Our Insurance Litigation Group

Case Law Updates from Across the Region

COX & PALMER

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In this issue

IN NEW BRUNSWICK

RCMP investigation files with respect to a suspicious house fire ruled admissible in subsequent insurance dispute due to their unconditional release to the insured.
- Bennett v State Farm Fire and Casualty Company, 2013 NBCA 4

Bennett's home was destroyed by a suspicious house fire. The RCMP investigated but no charges were laid. Bennett's insurer, State Farm, denied liability on the basis that the house was vacant for more than 30 days. Bennett commenced an action for recovery under the policy.

Subsequent to the close of pleadings, State Farm brought a motion to compel the RCMP to produce the files related to the suspected arson ("the Files"). The motions judge granted the order, which was subsequently overturned on appeal.

After the appeal, Bennett provided State Farm with an Affidavit of Documents which revealed that the RCMP had unconditionally released the Files to Bennett prior to the aforementioned motion. Bennett claimed that the Files were privileged. On motion, State Farm obtained an order requiring Bennett to produce the Files. Bennett appealed.

On appeal, Bennett argued that the Files were subject to public interest immunity and litigation privilege. Further, she argued that, since the Files were not created for the civil action, their use would be collateral and, therefore, against public policy.

The Court of Appeal dismissed the appeal. Bennett's argument for public interest immunity was rejected on the basis that the Files, prior to their release, would have been subject to the screening mechanisms under the Access to Information Act or the Privacy Act. Further, the Court found that the mere fact that Bennett's lawyer had requested the Files from the RCMP did not cloak them with privilege. Finally, the Court of Appeal found that there was no overriding public policy reason to limit the production of a document simply because it originates in the course of a police investigation.

Inference that passenger was not wearing seatbelt cannot necessarily be drawn from the fact that passenger was ejected from vehicle.
- Guignard v Hall, 2013 NBQB 7

The plaintiff, Guignard, was a passenger in a motor vehicle owned by the defendant, Denis Hall, and operated by the defendant Brian Hall. Guignard was seriously injured when he was thrown through the car windshield after the vehicle struck a telephone pole. Guignard claimed significant damages, the amount of which was in dispute. Although liability was admitted, the Halls argued that Guignard should bear some responsibility for failure to wear a seatbelt and that his damages should be reduced by at least 25% pursuant to section 265.2(1) of

the Insurance Act. Also at issue was Guignard's loss of income as Guignard was an upcoming tattoo artist before the accident and claimed he had planned to open his own tattoo shop.

Guignard did not remember if he was wearing his seatbelt and there was no investigation on the vehicle following the accident. The Halls asked the judge to apply a common sense approach and draw an inference that Guignard could not have been ejected from the vehicle had he been wearing his seatbelt. The judge found that in the circumstances of the case, that inference could not be drawn. One expert had testified that Guignard's injuries could be consistent with the fact that he wore a seatbelt. The judge held that the Halls failed to prove on a balance of probabilities that Guignard was not wearing a seatbelt and that his failure to do so contributed to the damages sustained.

In calculating loss of income, the Halls pointed out that the most money Guignard had ever made tattooing in a given year was $5,200.00. The judge accepted the evidence that Guignard would have opened his own shop and would have been successful, and imputed an annual income of $26,000.00. Guignard recovered more than $1,000,000.00 in damages in total.

IN NEWFOUNDLAND & LABRADOR

Court of Appeal finds that Trial Judge failed to consider evidence as a whole in denying insurance coverage in case of suspected arson.
- Performance Factory Inc. v Atlantic Insurance Company Ltd., 2013 NLCA 11

This was an appeal of a trial decision which found that the principal of Performance Factory or his father had set a fire that destroyed their building and, as a result, recovery under an insurance policy with Atlantic Insurance was denied. The issue on appeal was whether the trial judge erred in his analysis of the case. This was viewed by the majority opinion as a matter of law attracting the standard of review of correctness.

The case turns on statements allegedly made to the police by the principal of Performance Factory, Michael Hann, and his father, Wesley Hann. The statements involved admissions of having poured gasoline in the corner of the building and lighting it with a lighter in order to procure the insurance proceeds. The Hanns denied having made the statements at trial. Both Hanns were acquitted of criminal arson charges, in part because the statements were ruled inadmissible, as they were found to have been involuntary.

Several experts were called to testify at trial, and all agreed that gasoline vapours would likely have caused some burning due to "flash back" to the arsonist lighting the fire from the close distance necessitated by a regular lighter. No evidence of such burns was adduced.

The majority decided that the trial judge had rendered his decision without considering the whole of the evidence on a balance of probabilities, including the unanimous opinion of the experts that may have contradicted the statements, and instead fixated on the statements alone. A new trial was ordered.

The dissent took issue with the categorization of the question before the Court as a matter of law rather than mixed fact and law. It was proposed that the correct standard of review was that of palpable and overriding error, as it was a question of fact or mixed fact and law. The dissenting judge took the position that there was no such error and would have denied the appeal.

Nominal offer to settle does not attract costs advantage.
- Quinlan Brothers Limited v Coady, 2012 NLTD(G) 194

This case involved an application pursuant to Rule 20A, seeking an award of costs greater than the party and party costs awarded at trial on the basis that an Offer to Settle, in the amount of $5,000.00, had been made by defendants.

The plaintiff, Quinlan Brothers', claim was for $150,000.00, plus pre-judgment interest and costs, and had the potential to be "a significant amount". The defendant was successful and the Quinlan Brothers' claim was dismissed. The judge stated that had the Quinlan Brothers been successful, it had only proven damages totaling $100,000.00.

Quinlan Brothers argued that Coady's settlement offer was nominal and categorized it as being unreasonable and intended to discourage settlement. The Court agreed, and went further to suggest that the purpose of the offer was to form a foundation for the present costs application.

The Court highlighted that the obvious purpose of Rule 20A is to encourage out-of-court resolution of the case by the imposition of adverse costs consequences in order to promote the acceptance of a reasonable offer in the circumstances involved. Rule 20A's objective is to encourage settlement, not to provide a vehicle for the creation of a costs advantage. Where the offer is unreasonable, the Court is not bound to award higher costs to the party making the rejected offer. The Court must examine whether or not the plaintiff knew, or ought to have known, that the claim was devoid of merit. Only in such cases is rejecting even an extremely low offer worthy of the sanction of increased costs. The judge determined that there was no certainty at the time the offer was made that the claim was devoid of merit, and denied the application.

IN NOVA SCOTIA

Enhanced costs not warranted after failed settlement negotiations.
- Roscoe v Halifax (Regional Municipality), 2013 NSSC 5

At trial, the plaintiff, Roscoe, a retired Nova Scotia Court of Appeal judge, was awarded $30,280.48 at trial against the defendant, Halifax Regional Municipality ("HRM") for injuries she suffered after slipping on duct tape affixed to the floor of a gym operated by HRM during a badminton game. Although the parties were able to agree to costs, Roscoe submitted that HRM had approached settlement negotiations in an improper manner and, therefore, she was entitled to an additional $10,000.00 as "enhanced" costs. HRM opposed the costs motion.

The parties had participated in settlement negotiations in the winter of 2010. HRM's offer included a proviso that it was "subject to approval by Regional

Council". HRM subsequently accepted an offer by Roscoe, but again noted that it had to go to Regional Council for approval. Council rejected settlement on both liability and damages and was not open to reconsidering its position. Roscoe invited continued negotiations, however, HRM's lawyer advised that she was instructed to proceed to trial.

Roscoe argued that HRM's conduct was flawed in instructing its counsel to negotiate (leaving the impression that at least liability was not in issue), refusing to follow the recommendations of its counsel on liability and damages notwithstanding extensive negotiations on the issues, failing to consider any counter-offers and in subsequently retaining an expert to bolster its position. HRM argued that it was clearly indicated during settlement discussions that any final settlement was subject to the approval of Council. In addition, HRM argued that it did not have to follow the advice of its lawyer.

The Court found that Council had its own concerns regarding liability and damages and was entitled to decide, based on those concerns, to proceed to trial. Roscoe was unable to show that HRM acted maliciously or reprehensibly, abused the court process or engaged in wrongful conduct related to the litigation. Simply terminating settlement negotiations and providing no explanation beyond having concerns regarding liability and damages is not conduct which justifies the imposition of augmented costs as a remedial penalty.

Insurer Loses Appeal of $66.94 Fee.
- Nova Scotia (Attorney General) v Jacques Home Town Drycleaners, 2013 NSCA 4

The Nova Scotia Court of Appeal recently dismissed an insurance company's appeal of a 10% administration fee in the amount of $66.94 related to repair costs charged by the Province.

Wawanesa Mutual Insurance Co. refused to pay a 10% administration fee levied by the Nova Scotia Department of Transportation and Infrastructure Renewal for overhead expenses related to remediation of third party damage to government owned property. This case stemmed from an October 24, 2008 motor vehicle accident in which a vehicle owned by Wawanesa's insured veered off the road and collided with a wooden culvert belonging to the Province. The culvert was damaged and the Province spent $669.40 to repair it. Added to this cost was a 10% "administration/overhead fee" of $66.94 which Wawanesa refused to pay. Wawanesa argued that the calculation bore no rational connection to the damages claimed and that the percentage was arbitrarily derived.

At chambers, the judge found that the 10% administrative fee was a reasonable overhead charge and that such a modest percentage did not contain any element of profit.

On appeal, the Court of Appeal recognized that overhead expenses are recoverable as part of the cost of effecting repairs to one's damaged property. While the Court acknowledged Wawanesa's complaint that the Province failed to offer any evidence to explain or justify how they chose 10% as being a fair and appropriate administration fee, it found that extra administrative tasks were actually undertaken by the Province to process the claim as a result of the accident and that the cost of the extra work was quantifiable and bore a logical correlation to the initial cost of repairs. In view of the small amount of the claim, no further evidence was required to satisfy the trier

of fact as to why the Province chose 10% as being a fair and appropriate percentage to charge.

The Court did caution that if the claim had been substantially larger, the outcome may have been different. The Court further found that because the insurer had good reason to challenge the claim and seek the Court's consideration, no costs should be awarded.

Court of Appeal upholds finding of minor injury, limiting plaintiff's general damages to $2,500.00
- Awalt v Blanchard, 2013 NSCA 11

Michelle Kelly, a partner in our Halifax office, was recently successful in arguing to uphold a trial judge's finding that the plaintiff had suffered a minor injury in a motor vehicle accident, limiting her general damages to $2,500.00 (the minor injury cap in place at the time).

The plaintiff, Awalt, was a personal care worker who sought damages arising from a motor vehicle accident caused by the defendant, Blanchard. Liability was not in dispute. Immediately following the accident, Awalt was diagnosed with mild whiplash and tenderness was noted on the left side of her neck and shoulder. She returned to work approximately one week after the accident. Awalt alleged that her shoulder pain persisted and further investigation of her left shoulder almost two years after the accident revealed a rotator cuff injury which required surgery. Following the surgery, Awalt was off work for eight months. Although Awalt had a pre-existing history of work-related injuries to her shoulder, she alleged that the rotator cuff injury was the result of the accident.

At trial, a number of physicians and specialists gave evidence. The plaintiff's orthopaedic expert testified that the shoulder injury was caused by the motor vehicle accident. However, on cross examination he conceded that he had not been aware of Awalt's previous workplace injuries when he authored his report. The defence orthopaedic expert performed a paper review of Awalt's entire medical and occupational files and testified that Awalt suffered a whiplash injury in the motor vehicle accident and that her left shoulder injury was caused by a series of injuries incurred at work over a number of years. The trial judge preferred the evidence of the defence expert and found no causal connection between the accident and the rotator cuff injury. As a result, the trial judge held that the injuries caused by the motor vehicle accident fell within the minor injury cap of $2,500.00.

On appeal, Awalt took issue with the trial judge's assessment of causation and the medical evidence. The Court of Appeal upheld the trial judge's decision, finding that he did consider all the evidence but was simply not satisfied that Awalt had established causation. The Court of Appeal found that the trial judge preferred the opinion of the defence expert to the plaintiff's experts and that there was "more than adequate evidentiary foundation for the trial judge's conclusions".

Awalt also disputed the trial judge's interpretation of the minor injury legislation. The trial judge endorsed the Nova Scotia Supreme Court's previous minor injury cap decision in Farrell v Casavant (2009). Looking at the Farrell criteria, the Court of Appeal confirmed that:

1. There was an admitted personal injury.
2. There was no issue about a permanent personal disfigurement.
3. There was no evidence of a permanent serious impairment of an important bodily function caused by a continuing injury which is physical in nature (Awalt returned to work about a week after the accident).
4. Awalt was not "seriously impaired" in either her usual daily activities or her regular employment.

The Court of Appeal noted that, although the trial judge may not have articulated a detailed minor injury analysis, it is clear from his endorsement of Farrell and his careful review of the medical evidence that he applied that law.

IN PRINCE EDWARD ISLAND

Separate actions arising from same motor vehicle accident ordered to be tried at same time.
- McCrimmon v Estate of Hood, 2012 PESC 28

Two separate actions were commenced following a fatal motor vehicle accident. One vehicle was driven by the plaintiff, McCrimmon, and the other was driven by Hood, who died in the accident. McCrimmon alleged injuries as a result of the accident and commenced an action against Hood's estate. McCrimmon's parents also commenced an action against Hood's estate. The two actions contained overlap in the claims for damages, so Hood's estate moved to consolidate both actions or, in the alternative, to have both actions heard at the same time, pursuant to Rule 6.01(1)(d) of Prince Edward Island's Rules of Civil Procedure.

To meet the criteria for an order under Rule 6.01(1)(d), the proceedings must have a common question of law or fact and the relief claimed in them must arise out of the same transaction or occurrence, or series of transactions or occurrences. Upon review of the pleadings, the Court concluded that all the damages claimed were dependent upon findings of fact relating to the same accident. There were also common legal issues as both plaintiffs alleged that Hood was at fault for the accident. The Court concluded that provable damages sustained by all of the plaintiffs flow from the same accident and that the plaintiffs were not seriously inconvenienced by having both matters heard at the same time. The Court did not order consolidation of the actions because it would deprive the plaintiffs of the right to representation of their choice.

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