Date: 20150429
Docket: 14/25 & 14/26
Citation: *Tucker v. Unknown Person*, 2015 NLCA 21

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR COURT OF APPEAL

BETWEEN:

IAN TUCKER — APPELLANT

AND:

UNKNOWN PERSON — RESPONDENT

AND

BETWEEN:

IAN TUCKER — APPELLANT

AND:

AXA GENERAL INSURANCE — RESPONDENT

Corrected Decision: The text of the original judgment was corrected on April 29, 2015, and a description of the correction is appended.

Coram: Green C.J.N.L., Welsh, Rowe, Harrington and Hoegg JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador Trial Division (G) 2009 01T4612 and 201101G7191 (2012 NLTD(G) 132 and 2012 NLTD(G) 133)

Appeal Heard: November 18, 2014
Judgment Rendered: April 21, 2015

Reasons for Judgment by Hoegg J.A.
Concurred in by Green C.J.N.L., Welsh and Harrington JJ.A.
Dissenting Reasons by Rowe J.A.

Counsel for the Appellant: Alexander MacDonald Q.C. and Alexander Templeton
Counsel for the Respondent: Edward Vanderkloet

Hoegg J.A.:

INTRODUCTION

[1] Ian Tucker sustained bodily injury when he was struck by a vehicle as he was crossing Prescott Street in St. John's on October 13, 2007. The vehicle did not stop, and its owner or driver have never been identified. At the time, Mr. Tucker held a standard automobile insurance contract with AXA General Insurance (AXA). The contract contained the mandatory Section D endorsement, which provides coverage for all sums an insured is legally entitled to recover as damages resulting from an accident involving an owner or driver of an unidentified automobile.

[2] On October 13, 2009, Mr. Tucker filed a negligence action against Unknown Person. This suit has never been served. Approximately two and one-half years later, Mr. Tucker applied to the court under Rule 7 of the *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Sch. D, to add AXA as a defendant in this suit. On September 25, 2012, Mr. Tucker's application was dismissed on the basis that the rule did not permit it: *Tucker v. Unknown Person*, 2012 NLTD(G) 132 (*Tucker v. Unknown Person*).

[3] On November 18, 2011, Mr. Tucker filed an action against AXA alleging that AXA was in breach of Section D 2(1)(a) of their insurance contract and seeking recovery of his claim for damages. AXA subsequently applied to the court for dismissal of this suit on the basis that it was commenced after the limitation period expired. On September 25, 2012, AXA's application was granted, and Mr. Tucker's action against AXA was dismissed: *Tucker v. AXA General Insurance*, 2012 NLTD(G) 133 (*Tucker v. AXA*).

[4] Mr. Tucker appeals both decisions. The appeals were heard together by this Court.

TUCKER V. AXA

Factual History

[5] A police report was filed shortly after the accident. On November 1, 2007, Mr. Tucker's solicitor wrote to AXA advising of the circumstances of the accident, Mr. Tucker's injuries, that a police report had been filed, that the owner and/or driver of the vehicle which hit him had not been identified, and that Mr. Tucker would be seeking recovery from AXA under Section D of his policy. AXA's adjuster attended on Mr. Tucker and took a statement from him about the accident. Thereafter communication between Mr. Tucker's counsel and AXA was sporadic.

[6] On November 18, 2010, Mr. Tucker presented a demand to AXA claiming recovery of damages for the injuries he sustained in the accident under Section D 2(1)(a) of their insurance contract. On February 15, 2011, AXA advised Mr. Tucker in writing that it was denying his claim on the basis that he had not filed his action within the two-year limitation period referenced in Section D 9(2). AXA asserted that the two-year limitation period had begun to run from the date of the accident, and because Mr. Tucker had not yet filed an action against AXA, his claim was time-barred. On November 18, 2011, Mr. Tucker filed *Tucker v. AXA*, which was subsequently dismissed as described in paragraph 3.

The Applications Judge's Decision

[7] The applications judge found that Mr. Tucker's action against AXA was subject to the two-year limitation period in Section D 9(2) of their insurance contract. He found that Mr. Tucker's cause of action against AXA was a "direct action" against an insurer and not a claim for breach of contract. He found that it arose "no later than November 1, 2007" (the date on which Mr. Tucker advised AXA of the circumstances of the accident), although he stated that the "better view" was that it had arisen on October 13, 2007, the date of the accident. The judge stated it unnecessary to decide as between these two dates, stating that "even if one accepts November 1, 2007 as the operative date, it is clear that Tucker's action against AXA for Section D damages which was commenced four years later on November 18,

2011 is well outside the two-year limitation period in section 9 of the regulation and insurance policy".

Issues on Appeal

[8] Mr. Tucker says that his action against AXA was not time-barred. He says that the applications judge erred in so concluding, and argues that a proper interpretation of the provisions of Section D of the insurance contract leads to the conclusion that his action was filed within the applicable limitation period, which he asserts is six years, as stipulated in section 9 of the *Limitations Act*, SNL 1995, c. L-16.1.

[9] Mr. Tucker's appeal raises two limitations issues. The first concerns whether the limitation period for his action is two years, as stipulated by Section D 9(2) of the insurance contract, or six years, as stipulated in section 9 of the *Limitations Act*. The second issue is when the applicable limitation period begins to accrue.

Analysis

[10] Section 9 of the *Limitations Act* reads as follows:

> An action for which a provision as to limitation is not made in sections 5 to 8 or in another Act shall not be brought after the expiration of 6 years after the date on which the cause of action arose.

(Sections 5 to 8 of the *Limitations Act* are not relevant to this matter.)

[11] The relevant provisions of Section D of the insurance contract are set out below.

About Entitlement:

> 2(1) The insurer agrees to pay all sums that
>
> (a) a person insured under the contract is legally entitled to recover from the owner or driver of an uninsured automobile or unidentified automobile as damages for bodily injuries resulting from an accident involving an automobile; …

About an insured's responsibilities to the insurer:

4 Where bodily injuries to or the death of a person insured under the contract results from an accident involving an unidentified automobile, the claimant or a person acting on behalf of the claimant shall

(a) report the accident within a period of 24 hours after the accident or as soon after that period as practicable to a peace officer, a judicial officer or an administrator of motor vehicle laws;

(b) deliver to the insurer within a period of 30 days after the accident or as soon after that period as practicable a written notice stating that the claimant has a cause of action arising out of the accident for damages against a person whose identity cannot be ascertained and setting out the facts in support of the cause of action; and

(c) at the request of the insurer, make available for inspection by the insurer, where practicable, an automobile involved in the accident in which the person insured under the contract was an occupant at the time of the accident.

About procedures by which an insured can seek his or her damages:

5(1) Issues as to whether or not a claimant is legally entitled to recover damages and as to the amount of those damages shall be determined

(a) by written agreement between the claimant and the insurer;

(b) at the request of the claimant and with the consent of the insurer, by arbitration by

(i) one person, if the parties are able to agree on that person, or

(ii) where the parties are unable to agree on one person, 3 persons, one of whom is chosen by the claimant, one of whom is chosen by the insurer and one of whom is selected by the 2 persons so chosen; or

(c) subject to subsection (3), by the Trial Division in an action brought against the insurer by the claimant.

(2) The Arbitration Act applies to an arbitration under paragraph (1)(b).

(3) An insurer may, in its defence of an action referred to in paragraph (1)(c), contest the issue of

(a) the legal entitlement of the claimant to recover damages; or

> (b) the amount of damages payable,
>
> only if that issue has not already been determined in a contested action in the Trial Division.

About the limitation period within which an insured can take action against an insurer:

> 9(1) A person shall not commence an action to recover the amount of a claim provided for under the contract and under subsection 33(2) of the Act unless the requirements of this Schedule have been complied with.
>
> (2) Every action or other legal proceeding against an insurer for the recovery of an amount of damages shall be commenced within 2 years after the date on which the cause of action against the insurer arose and not afterward.

[12] Section 33(2) of the *Automobile Insurance Act*, RSNL 1990, c. A-22 also touches on this matter. It states:

> 33(2) Every contract evidenced by a motor vehicle liability policy shall provide for payment by the insurer of all sums that
>
> > (a) a person insured under the contract is legally entitled to recover from the owner or driver of an uninsured automobile or unidentified automobile as damages for bodily injuries resulting from an accident involving an automobile; …

Which Limitation Period Applies?

[13] The relationship between Mr. Tucker and AXA is a contractual one. It is governed by the terms of the standard automobile insurance contract for which Mr. Tucker paid valuable consideration. Section D is part of that contract.

[14] In his statement of claim against AXA, Mr. Tucker pleaded that AXA breached their contract by refusing to pay his claim for damages in accordance with Section D 2(1)(a). Mr. Tucker pleaded entitlement under Section D 2(1)(a), that he had submitted a claim for recovery to AXA on November 18, 2010, and that AXA had denied his claim.

[15] Section D 5(1)(c) provides that a claimant can have his or her entitlement and the amount which he or she is seeking to recover determined

by taking an action against the insurer in the Trial Division. Mr. Tucker filed his action for recovery (*Tucker v. AXA*) in the Trial Division.

[16] Section D 9(2) sets out the limitation period within which an action against an insurer for recovery of an amount of damages provided for under the contract must be commenced. The relevant words in Section D 9(2) are *an action against an insurer*. The section does not reference an action against a driver or owner of an unidentified or uninsured vehicle or any other action. Neither does any other provision in Section D. The only kind of action referenced in Section D is one for the recovery of damages under Section D 2(1). There being no other action to which the limitation period in Section D 9(2) could apply, it follows that the action contemplated in Section D 9(2) to which the two-year limitation period applies is an action taken by a person who has a cause of action against an insurer pursuant to Section D 2(1)(a) of the contract. The six-year limitation period generally applicable to breach of contract cases set out in section 9 of the *Limitations Act* does not apply because the parties have agreed, by virtue of their insurance contract, to be bound by the two-year limitation period stipulated in Section D 9(2). The plain words of Section D 9(2) in the context of the Section D endorsement lead to no other conclusion.

Accrual of the Limitation Period

[17] It is helpful to consider the nature of a cause of action taken pursuant to Section D 2(1)(a) of the contract. The section provides that the insurer will pay the insured damages for bodily injuries he would be entitled to receive from the owner or driver of an unidentified automobile. In other words, the contract provides that the insurer agrees to indemnify its insured's loss arising from an accident for which the owner or driver of the automobile involved is liable but unidentified.

[18] It is also helpful to consider what is at stake for an insured when an insurer does not pay a claim under Section D 2(1)(a). An insured loses his or her right to recovery of his or her damages sustained at the hand of the unidentified owner or driver from the insurer, not his or her damages per se. What the insured loses is the right to be indemnified by his or her insurer for damages which would otherwise be payable by the unidentified owner or driver.

[19] *Black's Law Dictionary*, 9th ed. (St. Paul, MN: Thomson Reuters, 2009) defines "indemnify" as follows:

> 1. To reimburse (another) for a loss suffered because of a third party's or one's own act or default: HOLD HARMLESS 2. To promise to reimburse (another) for such a loss. 3. To give (another) security against such a loss.

[20] Green C.J.N.L. described the concept of indemnity in *Ryan v. Dew Enterprises Limited*, 2014 NLCA 11, as "[a] claim that another party save the indemnity-claimant harmless against loss or damage which the indemnity-claimant has incurred or suffered or will incur or suffer at the hands of another, and to reimburse the claimant in respect of such loss or damage."

[21] In this case, Mr. Tucker's cause of action against AXA is that AXA failed to indemnify him or save him harmless in respect of his damages sustained at the hand of the unidentified owner or driver, as AXA had agreed to do under Section D 2(1)(a) of their insurance contract. Had AXA not failed to indemnify him, Mr. Tucker would not have had a loss giving rise to his cause of action against AXA. If AXA had paid Mr. Tucker's claim for recovery, Mr. Tucker would have had no loss.

[22] It is elementary that AXA had to have done something to give rise to Mr. Tucker's cause of action. That something, in an indemnity contract, is to refuse to indemnify the insured in accordance with the contract. It was AXA's refusal to indemnify Mr. Tucker in accordance with Section D 2(1)(a) that caused Mr. Tucker's loss, that being his legal right to recovery of his damages resulting from the accident. Although a cause of action taken pursuant to Section D 2(1)(a) requires an insured to establish that he or she is legally entitled to recover damages from the driver or owner of an unidentified automobile, it is the insurer's refusal of its alleged obligation to indemnify that causes the insured's loss of his right to recovery which crystallizes the insured's cause of action and triggers the limitation period. It follows that the two-year limitation period set out in Section D 9(2) begins to accrue from when the insurer refuses to pay an insured's claim for indemnification.

[23] Deciding limitations issues in such cases requires determining when an insurer refuses to indemnify. In many such cases, an insurer would wait for an insured to present a damages claim before refusing to indemnify. This is because an insurer who believes that it has some exposure under Section D 2(1)(a) may want to avoid litigation by having the opportunity to evaluate a claimant's demand and possibly settle it before a lawsuit is filed. However, it is entirely possible that an insurer could refuse to indemnify an

insured seeking recovery under Section D 2(1)(a) at any time after it becomes aware of the potential of such a claim. It is the insurer's prerogative to refuse to indemnify for any number of reasons. Perhaps the insurer disputes that a claimant is its insured, or that its insured is entitled to recovery under section 2(1)(a). Or perhaps an insurer may simply wish to move the matter into litigation so that it can avail of the Rules of Court in defending a claim for recovery. It is always open to an insurer to expressly refuse to indemnify under Section D 2(1)(a) and thereby trigger the applicable two-year limitation period set out in Section D 9(2).

[24] In the absence of an express refusal, however, the insurer refuses to indemnify by failing to pay the claim after it receives a demand. Once a claimant presents a demand to an insurer alleging the insurer's obligation to indemnify under Section D 2(1)(a) and setting out his or her damages, the insurer is fixed with the knowledge that the claimant is asserting a claim and becomes obligated to honor its contractual obligation to pay it. Unless and until the insurer pays the claim, it can be said to have refused to do so, putting it in breach of Section D 2(1)(a) of the contract. In this way, an insured is not left in a state of limbo waiting for an express refusal to crystallize a cause of action. Once the claim is submitted and not paid, the insured is on notice that the insurer, by not paying the claim, is in breach and he or she must file an action at any time within the ensuing two years, but no later, to preserve his or her right of action.

[25] An insurer's refusal under Section D 2(1)(a) therefore occurs on the earlier of either an express refusal to pay a potential claim, or the day following the date on which a claimant demands recovery from an insurer under section 2(1)(a) and does not receive it. (The day following the submission of a claim to an insurer, as opposed to the day on which the claim is submitted, in my view provides a clearly defined date on which to trigger the accrual of the limitation period because both parties have the same level of knowledge on that date.).

[26] This result is consistent with the reasoning of the Ontario Court of Appeal in *Markel Insurance of Canada v. ING Insurance Co. of Canada*, 2012 ONCA 218, 109 O.R. (3d) 652. *Markel* involved determining when a two-year limitation period began to run for a loss-transfer claim made under legislation by an insurer seeking indemnification for paid accident benefits from another insurer. The issue in *Markel* was when the first insurer's cause of action arose. The legislation provided that the applicable limitation

period was two years from the date the party seeking indemnification discovered its claim.

[27] The *Markel* court decided that the first insurer "discovered" its claim on the day after it submitted its claim for indemnification to the second insurer. Sharpe J.A. reasoned that the claim was discovered once the second insurer could be said to have failed to satisfy its legal obligation to indemnify, and that was on the day following the first insurer's request for indemnification. Justice Sharpe rejected the argument that no loss was suffered until the second insurer unequivocally denied the claim, saying that "once a valid request is made, the first insurer is legally entitled to be indemnified and therefore suffers a loss each day it is out of pocket" (paragraph 28). He reasoned that on the day following the first insurer's assertion of a claim, the second insurer became obligated to indemnify the first insurer, and its failure to do so caused the first insurer loss, which crystallized the first insurer's claim and triggered the accrual period. Once the first insurer knew that the second insurer was not responding to its legal obligation to indemnify, the first insurer had to file suit within the ensuing two-year limitation period in order to preserve its right of action.

[28] The *Markel* court was dealing with an indemnitee's right of action grounded in Ontario legislation. The indemnitee's claim in this case (Mr. Tucker's claim) is grounded in contract. Both claims are for indemnification which requires a loss in order to give rise to a cause of action for failing to pay. In *Markel*, the loss of the first insurer's right to indemnity in *Markel* crystallized when the second insurer refused to pay.

[29] The *Markel* reasoning was subsequently applied by the same Court in *Schmitz (Litigation guardian of) v. Lombard General Insurance Co. of Canada*, 2014 ONCA 88, 118 O.R. (3d) 694 leave to appeal to the Supreme Court of Canada refused, 2014 CanLII 46943. The plaintiff in *Schmitz* was injured in 2006 and filed a tort suit against a third party in 2007. The third party's insurance coverage was limited to $1,000,000, so the plaintiff filed suit against Lombard, its own insurer, for indemnification of the amounts exceeding $1,000,000 pursuant to the provisions of their insurance contract. The contract suit was filed in 2010. Lombard argued that the applicable two-year limitation period in the contract accrued from the date when the plaintiff knew or ought to have known that the quantum of his or her claims exceeded $1,000,000.

[30] The motions judge found that the limitation period accrued from the day following the plaintiff's assertion of claim to Lombard. The Court of Appeal upheld the motions judge's decision, saying, at paragraph 20:

> ... Once a legally valid claim for indemnification under the OPCF 44R is asserted, the underinsured coverage insurer is under a legal obligation to respond to it. To paraphrase and adapt Sharpe J.A.'s observations at para. 27 of *Markel*, the claimant for indemnity under the OPCF 44R "suffers a loss from the moment [the insurer] can be said to have failed to satisfy its legal obligation [under the OPCF 44R]". Thus, the claimant suffers a loss "caused by" the underinsured coverage insurer's omission in failing to satisfy the claim for indemnity the day after the demand for indemnification is made.

[31] The Appellate Court concluded:

> [26] Finally, as in *Markel*, the limitation period applicable to a claim for indemnity under the OPCF 44R does not start to run when the demand for indemnity is made. Rather, as held in *Markel*, default must first occur. Thus, following *Markel*, the limitation period starts to run the day after the demand for indemnity was made and paragraph two of the motion judge's order should be amended accordingly.

[32] In *Chahine and Al-Dahak v. Grybas*, 2014 ONSC 4698 the Ontario Superior Court applied the same reasoning. *Chahine* involved an insured's claim against his insurer for indemnity for damages the insured sustained at the hand of an unidentified driver. The motions judge in *Chahine* relied on the reasoning in *Schmitz*, saying that the proper question to be asked in the case was not when the plaintiff knew or ought to have known about the unidentified motorist, but when the plaintiff knew or ought to have known it suffered a loss resulting from the insurer's omission to pay.

[33] The courts in *Markel, Schmitz*, and *Chahine* appreciated that the claims asserted in those cases were insureds' claims for indemnification, taken pursuant to legislation in *Markel* and pursuant to contract in *Schmitz* and *Chahine*. They recognized that actions for failure to indemnify require a loss or default as *Schmitz* described it. Despite each of the claims in those cases resulting from the commission of a tort, they were not tort claims, and the loss suffered by each of the claimants in those cases was the loss of the right to be indemnified for the tort damages. Likewise, Mr. Tucker's loss was the loss of his contractual right to indemnification for the tort damages he incurred as a result of the accident. In summary, in a claim for breach of indemnity pursuant to an insurance contract, the limitation period accrues

from the date of the insured's loss of the right to be indemnified, which occurs when the insurer refuses to pay.

When did AXA Refuse to Pay Mr. Tucker?

[34] In this case, AXA did not expressly deny Mr. Tucker's claim until February 15, 2011. Previous to that date, discussions between Mr. Tucker's counsel and representatives of AXA indicated that AXA could be persuaded that the limitation period had not expired. Although it was open to AXA to advise Mr. Tucker it was refusing his claim for indemnification since November 1, 2007, when it first received notice of the potential claim, it did not do so. However, once Mr. Tucker submitted his claim on November 18, 2010, AXA knew it was being called upon to honour its Section D 2(1)(a) obligation. By not doing so, AXA must be said to have refused to indemnify Mr. Tucker, thereby crystallizing his cause of action. This is not to say that AXA need maintain its refusal, for it is always open to an insurer to attempt to resolve a claim regardless of the stage of litigation. But AXA's refusal to pay from the day following the submission of Mr. Tucker's claim triggered accrual of the two-year limitation period, requiring Mr. Tucker to protect his right of action by filing suit against AXA within the ensuing two years.

[35] The two-year limitation period in this case therefore accrued from November 19, 2010, the day after Mr. Tucker submitted his claim to AXA. As Mr. Tucker's suit against AXA was filed on November 18, 2011, it was filed within the two-year limitation period and is not time-barred.

[36] AXA has expressed concern that an insured can control when the limitation period in Section D 9(2) begins to run simply by delaying the presentation of a claim. As noted in paragraph 23 above, there is nothing to prevent an insurer from refusing to pay a potential claim at any time and thereby triggering the two-year limitation period. The insurer therefore has control of when the limitation period commences, unless it has no knowledge of a potential claim. In a situation where an insurer is unaware of a potential claim for an inordinately long time, that insurer may be able to avoid coverage by arguing prejudice from inordinate delay under the notice provision in Section D 4, which provides that an insured must give notice within 30 days of an accident that he or she has "a cause of action against a person whose identity cannot be ascertained and setting out the facts in support of the cause of action." That situation did not arise in this case because AXA was notified of Mr. Tucker's claim less than three weeks after

the accident, and its adjuster was able to take a statement from Mr. Tucker shortly thereafter.

[37] To support his decision that Mr. Tucker's cause of action arose on either the date of the accident or the date on which Mr. Tucker gave notice of the accident to AXA, the applications judge relied on several cases from the Ontario Court of Appeal dealing with somewhat analogous situations under Ontario insurance legislation: *July v. Neal* (1986), 32 D.L.R. (4th) 463 (Ont. C.A.); *Johnson et al. v. Wunderlich* (1986), 57 O.R. (2d) 600 (C.A.); *Hier v. Allstate Insurance Co. of Canada* (1988), 51 D.L.R. (4th) 1 (Ont. C.A.); *Chambo v. Musseau* (1993), 106 D.L.R. (4th) 757 (Ont. C.A.); and *Caruso v. Guarantee Co. of North America* (1996), 31 O.R. (3d) 339 (C.A.). Together, these decisions imply that the limitation period in cases involving unidentified drivers starts running as soon as an insured discovers that he or she was injured by an unidentified driver.

[38] The approach in the cases relied on by the applications judge is inconsistent with the contractual relationship between an insured and an insurer and the nature of a claim under Section D, and does not address the failure of an insurer to indemnify an insured in accordance with the terms of their insurance contact, a situation that was clearly pleaded in Mr. Tucker's suit against AXA. A cause of action for failure to indemnify in accordance with the terms of a contract does not arise until the contract is breached or until there is default, as the *Markel* and *Schmitz* courts found. In any event, the old Ontario authorities the applications judge followed have been overruled by the reasoning in *Markel*, which I note is the same reasoning as that of Finlayson J.A. in dissent in *Johnson.* In *Johnson*, Justice Finlayson held that "there is no breach of contract until the insurer renounces the policy or its obligations thereunder" and "that the limitation period starts to run from the date of such renunciation" (paragraph 45).

[39] Accordingly, I do not agree with the applications judge that Mr. Tucker's cause of action arose on either October 13, 2007 or November 1, 2007 or that the limitation period set out in Section D 9(2) accrues from either of those two dates. To my mind, the judge erred by misinterpreting the nature of the cause of action Mr. Tucker had against AXA. He failed to appreciate that Mr. Tucker's cause of action was a breach of contract occasioned by AXA's failure to indemnify him in accordance with Section D 2(1)(a), and that it was not the accident but the loss of Mr. Tucker's right to be indemnified that gave rise to his cause of action and triggered the two-year limitation period.

[40] In the result, I would allow Mr. Tucker's appeal and reinstate his action against AXA.

[41] Given that *Ian Tucker v. AXA General Insurance*, 201401H0025, is reinstated, it is unnecessary to decide Mr. Tucker's appeal in 200901T4612 – *Ian Tucker v. Unknown Person*. The issues raised by that appeal remain for another day.

COSTS

[42] Mr. Tucker shall have his costs for one counsel on column 3 in this Court and in the Court below.

_____

L.R. Hoegg J.A.

I Concur: _____

J. D. Green C.J.N.L.

I Concur: _____

B. G. Welsh J.A.

I Concur: _____

M.F. Harrington J.A

Dissenting Reasons by Rowe J.A.

[43] I have read the reasons of my sister Hoegg, with which my colleagues on this panel concur. I must differ. I find persuasive the analysis set out by the trial judge. I cannot see how I could improve upon what he has written. I adopt his reasons. The same is true for the appeal in this tort action (2012 H 0067). Thus, I would have dismissed both appeals.

_____

M. H. Rowe J.A.

APPENDIX

Corrections made on April 29, 2015:

1. The word “applications” was changed to the word “application” in paragraph [2].

2. The word “applications” was changed to the word “application” in paragraph [3].