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Recent Caselaw

**1st Case**

Our first case this month is an appeal of a decision which was reported in our July 2012 Newsletter, considering the test for determining whether injuries arise out of the use or operation of a motor vehicle.

**2nd Case**

This month's second case addresses the issue of privilege over RCMP documents gathered in an appeal of a decision reported in our January 2012 Newsletter.

**3rd Case**

The third case for this month's newsletter deals with disclosure and production of documents pursuant to the discovery provisions of the New Brunswick Rules of Court.



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**ANNOUNCEMENT**

Foster & Company is pleased to announce that Michael J. Bray, Q.C. has joined our firm as counsel.

Originally from Brighton, England, and fluently bilingual, Michael completed his Bachelor of General Studies - Geography & Anthropology at Simon Fraser University. He received his Bachelor of Laws degree from Université de Moncton, was called to the New Brunswick Bar in 1987 and was appointed Queen's Counsel in 2003.



Michael J. Bray, Q.C.

Michael spent several years in private practice before joining the Department of Justice at the Province of New Brunswick in 1989 as Executive Assistant to the Chief Justice of the Court of Queen's Bench. He has held positions of increasing responsibility with the Department of Justice, most recently as the Registrar of the Court of Appeal and the Court of Queen's Bench which included being Registrar of Bankruptcy. As Registrar of Bankruptcy he has conducted court hearings during the last thirteen years and many of his decisions are published in law journals and databases.

Michael has been a panel member, consultant, and advisor with associations such as the National Judicial Institute, the Canadian Judicial Council the International Association of Women Judges, CAIRP and Industry Canada. He has conducted CLE sessions for both Bench and Bar, taught the Bar Admission Course in Bankruptcy, and has authored and co-authored several articles for academic journals. His article "To Whom the Swords, For Whom the Shields - the Feminization of Poverty in Canadian Insolvency Practice" is mentioned by the Supreme Court of Canada in *Schreyer v. Schreyer*.

He is a member of the Law Society of New Brunswick, the Canadian Bar Association and INSOL International.

Michael is a knowledgeable addition to our litigation group. His knowledge and expertise in commercial matters will enhance our ability to provide unsurpassed value to our clients.

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**Martin v 2064324 Ontario Inc. (Freeze Night Club), 2013 ONCA 19**

1st Case

The plaintiff was assaulted and injured by two unknown assailants in a public parking lot while placing some of his belongings into the trunk of his vehicle. The assailants first forced the plaintiff into the trunk, then into the front seat of the vehicle. They then drove to another parking lot and the assault continued. The assailants drove the vehicle over the plaintiff's right foot before finally driving away with the vehicle.

The plaintiff commenced an action against several parties, including a claim against his motor vehicle insurer for unidentified motorist coverage, and for statutory accident benefits. The insurer applied for summary judgment requesting dismissal of the plaintiff's action against it.

The motions judge determined that the plaintiff was entitled to statutory accident benefits as he was injured as a result of an "accident" within the meaning of Ontario's Insurance Act, and his injuries arose directly or indirectly from the use [or] operation of his automobile as contemplated by the relevant section of that Act. For details of the motions judge's decision, 2011 ONSC 7145, please see our July 2012 Newsletter.

On appeal, the central issue was whether the plaintiff had met the "causation" branch of the test used by the Court to determine eligibility for Statutory Accident Benefits. This portion of the test asks whether the plaintiff's injuries were the result of an intervening act or acts, which were not part of the 'ordinary course of things' or a 'normal incident of the risk created by the use or operation of the car'. If so, then the use or operation of the plaintiff's vehicle could not be said to be 'a direct cause' of his injuries within the meaning of the Insurance Act, supra.

The Court of Appeal found that the motions judge had erred in his causation analysis because it was the actions of the assailants, and not the use or operation of his vehicle, that directly caused the plaintiff's injuries, other than the possible exception of the injury to the plaintiff's foot when it was run over by the vehicle. The Court held that a trial was required to decide whether the injuries sustained to the plaintiff's foot when it was run over by the vehicle was an "accident".

The Court of Appeal dismissed the plaintiff's action against his insurer, except for the claims concerning the alleged injury to his right foot.

**Bennett v State Farm Fire and Casualty Company, 2013 NBCA 4**

2nd Case

The plaintiff's home was destroyed by a suspicious fire in June 2008. The RCMP launched an investigation after the fire, but no criminal charges were laid. The plaintiff's insurer denied coverage on the grounds that the home had been vacant for more than 30 consecutive days. The plaintiff then commenced an action against the insurer for recovery under the policy.

In her Affidavit of Documents, the plaintiff claimed privilege over several documents her solicitor had obtained from the RCMP. The insurer filed a motion challenging the plaintiff's claim of privilege.

The motions judge rejected the plaintiff's argument that the documents were privileged as having been gathered "in the course of litigation", finding that they were "simply obtained to prepare for the litigation". The motions judge noted that by putting the vacancy of her home in issue in the pleadings, the onus was on the plaintiff to establish that the documents were not relevant to the litigation. She found that the insurer had provided evidence that the documents were "both necessary and relevant to the issue of the vacancy of the premises".

The motions judge also rejected that plaintiff's argument that the documents were subject to statutory privilege, holding that there was "no evidence of common interest between [the plaintiff] and the RCMP" which could extend the statutory privilege under the Privacy Act to the benefit of the plaintiff. Finally, the motions judge also rejected the plaintiff's argument that the documents were subject to public interest immunity, finding that "public interest immunity does not extend to the plaintiff, only to a government agency".

The motions judge allowed the motion and ordered the plaintiff to produce the documents in question. The plaintiff appealed.

The Court of Appeal upheld the motions judge's decision, finding that "no valid claim of privilege or immunity [had] been shown to apply to the documents once the RCMP subjected them to the statutory screening mechanism and unconditionally released them". The Court of Appeal noted that "the simple fact that [the plaintiff's] solicitor gathered the documents himself did not cloak them in privilege any more than it would to medical records or Section B statements a solicitor might obtain in pursuing a personal injury claim".

The Court echoed Chief Justice Drapeau's words in *MacKenzie v. Davis*, 2008 NBCA 85, wherein he repeated Justice Ryan's statement that "the public interest is best served by confining the scope of litigation privilege", and added that "this is so because the privilege is an impediment to the truth finding process" and that "the search for the truth is at the heart of the quest for justice according to law".

The appeal was dismissed.

**Clark v. Collicott, 2013 NBQB 53**

3rd Case

The plaintiff was involved in two motor vehicle accidents, the first in 2005 and the second in 2008.

The defendants from both accidents brought motions requesting production of certain documents, including the plaintiff's CPP file, mental health clinic records, Section B file, RCMP file and two reports from a neuropsychologist.

CPP Documents

The plaintiff did not dispute the relevance of the CPP documents, which were listed in Schedule D of his Affidavit of Documents as documents which related to a matter in issue, which he believed to be in the possession or control of a person not a party to the action. However, the plaintiff maintained that various provisions of the federal Privacy Act limited the plaintiff's access to the CPP documents. He further argued that the CPP documents were privileged pursuant to the provisions of the Privacy Act as well as the Canada Pension Plan Act.

The plaintiff argued that section 8 of the Privacy Act prevents the government from disclosing personal information without the consent of the individual to whom that information related, and while section 12(1) creates a right of access to the individual, that right is qualified and restricted by section 26, which gives the government discretion to refuse disclosure of the documents. Therefore, the plaintiff only has a qualified right to documents, as opposed to an enforceable right.

The Court disagreed with the plaintiff's reasoning, finding that the plaintiff has an enforceable statutory right to the CPP documents, on the basis that "the government has no authority to refuse personal information requested it". The Court ultimately found that the CPP documents were in the "possession or control of the plaintiff" and ought to be produced.

The Court also dismissed the plaintiff's arguments that sections 104.01(1) and 104.08 of the Canada Pension Plan Act create a statutory privilege over the CPP documents, stating that "while personal information gathered by HRSDC may be privileged vis-à-vis third parties, no such statutory privilege extends to the individual to whom the personal information relates".

Mental Health Clinic Records

The Court found that the plaintiff's mental state, both before and after the accident, was relevant as he had claimed damages for cognitive and emotional deficits in his Statement of Claim. The Court determined that the mental health clinic records were "in the possession or control" of the plaintiff as he had an enforceable right to the documents. The plaintiff was ordered to produce the mental health clinic records for inspection to the defendant.

Section B File

One of the defendants requested an order that the plaintiff produce for inspection a copy of all medical records contained in his insurer's Section B file, which are in his possession or control, or alternatively that he produce for inspection a complete list of the medical reports in his insurer's Section B file. The Court found that it did not have jurisdiction to order the plaintiff to produce a list of the medical records contained in his insurer's Section B file, citing the Court of Appeal decision in *Reilly v. Paul* (2006), 305 N.B.R. (2d) 146, wherein Chief Justice Drapeau found that the Court lacks jurisdiction to make an order requiring a party to request documentation from a stranger to the action.

The Court found that there was no controversy with respect to the relevance of the Section B file as the plaintiff had certain documents from his insurer's Section B file listed in Schedule "B" of his Affidavit of Documents as being relevant to the action. The plaintiff contended that the documents were listed in Schedule "B" as they were prepared for the dominant purpose of litigation and were therefore cloaked in litigation privilege. The Court found that "while the documents may have been collected and even communicated through the plaintiff's counsel, the record is clear that the documents were produced for the purpose of enabling the plaintiff to receive Section B benefits". The Court also rejected the plaintiff's argument that the Section B file was subject to "common interest privilege", and ultimately ordered that the documents from the Section B file, listed in his Affidavit of Documents be produced for inspection.

RCMP File

One of the defendants sought production of the RCMP file records pertaining to the accident in 2005, which were described in Schedule "B" of the plaintiff's Affidavit of Documents. The Court ordered production of the RCMP documents, citing the Court of Appeal's decision in *Bennett v. State Farm Fire and Casualty Company*, 2013 NBCA 4 (see this month's second case for details).

Neuropsychologist's Reports

One of the defendants also sought production and inspection of two neuropsychologist's reports. The plaintiff privileged production of the reports on the basis that they were protected by litigation privilege. The plaintiff's solicitor had specifically requested that the neuropsychological reports be addressed to him for transmission to the Section B insurer, although the neuropsychologist had been retained by the Section B insurer in connection with the rehabilitation of the plaintiff. The Court found that the plaintiff failed to set out a sufficient factual foundation for privilege over the documents. The plaintiff's Affidavit of Documents did little more than track the language of the "boiler plate" claim for litigation privilege, and the plaintiff had not filed affidavit evidence in response to the defendants' Motions. In the end, the plaintiff was ordered to produce the neuropsychologist's reports for inspection to the defendant.

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.