# Case Law Update: Recent Key Decisions in the Atlantic Provinces

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#### **New Brunswick**

# Edmonson et al. v Edmonson et al., 2022 NBCA 4

#### **Background**

A five-year son sought summary judgment against his father. The son and the father were driving on the father's motorcycle. Although the father had constructed a makeshift second seat, the motorcycle was not designed to carry a second passenger. The parties were in a collision with a third-party vehicle, and the son was seriously injured.

The son sought summary judgment against his father on the issue of liability.

#### Trial Decision

The son's summary judgment motion primarily focused on the father's negligence as a parent and its causal connection to the son's injuries. The son's position was that the motion judge need only find a causal link to "some" of his injuries for the son's entire negligence claim to succeed. The motion judge disagreed. The motion judge stated that the causal connection must be applied per injury. Ultimately, the trial judge concluded that he could not determine whether the father had breached the standard of care owed to his son on the day of the accident, as they did not have evidence before the court on the circumstances of taking the son on the motorcycle in the first place. For example, the motion judge speculated that if the father took the son on the motorcycle out of urgency or necessity, the assessment of his actions might be viewed differently.

#### **Appeal**

The plaintiff appealed the motion judge's denial of summary judgment against the father for parental negligence. The appeal was allowed, and the Court of Appeal allowed the summary judgment against the father. The Court of Appeal stated that there was no evidence of urgency or necessity, and the only evidence was that the father wanted to visit a friend.

The Court of Appeal upheld that the father owed a duty of care to his son, and the father breached the standard of care, i.e., the makeshift seat was contrary to the Motor Vehicle Act. The father's conduct created an unreasonable risk of harm that a reasonable person would have foreseen.

The Court of Appeal turned to the causation (aka the "but for" test) and remoteness of damages. The father's lawyer argued that the third-party driver was to blame for the accident. The question for the Court of Appeal was "but for" the father's breach of his standard of care, would the son have suffered some injury. This is where the trial judge got it wrong. The trial judge believed they had to find a causal connection for "all" of the injuries alleged by the son to grant summary judgment. However, all the trial judge needed was a causal connection to "some" of the injury.

Lastly, the Court of Appeal commented on the remoteness of the damages. Could the father have foreseen his breach of the standard of care would cause the extent of harm suffered by the son? It is a reasonable person standard, and one does not have to foresee the exact injury, only the general type of consequences that could flow. The son's injuries were not far-fetched and were precisely what one could expect from a motorcycle accident.



#### **Key Takeaways**

The Defendant's negligence need only be the cause for "some" of a plaintiff's injuries; it does not need to be the "sole" cause of all the harm or for "all" of the injuries alleged, to satisfy the causation element to a finding of negligence.

This is a lower test for a plaintiff to meet to succeed in a summary judgment motion for liability.

# Aviva Insurance Company of Canada v MacDonald, 2022 NBCA 68

#### **Background**

After suffering injuries in a motor vehicle accident, the plaintiff was placed off work and provided with loss of income benefits under Section B of her policy through Aviva. The plaintiff received these benefits for 104 weeks. She was subsequently cleared to return to work and did so for the following 13 months, before she was indefinitely placed off work again by her family physician. The plaintiff applied for a resumption of her loss of income benefits, but Aviva denied her claim.

#### **Trial Decision**

At trial, citing Newton v General Accident Assurance Co., 1988 CarswellOnt 707, Aviva argued that if an insurer is able to pursue employment that they are reasonably suited for after the 104-week benefit period has passed, the insurer is no longer obligated to provide additional benefits. In accordance with the Policy, the plaintiff needed to show that after 104 weeks, her injury from the motor vehicle accident was continuously preventing her from participating in any employment that she was reasonably suited for.

The motion judge's decision ultimately turned on an interpretation of Clause 4 within the Policy, which stated that a person receiving weekly benefits was not precluded from receiving further payment if they found themselves unable to continue working within thirty (30) days of resuming their employment.

Aviva contended that this provision was only relevant to resuming work during the initial 104-week benefits period. The motion judge found that this specific interpretation was not clearly stipulated in the contract, and any ambiguity in the contract was to be resolved in favour of the plaintiff. As such, the plaintiff's motion for summary judgment in their suit to recover benefits was granted. Aviva appealed this decision.

#### **Appeal**

In assessing Clause 4 of the Policy, the Court ruled that since the insured had been medically cleared to return to their pre-accident employment and in fact returned for 13 months after her initial benefits coverage concluded, she could not be deemed a "person receiving a weekly payment" as contemplated in Clause 4 when she was placed off work after the 13-month return to employment, thus disentitling her from further Section B benefits.

The Court cited the Newton case with approval, noting that this principle was applicable whether a plaintiff returns to pre-accident employment or some other suitable occupation after they have received their 104 weeks of indemnity benefits.



Further, the Court stated that this policy interpretation did not penalize insured parties who returned to work for longer than 30 days, as one of the Policy's main tenets is that an insured has a contractual duty to return to work when they are medically cleared to do so. It was unreasonable for the plaintiff to argue for the ignorance of Clause 4 in favour of allowing significantly longer periods of work resumption when considering a reinstatement of benefits.

Thus, the motion judge's decision was deemed incorrect and was set aside, the appeal being allowed with costs payable to Aviva.

#### **Key Takeaways**

An insured is not able to resume work for over a year and subsequently seek a continuation of their Section B benefits. They will be found ineligible for continued indemnity benefits pursuant to the Policy.

Further, this will prove true regardless of whether the claimant returns to their pre-accident position. Any employment that they are reasonably suited for will be sufficient.

# Figuero-Monaca v Vautour-Landry, 2022 NBQB 098

#### Background

The plaintiff brought a motion seeking advance payment of special damages for loss of income under Section 265.6(1) of the Insurance Act, RSNB 1973, c I-12. The plaintiff was in a rear-ended motor vehicle accident. The Defendant denied liability.

Following the accident, the plaintiff was off work for seven weeks, after which he returned to work gradually and, two months post-accident, was back full-time. A few weeks later, a nurse practitioner placed him on half days. A few weeks later, he started a new position at work for full-time hours until his employment was terminated without cause the following month. The plaintiff sought past and future loss following his termination until the present day of the motion.

#### Decision

For a plaintiff to qualify for advance payment for special damages, the court must be satisfied with the evidence that the plaintiff will be more than likely than not successful at trial and that the defendant is liable for the special damages in question. The motion judge must be more than 50 percent certain that the defendant's liability for the special damages will be established at trial.

In this case, conflicting evidence on the severity of the collision (the plaintiff says the defendant was traveling at 40 or 50 km/h, while the defendant argues it was stop-and-go traffic and was only traveling at 5-6 km/h) was at issue.

The motion judge held that the evidentiary record did not allow the court to conclude that it is more likely than not, because of injuries sustained in the accident, that the plaintiff could not work. The plaintiff argued that he was terminated because of "poor performance" due to his injuries from the accident. However, his performance reviews were not overly negative; the objective evidence did not support the conclusion that his pace of work slowed due to his injuries. There were also conflicting medical expert opinions, and the court held that they could not assess creditability at the motion. The motion was denied for special damages.



#### Key takeaway

In defending a motion for advance payment of special damages, conflicting evidence, such as the extent of damage from the accident can be helpful. It may well be worth securing medical exam reports and other similar evidence to cast doubt on the cause of the injuries. Conflicting evidence requires a creditability assessment, which a motion judge cannot assess.

# Fidler v Province of New Brunswick, 2022 NBCA 1

#### Background

The plaintiff was involved in a snowmobile accident and brought an action against several defendants, including the Province of New Brunswick. The plaintiff rear-ended another snowmobile.

The Province denied liability based on statutory immunity and, in the alternative, on the basis it was not negligent

#### Appeal

The Off-Road Vehicle Act, SNB 1985, c 0-1.5 provides the Province with immunity from suit with respect to accidents using snowmobiles on "snowmobile managed trials". The motion judge concluded that this was a snowmobile managed trial; thus, the Province was exempt from liability. This was upheld on appeal.

The trial judge also turned to the question of whether the Province was negligent and concluded it was not, as the plaintiff failed to put any evidence forward which would support negligence on the part of the Province.

On appeal, the plaintiff argued that the motion judge should not have made a ruling on negligence because the issue was not before her. However, negligence was raised by the Province in that its pleadings stated that the Province was not required to maintain the trail and was not responsible for maintaining or grooming the trial. The plaintiff argued that they had not raised negligence in their pleadings.

#### **Key Takeaways**

Summary Judgment motions are alive and well. Both plaintiffs and defendants are using them. The Court of Appeal confirmed the value and effectiveness of summary judgment motions.

# Irwin v Swift et al., 2022 NBCA 35

#### Background

The defendants rear-ended the vehicle carrying the plaintiff. The defendants commenced a Third Party claim against the driver, Mr. Irwin, and alleged that the accident was caused solely by the negligence of Mr. Irwin. Mr. Irwin brought a summary judgment motion seeking to dismiss the Third Party Claim against him.



#### Trial

The motion judge acknowledged that the defendant's Third Party claim "was weak" but held that she did not want to deprive the defendants of their chance to proceed even if it is a weak case. The problem was the motion judge never went further to explain the "genuine issue requiring a trial."

#### Appeal

The motion judge shall grant the summary judgment motion if no genuine issue requires a trial. The granting of the summary judgment is not discretionary. Speculation on the part of the respondents as to why Mr. Irwin slowed or stopped was purely speculation, without any evidence in support. The respondents had an uphill burden to prove they were not the cause of a rear-end collision. They tried to argue that this was not a "routine rear-end collision situation," but there was no evidence to establish this statement.

#### **Key Takeaways**

In defending a motion for summary judgment, if possible, evidence to establish that there is a genuine issue requiring a trial should be led. However, speculation on the part of legal counsel, or even the Judge (see Edmonson et al. v Edmonson et al., 2022 NBCA 4 above), that an issue requires a trial is likely insufficient.

#### Newfoundland and Labrador

#### Rideout v. Balsom 2021 NLSC 3 2022 NLCA 20

#### Background

Corey Rideout, the Plaintiff, and Gail Balsom, the Defendant, were involved in a motor vehicle accident on September 1, 2017. In late February 2018, communications began between the Defendant's automobile insurer and the Plaintiff's lawyer. On June 26, 2019, the Plaintiff's lawyer presented a claim demand. The new adjuster on the file responded by seeking additional information. Unlike the communications from the first adjuster, their emails did not include a "without prejudice" label. The two-year limitation period passed on September 1, 2019. On September 5, 2019, the adjuster sent a "without prejudice" settlement offer, which was received on September 11, 2019. The next day, more than two years after the accident, the Plaintiff commenced their court action. On November 8, 2019, the adjuster requested a copy of the Statement of Claim "so we can continue negotiations". However, upon learning that the action had been commenced outside the limitation period, the adjuster ceased negotiations, and the Defendant applied to strike the action.

#### Decision

In Balsom v. Rideout, 2022 NLCA 20, Cox & Palmer was successful in the appeal of a lower court decision which denied an application to dismiss the action for being commenced outside the limitation period.



There were two broad issues: (1) whether an insurance adjuster's communications were protected by settlement privilege, and (2) if not, whether they confirmed the cause of action under Newfoundland and Labrador's Limitations Act, thereby re-starting the clock on the limitation period.

The applications judge, holding that settlement privilege did not apply "in the circumstances of this case", found that the cause of action had been confirmed, and that the action was not statute barred. On appeal, the adjuster's emails were held to be privileged and inadmissible and, consequently, there was no evidence to establish the alleged confirmation, and the action was dismissed.

The appeal decision confirms the importance of settlement privilege in the constant quest to promote settlement over litigation.

The Law of Settlement Privilege

The appeal court cited its own decision in Meyers v. Dunphy, 2007 NLCA 1, and the following three-part test:

A litigious dispute must be in existence or within contemplation,

The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations fail, and

The purpose of the communication must be to attempt to effect a settlement.

As for the general principles, the appeal court cited the Supreme Court of Canada's decision in Sable Offshore Energy v. American International Corp., 2013 SCC 37. The case confirms that the purpose of the privilege is to promote settlement by wrapping "a protective veil around the efforts parties make to settle their disputes by ensuring that communications made in the course of these negotiations are inadmissible".

While settlement privilege is often referred to as the rule about "without prejudice" communications, those words are not required to invoke the privilege. According to Sable Offshore Energy, what matters is the intent of the parties to settle the action, and "[a]ny negotiations taken with this purpose are inadmissible".

Additionally, the appeal court cited Wheaton v. Palmer (1999), 183 Nfld. & P.E.I.R. 233 (NLSC, TD) where the judge concluded that if "the communication in question can be said to be a part of a previous 'without prejudice' privileged correspondence, then the expression of intention and the privilege will continue". Also, the intention of non-disclosure can be "implied from the surrounding circumstances, including any settlement-oriented subject matter in the communication itself".

The appeal court summarized the applicable principles as follows:

"In assessing whether correspondence falls within the scope of settlement privilege, the whole of the circumstances must be considered to determine the writer's purpose. The fact that the correspondence is intended to commence or continue settlement negotiations may be inferred. Inclusion of the phrase "without prejudice", an actual settlement offer, or a clear statement that the correspondence is for settlement purposes are relevant factors, but are not essential."

Settlement Privilege Applied



While the second adjuster did not continue their predecessor's practice of marking the communications "without prejudice", the new adjuster's emails continued "in the same vein" with requests for information related to assessing the claim. Consequently, the appeal court found that the second adjuster's communication was "a part, or continuation of the earlier correspondence" with the inference that it would be covered by the previously included "without prejudice" label. This, together with the settlement-oriented subject matter of the communications lead the appeal court to conclude that the second adjuster's emails were "intended for the purpose of settlement negotiations, and as such, were protected by settlement privilege".

#### Intention of Non-Disclosure

On appeal, the Plaintiff focused on the second part of the test for settlement privilege, the requirement of an express or implied intention that the communication not be disclosed to the court if negotiations fail. The Plaintiff argued that this requirement should not be conflated with the third part of the test, being that the communication must be made in an effort to commence or continue settlement negotiations.

These two requirements have been considered together in other cases. In Meyers v. Dunphy, 2005 NLTD, aff'd 2007 NLCA 1, the judge wrote that because the communication in question had the character of being settlement-oriented, "then it seems to me that the communication was made with the expectation of confidentiality". Similarly, in Tuck v. Supreme Holdings Ltd., 2014 NLTD(G) 131, aff'd 2016 NLCA 40, the judge wrote that because these two requirements are "intertwined, their answers can be provided together".

As for the appeal court, it addressed the interplay between these two parts of the test by quoting with approval from the Law of Evidence in Canada, 5th Edition, where the authors (Lederman, Bryant, and Fuerst) noted that "many of the cases in this area seem to pay little attention to the question of intention", and that "[i]f the parties are involved in negotiating a settlement or buying peace, the intention [of non-disclosure] should be inferred in the absence of evidence to the contrary".

#### **Exceptions to Settlement Privilege**

While there is a presumption of inadmissibility, exceptions to settlement privilege do exist, including in cases of fraud, misrepresentation, or undue influence. Whether there should be an exception for the limited purpose of establishing an alleged confirmation was previously considered and rejected by the appeal court in Meyers v. Dunphy.

In this case, the appeal court considered the application judge's finding that even if the test for privilege was met, this was a situation where "the privilege has to yield." In applying its own reasoning from Meyers v. Dunphy, the appeal court held that the applications judge had failed to identify any "special reason" that would outweigh the public policy interest in promoting the settlement of disputes.

Finally, the appeal court held that the application judge's finding that the admission of the communications would not prejudice the defendant was incorrect. Admitting the communications for the purpose of confirming a cause of action "would clearly prejudice [the defendant's] right to rely on the limitation period".

#### **Key Takeaways**



When considering the potential application of settlement privilege, the whole of the circumstances must be considered. Whether the communication is intended to commence or continue settlement discussions may be inferred from those circumstances.

While relevant factors, neither of the following are essential: an actual settlement offer, or a clear statement that the communication is made for settlement purposes.

Marking communications "without prejudice" is good practice, but it is neither conclusive nor necessary. However, it may help to establish that the communication was meant to be confidential and protected by the privilege.

The intention of non-disclosure can be inferred from the surrounding circumstances. Unless there is evidence to the contrary, the intention can be inferred from the fact that the parties are engaged in commencing or continuing settlement discussions.

A denial of liability is not required to maintain the privilege. Additionally, engaging in settlement discussions and exchanging information about a claim "cannot be construed as an admission of liability, or an acknowledgement of a cause of action".

There must be some "special reason" for otherwise privileged communications to be admitted into evidence. The desire to prove an alleged confirmation under the Limitations Act, does not constitute a "special reason", and is not an exception to settlement privilege.

# Abbott v. Moorland Limited [2021] NLSC 66

#### Background

This is a damages assessment case. The plaintiff ("Abbott") suffered injuries when she slipped and fell on the commercial premises of the defendant ("Moorland"). Abbott then commenced an action which Moorland did not respond to. A default judgement was entered against Moorland with damages to be assessed. A director of Moorland attended court for the damages hearing but they were not represented, as required by Rule 5.07(2) of the Rules of the Supreme Court. The damages hearing was set over but there was no further participation from Moorland. Abbott called three witnesses, herself, her son and her longtime family doctor. All were found to be credible and reliable.

The plaintiff was 70 years old and had spent 45 years working as postmaster. She missed more than 9 months of work due to her injuries but was paid for that time off.

Abbott suffered facial injuries that were superficial and healed well. She had a sore hip and knee that required prescription medication and steroid injections. These injuries were presumed to have resolved as they were not reported at the hearing. Her shoulder did not have any pain at the time of hearing, though her range of motion was still limited and not expected to improve. Her main injury was multiple breaks in her upper left arm that required five months in cast. She also required approximately 2.5 years of physiotherapy.

#### Decision

The court held that Abbott was entitled to following damages amounts, plus interest and costs.



- General Damages of \$50,000 were requested and awarded accounting for the significant pain and impairment she had after the cast removal and the residual permanent disability that affects her daily activities.
- Diminished Housekeeping Capacity was assessed at \$3,000.00 for past and \$4,000.00 for future losses. Abbott requested a global sum of \$5,000.00 \$10,000.00 for loss of housekeeping capacity. It was noted that her ability was severely restricted for the first year.
- Special Damages were allowed as the out-of-pocket expenses were proven and reasonable totaling \$3,924.07, and including:
  - The portion of her new glasses, prescription medication, medical aids etc. that were not otherwise covered.
  - The cost of housekeeping services for the help she had hired and paid for.
  - Personal care costs the court took a closer look at because they were provided by her daughter. Abbott paid her daughter \$10 each time she came to help her bathe which was four times a week for the 23 weeks she was in a cast.
  - Driving services were also given a closer look as those services were provided by her son. She paid him \$20/trip (regardless of distance) plus meals and gas for 25 trips and one \$120 tank of gas.
  - Gas was proved through receipts, but they often covered more gas than was required for that trip. The court allowed \$22.50 per round trip to Clarenville (106 km) for each of her 46 trips. The court also allowed \$60/round trip to St. John's, which is 380km round trip from Clarenville, for each of her seven trips to town.
  - Costs for MCP services were certified and the \$10,993.39 including prejudgment interest was allowed.

#### **Key Takeaways**

- The court will allow compensation for reasonable amounts paid to immediate family members for their services.
- The court will proceed to assess damages with or without the participation of the defendant.

# Fennelly v. Lloyd's Underwriters and Anthony & Associates Inc., 2021 NLSC 160

#### Background

Fennelly v. Lloyd's Underwriters, 2021 NLSC 160, involved an application by the First and Second Defendants, Lloyd's Underwriters ("Lloyd's") and Anthony & Associates Inc. ("Anthony"), pursuant to Rule 40.11 of the Rules of the Supreme Court, 1986, S.N.L. 1986, c. 42, Sch. D, to dismiss the insured Plaintiff's claim for want of prosecution. This was in fact the second such application brought by Lloyd's. The first application was ultimately unsuccessful as Justice McGrath concluded that although the Plaintiff's delay to that point was both inordinate and inexcusable, Lloyd's was not prejudiced by the delay.

The insured, Thomas Fennelly ("Fennelly") claimed entitlement to insurance proceeds arising from damages sustained to its fishing vessel in or about January of 2006. At that time the vessel was subject to a policy of insurance in the amount of \$500,000.00 against total loss caused by named



risks underwritten by Lloyd's and brokered by Anthony. Lloyd's denied coverage on the basis that the damage was less than \$500,000.00 and Fennelly commenced a claim for damages for breach of contract and negligent misrepresentation in 2008. Lists of Documents were exchanged in 2009 and discoveries took place in 2010. Counsel for the parties exchanged correspondence on various issues between 2011 and 2013. The vessel was decommissioned and destroyed in 2013 with the consent of Lloyd's but the demolition did not go as planned and portions of the damaged vessel were not preserved. Fennelly's counsel met with a proposed expert in 2014 but never communicated this with Lloyd's or Anthony.

#### The 1st Application

In September 2015, Lloyd's brought the first application for want of prosecution that was unsuccessful1. Justice McGrath characterized the delay in excess of 9 years to be inordinate and found that Fennelly had no excuse for failing to take steps that could have been taken. However, Justice McGrath found that Lloyd's had not been prejudiced by the delay as it did not lose out on an ability to examine the vessel because of Fennelly's actions. The vessel had already been inspected by Lloyd's experts and they knew of its decommissioning. No prejudice arose as a result of Fennelly's delay in prosecuting its claim.

#### The 2nd Application

Justice Burrage noted that "precious little" occurred between the decision of Justice McGrath in January of 2016 and the hearing date of the 2nd application in November of 2021. Fennelly filed a Supplemental List of Documents in March of 2016, and a discovery of a former employee of Anthony occurred prior to November 2016. Fennelly issued interrogatories to the former employee on November 14, 2016, which were promptly replied to and forwarded, by the Plaintiff's lawyer, to Lloyd's and Anthony in January of 2017.

In January of 2017, Fennelly requested further discoveries of an unidentified representative of Lloyd's, to which Lloyd's sought clarification of the topics Fennelly wished to cover in June of 2017. No reply to that request was received. Fennelly filed a Notice of Intention to proceed in October of 2017, which was the last correspondence received by Lloyd's or Anthony until the 2nd application.

#### Decision

An application for want of prosecution addresses three questions: (1) has there been an inordinate delay? (2) if so, is the inordinate delay inexcusable? (3) are the defendants likely to be seriously prejudiced by the delay?

#### **Inordinate Delay**

Between forwarding the responses to interrogatories and the filing of the 2nd application, Fennelly's failure to advance the claim represented "a further 3.5 years of inactivity". Justice Burrage concluded that the now 13-year delay was inordinate.

"[16] The Plaintiff was guilty of causing an inordinate and inexcusable delay in September 2015, following 9 and one half years of relative inactivity. In light of this finding, one would have thought the Plaintiff would be more than expeditious in advancing the claim. Quite remarkably, the precise opposite was the case. I thus have no difficulty in concluding that the now 13-year delay is inordinate."

The Delay Was Inexcusable



Justice Burrage also concluded that the explanation offered by Fennelly for the delay, that he was pursuing a second unrelated claim and wished to see that to fruition first, was in essence a strategic one but hardly a justification and was deemed inexcusable.

#### Actual and Deemed Prejudice

Justice Burrage found that Anthony had been prejudiced. When Anthony's former employee responded to the Plaintiff's Interrogatories in November, 2016, he had no recollection of having met with Fennelly to arrange the insurance in 2005.

"[20] ... We don't know what Mr. Rowe might have recalled had he been questioned earlier, but it is fair to say that memories do not improve with the passage of time. ..."

"[21] I conclude that Mr. Rowe's loss of what memory he may have had of the meeting with the Plaintiff represents direct prejudice to Anthony."

As for Lloyd's, it did not allege any direct prejudice but Justice Burrage noted that "in the right circumstance prejudice need not be directly proven, but may be inferred." Given that the delay now reached 13 years, Justice Burrage was satisfied that it was "well past the point where prejudice to Lloyd's and for that matter, Anthony, as well, can be inferred." As a result, the action was dismissed for want of prosecution.

#### **Key Takeaway**

In the right circumstance, prejudice need not be directly proven but may be inferred given the common-sense proposition that "the longer the delay the greater the likelihood of prejudice". How long of a delay is required before counsel should consider bringing an application for want of prosecution remains to be seen and will likely be dependent on the facts of each case, but it appears that a delay of 13 years is "well past the point" where prejudice can be inferred.

# Corner Brook (City) v Bailey: Insurers and Defence Counsel Breathe a Sigh of Release

On July 23, 2021, the Supreme Court of Canada released its decision in Corner Brook (City) v Bailey, 2021 SCC 29. The Court allowed the appeal and reinstated the stay of the third party claim.

#### Background

Bailey suffered injuries when she struck pedestrian worker, Temple, and Temple's employer's vehicle. Bailey sued Temple's employer (the City of Corner Brook), for damages respecting her injuries and the property damage to her vehicle.

The City of Corner Brook settled Bailey's claim for personal injuries and property damage for \$7,500 in exchange for a full and final release. The release included standard boilerplate language,



including that the City of Corner Brook 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..."

Subsequently, Temple brought a separate action against Bailey for damages for his injuries. Nearly five years later, Bailey's insurer filed a defence to Temple's action and issued a third party notice to the City of Corner Brook, seeking indemnity or contribution. The City of Corner Brook brought an application for summary trial to dispose of the third party claim on the basis that the release barred it. This issue ultimately made it to the Supreme Court of Canada.

#### **Summary Trial Decision**

At summary trial, Justice Murphy followed the "Blackmore Rule" when interpreting the release. He explained that upon interpreting a release, the goal is to ascertain the intention of the parties through an objective lens. Accordingly, the Court must first look to the words of the release. Following which, it may also look to the context in which the release was signed to interpret those words. The Court concluded that the release covered the third party claim against the City of Corner Brook and therefore ordered a stay. Bailey appealed.

#### **Court of Appeal Decision**

On appeal, Justice Butler, writing for a unanimous Court of Appeal, held that the focus of the release was Bailey's own claim against the City of Corner Brook, noting that the Blackmore Rule had been incorporated into the broader contractual interpretation principles prescribed by the Supreme Court of Canada in Sattva Capital Corp v Creston Moly Corp, 2014 SCC 5.

The Court of Appeal found that the release did not contemplate damages outside of Bailey's claim for personal injury and property damage. At paragraph 71, Justice Butler held that the trial judge made the following errors:

...The trial judge erred in putting too much weight on the broad, general language of the Release, in failing to consider "those things that were specially in the contemplation of the parties" at the time when the Release was given and in considering a "dispute that had not emerged" and/or a "question that had not at all arisen" when the Release was signed, as relevant to the interpretation of the Release.

The Court of Appeal reinstated the third party notice, and the City of Corner Brook appealed to the Supreme Court of Canada.

#### Supreme Court of Canada Decision

The Supreme Court of Canada overturned the Court of Appeal's decision and reinstated the decision of the applications judge. Justice Malcolm Rowe (a former justice of both the Newfoundland and Labrador Trial Division and Court of Appeal), wrote for a unanimous court.

Justice Rowe affirmed the notion that there is no particular "rule" for interpreting releases. Instead, the Court cited its decision in Sattva that courts must "read the contract as whole, giving words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the formation of the contract."

The Court cautioned, however, that while contextual factors are often used to determine the meaning of words in a release, surrounding circumstances should never "overwhelm the words of that agreement" or "deviate from the text such that the court effectively creates a new contract." The Court also noted that consideration to surrounding circumstances is limited to objective evidence.



With regards to the "Blackmore Rule", the Court agreed with the Court of Appeal that while the Blackmore Rule does not detract from the current law on contractual interpretation, it no longer adds any value. Instead, courts should defer to the ordinary rules of contractual interpretation when interpreting releases.

Finally, the Supreme Court of Canada noted that while there was no general rule of limiting the scope of releases, the wording of certain releases may suggest that a narrow interpretation is appropriate. The Court commented that in many cases, releases are often worded broadly to catch any and all future claims. Where this is so, the Court stated that a narrow interpretation is more likely to follow. Accordingly, when drafting releases, Justice Rowe provided the following guidance, at paragraph 41:

...the drafter of a release might consider wording that makes clear whether the release will cover unknown claims and whether the claims must be related to a particular area or subject matter. This is a sensible approach. I would add that releases that are narrowed to a particular time frame or subject matter are less likely to give rise to tension between the words and what the surrounding circumstances indicate the parties objectively intended.

#### **Key Takeaways**

While insurers and defence counsel can now rest a little easier, the Supreme Court of Canada provided the following useful guidance when it comes to drafting and interpreting full and final releases:

- The release should include clear wording to release unknown or future claims. This can be done by using explicit language as to whether the release will cover unknown and/or future claims and by specifying whether the unknown or future claims are related to a particular time period, area, or subject matter.
- 2. It is not necessary to list every possible type of claim (i.e., crossclaim, third party claim, counter claim, etc.). Instead, comprehensive language such as "all actions, suits, causes of action...foreseen or unforeseen...and claims of any kind or nature whatsoever..." is enough to capture all types of claims.
- 3. The "Blackmore Rule" is no more the ordinary principles of contractual interpretation apply to the interpretation of releases. Accordingly, when interpreting releases, the particular wording of the release is paramount to contextual factors, which must be viewed with an objective lens when interpreting the meaning of the contractual language.
- 4. Contractual interpretation is a fact specific exercise and should be treated as a mixed question of fact and law for the purpose of appellate review, unless there is an extricable question of law.

#### Nova Scotia

McMillan Estate v Booth, 2021 NSSC 284

Background



The parties attended a Judicial Settlement Conference ("JSC") in a fatal injuries claim before Justice Norton in May 2021.

The parties reached a settlement during the JSC whereby the Defendant agreed to pay a sum of money to the Plaintiff and his daughters in exchange for a release and a dismissal order.

Following the JSC counsel for the Defendant (automobile insurer) forwarded a form of Final Release to counsel for the Plaintiff. The Final Release contained a confidentiality clause restricting the Plaintiff's ability to disclose the existence and terms of the settlement.

The Plaintiff refused to sign the Final Release on the basis that the parties negotiated a settlement agreement that did not provide for confidentiality or non-disclosure of the settlement or its terms.

The Plaintiff brought a motion to enforce the settlement agreement reached during the JSC.

The sole issue before Justice Norton was whether the settlement reached between the parties at the May 10, 2021 JSC was subject to the condition that the Final Release would contain a confidentiality clause.

#### Decision

Justice Norton noted that it is established that settlement implies a promise to furnish a release unless there is agreement to the contrary. However, no party is bound to execute a complex or unusual form of release and the terms of the release must reflect the agreement reached by the parties.

Justice Norton explained that the JSC itself was confidential and without prejudice and the parties, by their undertakings to the Court, agreed not to publish or disclose the communications that took place within the JSC. However, once the parties concluded a binding contract of settlement, it was up to the parties to negotiate and agree upon the terms and conditions of that contract. The parties did agree that the settlement was conditional upon a dismissal order and signed release; however, there was no express agreement that the Release would contain a confidentiality clause.

#### **Key Takeaway**

There is no express or implied condition that a Final Release contains a confidentiality clause. Justice Norton suggested defence counsel consider attaching the form of Release and Order they expect to be signed as an appendix to the settlement brief sent to a judge or mediator.

# Landry v Chisholm, 2022 NSSC 207

#### Background

The 42 year-old Plaintiff was injured in a t-bone motor vehicle collision in June 2017 (the "MVA"). During the accident the Plaintiff heard a snap and felt a sharp pain in his low back, he suffered injuries to his neck, arms, knee and back. The Plaintiff was eventually diagnosed with a major depressive disorder, anxiety, and post-traumatic stress disorder.

The Plaintiff had a grade 10 education and worked as a heavy equipment operator in western Canada from 2005 to 2016, working 70 to 90 hour weeks. In 2016, with the downturn in the oil



industry the employer the Plaintiff worked for went into receivership and the Plaintiff and his family moved home to Cape Breton. The Plaintiff planned to find new work in Alberta, traveling back and forth to Cape Breton, working six weeks on, two weeks off; however, prior to obtaining employment in Alberta the Plaintiff was injured in a car accident.

Liability was admitted. The issues for trial were causation and damages.

#### Decision

The Defendant's position was that the Plaintiff suffered only minor injuries in the MVA and those injuries had resolved over the summer of 2017, with the exception of his back pain; however, there was no objective cause of the Plaintiff's back pain, which was psychological in nature. The Plaintiff's psychological issues were related to multiple factors and should be manageable with proper treatment.

Dr. Koshi, an expert in physical medicine and rehabilitation, was of the opinion that the Plaintiff exaggerated his level of pain and the Plaintiff suffered a Whiplash Associated Disorder Grade 1 as a result of the accident and likely suffered similar injuries to his low back which should have resolved in a matter of weeks. Dr. Koshi was unable to find any anatomical diagnosis for the Plaintiff's subjective reports of low back pain and found that the pain reported by the Plaintiff was actually in the middle part of the tailbone. Dr. Koshi found that the Plaintiff's pain was "non-specific pain" as it was pain which continues to be present after the expected recovery and there is no anatomical diagnosis or source of pain based on objective findings.

Dr. Yuzda, a psychiatrist, performed an independent medical examination and diagnosed the Plaintiff with a cannabis use disorder, based on the Plaintiff's own evidence that he consumed 3 – 10 grams of marijuana daily. Justice Lynch found at trial that the Plaintiff repeatedly misstated his marijuana use to various medical professionals; however, he was more of an occasional smoker of marijuana used to help him sleep.

Dr. Yuzda accepted Dr. Koshi's opinion that there was no physical cause of the Plaintiff's back pain and the Plaintiff had somatic symptom disorder.

The Plaintiff took the position that injuries to his neck, arms, and left knee had resolved; however, the injuries to his back and the psychological injuries had not resolved.

Dr. Gerald Reardon, an expert in orthopaedic surgery and medicine, testified at trial. Dr. Reardon testified that the diagnostic imagining reports showed nothing overly unusual for a man of the Plaintiff's age and there was no evidence of longstanding degenerative changes. Dr. Reardon noted the bulge shown in the Plaintiff's MRI performed in November 2017, at L5-S1 and the mild impingement on the nerve root. Dr. Reardon found no evidence of nerve root compromise. Dr. Reardon noted the snap that occurred at the time of the accident and was of the opinion that it was likely secondary to a disc rupture. Dr. Reardon noted that a rupture may not show up in an MRI. Dr. Reardon considered the Plaintiff's history, the snap experienced from the accident, the acute onset of the pain in the lower back, the bruising on the Plaintiff's back after the accident in coming to the conclusion that the Plaintiff had a disc rupture. Dr. Reardon particularly noted the acute onset of the pain and the fact that it had not gone away. Dr. Reardon found that a disc injury was more likely than a soft tissue injury.

Dr. Reardon diagnosed the Plaintiff with a permanent serious impairment to his bodily function secondary to the injury to his lower back from the accident. Dr. Reardon found that it was highly



unlikely that the Plaintiff would return to work. If not for the accident Dr. Reardon found, that in all likelihood, the Plaintiff would be pain free. Dr. Reardon based his findings partially on the fact that there was no evidence of any pre-existing degenerative issues in the Plaintiff's lumbar spine and no history of previous problems.

Dr. Christians, the Plaintiff's treating psychiatrist, diagnosed the Plaintiff with major depressive disorder which is moderate to severe and mild to moderate post traumatic stress disorder. Dr. Christian was of the opinion that the Plaintiff's mental health prognosis is dependent on the resolution of his back pain; however, since Dr. Reardon was of the opinion that the Plaintiff's back pain was most likely not going to get any better therefore the Plaintiff's mental health is unlikely to resolve.

Justice Lynch accepted Dr. Reardon's and Dr. Christians' opinions and awarded the Plaintiff \$1,102,812: \$8,486 in general damages for capped injuries that had resolved (neck, arms and knee) and \$100,000 in general damages for non-capped injuries (back pain and psychological injuries), \$25,000 for diminished earning capacity, \$185,347 for Past Lost Wages, \$775,00 for Diminished Earning Capacity.

#### **Key Takeaway**

Choose your experts carefully.

## Pratt v Cameron, 2021 NSSC 129

#### Background

The Plaintiff was injured in a motor vehicle accident involving the Defendant in August 2017. He suffered soft tissue injuries to his neck, shoulders and back, broken ribs, torn ligaments in his left knee and a concussion.

The Plaintiff subsequently returned to work as a truck driver in Alberta but had a workplace accident in January 2019 in which he sustained two crushed vertebrae in his mid-back. He subsequently began receiving benefits through Alberta Worker's Compensation and had not returned to work at the time of trial. Liability was admitted. The issues for trial were causation and damages.

#### Decision

In considering whether the legislated minor injury "cap" on general damages should apply to some or all the Plaintiff's injuries, the Court considered which party bore the burden of proving whether the "cap" applied. Under the former minor injury regulations, applicable to accidents before April 28, 2010, the onus was explicitly stated to be on the injured party to prove that the injury was not a minor injury. That provision was removed from the Regulations for accidents occurring on or after April 28, 2010.

Justice Lynch acknowledged two earlier decisions of the Nova Scotia Supreme Court in which judges had found that despite the removal of the provision which placed the onus on the injured person, the onus remained on the injured person to prove the "cap" did not apply.



Justice Lynch disagreed with these earlier decisions and found instead that the onus is on the Defendants to prove, on a balance of probabilities, that the Plaintiff's injuries fall under the minor injury cap. In so finding she relied on legislative debates and speeches to determine the background, context, and purpose of minor injury legislation.

Justice Lynch went on to find that the Plaintiff's soft tissue injuries were all "minor" and therefore subject to the minor injury "cap" on general damages. Notably, she found that the Plaintiff's LCL and ACL tears were to be categorized as a sprain and were subject to the "cap". The Plaintiff's broken rib and concussion were not "capped" injuries.

The Plaintiff was awarded \$63,486 in general damages for capped and non-capped injuries. The Court awarded \$25,000 for diminished earning capacity to account for the possibility that the Plaintiff's 2019 injury would at some point no longer prevent him from working and his left knee injury would thereafter present a diminishment to his ability to work. The Court also awarded \$15,000 in loss of valuable services and \$10,000 for future care associated with the Plaintiff's concussion.

#### **Key Takeaway**

There is conflicting case law in Nova Scotia regarding which party bears the burden to prove whether a Plaintiff's injuries are "minor" under the Automobile Accident Minor Injury Regulations.

## Blenus v Fraser, 2021 NSSC 79

#### Background

In July 2013 the 51 year-old Plaintiff was injured in a motorcycle accident. Liability was admitted. The issues for trial were causation and damages.

#### Decision

The Plaintiff suffered a right clavicle and scapula fracture, which required shoulder surgery and insertion of a plate, which was later repaired after becoming loose, and ultimately removed; right rib fractures (3 - 8); a collapsed lung, and subsequent soft tissue and back pain. The Plaintiff also experienced thoracic spinal fractures, specifically, right T5 and T6 transverse process fractures. He experienced serious ongoing back and shoulder pain that was exacerbated by activity, leaving him unable to perform physical work and preventing him from engaging in a range of activities that he participated in before the accident. The Plaintiff denied psychological injuries, insisting that his injuries were purely physical.

Justice Warner was satisfied that the Plaintiff's injuries were beyond the Smith v. Stubbert range for "persistently troubling but not totally disabling", given the Plaintiff's injuries were not only soft tissue injuries, but fractures that caused significant ongoing pain which did not show any sign of resolving.

Justice Warner awarded general damages of \$100,000, damages for loss of housekeeping and valuable services of \$25,000, cost of future care of \$25,000. Damages were reduced by 25 percent due to the Plaintiff's failure to mitigate.

#### **Key Takeaway**



Justice Warner did not award the Plaintiff any damages for Diminished Earning Capacity despite finding that the Plaintiff's ability to work was compromised by ongoing pain and discomfort associated with his injuries from the accident; however, the Plaintiff had an ability to mitigate his damages but declined to do so.

#### Prince Edward Island

## Stevens v Oyster Bed, 2022 PESC 25

#### **Background**

Mr. Stevens tragically passed away following a stock car race accident at Oyster Bed Speedway. The race formed part of the Maritime Pro Stock Tour series. His participation in the stock car race and the Tour series was conditional on his entering into various waiver and assumption of risk forms. The surviving spouse, on behalf of the deceased's dependents and beneficiaries, commenced an action against the Defendants, namely, Oyster Bed Speedway, Maritime Pro Stock Tour Ltd., and Shaw's Towing Service (1984) Ltd. The Defendants sought summary judgment on a motion before the Supreme Court of Prince Edward Island.

#### Decision

The Prince Edward Island Court of Appeal in Donovan v Queens County Residential Services Inc, 2016 PECA 1, previously upheld that the Fatal Accidents Act, RSPEI 1988, c F-5 (the "FAA"), is unique in Canada as the legislation creates an independent or separate cause of action and the dependents' cause of action is not derivative. As a result, the dependents' claim is not dependent upon the validity of the deceased's cause of action, and the waivers and release documents executed by the deceased do not preclude a claim by the deceased's dependents.

Notwithstanding this interpretation, the Defendants asserted that a claim under the FAA could not succeed relying on the common law volenti defence or voluntary assumption of risk. The defence of voluntary assumption of risk is based on the "moral supposition that no wrong is done to one who consents" and that by agreeing to assume the risk, a plaintiff absolves the defendant(s) of all responsibility. It was argued that Mr. Stevens voluntarily assumed the risk; thus, no duty of care was owed to the deceased by the Defendants. Given this lack of duty, it was further contended that the deceased's death was not caused by a wrongful act, as defined by the FAA, which would not satisfy the elements of the statutory cause of action.

The court rejected this argument. When reading the FAA in its entire legislative context, the explanatory notes of the FAA's enactment, and the Court of Appeal's decision, it was held that the volenti defence is not available in these circumstances and the dependents' claim would not be barred based on the volenti defence. Although unique to Prince Edward Island, the legislation was meant to provide a remedy for those dependents regardless of whether the deceased would be able to maintain an action on their own. It was noted that this may elevate the "rights" of the dependents beyond the rights a deceased would have otherwise.

Appeal



The Defendants are currently appealing the decision.

#### **Key Takeaways**

Waivers continue to be an important tool for businesses to limit their exposure to liability. Given Prince Edward Island's unique statutory regime, businesses and operators who regularly make use of waivers must be mindful that, in the unfortunate event of death, they will not be able to rely on any waivers or assumption of risk by the deceased. This is at odds with the enforceability of waivers where a participant is "merely" injured in their operation. Under those circumstances, the participant's claim is barred (provided their waiver is found enforceable).

# Robbins v Kenny, 2022 PESC 28

#### Background

The Plaintiff Robbins claimed compensation for injuries following a motor vehicle accident involving the Defendant Kenny. On consent, the Plaintiff Robbins attended an independent medical examination ("IME") with an orthopedic physician, Dr. Stanish. The Defendant Kenny sought an order requiring the Plaintiff Robbins to attend for an update to the first IME with the same physician, pursuant to section 48 of the Judicature Act, RSPEI 1988, c J-2.1. The Plaintiff Robbins objected to his attendance at a further IME, and, in the event the Plaintiff Robbins was ordered to attend, requested a fulsome court order addressing hypothetical concerns.

#### Decision

The court must examine the request from the prospective of fairness, necessity, and prejudice when considering a motion for a subsequent IME.

With respect to fairness, the court held that it would be unfair to disallow a subsequent IME when a new diagnosis, not originally contemplated, had since emerged following the first IME. With respect to necessity, the Defendant Kenny produced 29 items, which related to medical and treatment records, that post-date the first IME. The court held that these robust medical records, supported the second examination being necessary.

With respect to prejudice, the Plaintiff Robbins argued that his travel to Nova Scotia, where Dr. Stanish practices, was prejudicial. The court held that a request to attend an examination off-Island is not a prejudicial attempt to inconvenience or burden the Plaintiff Robbins. Further, the Plaintiff Robbins raised that the Defendant Kenny's choice to retain an expert in Nova Scotia, as opposed to Prince Edward Island, was also prejudicial. The court determined that the Defendant Kenny has the right to retain their own expert(s) outside of the geographical region.

The court ultimately granted a brief and uncomplicated order for the Plaintiff Robbins to undergo the subsequent IME with Dr. Stanish.

#### **Key Takeaway**

This decision is ultimately fact specific and likely only applicable to Prince Edward Island matters. However, should similar facts present themselves, this decision supports that an IME scheduled with a physician outside of Prince Edward Island is not prejudicial to the Plaintiff.



# Doucette v City of Charlottetown, 2022 PESC 11

#### **Background**

The Plaintiff Doucette alleged that an oil leak from property owned by the City of Charlottetown permeated the soil and entered the subterranean soil around her residence in 2013. Consequently, the soil surrounding and air inside the Plaintiff Doucette's home were contaminated, rendering her home unhabitable. The Plaintiff Doucette also alleged to continue to regularly smell oil inside and outside her residence. As a result, she wished to move out of the home where she raised her family and experienced many fond memories. However, she claimed that her residence cannot be sold, or, if it could be sold, its market value had been reduced. The claim was based in negligence, nuisance and trespass and alleged that City of Charlottetown breached the applicable duties of care and was, therefore, liable for the consequences which flowed from those breaches. The City of Charlottetown denied that it was negligent, or at fault in nuisance, trespass, or strict liability.

#### Decision

The court held that in light of the interference by the City of Charlottetown to the Plaintiff Doucette's residence, the City of Charlottetown is liable to her under all claims set forth in the Statement of Claim. The evidence clearly suggested that the City of Charlottetown, by permitting the release of fuel oil from its underground storage tank onto the Plaintiff Doucette's property, caused her physical injury and substantially interfered with her use and enjoyment of her land. The court also accepted that she could not continue to live in her home and her home was no longer saleable in its present condition.

The Plaintiff Doucette was awarded amounts for general damages, special damages, and moving expenses. In regard to general damages, the court determined that over seven and a half years, she experienced beyond ordinary anxieties, stress, and psychological upset. Therefore, she had suffered a compensable personal injury caused by the City of Charlottetown and was awarded \$20,000.00 per year, being \$150,000.00 in total. In regard to special damages, the court awarded her \$375,000.00, being the estimated property's value, with the condition that, the Plaintiff Doucette convey the property to the City of Charlottetown within 30 days. In regard to moving expenses, the court awarded her \$8,000.00.

#### **Key Takeaway**

Moving forward, substantial general damage awards, comparable to personal injury awards, may be awarded to a Plaintiff in order to compensate psychological distress arising from property damage.





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