Case Law Updates

June 2020

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Newfoundland and Labrador

Bailey v Temple, 2020 NLCA 3

Background

In this case, the plaintiff suffered injuries when she struck a pedestrian worker and his employer's vehicle. The plaintiff and her husband sued the employer for damages respecting her injuries and the property damage to their vehicle. The pedestrian defendant subsequently sued the plaintiff for damages for his injuries.

The defendant's employer settled the plaintiff's claim for personal injuries and property damage for $7,500 and required the plaintiff to execute a release. The release included standard, boilerplate language, including that the defendant employer was released from "…all demands and claims of any kind or nature whatsoever arising out of or relating to the accident which occurred on or about …". Nearly five years later, the plaintiff's insurer filed a defence to the defendant's action and issued a third party notice to the defendant's employer, seeking indemnity or contribution from the employer.

The employer applied for summary dismissal of the third party claim, arguing that the release barred it. The trial judge held that the release covered the third party claim against the employer and therefore ordered a stay.

Appeal

The Court of Appeal unanimously overturned the trial decision, holding that the release only applied to the plaintiff's claim for personal injury and property damage and not the third party claim.

Decision

Moreover, the Court of Appeal stated that the trial judge erred in not considering what was contemplated by the parties at the time the release was signed and additionally, that at the time the release was given, the third party claim "had not emerged". As such, the appeal was allowed and the third party notice was reinstated with costs to the appellants.

Key Takeaway

Insurers will not get more than they bargained for in standard form releases. This case emphasizes the need for insurers to turn their mind to the future to account for any third party actions.

Nova Scotia

MacVicar Estate v MacDonald, 2019 NSCA 90

Background

The parties were involved in a motor vehicle accident. At the time of the accident the Plaintiff, MacDonald, worked as a registered nurse. At trial, Justice Murray found that MacDonald's injuries left her unable to perform her own or any comparable job, and awarded her damages totalling $760,933.00.

Critically, the Court also held that MacDonald's future loss of income damages should be calculated on a gross basis, without deductions for income tax, CPP, and other items. In making this finding, the Court concluded that Section 113BA (1) of the *Insurance Act*, RSNS 1989 c 231 did not apply to future losses.

Appeal

The Defendant's Estate appealed both causation and damages, arguing that the Court failed to grasp "key details of the Respondent's pre and post-MVC symptomology leading to significant errors in considering causation…significantly inflating the Respondent's damages to an unreasonable level."

The Estate also argued that Justice Murray had made his finding without the benefit of *Sparks v Holland*, 2019 NSCA 3. In *Sparks*, *supra*, the Court found that all CPP disability benefits (past and future) must be deducted from the plaintiff's damages for income loss and loss of earning capacity.

Decision

Causation

The Court of Appeal found no error with Justice Murray's conclusions with respect to the cause of MacDonald's loss. In particular, the Court of Appeal held that Justice Murray had "carefully reviewed the evidence and that his factual findings and conclusions find full support in the record" (para 27).

Damages

The Court of Appeal also upheld Justice Murray's finding with respect to future loss of income. It distinguished the finding in *Sparks*, *supra*, and concluded that if the Legislature intended loss of income to be calculated on a net basis, both before and after trial, it would have said so explicitly.

Key Takeaway

In the case of motor vehicle accidents, insurers should assess future awards on the plaintiff's gross income before statutory deductions. Comparatively, past loss of income is still calculated on a net basis.

Intact Insurance Company v Malloy, 2020 NSCA

Background

The Plaintiff, Malloy, was involved in a car accident and brought an action against the defendant insurer with respect to a denial of medical benefits under Nova Scotia's *Standard Automobile Policy*. Malloy then brought a motion, requesting that the insurer disclose its policies, procedures and internal documents regarding how accident benefits are handled and resolved. The Motions Judge found in favour of Malloy, and ordered that the policies be disclosed.

Appeal

The Court of Appeal granted Intact's appeal, and found in favour of the insurer. The $500.00 in costs awarded to Malloy were reversed, and an additional $1,500.00 in costs were awarded to Intact for the appeal.

Decision

While Malloy's pleadings included allegations of bad faith, the Court of Appeal found that they did not specifically allege that Intact failed to comply with its internal policy. Further, there was no evidence that substantiated the claim of non-compliance, or that the relevant policies even exist (para 20).

The Court of Appeal emphasized the importance of supporting evidence in production motions and noted that the Section B adjuster could have simply been discovered, avoiding the necessity of the motion entirely.

Key Takeaway

Allegations that an insurer has acted in bad faith alone are insufficient to require that the insurer disclose internal policies and procedures regarding claims handling.

Prince Edward Island

Carr-McNeill v. Cape D'Or et al., 2020 PESC 5

Background

In this case, the Plaintiff tripped and fell on the premises owned and operated by the Defendant. As a result of the fall, the Plaintiff suffered a permanent partial disability to her middle finger on her right hand. The Defendant admitted partial liability for the fall, but argued contributory negligence.

Decision

No contributory negligence was found. The Court considered relevant case law from other jurisdictions and the respective approaches taken in each of these jurisdictions to establish an appropriate range of awards for this type of injury.
For general damages, Justice Cheverie elected to also include loss of future earning capacity under this heading as "enhanced" general damages. With respect to loss of future earning capacity, the decision adopted the following approach to access damages at paragraph 91:

> All that need be established is that the earning capacity be diminished so that there is a chance that at some time in the future the victim will actually suffer pecuniary loss.

The Plaintiff advanced evidence that her injury impacts her ability to efficiently perform certain work tasks, such as typing. The Court accepted that may result in a loss of earning capacity in the future notwithstanding that the Plaintiff held a permanent salaried position. The Court awarded the Plaintiff $60,000 in enhanced general damages. The Court did not parse out how that amount was divided between general damages for pain and suffering and the "enhancement" for loss of future earning capacity.

For loss of valuable services, Justice Cheverie indicated that the Plaintiff must submit evidence establishing that they have suffered a direct economic loss in that their ability or capacity to perform pre-accident duties and functions around the home has been impaired.

Even though the Plaintiff submitted limited evidence for loss of valuable services, the Court awarded the Plaintiff $4,000 in loss of valuable services.

Key Takeaway

PEI courts have been applying a very low evidentiary threshold to awards for loss of earning capacity.

Preece v Nicholson et al, 2019 PESC 34

Background

The minor Plaintiff had suffered a hypoxic ischemic injury and persistent hypoglycemia at birth. The Plaintiff argues that these injuries resulted in the development of cerebral palsy, but causation remains in issue in the claim. The Defendants brought this motion pursuant to the s. 48 of the *Judicature Act* and Rule 33 governing medical examinations of adverse parties, to obtain genetic samples from the Plaintiff. The Defendants argued that there was a 10% to 25% chance that the Plaintiff's cerebral palsy was the result of a genetic predisposition.

Decision

The Court considered that the appropriate legal test was the same as that which applies to obtaining subsequent medical examinations. The three elements of the test are fairness, necessity and prejudice. The element of necessity requires the moving party to establish that the medical examination is likely to produce evidence relevant to the claim. The fairness and prejudice elements are a balance of competing interests. The Plaintiff's interest is in being protected from invasive examinations.

In this case, the testing was a urine and blood sample which were minimally invasive. Balanced against the potentially large quantum of the claim, the Court was satisfied it would be unfair to the Defendants to require them to proceed to trial without the genetic evidence. The requested order was granted.

Key Takeaway

This is a somewhat novel case, but the key takeaway is that PEI courts may compel blood and urine testing in a proper civil case.

Doyle v Murray, 2020 PESC 5

Background

The Court used the opportunity in this case to set out its position on the cost of productions. The scenario that most often arises is where relevant documents are in the power but not the control of the Plaintiff. The most common example is medical records, but other examples arise outside of the medical context. Often, the third party in possession of the documents will charge exorbitant administration fees or pass on the cost of review for redaction of personal information or to comply with a professional obligation.

Decision

The Court found that those are obligations not owed to the Defendant and the cost of fulfilling them should not be borne by them.

In the result, the court set out a guideline that "reasonable costs of production" will be $0.25 per page for photocopies and an administration fee of 20% of the production cost or $25, whichever is more. Actual postage or courier fees may also be included.
It is open to the party wishing to establish that the foregoing guideline should not apply to bring a motion for an alternate calculation of reasonable costs. The moving party will bear the burden of establishing by evidence why additional costs are reasonable and should be allowed.

Key Takeaway

This case sets out guidelines for costs payable for production of medical charts. It will likely be the standard going forward.

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