Season's Greetings

Our entire team at Foster & Company extends our best wishes to you and your families for a safe and happy holiday season.

Recent Caselaw

1st Case

In our first case this month, the Court of Appeal significantly reduced an award for loss of valuable services.

2nd Case

Our second case this month deals with the production of RCMP investigative reports.

3rd Case

In our third case, the Court of Appeal explains "material change in risk" and where the onus of proof lies

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Furlotte v. Elward, 2011 NBCA 95 — 1st Case

In 1997, the parties were involved in a minor vehicle accident. Damage to the vehicles was minimal, and neither party called the police. The appellant, then a practicing lawyer, began to feel pain a day or two after the accident. He sued for damages in excess of $4,000,000, but at trial was granted judgment for $104,500, including an award of $74,500 for loss of valuable services.

The appellant appealed on ten grounds, with five of them relating to the admissibility of medical evidence. The respondent cross-appealed, seeking to strike or reduce the award for loss of valuable services.

The Court of Appeal found all the experts and their qualifications had been agreed upon by both parties, and there was abundant evidence to adequately support the factual background against which the medical experts expressed their opinion. Given the high standard of review and the deference owed to a trial Judge for findings of fact, the Court of Appeal was not prepared to interfere with the trial Judge's findings, except in one respect, targeted by the respondent's cross-appeal.

The Court of Appeal stated as a general rule that loss of capacity to perform valuable services should be allowed as special damages for the pre-trial period, only if the plaintiff establishes three things on a balance of probabilities:

1) the plaintiff was disabled by an accident-related condition from performing the task for which a claim is made;

2) but for the accident, the plaintiff would have performed the task in question; and

3) what it would have cost to have a professional service provider perform the task.

The Court of Appeal also stated that it makes no difference if the task was not performed, or if it was performed for free or at a discount from a family member or friend. Such an award is designed to fairly compensate a plaintiff for his or her loss of capacity to perform the task in question.

At trial, evidence was produced supporting two different scenarios for the valuable-services award. The respondent had asserted awards should be based on the annual rates for professional non- corporate service providers as calculated by Statistics Canada ($11,448), while the appellant asked for an average of rates provided by three local, professional corporate service providers in New Brunswick ($30,265). The trial Judge had chosen the larger rate based on local service providers.

The trial Judge did not give sufficient reasoning for choosing the higher of the two rates. The respondent had hired a expert in the cost of care and valuable services, while the appellant had not. The Court of Appeal held the award in excess of the lower amount constituted a windfall which could not be sustained even by application of the most deferential standard of review.

Accordingly, the Court of Appeal allowed the cross-appeal and substituted the lower rate, resulting in a reduced award of $28,500 for loss of valuable services.

Bennett v. State Farm, 2011 NBQB 273 — 2nd Case

In this case, the RCMP had investigated a suspicious house fire but in the end no criminal charges were laid. Meanwhile, the plaintiff homeowner's claim for indemnity for the loss was denied by her insurer, State Farm, on the basis of a vacancy exclusion contained in her home insurance policy. The plaintiff then brought an action for recovery under the policy.

In a previous decision in the same case, the Court of Appeal denied a motion by State Farm for production by the RCMP of its investigation records. State Farm's motion was denied for a number of reasons, including that the RCMP is not a "person" and could not therefore be ordered to produce documents under the Rules of Court. (For a summary of that decision, 2011 NBCA 27, please see our May 2011 Newsletter.)

After the RCMP investigation records were obtained by the plaintiff, State Farm brought another motion aimed specifically at those records which were now in the plaintiff's possession. The plaintiff objected, arguing that although the records were in her possession, they were covered by one or more kinds of privilege.

The motions Judge held that there was no litigation privilege over the documents as they were not created for the litigation, but merely obtained to prepare for litigation. As the plaintiff had put the vacancy of her home into issue, the onus was on her to establish the documents have no relevance to the litigation, which she had not done.

The Court also found there was no statutory privilege per the federal Privacy Act, since there was no common interest between the plaintiff and the RCMP that would extend statutory privilege under that Act to the plaintiff. Finally, the motions Judge dismissed the plaintiff's argument that the documents were subject to public interest immunity since there was no public interest in the documents to protect, pointing out that this type of privilege does not belong to private parties and is usually only asserted by the government.

The motions Judge ordered the documents produced.

Aviva Insurance Company of Canada v. Thomas, 2011 NBCA 96 — 3rd Case

Our final case this month again involves a house fire and an insurer's denial of coverage under a homeowner's policy. In this case, the insured was an elderly man with limited education who had purchased a multi-peril policy on his home in 2000 and specified the home's primary heat source was electrical. A year later, the insured installed a wood stove in his home as a secondary heat source. He did not disclose the installation in his renewal applications, although the applications did not require him to list secondary heat sources or specify that an installation of a wood stove would be considered a material change in risk.

The home was damaged by fire in 2007. The insurer denied coverage, and the insured brought an action for indemnity under the policy. The insured succeeded at trial (for a summary of that decision, 2011 NBQB 26, please see our June 2011 Newsletter), with the judge basing his decision on the fact that the insured did not know the installation constituted a material change in risk.

The insurer appealed, arguing the trial judge erred in his interpretation of a 'material change in risk'. The insured maintained that the insurer's disclosure requirements were ambiguous, and that the 'material change' statutory condition, which forms part of every policy of fire insurance in New Brunswick under Part IV of the Insurance Act, had no application to a multi-peril policy of insurance.

In the result, the appeal was dismissed. Chief Justice Drapeau for the Court of Appeal found that the insurer did not ask the insured to notify it of all material changes in its renewal applications; it only asked that the insured agree that the material provided in the original application was accurate. It was held that when an insurer fails to ask about a matter, a Court may infer the insurer does not consider the matter relevant. If the insurer had considered installation of the wood stove to be a material change in risk, then it had a duty of good faith to advise the insured of this in plain language. Thus the insurer could not benefit from the 'material change' statutory condition.

The Court of Appeal also found that previous rulings of the Supreme Court of Canada, which hold that legislation pertaining to 'fire insurance' is not applicable to multi-peril homeowner policies, do not apply in New Brunswick. The Court of Appeal stated the NB legislature has not amended the Insurance Act because the relevant provisions do not contain the same ambiguity as legislation in other provinces. Since the NB Act draws a distinction between 'contracts of fire insurance' and 'insurance against loss or damage arising from the peril of fire,' Part IV therefore applies to all contracts made in NB that provide insurance against loss or damage to property arising from fire.

Next, the Court turned its attention to whether the insured's lack of appreciation of the materiality of a change in circumstances to the risk was relevant. After considering and discussing case law, academic texts and principles of statutory interpretation, Chief Justice Drapeau ultimately held that the other two issues considered were sufficient to dispose of the case, and so the Court did not need to decide whether the 'material change in risk' statutory condition is only engaged where an insured knows an insurer views a particular change in circumstances as material to the risk.

In the final result, the Court of Appeal ruled that the statutory condition was relevant to a multi- peril insurance policy. However, the insurer could not rely on this condition because of its own acts and omissions prior to the loss.

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.