims.

For additional information concerning
Cozen O'Connor's Subrogation and Recovery Program, please contact:

Chris Reain
Subrogation and Recovery, Toronto
(416) 361-3200
creain@cozen.com
www.cozen.com