

# A Win on Appeal

Sometimes you don't have to cut your losses, even after you've been ruled as being partially to blame **By Elliott Goldstein**

Back in 2002, the Ontario Superior Court of Justice, in *Ancaster Jewellers Ltd. v. Pafco Insurance Co.*,<sup>1</sup> denied recovery to Ancaster following a robbery (see CCTV and the Law, "Failure to Activate," December 2002, p. 16, as well as the summary below). That decision was appealed to the Ontario Court of Appeal, which recently set aside that trial judgment.

In its place, the appellate court awarded judgment to Ancaster in the amount of \$169,900 plus interest and costs.<sup>2</sup> Basically, the decision turned on the wording of the insurance policy between Ancaster and its insurer, Pafco.

Ancaster's position was that the

endorsement applied only to the "named insured," that Brown, an Ancaster employee, was not the "named insured," and that the endorsement did not apply to the circumstances of the robbery. Ancaster argued that it had instituted, insofar as was within its control, a reasonably fail-safe procedure to ensure that the VCR and the recording system were switched on and in operation. It also argued that the VCR's failure to operate on the day in question was a matter of human error by Brown, to whom the "protective devices" clause did not apply.

Pafco acknowledged that the endorsement referred to the "named insured," but, in its submission (and

as the trial judge held), that phrase included employees and the endorsement therefore applied to exclude Pafco's liability to indemnify Ancaster for its loss.

The Ontario Court of Appeal agreed with the position advanced by Ancaster, holding as follows:

"The trial judge found that the phrase 'insofar as is within the Named Insured's control' modifies the words 'will be in proper working order and will be operational at all times.' However, immediately following the words 'insofar as is within the Named Insured's control,' there appear the words 'when there are authorized personnel in the insured's premises.'

"The reference to both 'Named Insured' and 'authorized personnel' is significant. The juxtaposition of those expressions in the Protective Devices clause recognizes the legal distinction between Ancaster as the Named Insured and persons such as the goldsmith (Mr. Brown) whose function it was to engage and monitor the VCR.

"Pafco cannot rely upon every failure of the VCR to be 'in proper working order and ... operational at all times' to deny liability under the policy. It can rely only on such failures as are within the Named Insured's control.

"The trial judge gave as examples of events not within Ancaster's control: a sudden electrical power interruption, an unexpected mechanical breakdown or the jamming of the videotape in the VCR. While I agree with these examples, they do not exhaust the events that are not within the Named Insured's control. **Once Ancaster installs a reasonably fail-safe protective system and properly instructs its employees in the operation and use of that system, it has met its obligation as 'Named Insured'**

## ORIGINAL RULINGS

When the case of *Ancaster Jewellers Ltd. v. Pafco Insurance Co.* was first heard, the Ontario Superior Court of Justice held that "failure to turn on the VCR elevates the risk that the images captured on tape may not be of assistance in identifying the robbers in some cases, to a certainty that there will be no images captured at all." The result in the case was that the insurer was entitled to deny any liability.

The decision was based on the wording of the Pafco Insurance contract and certain findings of facts, including the following:

On the day in question, the on-duty goldsmith entered the VCR room, pressed the "Stop" button on the VCR, pressed the "Eject" button, placed the ejected cassette into a separate rewinding machine, inserted the tape for the current day into the VCR, then pushed the "Record" button. He

testified he heard the clicking sound made by the VCR when the recording head moved into place on the day in question, and he believed the VCR was operating.

He further testified that he knew the power was on because the VCR had recorded all of the Wednesday tape. He confirmed that the VCR had operated without the need for servicing or repairs prior to December 24, 1998, and had operated flawlessly ever since.

Though the Court recognized that the surveillance videotape may not have helped police identify the robbers because they were wearing masks, the bottom line remained that the insured jeweller failed to activate the surveillance VCR.

**Editor's Note:** This summary has been taken from "Failure to Activate," *Canadian Security*, December 2002, p. 16.

under the 'Protective Devices' provision of the warranties endorsement. To hold Ancaster to a standard of perfection that excludes the possibility of human error turns it into a guarantor and effectively renders meaningless the qualifying phrase 'insofar as is within the Named Insured's control.'

"... So long as Ancaster discharges its obligation to install the required protective devices and takes all reasonable steps to instruct its authorized personnel in their use and operation, it has satisfied its obligation under the Protective Devices clause and is not foreclosed by the terms of that clause from indemnity for loss sustained in an armed robbery.

"It will be recalled that the trial judge found that it did not matter that the VCR's failure to record on the day of the robbery was caused by the failure of an employee of the named insured, because the named insured as employer was responsible in law for the failure or neglect of its employees. The proposition that an employer is responsible in law for acts of its employees is well-known. However, it does not apply where the parties to a

policy of insurance have defined their mutual rights and responsibilities in language which suggests a distinction between employer and employee."

The Ontario Court of Appeal effectively held that "the failure of an employee to cause the VCR to engage as he had been instructed to do and as he had done on many prior occasions did not constitute a violation of the Named Insured's obligation under the warranties endorsement." The Court, therefore, concluded that the circumstances attendant upon the theft of Ancaster's merchandise did not constitute a failure to comply with the Protective Devices clause in the warranties endorsement.

This appellate court ruling is a reasonable one because it means that as long as you install the required protective devices and take all reasonable steps to instruct your authorized personnel in their use and operation, you have satisfied your obligation under your insurance policy. ♣

*Elliott Goldstein, BA, LL.B., is a barrister and solicitor and visual evidence consultant based in Toronto, Ontario. He is also the*

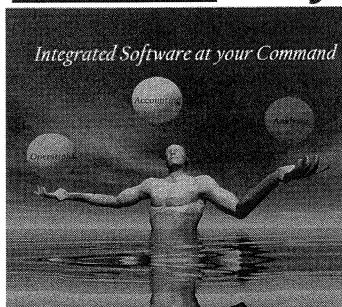
*Legal Issues representative on the Canadian Security Editorial Advisory Board.*

#### Author's Notes

1 59 O.R. (3d) 112.

2 [2003] O.J. No. 3167 (Ont. C.A.), unreported decision released Aug. 8, 2003. All quotes are from this case unless otherwise indicated.

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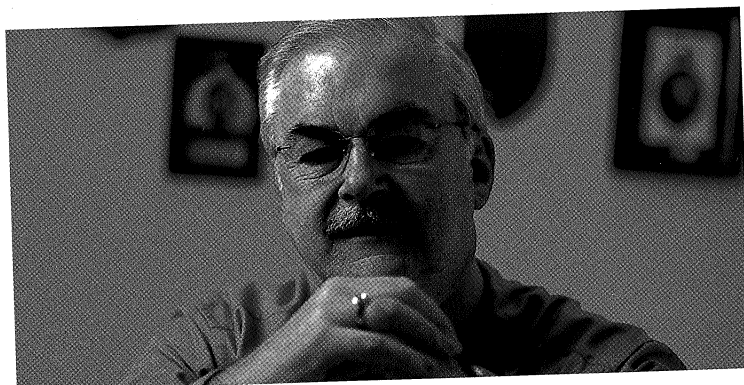
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