The Educator

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Executive Outlook 2020[1]

It is trite to say that the Caribbean insurance industry is changing.

By how much — and how quickly — has become a topic of conversation among the industry's key decision-makers. However, a lot of these conversations are closely guarded secrets.

There is no shortage of major issues facing the industry right now. Here are a few examples:

- Technology and service standards have become especially important in an age when people want to buy insurance in an instant on their mobile devices.

- Customers want their motor insurance rates to go down when the industry's claims costs are going up. Too many drivers are focusing on their text messages, Instagram, Face-book, other social media profiles, and changing their music instead of the road. Their cars, designed to keep them safe, are too expensive to repair when their warning signs are ignored.

- Commercial properties are exposed to the same kinds of hurricane and flood perils as people's homes – both subject to increasingly nasty weather and climate change. To say nothing of the robberies, kidnapping and arsons. And we won't even go down the path of discussing earthquakes, for which CARICOM members are clearly not prepared.

So, when it comes to figuring out how to change your business to make an honest living in this environment, where do you even start?

In preparation of this issue of *The Educator* we sought assistance in getting some of the leading CEO/GM of insurance companies to answer the following question:

> "What is the most important issue facing the (CARICOM) industry in 2020? (And why?)."

We sought also to get an answer to a follow up question about what the industry needs to do in order to address the top issue that they've identified.

However, since we did not get any responses, we changed the focus of the issue and will look at some topics that are trending.

Cricket, lovely cricket

[1] ***Canadian Underwriter*** - Fri, Dec 27, 2019. Reprinted with permission.

In the recent Trinidad and Tobago High Court case of ***Dinanath Ramnarine v. The Trinidad And Tobago Cricket Board of Control*** (TTCB)[2020], the Honourable Mr. Justice Frank Seepersad said:

> Cricket is a vital strand in the fabric of Caribbean culture. The sport has over the years been a source of national and international pride. Consequently, the future and viability of the sport depends on proper unbiased and efficient administration.
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> …
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> Those charged with the obligation to manage the sport should do so conscientiously always mindful that the game must stand above their personal interests.
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> …
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> Corruption has plagued public bodies in this Republic for far too long and corruption has been and continues to be cancerous. Corrupt practices are systemic and now possibly affect every facet of national life. The proliferation of corruption and/or corrupt activities violate core principles of the Rule of Law and impinge upon democratic corner stones such as equity, fairness and protection from arbitrary and/or irrational exercise of discretion. The continued adoption of corrupt practices has had a fundamental impact upon national life and has impeded our ability to realise our fullest potential.

Duty of Care

In the Saint Lucia Court of Appeal case of ***LUCELEC v Vanya Edwin-Magras*** [2019], it appears to be common ground between the parties that they were engaged in a contractual relationship, that is, one for the provision of electricity. It follows that St. Lucia Electricity Services Limited ("Lucelec"), the exclusive supplier of electricity in Saint Lucia, would have owed Ms. Vanya Edwin-Magras, the customer, a duty to take reasonable care so as to ensure that she suffered no injury. At trial therefore, the question for determination was whether the appellant breached the duty of care it owed to the respondent.

The Court of Appeal noted that a claimant is entitled to succeed in a claim in negligence where he is able to demonstrate with cogent proof that the defendant owed a duty to the claimant and that the breach of such duty caused injury to him. In discharging the burden of proving the defendant's negligence, the claimant must show the existence of a sufficient relationship of "proximity" or "neighbourhood" between the defendant and himself and the foreseeability of damage by reason of the defendant's negligent performance resulting in injury to the claimant.

The cost of replacement[2]

On 16th June 2015, there was an interruption in the supply of electricity to Ms. Edwin-Magras' home and as a result of this electrical fault, her Sony 46" flat screen television, a number of fluorescent light bulbs, her surge protector and her Viking refrigerator were damaged. In this case, the respondent purchased the refrigerator in 2011 at the cost of US$5,799.00 or EC$15, 672.09.00.

LUCELEC effectively repaired and returned the flat screen television and also performed certain repairs to the refrigerator. LUCELEC argued that the fault which occurred caused only a burnt fuse to the refrigerator which was replaced, and which should have returned the appliance to a functioning state. However, Ms. Edwin-Magras complained that the refrigerator never returned to the normal cooling temperature between 35-40 degrees Fahrenheit.

Following repeated calls to LUCELEC, Ms. Edwin-Magras eventually submitted a claim for compensation for the replacement of her surge protector, bulbs and the Viking refrigerator. She also

[2]The February 2020 issue will focus on this issue.

claimed compensation for electrical expenses incurred and spoilt food connected with the electrical fault. LUCELEC agreed to compensate her for all items; however, it declined to replace the refrigerator.

The litigation strategy employed by LUCELEC involved raising doubts as to the functioning of the refrigerator prior to the electrical fault.

In the initial trial [***Vanya Edwin-Magras v. LUCELEC*** (2018)], in assessing the issue of credibility, The Honourable Godfrey P. Smith, the trial judge assessed Ms. Edwin-Magras' credibility on the basis that she was a "woman of means who lives in the idyllic, upscale community of Cap Estate, perhaps the most affluent neighbourhood in Saint Lucia" and had "obvious wealth" and therefore had no reason or motive to lie.

Critical injury insurance coverage

A Former deputy prime minister of Canada has lost a legal bid to secure a $500,000 insurance claim that was rejected because he received a cancer diagnosis just weeks after cancelling his critical illness coverage.

The claimant, a lawyer, now 70, was diagnosed with kidney cancer in May 2017. A tumour was discovered by chance during an ultrasound to investigate another condition. He received treatment and is now recovered.

After his diagnosis, the claimant submitted a $500,000 insurance claim to Manulife Financial that was rejected by the company.

The claimant had paid premiums for critical injury insurance coverage — a special addition to his term life insurance — since December 2009, but in mid-March 2017, he wrote a letter cancelling that coverage.

His coverage officially lapsed on April 1. He was diagnosed with cancer on May 23.

His kidney cancer qualified as a critical illness, but Manulife denied the claim since his policy was no longer in force. He argued that his kidney tumour had been present while he was still paying policy premiums. "It is the condition, not the diagnosis, that is key," he said.

Manulife, however, maintained its position, and the claimant launched a breach of contract suit against the insurer in January 2018.

The insurer argued that the insurance policy was clear: that a critical illness diagnosis was the "triggering event" for a policy entitlement. It meant that for the insurance claim to be valid, the diagnosis had to take place while premiums were still being paid.

The claimant's diagnosis was not made until five weeks after his policy had lapsed.
In a decision released recently, the Ontario Superior Court sided with the insurance firm: "The making of a diagnosis by a physician — and the receiving of a diagnosis by the insured person — is a clear, indisputable event which validates the existence of a covered condition," the court said.

Making insurance coverage decisions on the basis of when a condition arose would lead to more uncertainty and more disputes, the judge said, since that can be a difficult moment to pinpoint.

"It is easy to understand why, upon receipt of the cancer diagnosis is May 2017, [the claimant] communicated with Manulife in an effort to secure payment of the insurance for which he had previously had coverage," the judge added. "Unfortunately for [the claimant], the loss of enti-

tlement to that insurance is the consequence of the decision he made several months earlier to terminate the rider effective March 31, 2017."

Facts that vitiated a life insurance policy

On April 10, 1987, shortly after his arrival in Canada, the respondent's husband (the "deceased") completed an application for life insurance. He required the life insurance in order to obtain a mortgage. On the application, the deceased provided a social insurance number. He also stated that he had "[j]ust moved to Canada from Spain." The policy was issued and insured the deceased's life for $75,000.

Unbeknownst to the insurer, the deceased had been convicted in Greece many years earlier of various offences, including manslaughter. At the time, the deceased was a member of a terrorist entity known as the Popular Front for the Liberation of Palestine ("PFLP"). Along with a fellow terrorist, he stormed an El Al civilian aircraft in 1968, throwing grenades and firing live rounds at the occupants. At least one person was killed.

Following a conviction and release, eventually, in 1987, the deceased came to Canada. He did so fraudulently by using an alias. That is also how he obtained his social insurance number. Eventually, the deceased's past activities were discovered by Canadian authorities. In 2013, the deceased was deported to Lebanon from Canada. He died from lung cancer in 2015.

The Ontario Court of Appeal determined that the motion judge made a palpable and overriding error in finding that the deceased's failure to reveal his past activities did not constitute a failure to reveal material facts that vitiated the policy. Their conclusion was that the deceased intentionally withheld information which is sufficient to establish fraud.

The CLICO saga

In March 2019, Trinidad and Tobago Finance Minister Colm Imbert announced the sale of Colonial Life Insurance Company (Clico) and British American Insurance Trinidad Ltd (BAT). The Minister said the two main bidders were Sagicor and Maritime, with the preferred bidder being Sagicor, even though the company's bid was $300 million lower than Maritime.

This was followed recently by the Central Bank of Trinidad and Tobago's announcement that the long-delayed sale of the traditional insurance portfolios of CLICO and British American Trinidad (BAT) choosing its preferred bidder Sagicor Life, a subsidiary of Sagicor Financial Corporation.

Pre-action protocol letters

Majority shareholders of CL Financial Limited (CLF) have initiated legal action against the State in a bid to stop the sale of Colonial Life Insurance Company (Clico) and British American Insurance Trinidad Ltd (BAT). This follows the action initiated by Maritime.

The "but for" test for causation

In a motor vehicle context, the "but for" test requires the claimant to prove that but for the motor vehicle accident, she would not suffer an impairment which causes the complaints she puts forward as the basis for her claim. In our view, this is more stringent than the material contribution test. The material contribution test requires the claimant to prove that the motor vehicle accident

materially contributed to the impairment which causes the complaint she puts forward as the basis for her claim.

In ***LUCELEC v Vanya Edwin-Magras*** [2019], the Court of Appeal noted that matters of causation are decided on the balance of probabilities (i.e. 51%). Since the burden of proof rests with the claimant, the onus is on them to argue that had the defendant not acted negligently, harm would likely not have occurred. Thus, if a court finds that there is a 51% chance that a defendant caused a claimant's harm, they will hold the defendant entirely responsible for the harm.

The Court of Appeal also noted:

> Ultimately, in order to succeed in a claim in negligence, a claimant must prove that the defendant's negligence is the cause in fact of a particular injury damage or loss, which means that a specific act must actually have resulted in injury to another. In its simplest form, cause in fact is established by evidence that shows that a tortfeasor's act or omission was a necessary antecedent to the plaintiff's injury. Courts analyse this issue by determining whether the claimant's injury would not have occurred "but for" the defendant's conduct. If an injury would have occurred independent of the defendant's conduct, cause in fact has not been established, and no tort has been committed.

In the British Virgin Islands Court of Appeal case of ***Hannibal v The BVI Health Services Authority*** [2019], Dr. Hannibal instituted a medical negligence claim against the BVI Health Services Authority which operated the Peebles Hospital. He asserted that had its employees taken reasonable care in administering urgent and active treatment with respect to the TIA, his condition would probably not have deteriorated to the extent that he suffered a right cerebral vascular accident within 24 hours of his admission. Dr. Hannibal further alleged that even if such an event had occurred, he would probably have recovered with little or no disability within three months of its occurrence. The Health Authority denied the alleged negligence and contended that even if there had been a breach of duty, Dr. Hannibal's medical history was such that the breach would not have made any difference to his condition and that he would still have suffered the stroke.

The Court of Appeal noted that, in addressing the issue of causation, Ellis J, the trial judge stated that Dr. Hannibal has to prove that the breach of duty caused or materially caused his stroke and that it was foreseeable as a result of the breach. The claim will fail unless it can be proven on a balance of probabilities. The learned judge posited that the question for the court was: would the injury have been suffered but for the negligence of the defendant? If yes, the defendant was not liable, if no, the defendant was liable.

The learned judge recognised that in proving causation, the courts have on occasions applied a different test than the "but for" test, and stated that where two or more causes exist which operate concurrently, it may be factually impossible to determine which one was the cause on a balance of probabilities. In order to circumvent this difficulty, the courts have developed the "material contribution" test, by which the claimant does not have to prove that the defendant's breach was the sole or even the main cause of the damage, provided he can demonstrate that it made a material contribution to the damage. The learned judge opined that on the evidence there is no contention that there were multiple causes contributing to the stroke and therefore that, in the court's view, the usual "but for" test of causation was the appropriate test to be applied.

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