Our Insurance Litigation Group

Case Law Updates from Across the Region

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COX & PALMER

In this issue

SUPREME COURT OF CANADA

Did trial judge err in improperly inviting a jury to find a child responsible for an accident by referring to statutory right-of-way provisions in Nova Scotia's Motor Vehicle Act.

- Annapolis County District School Board v. Marshall, 2012 SCC 27

Four-year-old Johnathan Marshall, was struck by a school bus driven by the applicant Feener. Johnathan ran onto the highway and into its path. Feener braked immediately upon seeing the boy but Johnathan was struck, suffering serious injuries. At age 19, Johnathan, through his litigation guardian, commenced an action against Feener and his employer.

A jury found that Feener was not negligent. Johnathan's action was dismissed at trial. Johnathan appealed, alleging various errors by the trial judge in his charge to the jury. The Court of Appeal ordered a new trial finding that, in referring to statutory right-of-way provisions in Nova Scotia's Motor Vehicle Act, the trial judge improperly invited the jury to treat Johnathan like an adult and therefore find him responsible for the accident.

The appeal was allowed, with the SCC finding that there were no errors in the trial judge's instructions to the jury and that the Court of Appeal failed to appreciate the dual function of the statutory right-of-way provisions, which inform the assessment of whether a pedestrian was contributorily negligent and help determine whether a driver breached the applicable standard of care owed to all pedestrians. The jury was not asked to adjudicate on Johnathan's negligence and it was made clear by the trial judge that, as a child, his liability was not in issue.

The appropriate application of the material contribution test in negligence actions.

- Clements v. Clements, 2012 SCC 32

The plaintiff, Clements, drove over a nail while driving his motorcycle with his wife. The nail damaged the tire, which resulted in Clements losing control of the motorcycle. Clements's wife suffered a brain injury in the crash and sued her husband, alleging that her injury was caused by his negligence in driving an overloaded motorcycle too fast. At trial, Clements was found to be negligent, based on the "material contribution" test. The Court of Appeal set aside the judgment, dismissing the action on the basis that the "material contribution" test was not appropriate in the circumstances and "but for" causation had not been proved.

The key issue for the Supreme Court of Canada was whether the "but for" test or the "material contribution" test applied. Chief Justice McLachlin confirmed that generally the "but for" test is applied to determine causation in a negligence action. The "material contribution" test is only applicable when it is impossible to prove causation on the "but for" test, but is clear that the defendant acted negligently, exposing the

plaintiff to an unreasonable risk of injury. This typically occurs when there are multiple tortfeasors at fault and one or more has in fact caused the plaintiff's injury, but all the defendants are pointing the finger at each other.

Chief Justice McLachlin summarized the present state of the law in Canada with respect to causation at paragraph 46,

> • *As a general rule, a plaintiff cannot succeed unless she shows as a matter of fact that she would not have suffered the loss "but for" the negligent act or acts of the defendant. A trial judge is to take a robust and pragmatic approach to determining if a plaintiff has established that the defendant's negligence caused her loss. Scientific proof of causation is not required.*
>
> • *Exceptionally, a plaintiff may succeed by showing that the defendant's conduct materially contributed to risk of the plaintiff's injury, where (a) the plaintiff has established that her loss would not have occurred "but for" the negligence of two or more tortfeasors, each possibly in fact responsible for the loss; and (b) the plaintiff, through no fault of her own, is unable to show that any one of the possible tortfeasors in fact was the necessary or "but for" cause of her injury, because each can point to one another as the possible "but for" cause of the injury, defeating a finding of causation on a balance of probabilities against anyone.*

The Supreme Court found that the trial judge made two errors: (1) insisting on scientific precision in the evidence as a condition of finding "but for" causation, and (2) applying a material contribution test in "a simple single-defendant case". The matter was returned to the trial judge to be dealt with on the basis of "but for" causation.

IN NEW BRUNSWICK

Insurer of defendant tortfeasor unable to plead tort of unlawful interference with economic relations against plaintiff's section B insurer in motor vehicle litigation.

- Leavitt v. Hooper, 2012 NBQB 74

The plaintiff Leavitt was injured in a motor vehicle accident with the defendant Hooper, who admitted liability. Shortly after the action was commenced, Leavitt's Section B insurer, Aviva Canada Inc. ("Aviva"), ceased paying Section B benefits to Leavitt after 104 weeks once it determined that Leavitt no longer qualified for benefits. Hooper (in effect, AXA Insurance Canada) ("AXA") claimed contribution for the weekly indemnity benefits from the date Aviva terminated benefits and for future benefits.

The decision concerns a motion by Hooper to amend a third party claim against Aviva to add a claim for damages for intentionally causing economic loss allegedly suffered because of Aviva's "unlawful breach of contract with its insured" by not continuing the weekly indemnity payments. Aviva brought a cross-motion to dismiss the third party claim, claiming that the tort of unlawful interference with economic interests could not be engaged through the third party claim. Aviva sought summary judgment to have the third party claim dismissed.

The court found that Aviva committed no illegal or unlawful act; rather Aviva was at liberty to dispute entitlement after the initial 104 week period, meaning there had been no economic loss. Further, the court found that Hooper was not insured by Aviva and was not party to the contract between Leavitt and Aviva. The court ultimately granted summary judgment to Aviva, stating Hooper had no right of action against Aviva as Aviva was not liable to her or her insurer.

First look at the application of s.22 of the Limitation of Actions Act.

- Gildart v. Minhas, 2012 NBQB 300

On June 14, 2009, Gildart was involved in a motor vehicle accident. Following her accident, Gildart met with her lawyer on June 30, 2009 to commence her claim for compensation against the defendant, Minhas. Gildart's solicitor did not initiate legal proceedings until July 26, 2011, over the two year limitation prescribed under legislation. Minhas contended that Gildart's claim was prescribed under s.5 (1) (a) of the *Limitation of Actions Act* (the "Act"). Gildart filed a motion asking that paragraph 8 of Minhas' Statement of Defence be struck out on the ground that s.22 of the Act precludes the application of the limitation period contained in s.5(1). Gildart maintained that her solicitor was actively involved in settlement proposals with a representative for Minhas' insurer and that she and/or her solicitor reasonably believed that her claim would be resolved by agreement, and therefore delayed her decision to bring her claim within the two year limit.

Prior to the expiration of the two year limitation, Gildart's solicitor had sent several letters and emails to two claims examiners for Minhas' insurer. The correspondences dealt with Gildart's medical information, employment information, particulars of loss of income, etc. Each of the examiner's letters included a disclaimer stating that "nothing herein contained is or shall be construed as either an admission of liability or a waiver or extension of any applicable notice, claim or limitation."

In March of 2010, a "without prejudice" offer of settlement for $2,500 in general damages was sent by one of the claims examiners. The offer was rejected, and a counter offer of $82,620.02 was made by Gildart's solicitor. Finally, on July 7, 2011, the claims examiners wrote to Gildart's solicitor requesting his Statement of Claim. The court took the position that the large discrepancy between the offers was certainly not indicative of a likely resolution or assurance that an agreement would be reached.

Justice McNally of the Court of Queen's Bench, rejecting Gildart's motion, concluded as follows:

> *(24) In the circumstances of this case as presented on this motion, I have not been convinced on the balance of probabilities that [Gildart's solicitor], despite his statement to the contrary, believed that he or his client received any assurance from any of the representatives of the defendant's insurer by their statements or actions, that the claim would be resolved by agreement or that there was any waiver of any defence or time limitations under the Act. Further, even if [Gildart's solicitor] personally believed that he received such an assurance from the defendant's insurer, in my opinion it would not have been reasonable in the circumstances for him to believe that was the case.*

IN NEWFOUNDLAND & LABRADOR

Court of Appeal clarifies test for granting order compelling a plaintiff to submit to an independent "Mental Examination"

- Lawlor v. Pennell, 2012 NLCA 32

In 2004, the plaintiff, Pennell, suffered soft tissue injuries as the result of a motor vehicle accident with the defendant, Lawlor. She commenced an action seeking damages for her physical injuries and "ongoing pain, suffering and distress" but later amended her claim to allege that private investigators hired by the Lawlors had harassed and been aggressive to her, causing "severe emotional trauma" and harm to Pennell and her unborn child.

Since the accident, a number of Pennell's treating physicians had suggested her mental health may be complicating her recovery and recommended that she seek consultation with a psychiatrist or a psychologist. Therefore, the Lawlors requested that she submit to a mental examination, which Pennell refused. They brought a rule 34.01 application requesting an order that Pennell submit to an examination by a designated psychiatrist. The applications judge considered the competing rights, the plaintiff's right to privacy and the defendant's right to know the case against them. He gave significant weight to the fact that Pennell had undergone several medical examinations already by consent, finding that the balance was in her favour. He then found that her mental condition was not put "in issue", as required by rule 34.01.

The Court of Appeal upheld the ruling but clarified the test. An applications judge must first, as a threshold matter, decide whether mental health is in issue. Then they may move on to consider the competing rights. The Court of Appeal noted that mental examinations will be ordered less frequently than physical because they are intrusive and require doctor-patient trust, which is difficult to establish with an unfamiliar psychiatrist chosen by opposing counsel.

Court of Appeal and Trial Division consider adding parties after expiry of Limitation Period.

- Houston v. 10475 Newfoundland Limited, 2012 NLCA 34, and Tucker v. Unknown Person, 2012 NLTD (G) 132

In *Houston v. 10475 Newfoundland Limited*, 2012 NLCA 34, the plaintiff, Houston, fell on an icy walkway in an area abutted by two commercial buildings. She started an action within the limitation period, naming only the property manager of one of the building owners as defendant. Following the expiry of the limited period, she made an application for leave to add both owners as parties.

The applications judge allowed the additions pursuant to s. 11(1)(d) of the *Limitations Act,* which provides that the expiration of a limitation period does not bar the addition of a new party under the Rules if the claim is related to the original action, and rule 7.04(2)(b), which provides that a court may, after expiry, order any person be added as a party, who "ought to have been joined" or "whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated upon". The judge relied on the second part, the "necessity branch", in adding the parties. The building owners appealed.

The Court of Appeal allowed the additions on different grounds than the applications judge. Emphasizing the discretion of the applications judge, they urged a liberal and purposive interpretation of the relevant provisions and held that both grounds under rule 7.04(2)(b) were applicable, seemingly expanding the scope of the test for allowing post-limitation period additions and minimizing the prejudice suffered by the lost limitations defence.

Subsequently, in *Tucker v. Unknown Person*, 2012 NLTD(G) 132, the Trial Division considered an application of the plaintiff, Tucker, to add his Section D insurer to an action in which he had only named an "unknown person" as defendant within the limitation period.

Tucker's counsel argued that *Houston* represented a change in the approach to be taken and that, following *Houston,* the decision to add a new party was completely within the discretion of the court and, in this case, that all factors pointed to an exercise of discretion in Tucker's favour. Orsborn C.J. rejected this submission, finding that the liberal approach in *Houston* did not "fit comfortably with statements in earlier authorities". He stated that in the absence of an explicit statement in *Houston* that earlier cases should no longer considered good law, he could not consider the well-established principles to be changed.

Therefore, in making his decision Orsborn C.J. abided by the traditional narrow interpretation of the "ought to" branch namely, that it is only applicable where the legal integrity of the proceeding requires the party's addition. He found that this was not the case. He then held that AXA was not a party "necessary" to the adjudication of Tucker's personal injury action against the unknown person. The application was dismissed.

An application for leave to appeal the decision in *Tucker v. Unknown Person* has been filed with the Newfoundland and Labrador Court of Appeal.

IN NOVA SCOTIA

Insurer's handling of claim not relevant to issue of damages

- Levine v. Roots Canada Limited, 2012 NSSC 268

Sandra Arab Clarke, a partner in our Halifax office, was recently successful in defending a motion for production of the insurer's entire file which the plaintiff Levine argued was necessary insofar as it may "touch upon" how the insurer handled Levine's claim.

Levine had been injured at a Roots store in 1997. Liability and damages were severed and at the liability trial, the judge assessed liability as split equally between Levine and Roots and held that costs would be borne by each party. On the issue of damages, Levine sought production of Roots' insurer's entire file, without redactions, claiming that the manner in which the insurer had handled the claim prior to commencement of litigation and delay on the part of the insurer was relevant to the issue of costs and the amount of prejudgment interest to be awarded. Roots argued that the conduct of its insurer was irrelevant because liability had already been determined and each party had been ordered to bear its own costs. Roots noted that Levine was not the insured and argued that an insurer owes no duty of good faith to a plaintiff in a third party claim. Roots also argued that redacted information was either irrelevant or properly redacted in accordance with laws of evidence.

The court refused to grant Levine's motion for production. Levine had failed to prove the evidentiary basis that raised his argument from a "fishing expedition" to an "air of reality", the current test in Nova Scotia for relevance. The mere fact of delay and other issues raised by Levine did not make the examination of the insurer's conduct and its entire file appropriate. Levine could not produce any authority for his argument that an insurer's handling of a third party claim could affect the costs award between the parties. Levine did not plead the issue of the insurer's conduct in his pleadings and therefore, it was not a matter in issue.

Insurer unable to subrogate against insured's employee

- Portage LaPrairie Mutual Insurance Company v. MacLean, 2012 NSSC 341

Portage LaPrairie Mutual Insurance Company ("Portage") insured Green Thumb Farmers Market. The defendant MacLean was an employee of Green Thumb when a fire occurred while MacLean was cooking at the market. Portage paid out its insured's fire loss claim and commenced a subrogated action against MacLean. MacLean successfully brought an action for summary judgment against Portage on the basis that the circumstances of the case did not allow for the insured employer to sue MacLean. Since, based on the principles of subrogation, Portage could have no greater rights than its insured, Portage could not then recover from MacLean.

Although the court found that there was no right of the employer/insured to sue MacLean, and therefore no subrogated right of Portage to bring the claim, the court also considered the insurance contract and found that Portage had specifically contracted out of the right to sue an employee of its insured. MacLean relied upon a provision of the commercial general liability portion of the policy in which Portage named employees as insured for negligent acts in the course of employment causing bodily injury and property damage to third parties. MacLean argued that because employees are "insured" for the purposes of the CGL portion of the policy, Portage specifically agreed not to bring a subrogated claim against employees under the Property, Business Interruption and Extra Expense portion of the policy (under which payment was made for the fire loss). The Property portion of the policy contained the following provision:

> *11. The Insurer, upon making any payment or assuming liability therefor under this Form, shall be subrogated to all rights of recovery of the Insured against others and may bring action to enforce such rights. Notwithstanding the foregoing, all rights of subrogation are hereby waived against any corporation, firm, individual or other interest with respect to which insurance is provided by this Policy.*

The Declarations portion of the policy made it clear that the term "policy" included both the Property portion and the CGL portion. The court found that on a plain reading of the policy, the rights of subrogation against employees were specifically waived by Portage. Further, the court found that a clause waiving subrogation rights against the employer for loss arising from what will normally be conduct contemplated by the contracting parties to be performed by the employer's employees should also apply for the benefit of the employees.

IN PRINCE EDWARD ISLAND

The relevant factors constituting a true offer to settle pursuant to Civil Procedure Rule 49.

- Shepard v. Sanderson & Govt of PEI 2012 PESC 20

The plaintiff Shepard suffered injuries after being struck by heavy snow thrown onto her by a snowplow. She commenced two separate actions against the defendants for payment of Section B benefits pursuant to a standard policy of automobile insurance, and in negligence. The court found that the defendants were 100 percent liable and ordered costs payable to Shepard. Shepard offered to settle the section B claim and the "liability component" of the negligence claim prior to trial and, as such, claimed substantial indemnity costs pursuant to Civil Procedure Rule 49.10, which states,

49.10 (1) Where an offer to settle,

> *(a) is made by a plaintiff at least seven days before the commencement of the hearing;*
>
> *(b) is not withdrawn and does not expire before the commencement of the hearing; and*
>
> *(c) is not accepted by the defendant, and the plaintiff obtains a judgment as favourable as or more favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date the offer to settle was served and substantial indemnity costs from that date, unless the court orders otherwise.*

The court found that the two offers were not Rule 49 offers as they did not put the recipient in a position where the recipient must or should give serious and careful consideration to the merits of their own case. Furthermore, the court found that an element of compromise is not an essential element of an offer to settle but its absence can be a relevant factor to be taken into account.

Right of way for vessels engaged in fishing pursuant to the Canada Shipping Act's Collision Regulations.

- Hogan v. Buote 2012 PESC 10

The plaintiff, Brian Hogan, was hauling his lobster traps on the waters off Prince Edward Island when the defendant, Darryl Buote, spotted him. Buote lost sight of Hogan's boat momentarily and when he next saw Hogan's boat, it was too late to avoid a collision. The boats collided and Hogan's boat was damaged.

The Collision Regulations made pursuant to the *Canada Shipping Act,* particularly Collision Rule 15(a), governed the issue of liability:

> *When two power-driven vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way and shall, if the circumstances of the case admit, avoid crossing ahead of the other vessel.*

This Rule would give the right of way to Buote as he was on Hogan's starboard side. However, this Rule is modified by Subrule 18(iii), the relevant part of which states that a "power-driven vessel underway shall keep out of the way of a vessel engaged in fishing".

The court concluded that Hogan did not fall under this exception for vessels engaged in fishing, stating at paragraph 18,

> *The simple act of fishing is insufficient to meet the definition. There must be a restriction on manoeuvrability caused by the fishing nets, lines, trawls or other fishing apparatus in order to bring a boat within the definition.*

The court found that Hogan's restriction on maneuverability was negligible in this case and was no restriction at all. The court also rejected Hogan's argument that the custom in the area is that fishermen give way to boats that are hauling or setting traps.

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