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

The first case this month is a Supreme Court of Nova Scotia decision concerning whether a woman's automobile insurance policy covers her for damages to her vehicle that were incurred when her husband stole and crashed it.

### 2nd Case

In our second case, the Ontario Court of Appeal addressed whether or not a young child is covered by her mother's automobile insurance for injuries she suffered while riding in her father's uninsured vehicle. Although this case takes place in Ontario, New Brunswick's Insurance Act suffers the same ambiguity of language that caused the dispute.

### 3rd Case

Our last case is an appeal which overturned a decision we reported in our newsletter of September 2012. The case deals with the wording of the accidental death benefits clause in a life insurance policy.


Foster & Company has been distinguished by A.M. Best Company as 2013 Recommended Insurance Attorneys.

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## ANNOUNCEMENT

In light of the amendments to the Minor Injury Regulation - Insurance Act 2013-37, The New Brunswick Insurance Board will hold a generic hearing to consider the expected impact on automobile insurance loss costs in New Brunswick. Please find further details in the attached document.

## Wawanesa Insurance v. Laybolt, 2013 NSSC 230.

1st Case

Morgan Laybolt was the owner of a 2011 Honda Civic. In May of 2012 Morgan's husband drove the vehicle without her permission or consent. Morgan's husband did not have a driver's licence. En route to his destination, he lost control of the car and crashed. The accident destroyed the car.

Morgan charged her husband with theft. She made a claim to her insurer Wawanesa for the replacement cost of the vehicle under the 'collision or upset' provisions in the policy. Wawanesa refused to pay the claim.

The parties argued the matter in small claims court. Morgan argued that the car was covered under Section C, Subsection 2 of the policy:

> Section C - Loss of Or Damage to Insured Automobile
>
> Subsection 2 - Collision or Upset
>
> The Insurer agrees to indemnify the insured against direct and accidental loss of or damage to the automobile, including its equipment caused by collision with another object or by upset.

Wawanesa argued that Section C, Subsection 3(3) and Section 6(2) applied:

> Subsection 3 - Comprehensive
>
> (3) Loss or damage caused by missiles, falling or flying objects, fire, theft, explosion, earthquake, windstorm, hail, rising water, malicious mischief, riot or civil commotion shall be deemed loss or damage caused by perils for which insurance is provided under this subsection 3...
>
> Section 6 - Exclusions...
>
> The insurer shall not be liable...
>
> (2) under subsections 3 (Comprehensive) and 4 (Specified Perils) only, for loss or damage caused by theft by any person or persons residing in the same dwelling premises as the insured, or by any employee of the insured engaged in the operation, maintenance or repair of the automobile whether the theft occurs during the hours of such service or employment or not.

The adjudicator allowed Morgan's claim for coverage. He stated that there was ambiguity in the policy, but the contra proferentum rule dictated that he interpret the ambiguity in favour of the iinsured and not the insurer.

Wawanesa appealed to the Supreme Court of Nova Scotia. Wawanesa argued that coverage of Morgan's vehicle was excluded because the cause of the accident was the theft of the motor vehicle by a person in the same dwelling premises. The Court dismissed the appeal. The Court stated that reference to the contra proferentum rule was unnecessary for determining the case. Morgan's car was damaged by collision or upset as per Subsection 2, and the exclusion under Section 6(2) does not apply to Subsection 2.

## Jubenville v. Jubenville, 2013 ONCA 302.

2nd Case

Kelly and Kevin Jubenville were married in 1987 and had a daughter Ashley in 1988.

The family had three vehicles: a Pontiac Fiero, a Dodge Shadow and a Mercury Cougar. Kelly purchased an automobile insurance policy with Economical Mutual Insurance Company in which she was the named insured. The policy included coverage for the Fiero and the Shadow, but not the Cougar. The Cougar was owned and registered in Kevin's name, but there was no insurance policy covering it.
In 1993 Kevin and Ashley were involved in a car accident while driving in the Cougar. Ashley was injured. In 2011 she launched an action against Economical claiming that Kelly's automobile insurance policy entitled her to benefits. The policy covers Kelly's dependant relatives in respect of claims for bodily injuries that were suffered while traveling in an uninsured vehicle. However, the policy specifically excludes coverage where the uninsured automobile is owned by or registered in the name of "the insured or his or her spouse".

In order for the Court to determine if the policy covered Ashley for the injuries she suffered in the accident, it had to interpret the term "the insured". Economical argued that "the insured" referred to Kelly. Interpreting the provision this way, Ashley did not qualify for coverage because the uninsured vehicle was owned by Kevin, Kelly's spouse. Ashley argued that "the insured" referred to the person making the claim (herself). On this reading, Ashley qualified for coverage because she didn't own the uninsured vehicle (nor did she have a spouse).

Section 224(1) of the Insurance Act states:

"Insured" means a person insured by a contract whether named or not and includes every person who is entitled to no-fault benefits under the contract whether or not described therein as an insured person.

Both Ashley and Kelly fit that definition.

The Ontario Superior Court of Justice ruled for Ashley. It stated that there is a fundamental principle for interpreting insurance contracts which dictates that we must interpret provisions broadly and exclusions narrowly, so that ambiguities are resolved in favour of the insured not the insurer. When the Court applies this principle, Ashley, not Kelly, is "the insured" in the relevant provision.

Economical appealed the decision. The Court of Appeal for Ontario dismissed the appeal. It concurred with the trial court's reasoning, and added that excluding an individual like Ashley from coverage is unjust. Ashley, at five years old, had no control over the scope of her parents' insurance coverage.

## McLean v. Canadian Premier Life Insurance, 2013 BCCA 264.

3rd Case

In this case, the plaintiff's husband was killed in a plane crash. Subsequently, the plaintiff made a claim as beneficiary of a life insurance policy issued by the defendant for an accidental death benefit of $1,000,000. The accidental death benefit rider in the policy provided coverage if a covered person suffered a loss while riding in a "common carrier."

The policy defined "common carrier" as

...a public conveyance which is
1. Licensed to transport passengers for hire; and
2. Provided and operated (a) for regular passenger service by land, water or air, and (b) on a regular passenger route with a definite regular schedule of departures and arrivals between established and recognized points of departure and arrival; and
3. Provided and operated under a Common Carrier license at the time of the Loss.

The trial judge found that "the words of the contract are clear and unambiguous" and held that the loss did not come within the policy terms. Specifically, holding that at the time of the loss the deceased insured was not a passenger of a "common carrier" as defined in the policy.

In a unanimous decision authored by Madam Justice Neilson, the British Columbia Court of Appeal allowed the appeal and held that the insured was entitled to the $1 million benefit provided by the policy.

In the Appeal decision, Justice Neilson reviewed the principles of contractual construction, noting that "an implied term should not be added to the contract unless it 'goes without saying' or is necessary to provide business efficacy. Nor should the court imply terms that render the express words of the contract meaningless, or contradict them. The onus to establish an implied term rests on the party seeking to rely on it.

It was held that, upon examination of each element within the definition of "common carrier", the temporal requirement contained in one of the elements did not apply to them all. There was an absence of any temporal requirement within the requirement that the aircraft be operating on a regular passenger route at the time of loss. This led to ambiguity as to whether an aircraft must actually be flying on a regular passenger route at the time of loss to meet the definition of Common Carrier, or whether it was sufficient that it was licensed to fly on passenger routes.

This ambiguity was resolved as against the drafter of the policy - the insurer- and in favour of the appellant to find coverage for the loss. It was noted that the insurer could have created a clear temporal requirement for each of the defined elements of "Common Carrier" or created a clear exclusion for charter flights. Since it did not do so, it was held that the defendant must bear the consequences of the ambiguity in its policy.

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.