

Case Law Update

October 25, 2023



Table of Contents

Nova Scotia	3
• Martin et al v. Estate of Pierette Landry and Pembridge Insurance Co., 2023 NBKB 32	
Mirrer Hall Investments Inc. et al. v. The City of Moncton et al., 2023 NBCA 14	3
Wüst Estate v. Novex Insurance Co., 2023 NBKB 62	5
Natasha Poirier v. Bruce Randolph "Randy" Van Horlick, 2022 CarswellNB 142	5
Newfoundland & Labrador	7
Dawe v. Morgan, 2023 NLCA 11	
Power v. White, 2022 NLSC 20	7
Kennedy v. Intact Insurance Company, 2023 NLSC 7	8
Harris v. Hillyer, 2022 NLSC 53	9
Nova Scotia	9
Blenus v Fraser, 2023 NSCA 73	
LaMarche v Campbell, 2022 NSSC 338	10
• Lauzon v Magee, 2023 NSSC 137	
Ricketts v Best Buy Canada Ltd, 2023 NSSC 209	
Prince Edward Island	12
Stevens v Oyster Bed, 2023 PECA 7	
Clark v 100265 PEI Inc, 2023 PESC 10	



New Brunswick

1) Martin et al v. Estate of Pierette Landry and Pembridge Insurance Co., 2023 NBKB 32

Background

The Defendant Ms. Landry was operating a motor vehicle when she crossed the centre line and collided with the Plaintiff vehicle. Ms. Landry's Insurer, Pembridge Insurance ("Pembridge"), denied coverage and indemnity on the basis that the collision had been a deliberate act which constituted a suicide attempt, thereby invoking the public policy rule under section 2 of the *Insurance Act*, R.S.N.B. 1973, c.I-12 (the "*Insurance Act*"). Pembridge maintained that the injured Plaintiffs were limited to indemnity of \$200,000, as set out in section 243 of the *Insurance Act*. On October 29, 2021, Justice Denise LeBlanc, as she then was, issued a written decision confirming that in the circumstances, Pembridge's obligation was limited to \$200,000, following her interpretation of sections 243 and 250 of the *Insurance Act*. Justice LeBlanc's decision was appealed and upheld by the New Brunswick Court of Appeal.

Following the Appeal, Pembridge filed a motion heard before Chief Justice Tracey DeWare, for an Order allowing it to pay into court the sum of \$200,000 in full and final satisfaction of its obligations.

One of the issues before the Court was whether Pembridge was liable to pay costs and interest *in addition* to the \$200,000 available to the Plaintiffs under the Policy. Pembridge argued that as it *did not* hold a contract of indemnity on behalf of its Insured following the determination that the accident was the result of an intentional act, there was no obligation to pay costs or interest to the Plaintiffs. Pembridge maintained that upon payment of \$200,000 into court, they would have satisfied all potential obligations owing to the various Plaintiffs.

The Plaintiffs all advanced the same argument in response to Pembridge's motion, suggesting that the wording of both the Standard Automobile Policy of Insurance and the *Insurance Act* provided for the conclusion that Pembridge was responsible for costs and interests to the Plaintiffs, *in addition to* the \$200,000 statutory minimum.

Chief Justice Tracey DeWare concluded that Pembridge was relieved of its obligations to the Plaintiffs upon payment of the \$200,000 statutory minimum, and that Pembridge was *not* required to pay costs and interest in addition to the \$200,000 available to the Plaintiffs, pursuant to sections 2, 243(1) and 250(11) of the *Insurance Act*.

Key Takeaways

The conduct of an Insured can relieve an Insurer of its obligations to indemnify under a policy of insurance. In instances such as these ones, payment of \$200,000 shall be the maximum, and exclusive of costs and/or interests.

2) Mirrer Hall Investments Inc. et al. v. The City of Moncton et al., 2023 NBCA 14

Background

The City of Moncton ("City") purchased land from Mirrer Hall Investments Inc. ("Mirrer"). The transaction included a contractual obligation that Mirrer demolish the mall building located on the property and remove, amongst other materials, concrete floor slabs, carrying beams and foundation walls to make way for



eventual construction of the arena. The subcontractor retained by Mirrer failed to remove all of the material, and the City arranged for the work to be completed instead. The City received an invoice for \$260,457.75 for the work, but did not send it to Mirrer to seek reimbursement until June 13, 2018, being more than ten months following their receipt of such. The City filed its action on September 11, 2018, more than two years after the latest of the dates on which the breach of contract was confirmed by the City.

Mirrer brought a motion for summary judgment and dismissal of the City's action on the basis that the action was statute-barred by section 5 (General limitation periods) of the *Limitation of Actions Act*, S.N.B. 2009, c. L-8.5 (the "*Limitation of Actions Act*"). The motion judge dismissed the motion, finding that the action was based on a continuous act or omission, and was therefore not prescribed by section 5 but, rather, was governed by section 6 (Continuous act or omission) of the *Limitation of Actions Act*. The motion judge also found that the City had been given assurance contemplated by section 22 (Delay caused by defendant) such that, even if section 5 applied, the City's action under the circumstances was preserved.

Appeal

Mirrer appealed the motion decision, and such appeal was allowed. The Court of Appeal found that the breach of contract occurred at a specific moment in time and was not a "continuous act" for the purpose of determining the applicable limitation period within which to commence an action for damages arising from a breach. As such, section 5 of the *Limitation of Actions Act* applied. It was found that the motion judge erred in his interpretation of the applicable limitation period and erred by failing to apply the principle established by the Supreme Court of Canada in *Grant Thornton LLP v. New Brunswick*, which held that section 5(1)(a) and (2) of the *Limitation of Actions Act* codified the common law rule of discoverability.

It was found that the City had all the knowledge it needed from which it could draw a plausible inference of liability as early as October 30, 2012, when it learned the steel was misaligned and certainly no later than July 15, 2014, when a third party presented its comprehensive claim to the City.

The Court of Appeal found that all requirements to trigger the commencement of the limitation period under section 5 were met. It was found that the motion judge erred by conflating a breach of contract with knowledge as to the extent of damages. It was found that there was no basis to argue that continuing acts, omissions or breaches occurred so that section 6 would apply. It was reiterated that the notion of a continuous act or omission was reserved for cases where there were repeated acts or omissions; however, in this matter, a breach of contract on which a claim was based occurred only once and was not continuously repeated.

The Court of Appeal also found that the City could not raise the argument it should be relieved from its failure to commence its action within the two-year limitation period on the basis that a third party had never admitted its fault. The triggering of a limitation period for a claim for professional liability was found not to be predicated on an admission of fault by the professional.

Key Takeaways

The fact that it may take time for a breach to be remedied is irrelevant to the running of a limitation period. The passage of time does not render a single breach a continuous one for purposes of distinguishing the *Grant Thornton* principle.



3) Wüst Estate v. Novex Insurance Co., 2023 NBKB 62

Background

The Insured was a registered massage therapist and insured pursuant to a master Policy of professional and general liability insurance via his former association. The Policy provided for miscellaneous malpractice liability (MML) coverage and commercial general liability (CGL) coverage. It was alleged that the Insured took videos of his female patients in massage treatment rooms without their knowledge or consent. Two proposed class actions were brought by the victims against the Insured's estate. One class alleged that the Insured breached his fiduciary duty, committed assault and battery and was negligent, while the second class of victims sought damages for negligence, breach of contract, breach of fiduciary duty and intrusion upon seclusion.

The Insured's estate applied for a declaration that the Insurer owed a duty to defend the Insured as it related to the two proposed class actions. The Application was dismissed, as the class action pleadings alleged that the Insured not only secretly recorded the victims forming both classes, but also that he edited and stored videos, and later used and viewed such for his own gratification. The Court found that the Estate's suggestion that there was a possibility that such claims would be characterized as negligent or non-intentional lacked the air of reality. It was concluded that the underlying claim was for intrusion upon seclusion which, by its nature, was intentional in nature, and therefore, as the true nature of the claims against the Insured were intentional conduct, the Insured's acts did not fall within the coverage awarded by the Policy. With respect to the miscellaneous malpractice liability coverage, the Court found that it strained credulity to suggest that the recordings could have been made for justifiable purposes.

The Court concluded that there was no possibility that claims against the Insured could fall within the confines of the Policy because they did not arise from the provision of professional services. With respect to the commercial general liability coverage, the Insured's conduct could not reasonably be considered an accident, and therefore such occurrence was not covered by CGL coverage. The conduct alleged against the Insured constituted abuse, and the Insurer established that the claims against the Insured fell within the abuse exclusion of both MML and CGL coverage, and therefore no coverage was provided.

Key Takeaways

Coverage granted via professional associations and/or bodies may not be applicable in the even the acts completed by the professionals are intentional, and/or fall outside of the confines of the provision of professional services. This determination could have a ripple effect on the issuance of subsequent policies, and their application to intentional acts made by professionals.

4) Natasha Poirier v. Bruce Randolph "Randy" Van Horlick, 2022 CarswellNB 142

The Plaintiff, a nurse manager in a hospital surgical unit, suffered injuries as a result of an assault and intentional infliction of mental suffering caused by the Defendant, when he became upset and extremely physical as a result of his wife's hospital bed being relocated. When the Plaintiff attempted to speak with the Defendant regarding this change, the Defendant pulled the Plaintiff up by her hair, twisted her arm backwards, twisted three of her fingers back, and began punching the left side of her head numerous times. He threw her violently against the wall twice and continued to punch her nose. A colleague arrived but could



not stop the Defendant, who assaulted the colleague while continuing to beat the Plaintiff's head. Two colleagues finally removed the Defendant, 11 minutes after the assault commenced.

In criminal court, the Defendant was convicted of assault and sentenced to six months incarceration and two years probation. The Plaintiff suffered a number of significant injuries, including but not limited to a mild traumatic brain injury resulting in severe symptoms, post-concussion syndrome, cognitive difficulties, and a deviated septum requiring surgical intervention. She developed chronic pain, and suffered anxiety, nervousness, post-traumatic stress disorder, and major depressive disorder. She likely suffered mild neurocognitive disorder and somatic symptom disorder and was left with various moderate to severe limitations and disorders. Her symptoms impaired her ability to work and perform tasks of daily life, and her psychological damages led not only to a decline in her mental health, but a hospitalization. The Plaintiff continued to suffer from post-traumatic stress disorder at the time of trial, and the assault was found to have a devastating effect on all aspects of the Plaintiff's life. She would not be able to return to her prior career or to any equivalent occupation in the workforce and would not be able to return to full-time hours in any job.

Significant awards for damages under the torts of assault, battery and intentional infliction of mental suffering were awarded. Most notably, Justice Ouellette awarded \$167,424 for past loss of income, \$859,720 for future loss of income, \$150,000 for general damages and \$25,000 for aggravated damages. The total damages awarded were of \$1,266,955.

Justice Ouellette indicated that punitive damages were not shown to be warranted, as the Defendant had already been penalized by being sentenced to jail time in the criminal matter.

Justice Ouellette also ordered pre-judgment interest from August 19, 2020, until the date of judgment at the amount of 2.5% per year, calculated at \$48,508.

Key Takeaways:

Awards for psychological damages are increasing and prevalent in New Brunswick. Although the Plaintiff in this matter suffered a number of physical injuries and psychological damages, her most prominent and long-standing issues remained cognitive and psychological. The Court was satisfied that the Defendant had caused the intentional infliction of mental suffering (a generally uncommon tort in New Brunswick) and made a damages award of \$1,266,955 as a result.

Although the Court issued pre-judgment interest and costs pursuant to the Tariffs contained in the Rules of Court, it is interesting to note that the pre-judgment interest award was at a rate lower than that traditionally awarded.



Newfoundland & Labrador

1) Dawe v. Morgan, 2023 NLCA 11

Background

Ryan Morgan ("Morgan") applied for an order (a) permitting him to remove two derelict vehicles from his property (the "Application"); and (b) that Ralph Dawe ("Dawe") pay for so doing. Dawe made an Offer to Settle pursuant to Rule 20A (the "Offer"); Morgan did not accept the Offer and Dawe did not revoke it.

The Application was heard, but the Judge who heard it passed away before rendering his decision. The parties subsequently applied to have the application reheard by another judge, who did so by reviewing the affidavits and memoranda filed by the parties and listening to the audio recordings of the cross-examinations of the affiants and the arguments of counsel in the original hearing.

The Judge had no basis upon which to grant the Application, which was therefore dismissed, and Dawe was awarded Column 3 costs under the Rules of the Supreme Court, 1986.

Having made the Offer, Dawe applied to the Judge for an order replacing the original costs order with an order awarding him double party and party costs; same was denied because the Judge referred to the Offer as "nominal and one that contained no element of compromise." Dawe appeals the Judge's decision.

Decision

The Court of Appeal held that in cases regarding property disputes, "there is often no compromise, other than foregoing or capping costs, available, which could serve to focus the parties on the viability of their positions and the risks of litigation." As such, the Court of Appeal held that offers to forego or cap costs do contain an element of compromise and can be valid Rule 20A offers to settle.

The Court of Appeal held that once the requirements set out in Rule 20A.08 are established, costs consequences should follow in all but exceptional cases.

Resultingly, Dawe was awarded double party and party costs from the date of service of the Offer.

Key Takeaways

Offers to settle dealing only with costs can still be deemed to contain elements of compromise.

Once the requirements set out in Rule 20A.08 are established, costs consequences should follow in all but exceptional cases.

2) Power v. White, 2022 NLSC 20

Background

Diane Power ("Power") was injured in a rear-end MVA in January of 2014; Jeremy White ("White"), who was at fault, was uninsured. White acknowledged his fault for the accident and for driving without insurance.



Power sought indemnity under Sections B and D of her insurance policy through the Personal Insurance Company ("Personal"), who settled her claim for a global amount of \$500,000.00 (inclusive of costs and interest).

Subsequently, Personal brought a subrogated claim to recover damages from White.

Decision

The Court calculated the total damages under various heads differently than Personal, but inclusive of prejudgment interest, its calculation came out in excess of \$500,000.00.

As such, the Court awarded Personal the full \$500,000.00 in damages, stating that the settlement was reasonable and similar to what would have been awarded had the case gone to trial.

It is also important, here, that Power's doctor noted that, along with her chronic pain, she was "markedly worse with concurrent depressive symptoms and [was] unable to work" as a result. The Court cited *Gordon v Sexton*, NLTD(G) 127 and considered the depressive symptoms in its calculation of general damages, which the Court held would have been approximately \$80,000.00 had the case gone to trial. No particular value or apportionment of damages was given for the depressive symptoms.

Key Takeaways

The court will apply some rigor to their assessment of damages, they will not simply defer to the settlement between parties as brokered by counsel.

Courts in Newfoundland and Labrador continue to consider mental injuries in their damage calculations – in this case, mental injuries were included in the total amount awarded for "general damages."

3) Kennedy v. Intact Insurance Company, 2023 NLSC 7

Background

Kimberley Lake ("Lake") allegedly suffered a slip and fall at the Kennedy residence when collecting her son from a counselling session. Lake claimed against William and Susan Kennedy (the "Homeowners") and Judith Kennedy, who offered counselling services based out of the Kennedy residence.

The Homeowners sought an order that Intact had a duty to defend them pursuant to their home insurance policy; however, Intact argued the claim fell under a Policy exclusion related to business use.

Decision

The Court held that the onus was on Intact to establish that the exclusion clause applied, and that same would be construed narrowly.

Intact did not enter evidence to suggest that the business was "continuous or regular," per the policy. As such, the Court held that the exclusion was unavailable and Intact indeed had a duty to defend the Homeowners.



Key Takeaways

Where an insurer does not provide the adequate documentation required to rely on an exception, same will not be available and the duty to defend will be triggered.

4) Harris v. Hillyer, 2022 NLSC 53

Background

The Plaintiffs were passengers on a bus that was involved in a single-vehicle collision. The collision happened in Nova Scotia but the Plaintiffs were domiciled in Newfoundland and Labrador.

The question for determination was whether the laws of NS or of NL should apply in respect of damages. This was particularly relevant because NS has legislation limiting the award for general, non-pecuniary damages for minor injuries (whereas NL does not).

Decision

The Court cited leading case *Tolofson v Jensen*, [1994] 3 S.C.R. 1022, which held that substantive rights may be determined by a foreign law (i.e. where the loss occurred) but "all matters appertaining to procedure are governed exclusively by the law of the forum." To this end and in respect of substantive rights, Justice Khaladkar explained that "ordinary people expect their activities to be governed by the law of the place where they happen to be."

As such, the legal issue for determination was whether the cap on damages was substantive or procedural in nature.

The Court held that awarding a remedy was procedural in nature and as such, the laws of Newfoundland and Labrador governing same would apply. There would be no cap on non-pecuniary damages.

Key Takeaways

The law governing the award of damages is procedural in nature and thus governed by the law of the forum.

Damages arising from an accident that occurred in a different jurisdiction may still be governed by the laws of Newfoundland and Labrador.

Nova Scotia

1) Blenus v Fraser, 2023 NSCA 73

Background

The 51-year-old Plaintiff was injured in a motorcycle accident. At trial, Justice Warner awarded \$100,000 in general damages, \$25,000 for loss of valuable services, and \$25,000 for future cost of care. However, Justice Warner did not award damages for loss of income or diminished earnings, despite finding that the Plaintiff's ability to work was compromised by ongoing pain and discomfort associated with his injuries from



the accident. Justice Warner also reduced the Plaintiff's damages by 25 percent due to a failure to mitigate his damage. The Plaintiff appealed these findings.

Decision

The Court of Appeal dismissed the Plaintiff's appeal, finding that the Plaintiff had not demonstrated any error of law committed by the judge. The Court of Appeal further held that Justice Warner's findings on causation and failure to mitigate were well supported by the judge's unchallenged factual findings.

Key Takeaway

None of the trial judge's factual findings were challenged. The Court of Appeal is not an opportunity for a retrial – the Court will not re-weigh trial evidence on appeal.

2) LaMarche v Campbell, 2022 NSSC 338

Background

This case involves a motor vehicle accident that occurred on August 22, 2019. The trial, scheduled on January 4, 2023, related to damages only. Two months before trial, the Defendant and one of the Plaintiffs filed motions relating to evidence for trial. The Defendant filed a motion requesting the admission of two expert reports filed past the deadline identified at the Date Assignment Conference (DAC). The Plaintiff filed a motion seeking an advance ruling pursuant to *Civil Procedure Rule* 55.15 on the admissibility of opinions set out in the treating physician's narrative. The deadline for the identification of these opinions was April 4, 2022, the same date as set for the submission of expert reports.

Decision

Justice Campbell refused to accept the expert opinions sought to be filed by the Defendant. The Court reviewed the legal test for the late admission of expert reports and concluded that there were no exceptional circumstances to justify the late filing of the reports.

Comparatively, the Plaintiff's motion was granted. The Court found that the Plaintiff's failure to formally identify the opinions they sought to rely on by the date set at the DAC did not compromise the Defendant's ability to prepare for trial.

Key Takeaway

Treating physician narratives are treated differently than *Rule* 55 expert reports.

But, since this decision, the *Rule* regarding treating physicians has changed. A treating physician may provide an opinion instead of a *Rule* 55 expert report, but that opinion must now be condensed in a Treating Physicians Report (*Rule* 55.14). Treating Physician Reports require more information than what was required under the old rule regarding treating physicians' narratives.



3) Lauzon v Magee, 2023 NSSC 137

Background

The Plaintiffs and Defendant were involved in a motor vehicle accident on March 9, 2018. One of the Plaintiffs was 17 years old at the time of the collision. The Plaintiffs retained legal counsel on December 21, 2018. However, neither Plaintiff filed a Notice of Action until March 7, 2022. The Defendant filed defences to both actions claiming that the Plaintiffs had failed to meet the relevant limitation period. In response, the Plaintiffs filed motions to disallow the Defendant's limitation defence. The Defendant also sought summary judgment alleging that the claims were statute barred.

Decision

The Court undertook an analysis pursuant to Section 12 of the *Limitations of Actions Act*, SNS 2014, c 35. After weighing the factors listed in subsection 12(5), the Court concluded that the balance weighed in favour of the Plaintiffs and disallowed the Defendant's limitations defence.

The Court noted that the reason for the delay in filing the Plaintiffs' claims was solicitor inadvertence. The Court found the Plaintiffs had acted promptly in retaining legal counsel. Of particular note was the fact that the adult Plaintiff had only filed his Action two days before he would have been prevented from a section 12 analysis altogether. Regardless, the Court dismissed the motion for summary judgment.

Key Takeaway

The Court favours Plaintiffs in the section 12 analysis. This is particularly true where solicitor inadvertence plays a part in the delay in filing a claim.

4) Ricketts v Best Buy Canada Ltd, 2023 NSSC 209

Background

On May 14, 2019, the Plaintiff slipped and fell on tile floor as she was entering a Best Buy store in Bayer's Lake, Halifax. She brought an action against Best Buy under the *Occupiers' Liability* Act, SNS 1996, c 27, claiming damages for her injuries.

In defence, Best Buy said that there was no water on the tile floor when the Plaintiff stepped on it. Best Buy further said that it took reasonable care in the circumstances to make its premises safe. Damages were agreed upon before trial and liability remained the only issue.

Decision

The Court found in favour of Best Buy. Specifically, the Court found that the Plaintiff had failed to establish that Best Buy failed to take such care as was reasonable to see that each person entering the premises was reasonably safe.

The Court reviewed the precautionary measures taken by Best Buy – the flooring in place, wet floor signs, mats, etc. – and found that it had met the standard for reasonableness. Of note, the Court found that it was raining on the date of the Plaintiff's fall and that the treads on her shoes were worn.



Key Takeaway

The fact that a slip and fall has occurred does not automatically make the occupier liable for it. A court will assess the precautionary measures taken as well as the circumstances of the fall to determine liability.

Prince Edward Island

1) Stevens v Oyster Bed, 2023 PECA 7

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 dependants 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. The motion was dismissed. The Defendants appealed.

Decision

The Prince Edward Island Court of Appeal in *Donovan v Queens County Residential Services Inc*, 2016 PECA 1 ("Donovan"), 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 dependants' cause of action is not derivative. As a result, the dependants' claim is not dependant 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 dependants.

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 Supreme Court of Prince Edward Island rejected this argument, which was then upheld by the Court of Appeal. When reading the *FAA* in its entire legislative context, the explanatory notes of the FAA's enactment, and the Court of Appeal's Donovan decision, it was upheld that the *volenti* defence is not available in an independent action, and the dependants' claim would not be barred based on the *volenti* defence. The legislative language makes it clear that the traditional analysis of the duties and responsibilities between a plaintiff and a defendant do not apply. The dominant relationship is between the dependants and the wrongdoers with the factual context of the deceased's role being reduced from its normal primacy to one of secondary importance.

All other Canadian provinces have chosen to create derivative claims to establish the dependants' right of action, so defences, including the *volenti* defence is available. However, it is important to note that *volenti*

has diminished as a defence with the rise of contributory negligence. The *volenti* defence has been described as "exceptional" and "anachronistic" by the Supreme Court of Canada.

Key Takeaway

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).

2) Clark v 100265 PEI Inc, 2023 PESC 10

Background

The Plaintiff Clark advanced a claim for personal injuries arising from a fall on a pool deck while staying at a rental accommodation owned and operated by the Defendant. The Plaintiff alleged that she fell on a raised portion of the pool deck referred to as a ladder platform. The claim was based on the breach of the Defendant's duty under the *Occupiers' Liability Act*, RSPEI 1988, c 0-2 (the "OLA"). The Defendant sought summary judgment as it claimed to have met the applicable standard of care imposed by the OLA.

Decision

Pursuant to Rule 20 of the Rules of Civil Procedure, the Court shall grant summary judgment if the Court is satisfied that there is no genuine issue requiring a trial. The two-part test for determining whether there is a genuine issue requiring trial is well established by the Supreme Court and Court of Appeal of Prince Edward Island. The first part requires the moving party to show there is no material fact in issue which would create a genuine issue for trial. The second part of the test provides that, when the moving party discharges this onus, the responding party must adduce evidence to establish that the position taken in his pleading has a real chance of success.

As *obiter*, Justice Cann noted that a holistic approach to all of the evidence presented in the summary judgment motion aligns more with the majority of Canadian authorities in recent decades. These authorities direct that the evidence in a given matter be considered as a whole, rather than piecemeal and as though it belongs to one party or another, unless there is a compelling reason for discrete treatment.

In applying the previously referenced two-part test, the Court found that the Defendant did not meet its evidentiary burden of showing that there was no genuine issue requiring a trial and dismissed its motion for summary judgment. First, the Defendant failed to demonstrate that the pool deck was reasonably safe for its users. The ladder platform was of a height to trip someone walking on the deck, and it was similar in appearance to the rest of the pool deck. Second, the Defendant failed to put forward clear evidence in support of its safe use argument as it could not be ascertained whether the absence of past pool deck complaints was due to the system of monitoring or users not complaining post trip. Third, although the Defendant passed an inspection, in accordance with the *Public Health Act Swimming Pool and Waterslide Regulations*, PEI Reg EC93/01, mere days before the fall, an inspection was not "weighty" evidence of compliance with the standard of care.



Key Takeaway

This decision plants the seed for the Court of Appeal to revisit the test applied by the Court when deciding a motion for summary judgment in Prince Edward Island. Despite slip and fall matters being highly fact specific, this decision supports that the application of brightly coloured paint or tape to alert the user to small elevations, which may constitute a tripping hazard, may be sufficient for an occupier of a premises to ensure users are reasonably safe while on the premises.

3) King v Charlottetown (City) and Shaw's Towing, 2023 PECA 3

Background

The Plaintiff obtained judgment for an award of damages against one Defendant in the Supreme Court of Prince Edward Island Small Claims Section. The Judge found that the Defendants had made a pre-trial offer to settle pursuant to Small Claims Rule 14.07 that was more favourable than the Plaintiff's judgment obtained, so instead ordered the Plaintiff to pay costs of the proceeding to both Defendants.

The Plaintiff appealed.

Decision

The Court of Appeal allowed the Appellant's appeal and set aside the award of costs to the Respondents for three reasons:

- 1. The offer lacked certainty. The purpose of the rules that impose costs consequences for failure to accept an offer that is shown to be as favourable or more favourable than the judgment obtained is to encourage settlement. The terms of the offer should not call for a judicial assessment of the party's costs up to the date of the offer. An offer must be fixed and determinable.
- 2. The judgment was undervalued. No factor for costs of the proceeding was added into the valuation of the judgment, so the comparison undervalued the judgment and was incomplete.
- 3. The offer was overvalued. The Respondents in this matter incurred costs of repairs to the Appellant's property, but this did not correspond to additional value accrued to the Appellant.

Key Takeaway

While this matter arose from the Small Claims Section, the rules that impose costs consequences for failing to accept an offer have broad application. Moving forward, care must be taken when advancing a settlement offer with costs consequences that the offer is fixed, determinable, and properly valued.





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