Atlantic Canada Case Law Updates

COX & PALMER

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NEW BRUNSWICK

Denying coverage under the "your product" exclusion

- *Ultimate Windows Doors v Aviva Insurance Company of Canada, 2014 NBQB 159.*

Ultimate sold siding to the Cusacks for their family home. Shortly after it was installed, the siding had to be replaced twice because it was blistering and peeling. The Cusacks brought an action against Ultimate for breach of contract alleging the siding was not fit for the purpose. Ultimate filed a claim with *Aviva* under its CGL policy. *Aviva* refused to pay or to defend the claim on the basis that the claim fell under the "your product" exclusion. Aviva's position was that the policy covered damage caused by faulty products and not damage to faulty products.

The trial judge reiterated that the threshold for establishing that a claim is covered under a policy is a low one. The court need only be satisfied that there is a mere possibility that it is covered by the policy.

The court granted Ultimate's application. Based on the amount claimed it was realistic to infer the possibility that the Cusacks' claim included damages to other property that would have been damaged in the process of removing and replacing the siding. Aviva could not rely on the "your product" exclusion, as there was a possibility that a portion of the claim would be covered by the policy.

Considering advance payment for special damages

- *Wood v New Brunswick (Minister of Education), 2014 NBQB 160*

Wood was injured in a motor vehicle accident. She was rear-ended by a school bus and her car was "sandwiched" between the bus and the car in front of her. The Minister admitted liability for the accident, but disputed that it was responsible for the full extent of the injuries claimed by Wood. Wood brought a motion for advance payment of special damages for past lost income and costs of treatment.

When considering an advance payment the judge must proceed in two steps. The Court must determine if it is more likely than not that the plaintiff will prove liability for special damages. If the plaintiff is able to demonstrate the probability, the judge must determine the appropriate amount for the advance payment.

The Minister argued that the accident had no negative impact on Wood's earning capacity. Wood's tax return showed that she had been making more money since the accident. Wood responded that when the accident occurred she was planning to return to work full-time.

The judge decided that the issue surrounding full-time employment should be determined at trial. Therefore, the judge decided to evaluate the advance payment using the average amount of hours she had been working from the date of the accident going back two months. Prior to the accident, Wood had been working at least 28 hours per week, whereas after the accident, her hours decreased to approximately 16 hours per week.

NOVA SCOTIA

Duty of Utmost Good Faith Owed to Insured

- *Industrial Alliance Insurance and Financial Services Inc. v Brine, 2014 NSSC 219*

Brine suffered from depression. He was approved for LTD benefits in 1995. In October 1998, Industrial ceased payments to Brine, alleging that he had received undisclosed CPP and Superannuation disability benefits resulting in an overpayment. Industrial set-off the overpayment by reducing Brine's monthly disability payments to $0. It withheld monthly disability payments until the alleged overpayment was extinguished in 2003. Industrial also subrogated against Brine for a $300,000 human rights settlement which he received in 2004.

Justice Bourgeois held that, while Industrial was not estopped from claiming the overpayment due to representations made to Brine, it should have pro-rated the overpayment and was not entitled to undertake a complete up front claw back of disability payments, resulting in a breach of the policy. Further, Brine's bankruptcy had extinguished the overpayment. Justice Bourgeois rejected Industrial's argument that Brine was a fiduciary who had misappropriated funds by failing to notify it of the overpayment. She held that, while the obligation of utmost good faith required by parties to an insurance contract is mutual, such relationship does not serve to trigger the imposition of fiduciary duties.

While neither Industrial's interpretation of the set-off provision, nor the position it took vis-à-vis the overpayment, were unreasonable, the court found that Industrial acted in bad faith in several ways. Although Industrial was not obligated to offer rehabilitation services under the policy, it could not escape its obligation to manage the provision of this benefit in good faith once services were first provided. Further, Industrial acted in bad faith by treating the payment of disability benefits as taxable income despite two separate rulings to the contrary from the Tax Court of Canada. The court further criticized the actions of Industrial for failing to disclose an IME report until the week prior to trial and inferred that it had done so to obtain a better bargaining position. Finally, the court found that Industrial had purposely painted Brine in a negative light to reinforce its position.

Industrial was ordered to pay approximately $62,000 to Brine, representing the overpayment amount which would have been expunged by his bankruptcy. Furthermore, $30,000 in general damages for mental distress, and $150,000 in aggravated damages were awarded, together with punitive damages of $500,000.

Failure to mitigate leads to 20% reduction in Plaintiff's claim

- *Hollett v Yeager, 2014 NSSC 207*

Hollett suffered soft tissue injuries to his spine and knees after being rear-ended by Yeager. Hollett claimed he was permanently disabled. The main issues before the court were causation, mitigation, and damages.

All medical experts agreed that Hollett's physical injuries resolved within two years post-accident, but he continued to experience severe and chronic pain. Justice Coady found that, although Hollett was not a malingerer, he had convinced himself that he was permanently disabled and unemployable. He noted that Hollett's overall

demeanor was extremely exaggerated and that he was defensive to any suggestion that recovery and employment were possible. Had he participated in recommended treatment, Hollett would have been capable of achieving greater recovery.

Justice Coady found that Hollett's general damages fell within the *Smith v Stubbert* range of damages for persistently troubling but not totally disabling injuries. He awarded Hollett $47,500.00 for general damages, but then discounted this amount by 20% for Hollett's failure to mitigate, He applied this reduction to all other heads of damages.

The court considered the deductibility of Hollett's CPP income and noted a previous finding by the court in *McKeough v Miller*, 2009 NSSC 294, which held that CPP benefits are deductible. However, Justice Coady noted that the decision in *McKeough* had been based on Ontario case law which had since been overturned and that, in light of the subsequent rulings of the Ontario courts, *McKeough* had been wrongly decided and that CPP benefits were not deductible.

NEWFOUNDLAND & LABRADOR

Court of Appeal confirms vacationing parents are dependent relatives under an SEF 44 Family Protection Endorsement

- Drover v Smith (appeal by Scottish & York Insurance Co.), 2014 NLCA 31

Scottish & York appealed a decision of the Newfoundland and Labrador Supreme Court, Trial Division that found the parents of Drover to be dependent relatives during a family trip to Florida and insured persons under his endorsement policy.

At trial, it was noted that Drover had agreed to look after all of his parents' expenses during the family vacation to Florida, including rental accommodations. The trial judge determined that the relevant period of time for determining the parents' status was the date of loss and that, when the parents left to travel to Florida, their status changed from independent to dependent relatives of their son.

On appeal, the Court noted that the relevant time period for determining coverage under the policy, based on statute and the common law, was the two-week vacation period. The trial judge considered all the circumstances, which included an agreement with their son. The result was that the parents should be regarded as principally dependent for insurance purposes. The Court of Appeal noted that the term "dependent" is ambiguous, applied the principle of contra *proferentum*, and an interpretation that supported coverage was adopted.

In considering the wording of the SEF 44 Supplement, it was clear that the policy contemplated a person could be considered dependent for purpose of coverage although financially independent.

Justice White, in dissent, could not find the Drovers to be principally dependent on Wade for financial support while in Newfoundland and Labrador, nor while in Florida.

Court dismisses moose-vehicle collision class action against Province

- George v Newfoundland and Labrador, 2014 NLTD(G) 106

The Court addressed the introduction of moose to the island of Newfoundland and the management of the moose population as it related to highway safety. A previous order of the Newfoundland and Labrador Supreme Court, Trial Division certified the class. In the matter before it, the court concluded that George, on behalf of the plaintiffs, did not establish liability.

The Province could not be held strictly liable under either of the three headings of strict liability: (i) the *scienter* doctrine, which provides that the keeper of a wild animal is strictly liable for damages caused by the animal; (ii) *Rylands v Fletcher,* which places liability on land owners who bring something of a non-natural use onto their property which is likely to do mischief if it escapes; nor (iii) the emerging principle of strict liability for abnormally dangerous activities which was not yet fully recognized in by the jurisprudence. This was not the case to do so.

With respect to the argument of public nuisance, the Court noted immunity from a suit for the introduction of moose to the island. It also held that the presence of moose on the highway did not result from an activity of the Province. George could not identify an activity of the Province that posed an actionable public nuisance.

Finally, George was unable to establish that a *prima facie* duty of care exists as between the parties based on proximity or foreseeability. No duty arose either through direct interaction, nor the applicable statutory regimes. The Court also considered whether, if a *prima facie* duty of care were found to exist, policy reasons would negate that duty of care. The moose management scheme of the Province was found to be a core policy decision that was not found to be irrational or made in bad faith. The policy was not made in isolation from its moose-vehicle collision risk mitigation policy, which was also neither irrational nor made in bad faith.

The claims against the Province were dismissed.

PRINCE EDWARD ISLAND

Increase to PEI's cap for minor personal injuries and other changes to the *Insurance Act*

PEI has enacted several changes to the *Insurance Act* that will apply to motor vehicle accidents occurring on or after October 1, 2014, including:

- An increase in the amount that an insured can recover for "minor personal injury", being compensation for pain, suffering and loss of enjoyment of life, from $2,500 to $7,500.
- A narrower definition of "minor personal injury", now limited to a sprain, strain or whiplash-associated disorder injury that does not result in serious impairment.
- An increase in amounts recoverable for accident benefits (Section B) as follows:
    - Medical and rehabilitation expenses increased from $25,000 to $50,000.
    - Funeral expenses increased from $1,000 to $2,500.
    - Death benefits increased from
        - $10,000 to $50,000 for the highest earning spouse
        - $10,000 to $25,000 for the other spouse
        - $2000 to $5,000 for a dependant
    - An increase in the maximum weekly indemnity amount for loss of income from $140 to $250.
    - An increase in the maximum amount for a principal unpaid housekeeper from $70 per week over 12 weeks to $100 per week over 52 weeks.

The amendments took effect on October 1, 2014.

Provisions around Direct Compensation for Property Damage effective for motor vehicle accidents occurring on or after October 1, 2015 were also included in the legislative changes but have not yet been proclaimed by government.

PEI's Health Services Act exempts QIA reports and evidence from any legal proceeding.

- Carter (Estate), 2014 PESC 24.

Carter's Estate brought an action against the Queen Elizabeth Hospital ("QEH") claiming negligence in Carter's treatment. The QEH contracted with an external physician to conduct an independent review of the circumstances leading to Carter's death as part of a Quality Improvement Activity ("QIA"). Carter's Estate sought production of the report. The motion was dismissed.

The *Health Services Act* authorizes the creation of a "committee" to investigate and make recommendations with regard to the provision of health services. The legislation exempts the QIA findings from any legal proceeding.

The court stated that the purposes of a QIA are twofold:

1) To encourage a confidential exchange of information amongst caregivers when:
    a. Something goes wrong;
    b. Something unusual happens; or,
    c. Events disclose a problem or an opportunity to change or take another look at an existing protocol or procedure to maintain or improve a high standard of medical care in the hospital.
2) To permit an expert to review the file and offer an opinion on what happened and whether anything could have been done better.

The court stressed the importance of the health system being able to implement a peer review system, such as a QIA, to improve the quality of its health services without fear of the results of the QIA being disclosed through litigation.

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