Our Insurance Litigation Group

Case Law Updates from Across the Region

COX & PALMER

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In this issue

NEW BRUNSWICK

Pre-existing injury precludes advance payment for loss of income

- McDonald v. Martin, 2013 NBQB 199.

McDonald claimed that she suffered serious injuries as a result of being thrown from the motorcycle that was driven by Martin. Liability was admitted. McDonald sought, by way of motion, an advance payment toward loss of income in the amount of $49,224 (or an amount to be determined by the court), pursuant to Rule 47.03(3) of the Rules of Court, and section 256.6 of the *Insurance Act*, RSNB 1973, c I-12.

Justice Clendening began her analysis by conducting a case law review. She cited *Smith v. Agnew*, [2001] NBJ No 28, as the leading case in New Brunswick regarding advance payments. In that case the Court of Appeal set forth the process for determining whether an advance payment is appropriate in the circumstances, as summarized by Justice Clendening at para 10:

> *It is clear that the motion judge must be satisfied that the Plaintiff will more likely than not be successful at trial. Then the motion judge must move on to the defence's pleading and/or any counterclaim to determine if they are more likely than not to succeed at trial. At paragraph 71 of Smith v. Agnew, Drapeau, J.A. (as he then was) said of the review of defence and counterclaim pleadings, "If, after giving full effect to the defences and any counterclaims, the judge is not satisfied that the Plaintiff will be awarded compensation for the special damages in question, the motion must be dismissed."*

Counsel for Martin argued that McDonald had not met the first part of the test of *Smith v. Agnew* because she had suffered from back problems since her childhood, including progressive degenerative disc disease. In addition, prior to the accident she had sustained a workplace injury which caused her to be off work for a period of time.

Justice Clendening noted that the courts must seriously consider pre-existing injuries or pre-existing conditions in determining motions for advance payments. On this basis, she dismissed the motion and concluded that McDonald did not succeed on the first part of the test in *Smith v. Agnew*, and held that the issues of past loss of income and the pre-existing back injury must be determined by the trial judge.

Court grants motion for extension of time to commence third party claim on basis of no undue prejudice to plaintiff; dismisses motion to try two actions together/ consecutively.

- Robichaud v. Paquette, 2013 NBQB 287.

Two motions were heard by the court in relation to separate proceedings involving the same plaintiff following two motor vehicle accidents.

In the first motion, a defendant in one of the actions, Dominion, sought an extension of time to commence a third party claim pursuant to Rule 30.02(1) of the *Rules of Court*. In that action, the plaintiff was involved in a motor vehicle accident (MVA) in June of 2010 and commenced an action against Hicks and Dominion. In Hicks' defence, he stated that the driver of his vehicle was Thadzi. Dominion sought to commence a third party claim against Thadzi. Rule 30.02 requires that a third party claim be issued within 10 days after the time for filing/serving the defence in the main action and then served within 30 days of issuance. However, the court may order an extension of the time limit if it is satisfied that the plaintiff would not be unduly prejudiced.

Dominion claimed that it would have a subrogated claim against Thadzi if the accident occurred as alleged by the plaintiff and it was liable to pay damages pursuant to the insurance policy. Upon reviewing the evidence, Justice McNally was satisfied that Thadzi may be liable for any amount that the defendant would be required to pay the plaintiff pursuant to its insurance policy and that he should be bound by any liability and resulting damages. Justice McNally also noted that the plaintiff did not oppose the motion and did not assert that she would be unduly prejudiced by such an order. As such, he allowed the motion and ordered that Dominion file the third party claim within 10 days and serve it within 30 days.

With respect to the second motion, the plaintiff applied to consolidate the two separate actions. The first action was commenced in December of 2006 in relation to an MVA that occurred in January 2005 between the plaintiff and a vehicle owned by the Town of Rothesay, which was operated Paquette. The second action was commenced in June of 2012 in relation to the MVA that occurred in June 2010 between the plaintiff, Hicks and Dominion. The plaintiff claimed that the two actions had a question of common law or fact and sought an order to have them heard at the same time or alternatively one immediately after another. The defendants opposed the motion, as the trial of the first action had been scheduled to be heard over a year earlier, but had been rescheduled by the court.

Justice McNally found that the only common element between the two actions was that the plaintiff allegedly suffered injuries as a result of the accidents, which were five and a half years apart, and was treated by some of the same doctors, whom would likely have to testify at both trials. Justice McNally considered the possibility of any undue delay, and found that, if the requested order were granted, the trial of the first accident would have to be adjourned because the second action had not been set down for trial. Further, a new trial date would likely not be available within a year since the trial was scheduled for a month. Lastly, Justice McNally discussed the possible impact of the requested order with respect to the availability of the witnesses and their memories of events. Based on the foregoing, he concluded that the requested order would unduly delay the trial of the first action for no valid reason. As a result, the plaintiff's motion was denied.

NEWFOUNDLAND & LABRADOR

Court sets aside service *ex juris* and dismisses statement of claim due to plaintiff's failure to establish real and substantial connection to jurisdiction

-Jefferson v. MacKlem, 2013 NLTD(G) 106.

The defendant, MacKlem, made an application pursuant to Rule 6.07(7) seeking to have the service of a statement of claim set aside and the proceeding stayed. The plaintiff, Jefferson, had commenced an action in Newfoundland and Labrador with respect to an MVA alleged to have occurred in Ontario. At the time of the alleged accident, both Jefferson and MacKlem were resident in Ontario. Jefferson and her family moved to Newfoundland approximately 10 months after the accident. Most, if not all, of her relevant medical treatment occurred in Ontario.

Rule 6.07(2) of the *Rules of Court* requires a plaintiff to seek leave of the court prior to serving a statement of claim outside of the jurisdiction unless one of the exceptions found in subsection 6.07(1) applies. While Jefferson initially relied on the exception set out in subsection 6.07(1)(o), which allows for service *ex juris* where expressly permitted by statute, she abandoned this position at or before the application. Instead, Jefferson attempted to seek the forgiveness available under Rule 6.07(8) which allows the court to validate service *ex juris* where leave would likely have been granted had it been previously sought. Jefferson's revised position led the court to consider whether or not a real and substantial connection to the jurisdiction had been established. The court relied on the four presumptive connecting factors outlined by the Supreme Court of Canada in *Van Breda v. Village Resorts Limited*, 2012 SCC 17:

> *(a) The defendant is domiciled or resident in the province;*
>
> *(b) The defendant carried on business in the province;*
>
> *(c) A tort was committed in the province; and*
>
> *(d) A contract connected with the dispute was made in the province.*

As none of these factors could be said to apply, the court then looked at Jefferson's medical history to search for a real and substantial connection to the jurisdiction. The court found that Jefferson had been treated in Ontario by a family physician, physiotherapist and orthopedic surgeon, all treatments being somewhat related to the MVA. Despite moving to Newfoundland in September of 2010, the court could find no record of medical treatment related to the accident prior to the statement of claim being filed in December, 2012. The only connection between the action and the jurisdiction at that time was the ongoing pain and suffering that Jefferson allegedly endured. The court determined that the law does not recognize continuing suffering alone to be a factor giving rise to a real and substantial connection between an action and the jurisdiction. As such, it set aside the service *ex juris* of the defendant and dismissed the statement of claim.

New personal injury assessment from Supreme Court of Newfoundland

- Gordon v. Sexton, 2013 NLTD 127.

The plaintiff claimed for damages arising from injuries sustained in a rear end collision in April 2002. Liability was admitted. The sole issue before the court was an assessment of the plaintiff's damages. The plaintiff, aged 53 at the time of trial, continued to suffer some 11 years post-accident from chronic myofascial pain, occipital neuralgia, Grade II whiplash and depression.

Prior to the accident, the plaintiff was employed as a seasonal snow clearer for Parks Canada. The court agreed that he was unable to continue in this position due to his injuries. However, he was able to secure a job as a park patrol officer during tourist season, averaging 22 weeks yearly. In this position, the plaintiff was paid less hourly, but earned the same annually by working more weeks. Despite there being no change in total earnings, the court found "a real loss of income" as the plaintiff was not available to earn other income or receive EI benefits during those extra weeks of work with the park. Past lost income was awarded based on the wage of a snow plow operator. Future lost income, based on the same wage, was extended to age 65. The plaintiff had also lost income from the commercial fishing industry where he had worked with his brother. He was unable to establish that he would have continued to work in the fishery with another company after the sale of his brother's enterprise. Other evidence relating to the plaintiff's income from sawmilling and handyman income was rejected entirely due to lack of records and the fact that the plaintiff's testimony on this point was "vague, ambiguous and wholly unreliable". The court also noted that the plaintiff's credibility was negatively affected by his admissions of past "flouting permit conditions and hiding income from government agencies and his estranged wife".

The domestic and maintenance work at home that the plaintiff was able to do was significantly restricted by his injuries. For past and future loss of valuable services, the court used a "somewhat arbitrary" $750 annually to calculate his loss. The court also found that the plaintiff would likely require acupuncture, nerve block injections (every 6-8 weeks) and over-the-counter medications for the rest of his life. Future care until age 74 was calculated at $240 a year for medications and $900 for monthly acupuncture therapy. The defendants argued that the plaintiff should source treatments closer to his home, but the court found that the plaintiff was not being unreasonable in failing to pursue closer therapy and refused to jeopardize the strong patient-physician relationship which had developed. Interestingly, for the future loss amounts, a 200% mortality factor was assigned to the plaintiff as he was a "chronic cigarette smoker", allowing him a life expectancy of age 74.

In terms of general damages, the court found that $75,000 represented "reasonable compensation" for the plaintiff's injuries, in recognition of their impact on all aspects of his life in the 11 years since the accident and the fact that they would likely affect him for the rest of his life.

NOVA SCOTIA

Prior administrative proceeding not a "Claim" for the purpose of a "Claims Made" policy

- Hants Realty Ltd. v. Travelers Guarantee Co. of Canada, 2013 NSSC 195.

Hants Realty brought an application to have its insurer, Travelers, assume carriage of the defence of a civil action brought against it by former clients, the Pattens. Travelers denied that it was obligated to respond under the insurance policy on the basis of two arguments: (1) that the claim was not "first made" during the policy period, and (2) that the claim was excluded in any event.

The insurance policy was a "claims made" policy. Travelers argued that the claim was not "first made" during the policy period because before bringing their civil claim against Hants Realty, the Pattens had made a complaint to the Nova Scotia Real Estate Commission. It was when the Pattens filed this complaint, Travelers argued, that the claim was "first made", such that the claim was outside the policy

period. The Nova Scotia Supreme Court disagreed. It held that because the complaint to the Commission was administrative in nature and no damages were available, there was no "claim" against Hants Realty of which it should have notified Travelers. The policy defined a "claim" as a written demand for damages, a civil proceeding, or an alternative dispute resolution proceeding. The court found that the claim was not "first made" until Hants Realty received correspondence indicating that the Pattens intended to seek damages. This was within the policy period.

Travelers also argued that the claim was excluded in any event, pursuant to a policy exclusion for "Loss in connection with any claim ... arising out of ... Any Wrongful Act, or any ... situation ... indicating the possibility of a Claim and already known to the Insured prior to the effective date of the initial policy". The court found that the broad wording of the exclusion mandated a narrow interpretation. The fact that the Pattens' complaint to the Commission had been resolved in favour of Hants Realty had led Hants Realty to reasonably believe that there was no claim, or possible claim, at the time its policy with Travelers was issued. The court thus concluded that Travelers had an obligation to defend the civil action.

Court of Appeal reinforces Smith v. Stubbert range for soft tissue injuries; asserts current upper limit of $58,500

- Hayward v. Young, 2013 NSCA 64.

Hayward was injured in a car accident in 2003. The defendant, Young, admitted liability, and the trial was confined to an assessment of damages. Hayward claimed damages exceeding $1 million and argued that he'd sustained both soft tissue and brain injuries. Following a nine-day trial, Justice Robertson found that Hayward had succeeded in establishing that the car accident had caused soft tissue injury, but failed to establish that it had caused brain injury. She awarded $120,000 in general damages for pain and suffering. Hayward appealed and Young cross-appealed.

Hayward's appeal was dismissed. The Court of Appeal found no reason to disturb Justice Robertson's conclusion that Hayward had failed to prove that the car accident caused brain injury. However, Young's cross-appeal was allowed. The Court of Appeal found that Justice Robertson had made a reversible error when she awarded $120,000 to Hayward for general damages, after concluding that his injuries were within the *Smith v. Stubbert* range. *Smith v. Stubbert* is a 1992 decision of the Nova Scotia Court of Appeal which held that the range for non-pecuniary damage awards for "persistently troubling but not totally disabling" injuries is from $18,000 to $40,000 (117 N.S.R. (2d) 118). This has remained the law in Nova Scotia for the past 20 years, with adjustments for inflation. The Court of Appeal found that, since $40,000 in 1992 translates into $57,150 in 2011 (the year the judge filed the decision), Justice Robertson had awarded more than double the upper limit set in *Smith v. Stubbert*. This was a reversible error. The court reduced Hayward's general damages to $57,500, thereby confirming that plaintiffs who fail to bring their injuries outside the scope of *Smith v. Stubbert* will be confined to maximum general damages awards of roughly $58,500 in 2013.

Brokers beware: breach of duty to inquire may result in significant liability

- Keizer v. Portage LaPrairie Mutual Insurance Co., 2013 NSSC 118.

Keizer was a carpenter by trade. In 2008, he decided to begin doing carpentry and furniture repair work in a woodworking shop he set up in his garage, which was heated by a wood stove. He informed his insurance broker, Founders, of these

intentions. Founders neglected to pass this information along to the underwriter, Portage. In 2009, a fire broke out in the garage. Keizer submitted a property loss claim to Founders, who in turn reported the loss to Portage. Portage denied Keizer's claim on the basis that it had not been informed that Keizer was using his garage as a woodworking shop. Keizer brought a claim against Founders and Portage.

The court dismissed Keizer's claim against Portage for indemnity under the insurance policy. The court found that using the garage as a woodworking shop constituted a material change in risk of which Portage had not been informed. The combination of a woodworking shop with a wood stove was not a risk to which Portage would have provided coverage. Furthermore, Keizer was not entitled to relief against forfeiture under s. 171 of the *Insurance Act.* Requiring Portage to pay a claim for a risk it never would have accepted would cause significant prejudice to Portage.

The court next considered Keizer's claim against Founders, which was made on the basis of negligence and breach of contract. The negligence claim succeeded. The court found that, once informed of Keizer's intended business activity, Founders had a duty to inquire to determine whether it might constitute a material change in risk under the insurance policy. "The goal of a broker," the court found, "is to identify the exposures of risk of the clients and to match them up with the necessary coverages." By its failure to fulfill its duty to inquire, Founders breached the standard of care to be met by insurance brokers and was liable to pay Keizer's loss of coverage and hence his fire damage loss of $81,102.16.

While it is well established that insurance brokers owe a duty to customers to help them obtain proper coverage, this case extends that duty to the duration of the policy period, and demonstrates that when customers provide further information after coverage is already in place, brokers have a duty to make proper inquiries and responses.

Court of Appeal affirms major decision in favour of disability insurer

- Walsh v. Unum Provident, 2013 NSCA 12.

Unum, the insurer, and its predecessors provided disability coverage to Walsh, dating back to 1993. In 2000, a claim for "major depression disorder" was filed and, for a time, honoured. Unum then questioned Walsh's ongoing disability and stopped paying. Walsh commenced action against Unum. In preparing for trial, Unum secured and reviewed Walsh's medical records. It noted a litany of undisclosed health problems that pre-dated the application for coverage, including heart problems, headaches, seizures, anxiety, and back problems. Unum further concluded that, had these problems been known, they would have affected its decision to offer coverage. Unum ultimately viewed these as fraudulent material misrepresentations prompting it to then challenge the actual coverage. It therefore counterclaimed seeking (a) a declaration that the policy was void from the outset, (b) the return of its money with interest, and (c) legal costs.

At trial, Justice Pickup found entirely in Unum's favour. Specifically, he accepted Unum's counterclaim in its entirety including the return of all benefits paid plus interest. Alternatively, he found that Walsh was not disabled under the policy, thereby affording Unum a full defence to the claim proper. Walsh then appealed to the Court of Appeal, which dismissed the appeal, essentially by adopting the judge's reasoning in its entirety on the fraudulent material misrepresentation issue. The court noted that

Justice Pickup had correctly articulated the law as it related to material representation and then applied "unassailable" factual findings – many of which went directly to Walsh's credibility – which were solidly supported by the evidence. The court also noted that the insurer's health questions were unambiguious and that the plaintiff offered no evidence of being confused by them.

PRINCE EDWARD ISLAND

Court comments on requirements for approval of settlement offer under Rule 7.08, sealing order and parameters for contingency fee agreements

- Wood (Litigation guardian of) v. Wood, 2013 PESC 11.

The plaintiff was a minor when she suffered a brain injury in an MVA. The parties reached a settlement by mediation and the plaintiff's litigation guardian sought court approval of the settlement. The settlement was approved, however a sealing order and solicitor-client costs remained outstanding.

The plaintiff's litigation guardian sought an order under Rule 7.08, the parens patriae jurisdiction of the court. The court commented that counsel should treat Rule 7.08(5) as a minimum requirement and consider filing "any other material relating to any relevant issue to assist the court to conclude whether or not the settlement is in the best interests of the person under disability."

The parties requested a sealing order, but the court refused the order, stating that there was insufficient evidence to support overturning the presumption of open courts. The burden of displacing this presumption rests with the party applying for the publication ban.

The lawyer's fee was a contingency-based agreement, giving counsel 25% of the gross value of the settlement, less disbursements. The court stressed that contingency-based arrangements should not be the default fee arrangement, and that a contingency percentage should not be applied to costs. The court noted that it is essential that the lawyer negotiate a separate amount for costs and suggested brackets for contingency agreements, being: 15-20% to the end of discovery; 20-25% if the matter settles at mediation; and, 25-30% (up to 33.3%) if the matter settles at trial or after trial.

FROM THE SUPREME COURT OF CANADA

How does settlement privilege affect Pierringer Agreements?

- Sable Offshore Energy Inc. v. Ameron International Corp., 2013 SCC 37.

The plaintiff filed a claim against a number of defendants, when paint used on offshore structures failed to prevent corrosion. The plaintiff entered into Pierringer Agreements with some of the defendants, permitting them to withdraw from the litigation upon settlement, but allowed the claims against the remaining defendants to continue. All of the terms of the settlement agreements were disclosed, except the financial amounts. The remaining two defendants sought disclosure of these figures.

Settlement privilege is premised on the understanding that parties are more likely to settle if they have confidence that communications related to negotiations will remain confidential. Both negotiations and the content of the settlement agreement are covered by the privilege. To be exempt from the privilege, a defendant must

establish that "a competing public interest outweighs the public interest in encouraging settlement".

Pierringer Agreements complicate settlement privilege as they provide protections for non-settling defendants, such as requiring the settling defendant to make its settlement evidence available to non-settling parties upon discovery, as was the situation in this case. A crucial aspect of Pierringer Agreements is that a non-settling defendant can only be held liable for its share of the damages, and severally, but not jointly, liable with the settling defendants.

In denying the request for disclosure of the settlement amounts, the court found that such knowledge would not materially affect the non-settling defendants' ability to fully know their case. Furthermore, the settling defendants were able to come to an agreement without the benefit of a previous settlement agreement.

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