Our Insurance Litigation Group

Case Law Updates from Across the Region

COX & PALMER

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NEW BRUNSWICK

Settlement privilege and what exceptions are applicable so that the privilege does not attach

- Hermitage-Kilkenny v Morris, 2013 NBQB 407

Hermitage-Kilkenny and the defendants were involved in a motor vehicle accident in 2010. Hermitage-Kilkenny was involved in two prior motor vehicle accidents, one in 2004 and one in 2006. For both of these two prior accidents she commenced actions and settled amicably prior to any trial. Settlement amounts in both actions consisted of global lump sum amounts and were not apportioned between any specific heads of damages. Hermitage-Kilkenny refused to respond to discovery questions pertaining to the settlements in the two prior actions citing settlement privilege. The defendants brought a motion seeking production of the settlement sum in each of the two prior actions on the grounds that the settlement amounts were relevant and should be disclosed in order to avoid the risk of double recovery.

The Motions Judge recognized that there is a public interest in encouraging settlements and therefore settlement negotiations are subject to a privilege which keeps the negotiations and settlements confidential and not compellable to disclosure. The court applied the principle that it must be established that disclosure of the communications related to settlement is necessary, either to achieve the agreement of the parties to the settlement or to address a compelling or overriding interest of justice.

The Motions Judge concluded that relevance had not been established by the defendants. The Motions Judge was of the view that Hermitage-Kilkenny was still obligated to establish her injuries and their effects on her from the date of the accident in question and if there were pre-existing injuries, these would be considered by the medical experts and the court. The court concluded that knowing the global settlement amounts would be of little, if any, assistance in determining Hermitage-Kilkenny's damages and that knowing or not knowing the global settlement amounts would have little impact on the risk of double recovery by Hermitage-Kilkenny. The evidence of the global settlement amounts was not relevant or either of insufficient relevance to constitute an exception to settlement privilege.

Implementation of Pierringer Agreement

- Nadeau Poultry Farms Limited and Maple Lodge Farms Ltd. v. Desjardins & Desjardins Consultants Inc., et al, Unreported; - Decision of Justice Lucie A. LaVigne issued April 1, 2014 (NBQB Judicial District of Edmundston)

The plaintiffs and two of the defendants (collectively referred to as the "settling parties" and the defendants collectively referred to as the "settling defendants") entered into a form of proportionate share settlement agreement known as a Pierringer Agreement. The agreement provided that if implemented, the plaintiffs' action against the settling defendants would be settled and the settling defendants would withdraw from the litigation. The plaintiffs' action against the non-settling defendant was to continue with the non-settling defendant being liable only for the proportion of damages it actually caused – its several share of liability.

The settling parties jointly applied to the court by way of motion for various orders giving effect to the proportionate share settlement agreement including leave of the court permitting the discontinuance or dismissal without costs of the different claims and cross-claims against the settling defendants, that the plaintiffs be barred from bringing subsequent actions against the settling defendants arising out of the facts alleged in the plaintiffs' statement of claim and allowing the plaintiffs to file and serve an amended statement of claim to reflect the settlement agreement. The non-settling defendant opposed the motion. The non-settling defendant argued that the Pierringer Agreement was not disclosed in a timely manner, that the settling parties failed to submit the Pierringer Agreement to the court for approval and that the relief requested impeded the procedural entitlements of the non-settling defendant such that they were prejudiced in the further conduct of their defence and the relief requested to implement the Pierringer Agreement should not be allowed.

The Motions Judge concluded that there was an overriding public interest in settlement, and the promotion of settlement of complex multi-party litigation through the use of Pierringer Agreements was sound judicial policy that contributes to the effective administration of justice and which overrides any prejudice that could be caused by the fact that the settling defendants will no longer be parties to the action.

In granting the motion the court concluded that a Pierringer Agreement should be disclosed in a timely fashion, that the Pierringer Agreement in this case was disclosed in a timely fashion, that failure to seek court approval of the Pierringer Agreement was not an appropriate basis for rejection of the motion as the agreement was before the court and the court was given the opportunity to consider the fairness of the agreement when deciding whether or not to give effect to it and that the non-settling defendant had not shown tangible prejudice arising from the implementation of the Pierringer Agreement.

This was the first time a Pierringer Agreement had been the subject of a motion before a New Brunswick court. The non-settling defendant is seeking leave to appeal to the New Brunswick Court of Appeal. Deirdre L. Wade, Q.C. of our Saint John office was the drafter of the Pierringer Agreement before the court and counsel to one of the settling defendants.

NOVA SCOTIA

Access to Electronic Information: Computer Usage Patterns

- Laushway v Messervey, 2014 NSCA 7

Laushway was in a motor vehicle accident in December of 2005. Following the accident, he claimed that, as a result of his injuries, he could only sit at his computer for 2-3 hours each day. Before the accident he said he spent 12-15 hours a day at his computer operating his Internet-based multi-level marketing business.

Messervey sought an order for production of Laushway's computer hard drive to "conduct a metadata analysis to determine computer usage patterns" which would be conducted by a computer forensic consultant company. The application was brought pursuant to Rules 14 and 16 of the Nova Scotia Civil Procedure Rules. Laushway submitted that the requested disclosure would be overly intrusive, contrary to his privacy rights and amounted to a mere fishing expedition. The Chambers judge granted the production order and Laushway appealed.

On appeal, the court established a 3-step test for the application of Rules 14 and 16 when deciding whether compelled production of electronic information is justified:

1. Has the moving party satisfied the court that the sought-after information is "electronic information" and therefore subject to a production order under the Rules?
2. If so, has the moving party established that the sought-after information, now properly characterized as electronic information, is relevant?
3. If so, the moving party is then entitled to the presumption established by Rule 14.08 such that the responding party must then rebut the presumption in order to defeat the requested production order.

The Court of Appeal also provided a list of ten topical questions to guide judges on such applications and in exercising their discretion in weighing the evidence and balancing competing interests before deciding whether to grant or refuse a production order in such cases:

1. Connection: What is the nature of the claim and how do the issues and circumstances relate to the information sought to be produced?
2. Proximity: How close is the connection between the sought-after information, and the matters that are in dispute? Demonstrating that there is a close connection would weigh in favour of its compelled disclosure; whereas a distant connection would weigh against its forced production;
3. Discoverability: What are the prospects that the sought-after information will be discoverable in the ordered search? A reasonable prospect or chance that it can be discovered will weigh in favour of its compelled disclosure.
4. Reliability: What are the prospects that if the sought-after information is discovered, the data will be reliable (for example, has not been adulterated by other unidentified non-party users)?
5. Proportionality: Will the anticipated time and expense required to discover the sought-after information be reasonable having regard to the importance of the sought-after information to the issues in dispute?
6. Alternative Measures: Are there other, less intrusive means available to the applicant, to obtain the sought-after information?
7. Privacy: What safeguards have been put in place to ensure that the legitimate privacy interests of anyone affected by the sought-after order will be protected?
8. Balancing: What is the result when one weighs the privacy interests of the individual; the public interest in the search for truth; fairness to the litigants who have engaged the court's process; and the court's responsibility to ensure effective management of time and resources?
9. Objectivity: Will the proposed analysis of the information be conducted by an independent and duly qualified third party expert?
10. Limits: What terms and conditions ought to be contained in the production order to achieve the object of the Rules which is to ensure the just, speedy and inexpensive determination of every proceeding?

In the circumstances of this case, Laushway had put his computer use squarely in issue. There was a clear, direct link between the hours he said he spent at his computer and his income. The information was relevant and the court concluded that Messervey was entitled to access the information in order to test the extent and reliability of Laushway's claim.

Court comments on Plaintiff's election to proceed under Rule 57

- Royal & Sun Alliance Insurance Company of Canada v Raymond, 2014 NSCA 13

Raymond was the passenger in a vehicle insured by Royal & Sun Alliance ("RSA") that was involved in a serious single motor vehicle accident. Raymond suffered significant injuries and RSA paid some Section B medical and income replacement benefits but then discontinued payments and refused to cover outstanding medical expenses. Raymond commenced an action under Rule 57 of Nova Scotia's Civil Procedure Rules seeking income disability benefits to the date of trial and outstanding medical and rehabilitation expenses. Rule 57 sets out the simplified procedure for actions seeking damages of less than $100,000.

RSA brought a motion arguing that Raymond's action should not proceed under Rule 57 because the real amount of damages exceeded $100,000. The Nova Scotia Supreme Court dismissed RSA's motion, noting that it is the plaintiff who determines whether Rule 57 applies based on an estimate of the damages sought. The court found that an under-estimate could come up against the cap and an unreasonable over-estimate could lead to costs against the plaintiff. Further, the court stated that an estimation of the total of all causes of action under Rule 57.04(1)(c) does not include the value of payments that may accrue after trial because any liability to make future payments is a separate cause recoverable only if the disability persists.

The Nova Scotia Court of Appeal affirmed the motion judge's decision, concluding that Rule 57 was not violated. RSA was concerned that a favourable decision to Raymond would have beneficial precedential value potential to future causes of action but the court found that, as a matter of law, the claimant would have to prove his claim again in the future and these potential practical concerns did not take the claim outside the Rule.

Future CPP benefits not deductible under an SEF 44 Family Protection Endorsement

- Sabean v Portage LaPrairie Mutual Insurance Company, 2013 NSSC 306

This case dealt with the narrow issue of whether the value of future CPP benefits are deductible under an SEF 44 claim. Portage LaPrairie Mutual ("Portage") argued that the value of future CPP benefits payable to Sabean were deductible under the provisions of the SEF 44 Family Protection Endorsement because CPP disability benefits properly fall within clause 4(b)(vii) as "any policy of insurance providing disability benefits or loss of income benefits or medical expense or rehabilitation benefits". Sabean argued that, on the plain reading of the endorsement, future CPP benefits do not fit into any of the enumerated sources listed, including clause 4(b)(vii).

The court relied upon case law from New Brunswick in finding that the amount for future CPP benefits should not be deducted from the amount payable to Sabean under his SEF 44 endorsement. In particular, the court cited Lapalme v Economical, 2010 NBCA 87, where the New Brunswick Court of Appeal concluded:

> The scheme by which disability benefits are recoverable under the Canada Pension Plan may well be a "substitute" for a disability insurance policy, "tantamount", "comparable", "similar" or "akin" to schemes under policies of disability insurance for the purposes of the collateral benefits rule in tort, but that does not morph the Canada Pension Plan into a "policy of insurance" for Clause 4(b)(vii) purposes.

The wording of the SEF 44 endorsement in New Brunswick is identical to that contained in Nova Scotia. Justice Murray accordingly concluded that the CPP is not a "policy of insurance" within clause 4(b)(vii) and therefore Sabean was entitled to an award of damages, without deducting future CPP disability benefits.

Access to private Facebook profiles

- Conrod v Caverley, 2014 NSSC 35

Conrod was involved in a motor vehicle accident with an oncoming dump truck. Following the accident, she claimed that she was unable to return to work or participate in recreational and social activities. Caverley (who was represented by Michelle Kelly of our Halifax office) made a motion for the production of Conrod's private Facebook profile, as well as her Facebook usage history. Caverley argued that after viewing Conrod's public Facebook profile, it was reasonable to infer that some of the private contents of the Facebook profile could assist in assessing her claim. In an Independent Medical Examination, Conrod stated that she could now only use Facebook for 5-10 minutes per day. Caverley submitted that the login and usage history was relevant to the claim for damages.

The court confirmed that the burden remains on the defendants to satisfy the court that the material sought meets the standard of trial relevancy. If the defendant is successful, the judge is compelled to grant an order for production pursuant to Rule 14.12. Overall, Justice McDougall found that Facebook photos and information raised by Caverley were not relevant. He found that the "public" portions of Conrod's Facebook profile which were introduced by Conrod did not meet the test for trial relevance and, therefore, refused to infer that the "private" portions of her profile contained any relevant material. However, Justice McDougall commented that the evidence produced of the public profile was not clear and difficult to interpret. He did grant Caverley's motion for production of Conrod's Facebook usage history.

Although the court was not prepared to grant access to the Conrod's private Facebook profile in this case, this decision clearly signals that social media profiles are producible if the test for relevance is met and underscores the importance of the evidentiary record in such a motion. To gain access to the private Facebook information, parties will likely need to file large and clear photographs that easily identify location and date if they are admitted to show a plaintiff's activity level post-accident. In addition, requesting a usage history print-out, which is readily available from a plaintiff's Facebook site, can be a useful tool for defence counsel.

NEWFOUNDLAND & LABRADOR

Insurer unable to establish that home owners insurance policy would not cover loss

- Hallett v Fitzpatrick, Fitzpatrick, Unifund Assurance Company and Luxury Roofing Inc., 2013 NLTD (G) 179.

This case involved an Application pursuant to Rule 38.01(1) by the plaintiff's homeowner insurer that the claims made in the Statement of Claim would not be covered under the policy.

Hallett's home suffered water damage less than a month after work was completed on her roof by a contractor engaged by the Fitzpatrick defendants. The plaintiff's policy of insurance with the defendant/insurer excluded coverage for damage caused by "faulty workmanship." In her Statement of Claim, Hallett alleged that the water damage was caused by faulty workmanship in the replacement and installation of roof shingles. She also claimed that she was entitled to coverage under her homeowner's policy if the water damage was not caused by faulty workmanship and, instead, was caused by a peril specified in the policy. The problem with the plaintiff's position was that the

Statement of Claim did not plead which specified peril caused the damage. Following its review of the principles relevant on a Rule 38 application, the court held that common sense holds that, while the homeowner's policy would not apply in the case of faulty workmanship, the policy may be in play if it were determined through the course of the trial that the cause of the water damage was one of the policy's specified perils. As the cause of action against the insurer was not pleaded with sufficient specificity, the court ordered that Hallett amend the Statement of Claim to specify the basis or bases upon which it would alternatively seek coverage of the defined peril under the policy.

Vacationing parents held to be dependent relatives under an SEF 44 Family Protection Endorsement

- Drover et al. v Smith et al., 2013 NLTD(G) 150.

The Drovers were injured in an accident that occurred while they were passengers in a rental vehicle driven by their son. The Drovers claimed that they were entitled to coverage under the SEF 44 Family Protection Endorsement included on the automobile policy (the "Policy") for their son's principal vehicle.

The accident occurred while the Drovers were on vacation in Florida with their son's family. In exchange for the Drovers agreeing to assist with the care of their son's children, their son was covering all costs associated with the vacation, including travel, accommodation, food and entertainment.

The insurer that issued the Policy sought a summary trial pursuant to 17A, seeking a dismissal of the Drovers' claim on the basis that the Drovers were not dependent relatives under the Policy. The court agreed that, prior to the vacation, the Drovers lived in their own home and were financially independent from their son. However, the court held that, when they left their home on a vacation fully paid for by their son, the Drovers' status changed from independent to dependent relatives. Therefore, they were eligible for compensation under the Policy's SEF 44 Family Protection Endorsement.

This case is currently under appeal.

PRINCE EDWARD ISLAND

Ministerial Order against property owner for cost of oil spill upheld

- Fisher v Prince Edward Island (Minister of Environment, Labour and Justice), 2013 PESC 27.

Fisher was the owner of rental property on which an oil spill took place that he claimed was the result of vandalism to the fuel line by a former tenant. The Minister of Environment ordered Fisher to clean up the oil spill but Fisher refused, citing cost and that he was not at fault. The Minister hired outside contractors for cleanup, and billed Fisher for these services. Fisher refused to pay, and made application for judicial review of the Minister's Order to pay the costs of clean up.

Application dismissed. Subject to exceptions, responsibility for cleanup is that of the property owner. Fisher's claim of sabotage or vandalism was unproven and, in any event, was not a defence to his failure to pay. Reasonableness of the expenses associated with cleanup was not within the power of court to determine on judicial review, and there was no evidence that it was unreasonable. The Minister properly exercised its discretion by ordering Fisher to pay for the clean up. The Order did not

result in a penalty to Fisher under applicable law, nor was Fisher liable for any offence. There was no Charter or Bill of Rights violation by the Order. Fisher was not immune from the consequences of his financial decision, namely the failure to purchase applicable insurance to cover oil spills.

Proposed changes to PEI's auto accident benefits and cap

Changes are expected in the Spring of 2014 to PEI's auto accident benefits and cap for minor personal injury. The current Bill before the PEI Legislature includes the following amendments to the Insurance Act:

- Increasing benefit levels available under Section B (Accident Benefits), including medical and rehabilitation expenses, death benefits and indemnity for loss of income from employment.
- Changing the scope of "minor personal injury" to "sprains, strains and whiplash-associated disorder injury, that does not result in serious impairment". The proposed definition will mirror that of Nova Scotia.
- Increase the existing cap from $2500 to $7500.

The proposed changes are largely consistent with Nova Scotia's legislation, except with regard to assessment and proof of injury. Nova Scotia has amended its legislation to include such provisions, most notably:

a) requiring a plaintiff to seek and follow treatment

b) assessment of damages in multiple injury situations involving the cap

c) causation issues related to cap injuries

d) procedural short cuts for determination of cap issues

On PEI, assessment and proof of injury will continue to be dealt with by application of common law tort principles.

Contact

This is a publication of the Insurance Litigation Group

Please direct questions or suggestions to:

New Brunswick
Deirdre Wade, QC
dwade@coxandpalmer.com
506.633.4205

Newfoundland & Labrador
Kate O'Neill
koneill@coxandpalmer.com
709.570.5333

Nova Scotia
Joe Burke
jburke@coxandpalmer.com
902.491.4123

Prince Edward Island
Krista MacKay
kjmackay@coxandpalmer.com
902.888.4568