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.

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 concerns an insurer's duty to defend after an incident of "horseplay" led to a car-on-pedestrian accident which the insurer argued was an intentional and deliberate act.

2nd Case

The second case this month again considers an insurer's duty to defend, this time with regard to counterclaims against an insured homeowner for personal liability in an action arising from bodily injury to the homeowner's child.

3rd Case

This month's third case considers whether an insurer is permitted to bring a subrogated claim against an employee whose alleged negligence caused a fire loss to the insured business.

Foster & Company has been distinguished by A.M. Best Company as 2012 Recommended Insurance Attorneys.

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ANNOUNCEMENT

Foster & Company is pleased to announce that Matthew Pearn has joined our litigation and insurance defence team.

Matthew's post-secondary education includes a Bachelor of Science degree from Mount Allison University in 2004 as well as a Bachelor of Journalism from University of Kings College in 2006. He received his Bachelor of Laws degree in 2011 from the University of New Brunswick.

Matthew Pearn

Matthew was admitted to the New Brunswick Bar in 2012. He is a member of the Law Society of New Brunswick, the York Sunbury Law Society, the Canadian Bar Association and the Canadian Media Lawyers Association ('Ad IDEM').

Prior to his legal career, Matthew completed a Bachelor of Journalism and worked as a reporter for CBC Radio in both New Brunswick and Nunavut.

Matthew is looking forward to working with you and can be reached by:

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Savage v. Belecque, 2012 ONCA 426 — 1st Case

The plaintiff was a teenager at a skating rink. She left the rink with a friend to find a cigarette. In the rink's parking lot, she met the teenage defendants, one of whom was a driver and the other a rear-seat passenger in a vehicle. The plaintiff asked the passenger for a cigarette and, in "horseplay", the passenger grabbed the plaintiff's jacket. At this time, the car was set in motion and advanced with the plaintiff on her skates being pulled alongside. The plaintiff was dragged for some distance before the passenger let go and she fell. The driver stopped, looked back, did not see the plaintiff, reversed the car sharply, and hit the plaintiff, who was still on the ground trying to get up.

The plaintiff sued the driver, the passenger of the vehicle, the parents of both defendants, and her own insurer for uninsured and inadequately insured motorist coverages. The driver's insurer denied coverage and that there was a duty to defend, arguing that coverage was statutorily excluded because the loss was caused intentionally and deliberately.

The parties settled the main action for the plaintiff's compensatory damages and costs. The only remaining issue was which insurer would pay the damages. The motion judge decided that the driver's insurer had a duty to defend the driver and his family, although he declined to consider if the driver's insurer had a duty to defend the passenger based on the settlement reached by the parties.

The Court of Appeal agreed with the motion judge's decision that the driver's insurer did have a duty to defend. There was not enough evidence that the driver's conduct was intentional, as all parties agreed there had been no animosity between them and no reason why either defendant would intentionally cause harm to the plaintiff. The driver's insurer's only evidence to prove the defendant's intentional conduct was the fact that the plaintiff pled punitive damages, and an affidavit sworn by their solicitor concerning evidence given by the defendant about his driving conduct.

The Court of Appeal also upheld the motion judge's decision on costs that awarded the defendants the full amount of their self-retained legal counsel, as well as granting costs to the plaintiff's insurer on a partial indemnity basis.

Desormeaux v. Dominion of Canada General Insurance Company, 2012 ONSC 3199 — 2nd Case

The applicant and her husband and children were insured under a homeowner's policy issued by the respondent insurer.

When one of the applicant's children was injured by another child while at daycare services offered by the applicant's mother, the applicant and her household family members commenced proceedings against the applicant's mother, the other child, and that child's mother. The defendants counterclaimed against the applicant for contribution and indemnity, alleging that the injured child was under the applicant's care at the time of the incident and that the applicant was negligent in her supervision of the child.

The applicant applied for a declaration that the respondent insurer was obligated to provide her with a defence to the counterclaims against her. The insurer denied any duty to defend, as the applicant's policy excluded coverage for personal liability because of bodily injury to an insured or any person residing in the insured's household.

The applicant argued that the policy exclusion applied only to situations where an insured or a resident in an insured's home commenced an action directly against an insured, and did not exclude a duty to defend when a claim was made indirectly, such as by a third party via counterclaim.

The Court disagreed with the applicant, ruling that the wording of the exclusion was sufficiently clear to encompass the instant situation and made no distinction between direct and indirect claims. The fact the applicant was not sued directly by her child did not change the fact that the action was for injuries sustained to the insured or a person residing in the insured's household.

The Court dismissed the application.

Portage La Prairie Mutual Insurance Company v. MacLean, 2012 NSSC 341 — 3rd Case

The defendant was a 20-year-old employee of a farmers' market located in beautiful Pictou County, Nova Scotia. Following a fire at the market which caused substantial property damage, the market's insurer, after paying out the fire loss, filed a subrogation action against the defendant employee for the full amount of the loss, alleging the fire was caused by her negligence. The defendant in turn brought a motion for summary judgment on evidence, seeking dismissal of the claims against her.

The circumstances of the fire were as follows: shortly before closing time one evening and while short-staffed, the defendant placed eggs in a pot on a hot plate to boil for use in sandwiches the next day. She then stepped away from the stove to attend to other tasks elsewhere in the store. Shortly thereafter she smelled smoke, and returned to the hot plate to find the area in flames. It was later determined that the fire was caused by heat from the hot plate igniting the wooden cupboards above.

According to the Court, the overarching question was whether the law permitted an employer to hold their employee liable in tort for losses arising from property damage. If the employer could not sustain such a claim, then the employer's insurer in subrogation could not do so either. The issue turned on whether the defendant could be said to owe her employer a duty of care.

Analyzing the duty-of-care issue, the Court first found that employee liability to an employer for ordinary negligence did not give rise to a prima facie duty of care. Next, it determined that while employee negligence was reasonably foreseeable, there was not sufficient proximity between employee and employer to impose a duty of care for the defendant's ordinary negligence. The motion judge then decided that there were significant serious policy reasons which dictated against a finding of a duty of care, holding it would be unjust and unfair for such a duty to exist in the circumstances.

The Court concluded that there was no duty of care owed by the defendant to her employer, and therefore no action in negligence could be brought by the employer against the defendant. Thus, the insurer's claim against the defendant did not have a real chance of success.

Although it was not necessary for the disposition of the defendant's motion for summary judgment, the motion judge also considered whether the insurer, in its contract of insurance with the insured business, had specifically contracted out of the right to sue an employee. Under a provision of the commercial general liability portion of the policy, the insurer named employees as insureds with regards to negligent acts in the course of employment causing bodily injury and property damage to third parties. The defendant argued that because the employees were "insured" under this portion policy, the insurer had effectively agreed not to bring subrogated claims against employees under the property portion of the policy.

The Court found that under the policy declarations, the term "policy" encompassed both the property and CGL portions of the policy. Therefore, it agreed with the defendant that the insurer had specifically waived its rights of subrogation against the employees of the insured business, adding that it made no rational sense that an employee could be sued for ordinary negligence in the workplace through a subrogated claim by the insurer and that holding employees liable in such circumstances would lead to serious injustice.

The defendant's motion was granted and the claim was dismissed.

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.