FOSTER & COMPANY
Barristers and Solicitors

Newsletter

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Happy New Year! from all of us at Foster & Company.

Foster & Company's dynamic team providing clients with responsive, high quality services while maintaining the highest level of professional integrity and ethics.

Recent Caselaw

1st Case

Our first case this month is a New Brunswick Court of Appeal decision dealing with the deductibility of CPP benefits pursuant to Clause 4 ("Amount Payable per Eligible Claimant") of the NBEF 44.

2nd Case

Our second case this month deals with the interpretation of "struck by" or "hit by" as found in s. 265(2)(c)(ii)(B) of the Insurance Act of Ontario (analogous to s. 255(1)(c)(ii)(B) of the Insurance Act of New Brunswick).

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New Nouveau Brunswick CANADA

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Economical Mutual Insurance Company v. LaPalme, 2010 NBCA 87 — 1st Case

The Plaintiff commenced an action for damages arising out of a two-vehicle collision which occurred on September 25, 1997. On September 14, 2001, the Plaintiff settled her tort action with the Defendant and Royal & Sun Alliance Insurance Company of Canada (the insurer of the Defendant's vehicle). While the Plaintiff's NBEF 44 insurer, Economical Mutual Insurance Company ("Economical"), was not a party to the original action, it nonetheless joined in the minutes of settlement and preserved its rights to further litigate the quantum of the Plaintiff's damages.

Economical subsequently filed a Notice of Motion regarding the deductibility of CPP benefits from the amount payable under Clause 4 of the NBEF 44. On November 27, 2009, the Court of Queen's Bench determined that only CPP disability benefits for the period between the date of the accident and the September 14, 2001 minutes of settlement were deductible under Clause 4. Economical appealed this decision.

The Court of Appeal allowed Economical's appeal. The Court held that the wording of Clauses 4 and 5(b) of the NBEF 44 confirmed the relevant date for the assessment of damages and the quantification of the deductions identified in Clause 4 as the date of adjudication of the amount payable by the insurer. As such, Clause 4 only permits the deduction of CPP benefits that have actually been recovered by the claimant as of the date of adjudication (not the date of settlement of the tort action).

With respect to Clause 4(b)(vii), the Court held that the term "policy of insurance" does not include legislation providing for the payment of disability benefits. While CPP benefits may be akin to policies of disability insurance for the purpose of the collateral benefits rule in tort, that principle does not morph the Canada Pension Plan into a "policy of insurance" for Clause 4(b)(vii). As such, unrecovered pre-adjudication CPP disability benefits or CPP disability benefits which a claimant might be entitled to recover in the future are not deductible under Clause 4.

Lewis v. Economical Insurance Group, 2010 ONCA 528 — 2nd Case

This case arises from serious injuries sustained by the Plaintiff when she struck her head on a steel pole protruding from a truck. The truck could not be identified and the Plaintiff sued her own insurance company, Economical Mutual Insurance Company, for damages for personal injuries. As the Plaintiff was not an occupant of an automobile at the time she was injured, she was entitled to coverage only if she was "struck by" or "hit by" an unidentified automobile. The Defendant moved for summary judgment on the basis that it was actually the Plaintiff who struck or hit the pole as the truck was stationary at the time of the accident. The motions judge agreed and dismissed the Plaintiff's claim.

On appeal, the Court stated that as the provisions related to unidentified and uninsured motorist coverage were remedial they must be interpreted broadly and liberally. The Court referred to three cases to illustrate that courts have extended coverage to persons who were not "struck by" or "hit by" by an automobile in the literal sense (Talbot c. GAN General Insurance Co. (1999), 44 O.R. (3d) 252; Tucci v. Pugliese (2009), 98 O.R. (3d) 151; Re Strum and Co-Operators Insurance Association (1974), 2 O.R. (2d) 70). In all three cases a narrow interpretation of the words would have disentitled the claimant to coverage and produced a result contrary to common sense and the legislative intent of s. 265 of the Insurance Act. As a result, the Court set aside the motion judge's decision and dismissed the Defendant's motion for summary judgment.