

## Can There Be Contributory Negligence In A Case Of Negligent Misrepresentation?

by Michael Teitelbaum

In *Avco Financial Services Realty Ltd. v. Norman*, [2003] O.J. No. 1255, the Ontario Court of Appeal dealt with whether the question of contributory negligence is legally relevant in a case of negligent misrepresentation. The Court held that findings of negligent misrepresentation and contributory negligence can co-exist *at law*; however, the findings of negligent misrepresentation and contributory negligence could not co-exist *on the facts* of this case.

### The Trial Decision

In his Statement of Defence and Counterclaim, Norman alleged that Avco had misrepresented the nature of a loan insurance policy by failing to inform him and Mrs. Norman about the limited one-year term of the policy and the need to re-apply for insurance upon each loan renewal. Due to a diagnosis of cancer on the part of Mrs. Norman, the Normans were unable to renew the insurance policy after the first renewal. The evidence at trial was that a great majority of insurance applications from other financial institutions did not provide for a termination of insurance upon the renewal of the mortgage or loan transaction. Norman's position was that if not for Avco's

negligent misrepresentation, he and his wife would have obtained appropriate coverage with another insurer and his wife's loan insurance would have paid his debt to Avco.

The trial judge, Justice O'Neill, found Norman liable to Avco under his mortgage covenant, but also found Avco liable to Norman for negligent misrepresentation. O'Neill, J. held that by reason of the relationship between the parties, Avco had a duty to provide Norman and his wife, in a reasonably intelligible fashion, information about the salient provisions of the loan insurance policy. The court held that Avco breached its duty of care by failing to clearly inform the Normans, either orally or in writing, that the term of life insurance was limited to that of the mortgage; upon any renewal of the mortgage, they would have to re-apply and re-qualify for insurance coverage; and any intervening illness or disability during the one year of coverage could disqualify either one of them from obtaining subsequent coverage. The trial judge found that the insurance form signed by the Normans, while stipulating the term of the insurance coverage, was ambiguous and insufficient to convey the necessary information to allow the Normans to make an informed decision as to

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Firm News

## Noteworthy

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whether or not they should purchase that insurance.

Justice O'Neill was satisfied that if the Normans had known the coverage was limited to the term of the mortgage and they would have to re-apply and re-qualify for insurance upon each mortgage renewal, they would have either extended the term of the mortgage or attempted to make alternative mortgage or insurance arrangements. Accordingly, the Normans relied on Avco's representations to their detriment and this reliance was a proximate cause of the damages sustained by Norman when no life insurance proceeds were available to pay out the balance of the mortgage loan.

The trial judge concluded that Norman contributed to his own loss by failing to read the insurance form and inquire about the term of the insurance despite the fact that the renewal process itself ought to have raised concerns and questions in Norman's mind. Accordingly, O'Neill, J. found that Norman was contributorily negligent and that his negligence had been just as significant in contributing to his loss. As a result, he apportioned the degree of fault equally between the parties.

### The Appeal

Norman appealed from the finding that he was 50% contributorily negligent. Interestingly, Avco chose not to cross-appeal the finding against it of liability for negligent misrepresentation. In responding to Norman's ap-

peal, however, Avco indirectly challenged the finding of negligent misrepresentation because it argued that Norman was not only 50% responsible for his loss, but wholly responsible by reason of his failure to act reasonably in his own interest.

The significance of Avco's decision not to cross-appeal will be seen shortly.

Justice Charron, writing on behalf of a three-member panel

*“The injured party's conduct, in all the circumstances surrounding that event, must be considered in order to determine whether it acted reasonably in its own interest or whether it contributed to the loss by its own fault.”*

that included Morden and Weiler, J.J.A., agreed with the appellant's contention that in three recent decisions reiterating the necessary elements of the tort of negligent misrepresentation, the Supreme Court of Canada seems to have placed the concept of reliance at the forefront of the analysis, by identifying foreseeable and reasonable reliance as the foundation of the duty of care.

In the case of *Queen v Cognos*

*Inc.*, [1993] 1 S.C.R. 87 the Supreme Court listed five required elements in order to establish negligent misrepresentation:

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

The Court of Appeal then asked whether the shift in the analysis that brought to the forefront the concept of foreseeable and reasonable reliance had the effect, as contended by Norman, of incorporating the notion of contributory negligence into the cause of action itself. The Court held that it did not, for the following reasons:

1. The adoption of such an approach would create an unwarranted inconsistency in the law of negligence because it would be incorrect to “create a pocket of negligent misrepresentation cases” in which the question of contributory negligence

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would be determined differently from other negligence cases. Further, the adoption of a different approach in cases of negligent misrepresentation would be inconsistent with the provisions of the *Negligence Act* that provide for apportionment in cases where the plaintiff's negligence is found to have contributed to the damages.

2. A finding that the tort of negligent misrepresentation has been made out is not inherently inconsistent with a finding of contributory negligence because the test that underlies each finding is different.

The Court noted that because the reliance by the injured party on the statement must itself be reasonable, in many cases it will be difficult for a defendant to prove contributory negligence once a finding of negligent misrepresentation has been made against it. The Court continued:

“Indeed, if the allegation of contributory negligence is based on the contention that the injured party acted unreasonably in relying on the misstatement, the question will already have been determined on the main claim, and the plea of contributory negligence will not succeed.”

The Court also noted that while

the injured party's own conduct must be considered under the tests for both negligent misrepresentation and contributory negligence, the focus is different. With respect to the analysis on negligent misrepresentation, “the focus is on the reasonableness of the reliance (and, of course, its foreseeability from the perspective of the representor)”. Thus, the circumstances surrounding the misrepresentation in question are of paramount importance and whether or not it was reasonable to rely on the representation will “depend on an array of factors including the expertise and knowledge of the representor; the seriousness of the occasion; whether the information was requested; whether the representor received any direct or indirect financial benefits; the nature of the statement; and the presence of any disclaimers”.

Insofar as contributory negligence is concerned, the focus is on the event that occasioned the loss. The Court continued:

“The injured party's conduct, in all the circumstances surrounding that event, must be considered in order to determine whether it acted reasonably in its own interest or whether it contributed to the loss by its own fault. The circumstances surrounding the event that occasioned the loss, depending on the particular facts of the case, may be much wider in scope than

the circumstances surrounding the negligent misrepresentation. Hence, at this stage of the inquiry, the reasonableness of the injured party's reliance on the misrepresentation must be assessed in the context of the event that occasioned the loss... [T]he injured party will be found guilty of contributory negligence if it ought to have foreseen that it may harm itself by failing to act reasonably and prudently. In this context, the injured party's failure to act as a reasonable and prudent person may include a failure to guard against the foreseeable carelessness of others.”

Having found that negligent misrepresentation and contributory negligence can co-exist, however, the Court held that on the particular facts of this case, a finding of foreseeable and reasonable reliance is inconsistent with the trial judge's later finding on the issue of contributory negligence. The Court arrived at this conclusion because “the circumstances surrounding the alleged misrepresentation (the inquiry on negligent misrepresentation) are the same as the circumstances surrounding the event that occasioned the loss (the inquiry on contributory negligence). In these circumstances, it is difficult to see how two different conclusions could be arrived at on an assessment of the reasonableness of Mr. Norman's con-

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duct”.

The Court therefore concluded that the trial judge’s finding that Norman acted unreasonably in 1989 in not inquiring further into the term of the insurance was amply supported on the evidence. Moreover, it “ought to have been determinative on the question of foreseeable and reasonable reliance in respect of the tort of negligent misrepresentation”.

Accordingly, the Court dismissed Norman’s appeal, allowing the trial decision to stand.

### **Analysis**

The Court’s finding that the circumstances surrounding the alleged misrepresentation and the event that occasioned the loss were the same, so that the finding that Norman acted unreasonably with respect to the 1989 renewal was equally applicable to the issue of foreseeable and reasonable reliance, is intriguing.

This holding raises the question of whether the result would have been different if Avco had cross-appealed. It appears that if Avco had ap-

pealed, it might well have been successful and the finding of negligent misrepresentation against it would have been set aside.

Overall, the Court has provided a helpful summary and analysis of the principles of negligent misrepresentation and contributory negligence and their inter-relationship. It has also re-emphasized the need to carefully analyze the facts of each case in order to determine how the legal principles in respect of both negligent misrepresentation and contributory negligence should be applied.

## **Firm News**

Mario Pietrangeli and our law clerk, Sandra Green-Jones, will be speaking on the issue of trial preparation at a LSUC program titled "Personal Injury for Law Clerks" at Osgoode Hall on June 24, 2003.

Richard Horak will be participating in a roundtable discussion on Sep. 18, 2003 at an Insight Conference entitled Disability Insurance Claims and Litigation. The topic for discussion is Video Surveillance as Evidence in the Courtroom.

Jamie Trimble has been designated as a Specialist in Civil Litigation by the Law Society of Upper Canada. Jamie has also obtained his designation as a Certified Risk Manager (CRM).