February 2010

CASE LAW UPDATES FROM ACROSS THE REGION

IN NEW BRUNSWICK

Plaintiffs not required to answer questions in regard to prior settlements
– *Hermitage v. Budd,* 2009 NBQB 288

In 2003, the plaintiff injured her knee and wrist in a slip and fall accident for which she brought a legal action which settled. She was later involved in two separate motor vehicle accidents, one in 2004 and another in 2006. Concurrent examination for discoveries were conducted for both accidents in 2008. At the examination for discovery, a defendant's solicitor attempted to question the plaintiff on details of the settlement reached in her slip and fall action. The plaintiff's solicitor would not allow the plaintiff to answer the questions. The defendant brought a motion seeking settlement details of the slip and fall injury. The Court considered the issue of whether the plaintiff should be ordered to answer and provide details of the settlement. The Court accepted the plaintiff's submission that there was little probative value of knowing the amount of the settlement or how the settlement was broken down amongst various heads of damages. Given that it is in the public interest to encourage settlements, parties need to be assured that once a settlement is reached that it will not be revisited. The Court was not persuaded that the amount or breakdown of damages in the slip and fall accident was sufficiently relevant or necessary to the present case to warrant disclosure. The application was denied with costs to the plaintiff.

Now Easier for Insurer to Obtain both "Physical" and "Mental" Defence Medical Examinations
– *Blyth v. Crowther and Kelly,* 2009 NBCA 80*

The plaintiff sustained personal injuries in a motor vehicle accident. The plaintiff was diagnosed with both physical and psychological injuries. The defendant initially proceeded with a Rule 36 defence medical examination with an orthopaedic surgeon which dealt with the plaintiff's physical injuries. The defendant then requested a further defence medical examination with a psychiatrist to assess the plaintiff's psychological injuries (depression). The plaintiff refused the defendant's request. The motion judge ordered the plaintiff to attend the further examination with the psychiatrist.

The plaintiff appealed to the New Brunswick Court of Appeal. The plaintiff argued that special criteria applied to "second" defence medical examinations, and that a more stringent standard should be applied than when dealing with a "first" defence medical examination. The plaintiff further argued that "second" defence medical examinations should only be permitted in the rarest of circumstances.

Chief Justice Drapeau, on behalf of the New Brunswick Court of Appeal, rejected the plaintiff's arguments and concluded as follows:

"Rule 36.02(1) provides that the Court may order a party to submit to a physical or mental examination, or both. When the Court orders both, whether in the same or separate proceedings, distinct adjudicative standards do not come into play. **Neither is a "second examination" within the meaning of Rule 36.04(4); rather, one is a first "physical" examination while the other is a first "mental" examination. Accordingly, the examination by Dr. Forsythe was a "first" physical examination and the examination by Dr. Rosenberg will be a "first" mental examination."** (Emphasis added)

The plaintiff was ordered to attend the "mental examination" with Dr. Rosenberg (psychiatrist). The original order of the motion judge was revised by the Court of Appeal to delete reference to the term "independent medical examination", and replaced with the correct description of "defence medical examination".

This result of this decision is that in claims where both physical and psychological issues are present, it will now be easier to obtain both physical and mental defence medical examinations. The defendant need only meet the less exacting criteria as set out in the previous decision of the New Brunswick Court of Appeal in *Reid v. Murdock* (2005), 295 N.B.R. (2d) 219.

*Cox & Palmer represented the successful respondent on this appeal

Summary Judgment Granted to Commercial Host after a Fatal Accident
– *Feaver v. Briggs et al.*, 2009 NBQB 305*

Richard Feaver died after he was struck by a car while walking on or near Restigouche Road in Oromocto. On the evening of the accident Mr. Feaver had attended a Christmas Party with his wife at Barbie and Ken's Bar and Eatery ("Barbie and Ken's"). The Feavers had left Barbie and Ken's and were walking to a nearby restaurant when the accident occurred. It was alleged that Barbie and Ken's and Kenneth Fairley, the bartender that evening, were negligent in that they allowed Mr. Feaver to consume alcoholic beverages and become intoxicated to the extent that he was unable to ensure his own safety.

Barbie and Ken's and Kenneth Fairley applied for summary judgment dismissing the claim against them. In granting the relief requested, the Court found that there was no foreseeable risk of harm to Mr. Feaver when he left Barbie and Ken's. The bar had placed Mr. Feaver in the hands of three adults who were responsible for him, one of which was his wife. Further, the bar owners knew that there was a sidewalk between the two establishments and arrangements had been made for the Feavers to be driven home after they left the restaurant.

*Cox & Palmer represented the successful defendant in this case.

IN NEWFOUNDLAND AND LABRADOR

Newfoundland and Labrador Court of Appeal Considers Proper Characterization of Claim for Loss of Opportunity – *Jarvis v Treberg,* 2009 NLCA 51

While riding a bicycle, the plaintiff, Treberg was struck by a vehicle driven by defendant, Jarvis. Jarvis was held wholly at fault for the accident. At the time, Treberg was completing a Master's Degree in Biology. As a result of the accident, he suffered injuries, particularly to his leg, which delayed completion of his university studies and his entry into the workforce. The trial judge held that Treberg's entry into the workforce had been delayed by a year due to his injuries, and awarded Treberg $60,000.00 for that loss. This figure was based on the approximate annual salary that Treberg would have been expected to receive when he entered the workforce.

While the evidence established that Treberg had earned $22,000.00 during the year that he was recovering from his injuries, the trial judge did not deduct this amount from the $60,000.00 award for loss of earnings. Jarvis appealed this finding. In discussing the issue, the Court of Appeal held that to characterize the result of delayed entry into the workforce as loss of opportunity did not assist with the proper analysis of the issue. The Court stated that for the purposes of such analysis there is only one head of damage, and the issue is properly considered under the broad category of loss of future earning capacity, which generally encompasses employment or income related losses that are contingent on future events. The Court concluded that if a plaintiff is delayed in entering the workforce, the appropriate analytical approach is to assess the loss to the plaintiff in terms of the loss future earning capacity as a result of the injuries suffered. The measure of the loss will depend on the particular facts, and may be amplified by additional contingencies, such as if the plaintiff is delayed from entering the workforce for a significant period of time as opposed to minimal delay. The award to Treberg was reduced accordingly.

Arbitration Provision in Marine Insurance Policy not Tantamount to Exclusive Jurisdiction Clause
– *Midnight Marine Ltd. v Lloyds,* 2010 NLTD 3

Midnight Marine Ltd., the operator of a shipping business, commenced an action in Newfoundland against its liability insurer, Lloyds, for coverage with respect to a cargo loss claim. In responding to the litigation, Lloyds applied for a stay of proceedings on the basis of a jurisdictional clause in the insuring agreement that provided:

"Notwithstanding anything else to the contrary, this insurance is subject to English law and practice and any dispute arising under or in connection with this insurance is to be referred to Arbitration in London..."

Midnight Marine Ltd. had previously taken an action against Lloyds in an unrelated proceeding, but under the same policy wording. In that earlier proceeding, Lloyds did not raise the question of exclusive jurisdiction or arbitration. The Court held that the failure by the insurer to raise these points in the earlier litigation represented a contrary interpretation of the subject clause by Lloyds, or a waiver of that provision as an exclusive jurisdiction clause. In dismissing the stay of proceedings application, the Court held that in the absence of clear policy wording, or a clear understanding on the part of both parties that the arbitration clause was to be considered as an exclusive jurisdiction clause, Lloyds could not rely on it as such.

IN NOVA SCOTIA

Court of Appeal Upholds Award of Damages Resulting from Golf Mishap
– *Hayter v. Bezanson,* 2009 NSCA 113

The defendant and the plaintiff, accompanied by two other friends, went to play golf. They brought tequila, marijuana and beer with them to the golf course. By the sixteenth hole, the defendant had smoked a joint, drank nine beer plus a half pint of tequila. On that hole, he was the last of the group to hit. He shot his drive into the trees, then a provisional onto the fairway. Believing the defendant had completed his turn, the others started moving ahead toward their balls. Suddenly the defendant ran from 5-10 feet behind the ball and hit a "Happy Gilmore" shot. The plaintiff saw the ball coming toward him and raised his hand to protect his head. The ball hit his left wrist and then bounced to his chest. The ball strike permanently damaged the plaintiff's radial nerve or its distribution from the wrist, resulting in complex regional pain syndrome. He brought an action against the defendant. The trial judge awarded $227,500 in total damages and both parties appealed the decision. The defendant argued that (1) the plaintiff consented to the risk of golf balls going astray, (2) he was contributorily negligent in that he failed to take steps to ensure his own safety, (3) the golf ball strike did not cause the injuries, and (4) the trial judge over-calculated damages. The plaintiff cross-appealed, seeking increased damages. The Court of Appeal held that the plaintiff had consented only to the ordinary risks of golf and that the defendant's behaviour went beyond the ordinary risks. The plaintiff was not contributorily negligent because the defendant had given no warning that he was going to take a third shot, and the plaintiff had no time to get out of the way. The trial judge's finding that the ball strike caused the injury was supported by the evidence and upheld by the Court of Appeal. In short, the Court dismissed the appeal and cross-appeal with respect to damages, upholding the trial judge's award of $85,000 in general damages, $67,500 in lost income and $75,000 for lost future earning capacity.

C&P Brings Successful Motion for Non-suit following Marathon Environmental Illness Trial
– *Tingley v. Wellington Insurance,* 2009 NSSC 248 No. 375

The plaintiffs, a mother and her two children, brought an action against its homeowner insurer and the adjuster for breach of contract, negligent misrepresentation, negligence, breach of fiduciary duty, and equitable fraud. During a lengthy trial, the plaintiffs testified that in September of 1991, a break-in occurred at their Dartmouth home. Upon entering the house, they noticed an unusual smell, together with stains on the walls, carpets, and clothing. Soon after, they stated they began to experience health problems that they attributed to contamination of the home. Eventually, the family left the home. The plaintiffs' complained about the defendant's adjuster conduct and handling of their claim and brought the action.

At the closing of the plaintiffs case at trial, the defendants brought a motion for declaration of a non-suit with respect to the plaintiffs' claims for breach of contract, negligence, and breach of fiduciary duty. The issue was whether the plaintiffs had established a *prima facie* case against the defendants. The plaintiffs attempted to argue that new Civil Procedure Rule 51.06, like its predecessor, could only be invoked when a defendant moves for dismissal of *all* of the plaintiff's claims, and does not permit dismissing some while others remain. The Court disagreed, noting that Rule 51.06 states that the defendant may move for dismissal of the proceeding, or a claim in the proceeding.

The Court dismissed the negligence claim on the basis that the plaintiffs' had not presented any evidence to establish the standard of care required by the adjuster in the circumstances. The Court also dismissed the breach of contract claim because no express provision had been breached and no evidence had been presented that would permit reading an implied term into the contract. The Court then considered whether an insurer is in a fiduciary relationship with an insured and concluded that the obligation to deal in good faith does not equate to a fiduciary duty and dismissed the claim.

The Court was unwilling to dismiss the claim of negligent misrepresentation, stating that if the adjuster or his supervisor indicated to the plaintiffs that it was fine for them to return home, relying on a flawed report, it would be open to a judge or jury to find that the statement was made recklessly, carelessly, or negligently.

NSCA Dismisses Constitutional Challenge to Nova Scotia Cap
– *Hartling v. Nova Scotia (Attorney General),* 2009 N.S.C.A. 130

The Nova Scotia Court of Appeal dismissed an appeal of the Queen's Bench ruling that the Nova Scotia cap legislation is constitutional. The Court of Appeal agreed that the $2500 cap on minor injury damages as defined in section 113B of the *Insurance Act* is not discriminatory and, therefore, does not violate section 15 of the Canadian Charter of Rights and Freedoms. The Court also upheld the ruling that the regulations made pursuant to section 113B are valid. Therefore, at least for the moment, the law in Nova Scotia provides for a cap on general damages for minor injuries arising out of most motor vehicle accidents. The cap will generally apply to people with injuries which do not cause a substantial interference with the person's ability to perform usual daily activities or the essential elements of their pre-accident employment for a period longer than twelve months after the accident.

The Court of Appeal explained that although the cap regime creates a distinction between people who suffer injuries that are caught by the cap and others who are injured in motor vehicle accidents and that this distinction causes a disadvantage, the legislation does not perpetuate prejudice or stereotyping sufficient to trigger section 15 of the Charter. The Court also points out that claimants are still fully compensated for pecuniary losses and that the interest affected was already subject to an arbitrary cap, though higher, in the form of judicial limits on awards. Similarly, The Court rejected the Appellants' contention that the cap is discriminatory against women because the pecuniary loss recovery has traditionally been lower for women than men. This ground of appeal failed because the evidence suggested that the reason for the discrepancy is inequality of pay in the workplace and not the cap regime. This, the Court explains, should be resolved in the workplace and not through insurance legislation. The Court declined to rule on the constitutionality of the cap's apparent inclusion of all injuries which are purely mental in nature, leaving that issue to be potentially resolved in a future case.

As for the prospect of a further appeal, the Supreme Court of Canada very recently denied an application for leave to appeal from a recent Alberta Court of Appeal decision which upheld the constitutionality of that province's cap legislation. The Supreme Court of Canada's decision not to hear the appeal arising from Alberta will no doubt be discouraging to the plaintiffs who launched Nova Scotia's cap challenge. Although the Nova Scotia government has indicated an intention to abolish or revise the cap legislation, it has not announced a firm timeline for doing so nor has it confirmed whether any changes will be retroactive. These issues will apparently be dealt with during the spring legislative session. As a result, at least for the time being, counsel and insurers in Nova Scotia must focus on how the cap will be applied in individual cases.

WE WOULD LIKE TO HEAR FROM YOU

If you have any comments, suggestions or if there is a particular issue you would like more information on, please let us know. Any inquiries should be directed to our newsletter editor, Amanda Frenette, at afrenette@coxandpalmer.com or (506) 453-9642.

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