CANADIAN BAR ASSOCIATION: PERSONAL INJURY

10 MOST IMPORTANT DECISIONS: FROM *CLEMENTS* FORWARD…

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Latest on the "Drop Dead" Rule

Chevrier v. Ince et al, [unreported] Decision rendered April 15, 2015; Action No.: 0801-09976; E-File No.: CVQ15CHEVRIERR [Master A.R. Robertson, Q.C.]

This application to dismiss for long delay arose in the context of a personal injury claim stemming from a motor vehicle accident. The specific issue before the Court related to whether settlement discussions occurring approximately 18 months prior had significantly advanced the action, thereby warranting dismissal of the Defendants' application. Further, if determined that settlement discussions did not significantly advance the action, whether setting a questioning date after the expiry of the three year period amounted to proceedings in which the Defendants had participated for a purpose and to the extent that warrants continuation of the action, thereby qualifying as an exception to the drop dead rule, pursuant to rule 4.33(1)(d).

In this case, the last clear significant advancement of the action was on December 7, 2010. In May 2013, there was correspondence exchanged between the parties, including a settlement proposal put forth by Plaintiff counsel on a without prejudice basis. While there were communications back and forth with respect to settlement, there was no substantive response to the proposal until June 2013 when Defence counsel indicated that the Defendants would not be making a further settlement proposal at that time and suggested that if matters were to proceed, she would require further questioning of the Plaintiff on undertakings.

Following this exchange, nothing occurred until March 2014 when the Plaintiff's legal assistant contacted Defence Counsel's assistant to set a date for further questioning. A date was found by the two assistants and confirmed in a letter sent by Plaintiff Counsel's assistant, which letter was not responded to by Defence Counsel.

In May 2014, Plaintiff's Counsel provided further documents to Defence Counsel. No Questioning took place and the Defendant's Application was filed May 29, 2014.

In first determining the issue of whether the scheduling of questioning by the assistants satisfied the exception set out in rule 4.33(1)(d), the Court cited *Krieter v Alberta,* 2014 ABQB 349 and the confirmation therein that a discussion between legal assistants regarding questioning dates does not satisfy the exception set out in the rules, as there was no active participation by the

Defendant, as required. The Court also noted that the discussions regarding scheduling questioning only occurred *after* the three year delay.

In response to the Plaintiff's position that if the Defendant was unhappy with the slow pace of the claim, remedies were available to him, the Court stated that "it is the Plaintiff's claim and in the Plaintiff's interest to move the claim forward. Although an eager Defendant has tools to move a claim forward to resolution when faced with a Plaintiff who is not doing so, he need not".

Given Master Robertson's decision with respect to the exception argument, he then went on to consider whether the settlement discussions amounted to a significant advancement of the action and held that they did not. Specifically it was confirmed that "settlement discussions do not significantly advance the actions unless they narrow the issues, or resolve certain facts, or agree on quantum of damages". Here, "the May and June 2013 communications were, in the end, only settlement discussions from which nothing arose, no issues were resolved and nothing was agreed that might have streamlined the trial". Master Robertson also noted the fact that the discussions had been on a without prejudice basis, but confirmed that even if they had not been, it still would not have significantly advanced the action.

Noting the mandatory nature of rule 4.33, the Court dismissed the Plaintiff's action.

Hickaway v. Riddell Kurczaba Architecture Engineering Interior Design Ltd, 2015 ABCA 69 [Berger J.A. for the Court]

The Plaintiff, in August 2009, brought an action for wrongful dismissal. Pleadings were closed and Questioning of the Plaintiff was conducted February 23-24, 2011. Nearly three years went by before the following steps were taken:

- January 24, 2014: The Plaintiff served on the Defendant a proposed litigation plan and notice of appointment for questioning of a director/employee of the corporate Defendant;
- February 11, 2014: the Plaintiff obtained a scheduling order;
- February 18, 2014: the Plaintiff obtained an order fixing a date for questioning of the corporate Defendant's director/employee; and
- February 20, 2014: the Plaintiff delivered its answers to undertakings given at the 2011 questioning, along with a supplemental affidavit of records.

The Defendant's application for dismissal of the Plaintiff's claim for delay pursuant to Rule 4.33 was first heard by a Master and dismissed. On initial appeal to the Court of Queen's Bench, it was held that providing a response to an undertaking is usually a thing that materially advances the action, and the appeal was dismissed.

At the Court of Appeal level, the Defendant's appeal was again dismissed with the Court holding that it agreed with the Chambers Judge's decision that the Master had properly denied the Defendant's application to dismiss the action. Specifically, it was held that:

> [6] The justice in the court below properly observed that "[i]f the defendant had desired to move the action more quickly, it had the tools available…" (p. 17/19-20) He added at p. 17/30-32:
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> > "Any defendant, of course, has the opportunity under rule 4.31 to apply earlier for dismissal on the basis of delay, if it is able to show that the delay is inordinate or inexcusable and that there has been prejudice."

Here, there was no dispute that the undertaking answers provided by the Plaintiff prior to the three year mark were substantive. While this decision confirms that "providing a response to an undertaking will *usually* constitute a thing that materially advances the action", counsel should recognize that where the response to undertakings is not substantive, it may not in fact constitute a "thing". Further, even where substantive and where provided prior to the 3 year mark, an application can still be brought under rule 4.31 and may result in dismissal of the action if the delay is inexcusable and prejudice has resulted.

The Latest on the "Cap"

McLean v. Parmar, 2015 ABQB 62 [K.M. Eidsvik J.]

The Plaintiff sustained injury when her vehicle was hit by a City bus, many of which were ongoing for approximately 2 ½ years. During this period, she sought treatment through her family physician, physiotherapist, massage therapist, dentist, psychologist and prolotherapist. Approximately 3 years post-collision, the Plaintiff was involved in another motor vehicle accident and conceded that she was "recovered" from her prior injuries by that point in time. Hence, there was no claim brought for cost of future care.

Liability was admitted, such that the issues for determination by the Trial Judge revolved only around quantum of damages. With respect to the Plaintiff's claim for general damages, the Court was to determine if any part of the Plaintiff's damages were capped pursuant to the *Minor Injury Regulation*, AR 123/2004 (*MIR*).

In largely preferring the Plaintiff's witnesses over the Defence experts, the Court accepted that the Plaintiff suffered the following injuries as a result of the collision: moderate whiplash to her back, neck and hip with numbness and tingling into her right arm; mild concussion; TMJ disorder; depression; PTSD; and chronic pain (which improved over time but was not recovered from until approximately 2 ½ years post-collision).

The Court confirmed that the TMJ injury, depression, PTSD, concussion and chronic pain all fall outside of the *MIR*. The parties therefore agreed that the only injury requiring determination by the Court as to whether it is "minor" was the WAD II soft tissue injuries to the neck, back, arms and hip.

Though there was a certified examiner opinion that these injuries were "minor", the Court held that they were not, concluding that the Plaintiff had displaced the *prima facie* opinion of the examiner. Specifically, the Court noted:

> [58] In sum, I find that Ms. McLean has serious impairments to her employment opportunities in that she was unable to return to the essential tasks of her employment as a server despite her maximal recovery and she was not, and will not be able to pursue some of her usual recreational activities primarily as a result of her WAD injuries. As such her strain, sprain and WAD injuries are not "minor" ones as defined.

Eidsvik J. then goes on to note that "from a common sense point of view, the overall level of injury suffered by Ms. McLean is not what was contemplated by the Legislature to be a "minor injury"". Further, the period of time that the pain from these soft-tissue injuries lasted was well over three to six months and involved a much more rigorous treatment regime than 21 physiotherapy treatments, and therefore would be classified as "chronic pain" and not a "minor injury".

The Court awarded the Plaintiff: $60,000 in general damages (the amount claimed by the Plaintiff); $95,800 in past and future income loss from being unable to serve and the delay in her training as an accountant; $12,500 for loss of housekeeping capacity; and $3,855 in special damages.

This decision once again cements the injuries that are properly considered to fall outside of the *MIR* and confirms the distinguishment of chronic pain from a "minor injury" on the basis of any resulting vocational and avocational impairments, overall level of injury, amount of treatment required and period of time one suffers from the pain.

Despite the Defendant's suggestion that the Court assess each of the Plaintiff's injuries separately, the Court held that the proper process was first to review each injury to determine whether it is "minor" and, if none are, to assess damages for pain and suffering globally, particularly where the injuries impact one another.

Acceptability of Counsel's involvement in the drafting of Expert Reports

Moore v. Getahun, 2015 ONCA 55 [Sharpe J.A. for the Court]

This medical malpractice action arose from the Defendant physician's negligence in treating the Plaintiff's fractured wrist. At trial, the Judge preferred the evidence of the Plaintiff's expert in finding that the Defendant had breached the standard of care, thereby causing injury to the Plaintiff. Within the decision, the Trial Judge criticized Defence counsel, holding that it was improper for counsel to assist their expert in the preparation of their report. The Defendant appealed the decision, and in doing so challenged the Court's finding with respect to counsel's involvement in the preparation of the expert's report.

A number of groups were involved as interveners on appeal, all of whom challenged the Trial Judge's finding on the aforementioned issue. The Plaintiff conceded that the Trial Judge's view was erroneous, but argued the error had no impact on the outcome of the trial.

While the Court of Appeal rejected the Trial Judge's proclamation that the practice of consultation between counsel and expert witnesses to review draft reports must end, the Defendant's appeal was dismissed on the basis that this did not affect the outcome of the trial.

With respect to documentation and disclosure of communications with experts, Sharpe J.A., for the Court, stated that "[w]hile some judges have expressed concern that the impartiality of expert evidence may be tainted by discussions with counsel…banning undocumented discussions between counsel and expert witnesses or mandating disclosure of all written communications is unsupported by and contrary to existing authority".

While the Court of Appeal upheld litigation privilege as it relates to counsel's communications with their experts, the Court also cautioned that this privilege is qualified and that "the ends of justice do not permit litigation privilege to be used to shield improper conduct". Where there is a factual foundation to support a reasonable suspicion that counsel improperly influenced the expert, such that they interfered with the expert's duties of independence and objectivity, the Court can order disclosure of communications between counsel and their expert.

Counsel should be cognisant of their communications and of any potential effect they may have on the expert's independence and objectivity, as by not doing so, you could leave yourself open to an attack on your credibility and be required to disclose internal communications.

Attached as an Appendix to the Court of Appeal decision is a copy of the Advocates' Society Principles Governing Communications with Testifying Experts. This reference may be helpful to counsel to ensure that they are not blurring these ethical lines.

Advances (pursuant to s. 581 of the *Insurance Act,* RSA 2000 c I-3 and s. 5.6 of the *Fair Practices Regulation,* AR 128/2001)

Archibald v. Rella, [unreported] heard February 6, 2013; Action No: 1001-02039; E-File No.: EVQ13ARCHIBALDS [Graesser J.]

The Plaintiff was injured in a motor vehicle collision, as a result of which he required a number of surgeries and was left with chronic pain. The parties confirmed that liability was not at issue. As a result of the collision and related injuries, the Plaintiff alleged that he was unable to work, and as he had no savings at the time of the collision, he had to move in with family members at times, go on welfare and borrow funds from family members and settlement lenders.

The insurer had provided a previous voluntary advance of $25,000 and the Plaintiff had obtained settlement loans totalling over $40,000 before interest.

Providing evidence on the range of general damages, loss of income, and the Plaintiff's monthly deficit, the Plaintiff requested an advance in the form of a monthly payment of $2,200 up until settlement.

In looking at necessities of life, the Court referenced the "minimal necessities" including food, clothing, shelter, transportation and health needs, and also considered things like retraining and education where a person's abilities have been impacted by their injuries. The Court specifically recognized that:

> *In determining necessities of life, I think you have to look at the individual. The necessities of life for someone who has always had a marginal income might be different than the necessities of life for someone who has enjoyed a previously higher income. So I think what may be necessary for one may be a luxury for others or may be in a different category…*

In this case, the Court ordered that the insurer pay an advance to the Plaintiff in the amount of $2,100 per month until the earlier of the resolution of the action or the end of 2013.

In making this order, the Court considered the Plaintiff's pre-collision standard of living, current circumstances and the fact that this level of payment was not considered to create any risk for the insurer that they would be making a payment that they would not be held liable for at the end of the day.

Stewart v. Insurance Corporation of British Columbia, 2014 ABQB 578 [W.S. Schlosser, M.C.]

This was an application by the Plaintiff for an advance payment from the Defendant insurer. The Plaintiff's claim arose from a collision that occurred when he and his wife were travelling on the Coquihalla Highway and a vehicle travelling the opposite direction crossed the centre line and struck their vehicle. As a result of the injuries sustained in the collision, the Plaintiff was assessed with 16% whole person permanent impairment.

Despite his injuries, the Plaintiff continued in his employment as an oilfield consultant, but argued that his injuries effectively capped his potential for promotion and made continuing to work very difficult. The Plaintiff had a positive net worth and was able to pay for the necessities of life. Despite this, he sought a $1,000,000 advance to allow him to explore vocational options in order to mitigate future losses, relying on expert evidence of his past and future income loss. The Defendant took the position that despite having suffered severe injuries, the Plaintiff had minimal treatment and returned to work after only a brief absence, and that his claim was therefore minimal.

The Court noted that, at the time, orders for pre-judgment payment were extraordinary, and while earlier authority noted an inherent jurisdiction to do so, this was only with respect to partial summary judgment (e.g. for property damage), not to order an advance payment for general damages. Given the minimal authority on the matter, the Court looked to the sole prior

Alberta decision on this issue (*Bexson v. Williams,* 2014 CarswellAlta 1134), as well as legislation and case law from other jurisdictions. And held that:

> [19] Putting the above together, an advance payment requires:
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> 1. That the applicant be a 'claimant' as defined in section 5.6(1) of the regulation;
> 2. That liability be admitted, or;
> 3. That the applicant has demonstrated that it is *probable* that liability will be established on a balance of probabilities;
> 4. That the advance sought will be less than the total judgment;
> 5. That the applicant is unable to pay for the necessities of life, **and/or**;
> 6. The advance is otherwise appropriate.

With respect to determining whether an advance is "otherwise appropriate", the Court confirmed that the factors set out in the New Brunswick legislation (relating to an advance for special damages), as relied on in *Bexson*, are a useful starting point:

> (a) The amount of [special] damages already incurred or likely to be incurred before judgment by the plaintiff;
> (b) The amount, if any, counterclaimed by the defendant;
> (c) The extent, if any, to which the plaintiff may be found to be contributorily negligent;
> (d) Any failure by the plaintiff to mitigate the amount of [special damages]; and
> (e) The needs and resources of the plaintiff and the means of the defendant.

The Court also confirmed in its decision that there are no jurisdictional issues preventing a Master from ordering an advance.

With respect to this specific fact-scenario, the Court dismissed the Plaintiff's application on the basis that: his range of general damages had not been properly made out; the Court had reservations about his expert's income loss calculations; and the Plaintiff's "request for funds to explore vocational options does not fit *per se* into the criteria set out by other decided cases, however laudible his attempt might be", such that the advance would be considered otherwise appropriate.

Despite dismissing the Plaintiff's claim, the Court ordered that each side bear its own costs as "legal pioneers should not be punished".

Shannon v. 1610635 Alberta Inc., 2014 ABCA 393 [Cote J.A. for the Court]

The Plaintiff had significant debt and little in savings when he was injured in a rear-end motor vehicle collision. As a result of his collision-related injuries, the Plaintiff deposed that he was unable to return to his employment. The Plaintiff did own some unimproved land (in other provinces) but it was not possible to borrow against that land. The Chambers Judge ordered that an advance be paid by the Defendants, but imposed a condition that the Plaintiff's land be mortgaged to the Defendants, to secure repayment of any excess of the advance payment over and above the Plaintiff's ultimate trial award or settlement.

With the *Regulation* being new legislation with sparse judicial interpretation in Alberta, and the specified grounds for an advance being an inability to pay for the necessities of life *or* that the payment is otherwise appropriate, the issue before the Court of Appeal was what approach the courts in Alberta should take when asked to order a pre-trial payment on account of damages, under the *Insurance Act*.

The Court dismissed the Defendants' appeal and laid out the following test (at para 37):

1. An order for an advance payment requires two things:
   a. The defendant is probably liable to the plaintiff for the amount requested (or more); and
   b. Without the payment, the plaintiff is likely to go without necessities (or things broadly analogous), or unlikely to be able to prosecute his or her claim for damages.
2. If #1 is satisfied, the court should weigh approximately the plaintiff's likely loss without an advance payment against the defendant's likelihood of overpaying (looking at probabilities and money amounts in both cases).
3. The court should flexibly consider imposing terms and conditions on one of the parties, to mitigate the risk to one or both parties.

The Latest in Slip and Fall Cases

Swagar v. Loblaws Inc. (c.o.b. Real Canadian Superstore), 2014 ABQB 58 [G.A. Campbell J.]

The Plaintiff slipped on a broken egg on the floor of a Superstore, resulting in injury to his right shoulder and wrist. The Plaintiff advanced a claim against the Defendants in negligence and under s. 5 of the *Occupier's Liability* Act, RSA 2000, c O-4 (*OLA*) and the parties proceeded to trial on the issues of liability and damages.

In first considering liability under the *OLA,* the Court noted that the jurisprudence has established that an hourly sweep program meets the requisite standard of care for floor maintenance in a supermarket. While the Court confirmed that the floor maintenance system that was in place at the time of the fall met the standard of care, it held that the Defendants failed to prove that it was more likely than not that their employees followed the floor maintenance system and further held that the employees' failure to do so created the hazard resulting in the Plaintiff's fall. These latter findings were based on the evidence that the Defendant's employees failed to adequately follow either of the safety policies, leading to an inference that the Defendants may not have been rigorous in monitoring or enforcing compliance with their policies, including the floor maintenance system.

On the basis that there was no evidence that the Plaintiff failed to take reasonable care for his safety, the Court found no contributory negligence by him.

With respect to damages, the Court awarded $45,000 in general damages and $2,571.74 in special damages. No award was made for future loss of housekeeping capacity or future cost of care, on the basis that neither were medically justified.

This decision is positive for Plaintiff counsel dealing with liability in a slip and fall claim, which is virtually always in issue. While there may be some who had virtually accepted that a slip and fall claim would necessarily be met with a finding of contributory negligence, this decision confirms that is not always the case.

The Latest word on Summary Judgment

776826 Alberta Ltd. v. Ostrowercha, 2014 ABCA 49

The Plaintiff was seriously injured when struck and run over by an unknown vehicle in a parking area at the Defendant Raceway. The Defendant moved for summary dismissal of the claim on the basis that there was no genuine issue of material fact that could not be fair and justly determined by the Chambers Judge on the basis of Affidavit evidence alone. Manderscheid J. dismissed the Application, which decision was appealed by the Defendants.

The Defendant's appeal was dismissed. The Court of Appeal stated that appeals from denials of motions for summary judgment will be difficult to establish as front-line Judges are entitled to deference regarding their exercise of discretion. The Court then went on to review the meaning of "merit" within the context of an application for summary judgment:

> [10] From the substantive perspective, summary judgment can be granted if, in light of what the fair and just process reveals, there is no merit to the claim. No "merit" means that, even assuming the accuracy of the position of the non-moving party to any material and potentially decisive matters – matters which would usually require ordinary forensic testing through a trial procedure with *viva voce* evidence and which could not be resolved through the fair and just alternative – the non-moving party's position viewed in the round has no merit in law or fact.
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> [11] Stated another way, in order for the non-moving party's case to have merit, there must be a genuine issue of a potentially decisive material fact in the case which cannot be summarily found against the non-moving party or the record revealed by the "fair and just process". The mere assertion of a position by the non-moving party in a pleading or otherwise, or the mere hope of the non-moving party that something will turn up at a trial, does not suffice. The key is whether the circumstances require *viva voce* evidence in order to properly resolve the case: see *Canada v. Lameman,* 2008 SCC 14 at paras 10 to 11, [2008] 1 SCR 372.

This decision provides guidance on the proper interpretation of the Rules surrounding summary judgment. It also cements that the Appellate Court will give deference to the Chambers Judge's decision on whether summary judgment would be fair and appropriate.

Cost Awards

Canada (Attorney General) v. MacQueen, 2014 NSCA 96 [D.P.S. Farrar J.A. for the Court]

Five residents of Nova Scotia commenced a class action with respect to the contamination of their properties as a result of coke ovens and steel operations in nearby tar ponds. Contaminants included arsenic, lead, PCBs and PAHs. The Governments of Nova Scotia and Canada were named as Defendants for their role in the operation of the tar ponds and resulting contamination.

Bridgepoint Global Litigation Services Inc. provided the representative Plaintiffs with a $500,000 indemnity to help offset any order made against the representative Plaintiffs to pay the Defendants' costs.

Although the claim was initially certified by the Supreme Court of Nova Scotia as a class action, the representative Plaintiffs were not successful on appeal and their application for leave to appeal to the Supreme Court of Canada was dismissed with costs. The Nova Scotia Court of Appeal ordered the representative Plaintiffs to pay over $730,000 to the Defendants for their costs of the certification motion, the appeal and the reconsideration motion, $500,000 of which was paid by Bridgepoint through the indemnity.

Having the ability to utilize legal cost protection either through an indemnity for costs or coverage for a security for costs decision can provide both plaintiffs and their counsel a significant amount of security. In some cases, it may also be the only way in which a plaintiff can continue on with litigation where they do not have adequate personal assets to satisfy an adverse cost award or security for costs order.

In a recent case, an Ontario-resident Plaintiff (represented by Howie, Sacks & Henry in Ontario), who was injured in Alberta, managed to defeat an application seeking $180,000 as security for costs by convincing the Court that the Defendant's costs would be protected through the Plaintiff having purchased an indemnity agreement to protect himself from an adverse cost order, at his personal expense.

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