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Recent Caselaw

1st Case

Our first case this month clarifies the test used to determine arson in civil cases, and whether there must be proof of motive to make a finding of arson.

2nd Case

Our second case deals with the interpretation of the phrase "arising out of" a named insured's operations in a liability insurance policy endorsement naming additional insureds.

3rd Case

Our third case is the first decision to consider a section of New Brunswick's new Limitation of Actions Act which allows for an exception to an expired limitation period in certain circumstances.

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Richardson v. State Farm Mutual Automobile Insurance Company et al., 2012 NBCA 75

1st Case

The plaintiffs were insured by State Farm with a homeowners' policy and auto policies on two of their many vehicles. After a fire on May 26, 2004 which destroyed one of the uninsured vehicles and a conversation with their insurance broker, the plaintiffs significantly increased the coverage on their homeowner's policy. Three days later, on May 29, 2004, the plaintiffs' home and both insured vehicles were destroyed by fires. The circumstances surrounding the fires contained many suspicious aspects, one of which was that none of the uninsured vehicles was damaged. The insurer therefore denied coverage, alleging the fires had been deliberately set by the plaintiffs.

The plaintiffs commenced legal action. At trial, the judge dismissed the action with costs, citing strong evidence that one plaintiff had set the fires with the knowledge and approval of the other plaintiff.

The test for arson referred to by the trial judge consisted of three essential elements he deemed necessary to be established in a civil arson case. These were first, that the fires were of an incendiary origin; second, that the plaintiffs had an opportunity to set them; and third, the plaintiffs had sufficient motive to set them or cause someone else to set them.

The plaintiffs appealed the decision on grounds that the trial judge erred in finding the insurer met the burden of proof for arson, in the absence of motive by the plaintiffs to deliberately set the fires.

In deciding the appeal, the Court of Appeal rejected the "essential elements" test used by the trial judge in favour of what it described as a more "holistic" approach. Its unanimous decision stated, "...the standard of proof in civil arson cases does not require that the insurer establish each of the three elements, namely incendiary origin, opportunity, and motive on a balance of probabilities. Instead, the proper test is to assess all of the evidence, and then make the determination as to whether it has been established on a balance of probabilities that the insured set the fire or caused the fire to be set." The Court of Appeal went so far as to note, "[i]f, on the whole of the evidence, a court is satisfied on a balance of probabilities that the insured set the fire, there is no need to establish motive."

With respect to the trial judge's decision, the Court of Appeal decided the finding of motive was tenuous and failed to meet the balance of probabilities standard. However, this was not fatal to the trial judge's overall disposition of the case, since the "essential elements" was not the appropriate test for arson. The Court found that the trial judge had in effect applied the "holistic" test when reaching his decision; he looked at all of the evidence, and determined on a balance of probabilities that the plaintiffs had set the fires.

In the result, the appeal was dismissed.

Kinnear v. Canadian Recreation Excellence (Vernon) Corp., 2012 BCCA 291

2nd Case

A hockey club, the Vernon Vipers, used as its home a recreational facility called the Vernon Multiplex.

The Multiplex was owned by a corporation, Regional District of North Okanagan ("NORD"), and managed by another corporation, Canadian Recreation Excellence (Vernon) Corp. ("CRE").

The Vipers had a comprehensive liability policy of insurance which included an endorsement naming NORD and CRE as additional insureds, but "only in respect of liability arising out of the Named Insured's operations" per the wording of the endorsement.

The plaintiff, Kinnear, fell and was injured as he was leaving a Vipers hockey game at the Multiplex on September 15, 2006. He sued NORD and CRE for damages. NORD and CRE then brought third party proceedings against the Vipers and their insurer, claiming that as additional insureds, they were entitled to a defence and to contribution and indemnity for any amounts found owing to the plaintiff.

The Vipers and the insurer applied for a declaration that they were under no obligation to defend or indemnify NORD and CRE. The application was allowed, and the third party claims against the Vipers and the insurer were dismissed. The applications judge held that she could not conclude the liability in the case arose out of the operations of the Vipers. NORD and CRE appealed.

The position of NORD and CRE was that the phrase "arising out of" was meant to be interpreted using a "but for" test. Their argument was that the plaintiff would not have attended at the Multiplex, or fallen and been injured, but for the Vipers hockey game on the date in question; and therefore, the liability arose from the Vipers' operations. The Vipers and the insurer argued that NORD's and CRE's alleged negligence was completely divorced from the Vipers' use of the Multiplex, and that the third party pleadings filed by NORD and CRE demonstrated no causal connection between the alleged negligence and the Vipers' operations. Further, the Vipers and the insurer maintained that a simple "but for" analysis was insufficient as a means of interpreting the words "arising out of."

The British Columbia Court of Appeal decided that the insurer's interpretation of the policy wording was the correct one. It found that the phrase "arising out of" required an unbroken chain of causation, rather than a simple "but for" test which would allow a looser causal connection. Merely incidental or fortuitous connections were not enough to satisfy the closer causation requirement mandated by the language of the policy endorsement.

Applying its interpretation to the facts of the case, the Court of Appeal found the link between the Vipers' operations and NORD and CRE's liability was too tenuous to meet the standard of liability "arising out of" the Vipers' operations. The most the pleadings alleged was that the Vipers' operations caused the plaintiff to be in a place where, for unrelated reasons, he became injured. This, the Court wrote, might have been enough to meet a simple "but for" test, but it could not satisfy the more rigorous causal requirement. The Court concluded that the applications judge did not err in her interpretation of the policy, and dismissed the appeal.

Gildart v. Minhas, 2012 NBQB 300

3rd Case

The plaintiff was involved in a motor vehicle accident on June 14, 2009. She retained a lawyer that same month to advance a claim against the defendant. However, her lawyer did not commence legal proceedings against the defendant until July 26, 2011, over two years after the accident occurred. In his statement of defence, the defendant pled and relied on the 2-year limitation period to bring claims arising from motor vehicle accidents.

The plaintiff brought a motion to have the limitation-period paragraph struck from the defendant's pleadings, citing section 22 of the 2009 New Brunswick Limitation of Actions Act. This section provides that if a limitation period has expired, but a defendant or agent's actions or assurances before its expiry cause a claimant to reasonably believe that the claim will be resolved by agreement and therefore to delay bringing the claim, the claimant may have a further 6 months from the day on which he or she first knows or ought reasonably to know that his or her belief was unfounded to bring the claim.

At issue in the motion was whether the plaintiff had established on a balance of probabilities that the actions or assurances of the defendant or his agents caused the plaintiff reasonably to believe that the claim would be resolved by agreement, and therefore to delay bringing the claim, thereby triggering the limitation exception under section 22. The majority of the facts were not in dispute; the motion turned on the interpretation to be given to them and the inferences to be drawn from them.

The judge found that the plaintiff's solicitor first wrote to an adjuster retained by the defendant's insurer on July 9, 2009, to advise that he represented the plaintiff. Between that date and the date of commencing the action, several letters and emails were exchanged between the plaintiff's solicitor and various representatives of the defendant's insurer. Many of the pieces of correspondence from a claims examiner representing the insurer contained a written disclaimer, which said that nothing therein was to be construed as a waiver or extension of any applicable notice, claim or limitation.

On March 9, 2010, a representative of the defendant's insurer made a "without prejudice" offer to settle the plaintiff's claim for $2,500 in general damages. The offer was not accepted and on January 28, 2011, the plaintiff's solicitor sent a "without prejudice" assessment/settlement offer of just over $82,000, plus additional claims for disbursements and interest. On March 22, 2011, the file was transferred to a second claims examiner with the insurer, who wrote to the plaintiff's solicitor advising she could not respond to the proposal of January 28, 2011 without further information. On July 7, 2011, the claims examiner wrote to the plaintiff's solicitor again and requested a copy of the Notice of Action with Statement of Claim Attached.

The plaintiff's solicitor asserted in an affidavit that the second claims examiner's actions on behalf of the defendant's insurer caused him to reasonably believe that the claim would be resolved by agreement without having to commence an action.

The motions judge was not satisfied that prior to July 7, 2011, the plaintiff's solicitor believed the claim would be resolved by agreement, or that if he did have such belief it that it was a reasonable belief. This was because, first, the disparity between the settlement offers was clearly not indicative of even a likely resolution of the claim and could not be construed as an assurance that the claim would be resolved by agreement. Second, the evidence indicated all communication between the plaintiff's solicitor and the insurer's representatives was by way of written correspondence, and a review of this correspondence disclosed nothing that could be interpreted as an assurance on the part of either side that the parties would resolve the claim by agreement. Third, the motions judge found the plaintiff's solicitor's own evidence did not support his assertion that the insurer's representatives assured him or the plaintiff that the claim would be resolved by agreement.

The motions judge also observed that the plaintiff presented no evidence to establish the second requirement under section 22 of the Act, namely that the delay in bringing the claim was due to the claimant's belief that the claim would be resolved by agreement.

The plaintiff's motion to strike the limitation paragraph from the defendant's pleading was denied.

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