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Recent Caselaw

**1st Case**

Our first case this month deals with "Mary Carter" Agreements and the deduction of settlement monies made under such agreements from the damage award determined at trial.

**2nd Case**

Our second case this month deals with the definition of "principally dependant...for financial support" as found in the wording of Section B.

Our newsletter is not intended to give legal advice, however, to discuss legal matters or obtain the full text of cases readers are welcome to contact Foster & Company.

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**Update on Nova Scotia Court of Appeal Cap Decision**

The Nova Scotia Court of Appeal released its decision in *Hartling v. Nova Scotia (Attorney General)*, 2009 NSCA 130, on December 15, 2009. The Court heard two appeals simultaneously, both of which challenged the Province's 2003 legislation capping non-monetary damages for "minor injuries" at \$2,500. The Court dismissed the first appeal, holding that the trial judge gave sufficient weight to the evidence, which fell short of establishing that the legislation perpetuates prejudice or stereotyping sufficient to trigger section 15 of the Charter. With respect to the second appeal, the court denied leave, stating that there was no longer an arguable issue to be resolved as the plaintiff was successful in her application before the trial judge and was free to pursue her main action against the respondent Roy.

**Laudon v. Roberts, 2009 ONCA 383**

**1st Case**

In *Laudon v. Roberts*, the plaintiff sustained injuries when the boat in which she was a passenger was struck by another boat. The plaintiff commenced an action against the operators of both boats involved, alleging joint and several liability for her injuries. Prior to trial, the plaintiff entered into a "Mary Carter" Agreement (MCA) with one of the defendants (the "settling defendant"), whereby the settling defendant agreed to pay the plaintiff \$438,000 in exchange for full indemnity from the claim.

At trial, the jury assessed the plaintiff's damages at \$312,021 and found the plaintiff 11% contributorily negligent. The remaining liability was apportioned 50% to the settling defendant and 39% to the non-settling defendant. The trial judge refused to deduct the amount paid to the plaintiff by the settling defendant from the damage award and awarded the plaintiff judgement against the non-settling defendant in the amount of \$121,688.12. The non-settling defendant appealed.

The primary issue before the Court of Appeal was whether a plaintiff is obligated to deduct from a jury's damage award the payment she received pursuant to a "Mary Carter" agreement with one of the two defendants. The Court allowed the appeal, stating the principle that "an injured plaintiff should be neither over nor under, but fully compensated by way of damages for injury sustained by the negligence of others." As the jury damage assessment was less than that received from the settling defendant, to permit the plaintiff to recover any amount from the non-settling party would result in double recovery to the plaintiff, which was not permitted. In addition, the Court awarded the non-settling defendant costs in the amount of \$10,000. Leave to appeal to the Supreme Court was denied.

The implications of this decision may well result in the re-evaluation of the usefulness of Mary Carter Agreements. It will most certainly influence a defendant's decision to consider entering into a Mary Carter Agreement with plaintiff counsel as doing so could result in either overpayment of a plaintiff's claim and/or a co-defendant getting a "free ride".

**Kilcollins Estate v. Wawanesa Mutual Insurance Co. 2009 NBQB 576**

**2nd Case**

In *Kilcollins Estate v. Wawanesa Mutual Insurance Co.*, Constance and Catherine Kilcollins were involved in a motor vehicle accident on November 24, 2005. Catherine Kilcollins was killed in the accident and Constance Kilcollins suffered serious injury, resulting in her death on April 5, 2006. The Kilcollins' vehicle was covered under a Standard Automobile Policy SPF No. 1, issued by Wawanesa Mutual Insurance Company (hereinafter "the policy"). The plaintiff, Kilcollins Estate, commenced an action for recovery of death benefits in the amount of \$50,000 pursuant to Section B Death Benefits under the policy. Wawanesa denied the claim on the basis that Constance was not principally dependent for financial support on Catherine. Although Constance suffered from a "mental or physical infirmity", this did not factor into Wawanesa's decision to deny the claim.

At the time of the accident, Constance lived with her mother, Catherine Kilcollins, and was receiving Income Assistance in the amount of \$570 a month. Notwithstanding the income assistance received by Constance, the plaintiff commenced this action stating Constance was principally dependent for financial support upon her mother, at the time of Catherine's death. The Court acknowledged that Constance suffered from a mental or physical infirmity which made her dependent on Catherine for financial support to some degree. It was the degree of that support which was relevant in determining whether Constance was "principally dependent."

The Court held that although Constance received Income Assistance and did live alone for three years prior to 1998, her income fell far short of sustaining her basic needs. At the time of Catherine's death, Constance was receiving \$570 a month or \$7,774 a year from Social Assistance. The evidence revealed that Constance and Catherine pooled their incomes and that, although they lived a modest lifestyle, it was far superior to that which Constance would have been able to afford on her own. As a result, the Court concluded that Constance was principally dependant on Catherine for financial support at the time of Catherine's death. Kilcollins Estate was awarded \$50,000 in Death Benefits pursuant to Section B of the policy and costs in the amount of \$4,875.