

Canadian Insurance Law Reporter

February 2020
Number 830

Quantum of Damages 3

Recent Cases

Trial Judge Erred in Finding Defect in Property Was Covered Under Title Insurance Policy 3

Injured Passenger Who Had Taken Keys from Owner Was "Operating" Vehicle, Making Owner Vicariously Liable 5

Plaintiff With Wrist Injury Awarded \$125,000 in Non-Pecuniary Damages 6

SASKATCHEWAN'S NEW YEAR'S RESOLUTION? A NEW INSURANCE ACT TO RING IN THE NEW YEAR

— Darcy Ammerman and Jordan Goodman, Articling Student, of McMillan LLP.
© McMillan LLP. Reproduced with permission.

On January 1, 2020, *The Insurance Act* ("**New Act**") and *The Insurance Regulations* ("**New Regulations**") came into force in Saskatchewan, marking the first major overhaul to Saskatchewan's insurance legislation in decades. The New Act was created to modernize the way insurance is regulated in the province and to provide enhanced protection to consumers. Order in Council 478/2019 proclaimed the first day of 2020 as the coming into force date for the majority of the New Act, with a few provisions set to be proclaimed into force at a later date. Saskatchewan's prior insurance statute, *The Saskatchewan Insurance Act*, was repealed when the New Act came into force.

Highlighted below are several important changes created by the New Act. Since Alberta and Manitoba have similar insurance legislation, these changes are also compared to their relevant counterparts from the statutes in those provinces.

New Licensing Categories

The New Act creates a licensing regime for insurance intermediaries, which now includes managing general agents ("**MGAs**") and third-party administrators ("**TPAs**"). Saskatchewan is the first province/territory in Canada requiring a license to act as an MGA or TPA. In contrast, Alberta and Manitoba's licensing regimes only require insurers and insurance agents to be licensed.

An MGA is defined in the New Act as an insurance agent that manages all or part of the business of an insurer and carries out specific activities on behalf of that insurer, including:

- soliciting, negotiating or accepting applications for insurance from licensed insurance agents;
- effecting and countersigning contracts of insurance;
- accepting risks;
- underwriting insurance contracts;
- entering into written agency agreements with licensed insurance agents;
- supervising and monitoring the activity of licensed insurance agents with whom it has entered into written agency agreements; and
- undertaking any other prescribed duties or activities.

Once licensed, MGAs have the authority to sponsor selling agents, and are obligated to perform ongoing monitoring of the persons they sponsor. Employees of an MGA that hold

a valid insurance agent's license specifying that a particular MGA is their employer can only represent that one MGA, and as such will not be issued another license to represent a different MGA, TPA, insurer or business. As well, the New Act notes that the employee's license is automatically suspended the moment they are no longer an employee. Where such an individual ceases to be an employee of the MGA, the MGA must notify the Superintendent in writing within five days that the agent is no longer an employee, and provide the reasons why.

A TPA is defined in the New Regulations as "a business that, for compensation, carries out activities to administer a contract of insurance on behalf of an insurer, other than solely clerical activities, but does not include a business that is licensed as an insurance agent or managing general agent."

Similar to MGAs, employees of a TPA that hold a valid insurance agent's license will not be issued another license to represent a different TPA, MGA, insurer or business. Likewise, the employee's license will be suspended when their employment ends, and, similar to MGAs, the TPA must notify the Superintendent.

Unfair Practices

In an effort to further protect consumers, the New Act prohibits certain conduct in the insurance market. Specifically, the New Act prohibits insurers, insurance intermediaries and adjusters from making false or misleading statements, representations or advertisements, engaging in tied selling practices, performing any unfair, misleading, deceptive, fraudulent or coercive acts or practices, and any other act or commission prohibited by regulation.

There is also a prohibition on insurance intermediaries providing gifts, payments or anything of value as a method of inducing customers to purchase insurance, except as permitted by the New Regulations.

These prohibitions on unfair practices are substantially similar to those prohibited by Alberta's *Insurance Act*. The *Insurance Act* in Manitoba contains various provisions that prohibit similar behaviours, however, because the provisions are drafted differently, there may be some variation in how they are applied.

Fair Practices

In addition to the prohibitions noted above, the New Act outlines various fair practices that were incorporated for added consumer protection, including:

- a requirement that insurers, insurance intermediaries and adjusters advise policyholders suffering a loss that they have the right to choose a service provider to make repairs;
- a 10-day right of rescission in favour of the consumer in the case of life, accident and sickness or specific travel insurance, and the corresponding right to the return of premiums paid;
- a requirement on insurers in receipt of a notice of claim to notify the claimant of the applicable limitation period; and
- a requirement that insurers advise policyholders of the options available to them in the event a dispute occurs regarding payment of a claim or loss, or the insurer denies the insured's claim.

Alberta's *Fair Practices Regulation* is substantially similar to Saskatchewan's fair practices regime, except that Alberta only requires the insurer to notify the insured of the dispute resolution process – not of the options available to them.

Manitoba's statute is fairly different in this regard, as it does not require insurers to advise policyholders of their right to choose the service provider that makes repairs under a claim, advise an insured of the applicable limitation period once a claim is made, nor advise the insured of the options available to them if a dispute occurs after a claim is made.

Self-Evaluative Audits

The New Act requires an insurer, at the request of the Superintendent of Insurance, to self-assess its practices to identify non-compliance, and promote compliance with, insurance legislation, guidelines and other professional standards. This process is to be conducted in accordance with the New Regulations, and a copy of the audit must be provided to the Superintendent.

Documents produced during the self-evaluative audit process are privileged, and any person or entity involved in the process cannot be compelled to give or produce evidence regarding the process in any civil or administrative proceeding. However, these protections do not apply in proceedings commenced against the insurer by the Superintendent.

Alberta's *Insurance Act* and *The Insurance Act* in Manitoba provide substantially similar protections to those identified in the New Act. In all three provinces, there is a positive obligation to conduct the self-evaluative audit when requested by the Superintendent, but in Alberta and Manitoba such a request can also be made by their respective Ministers of Finance.

The Financial and Consumer Affairs Authority of Saskatchewan ("FCAA") has published two documents to help insurers understand the new regime, and is in the process of creating two more. These publications can be accessed online at <https://fcaa.gov.sk.ca/regulated-businesses-persons/businesses/insurance-companies/regulations-for-licensed-insurers>.

The first FCAA publication is a guideline on where and how non-Saskatchewan insurers (extra-provincial, federal and foreign insurers) are required to keep their records. The other is an interpretation bulletin on the notice that an insurer is required to provide to an insured under section 7-25. Where a dispute arises regarding an insured's claim, an insurer is required to provide them with written notice of the dispute resolution options that are available. The interpretation bulletin clarifies that, in respect of the references to OmbudServices in section 7-25, the insurer is only required to notify the insured of the applicable OmbudService(s) of which the insurer is a member, and which applies to the type of insurance at issue.

As of January 1, 2020, the New Act and the New Regulations are in force, creating a markedly different insurance regime in Saskatchewan. It remains to be seen whether any other provinces/territories will follow Saskatchewan's lead to adopt similar licensing measures for MGAs and TPAs.

QUANTUM OF DAMAGES

Injury	Non-Pecuniary	Total	Paragraph
Anxiety disorder	\$170,000	\$2,067,000	[2020] I.L.R. ¶ M-3183
Back pain	\$100,000	\$465,989	[2020] I.L.R. ¶ M-3180
Back pain	\$100,000	\$169,289	[2020] I.L.R. ¶ M-3182
Post-traumatic stress disorder	\$180,000	\$594,372	[2020] I.L.R. ¶ M-3184
Wrist	\$125,000	\$194,111	[2020] I.L.R. ¶ M-3179

RECENT CASES

Insurance Decisions

Trial Judge Erred in Finding Defect in Property Was Covered Under Title Insurance Policy

Ontario Court of Appeal, July 12, 2019

The respondent purchased a cottage property in 1999 and obtained a title insurance policy from the appellant. The cottage had been built pursuant to the township's building permit, starting in 1989. Pre-closing, the respondent's conveyancing solicitor conducted an off-title search and learned that the last building inspection was performed in 1991 and that a notice had been sent to the then-owners in 1992 that no final inspection had been conducted. The respondent deferred to the solicitor's advice to not request a final inspection pre-closing. In 2011, during renovations, the respondent discovered violations of the building code in the cottage and was advised that the property was unsafe for habitation. The respondent learned that the 1989 building permit was incomplete and had been revoked due to the builder's failure to call for inspections in over one year.

In 2014, the respondent made a claim to the insurer, alleging that the losses arising from the defects in the cottage made his title unmarketable. The insurer denied coverage and the respondent brought an action against the insurer, seeking indemnity. The trial judge found that the structural defects flowing from the inadequacy of the building permit

process resulted in the dangerous condition of the property that made the title unmarketable, and the claim was therefore covered under the policy (see [2018] I.L.R. ¶ I-6071 (Ont. Sup. Ct.). The insurer appealed.

The appeal was allowed. The Court found that the trial judge erred in her application of *MacDonald v. Chicago Title Insurance Co. of Canada*, [2016] I.L.R. ¶ I-5826 (Ont. CA) ("*MacDonald*") where indemnity under a title insurance policy was ordered. The Court distinguished *MacDonald*, in which there was no reason for the purchasers or their conveyancing solicitor to know that construction was undertaken without a permit. In the instant case, the respondent was on notice at the time of purchase of a potential problem with the building permit process and the lack of evidence of a final inspection. Further, in *MacDonald*, the evidence showed that had an off-title search for a building permit been conducted, the solicitor would have discovered that no building permit existed and that the construction was done illegally. This turned the matter into a title issue. In the instant case, the evidence was that, even if a final inspection had been conducted, that inspection would not have revealed the construction defects, as they were hidden behind the walls of the cottage. The defects would thus not be an issue regarding marketability of the title.

The purpose of title insurance is to protect against what off-title searches reveal, not what they do not reveal. The issue that the respondent faced was more akin to marketability of land rather than title, which title insurance does not cover. Having regard to the above, the trial judge erred in concluding that the situation here was covered by the unmarketability of title provision in the policy. Even if the coverage under the policy was available, the policy's exclusion for title risks that are actually known to the insured on the policy date would apply. The trial judgment was set aside.

Breen v. FCT Insurance Company Ltd. [2020] I.L.R. ¶ I-6180

Municipal Insurer Had Duty To Defend Township, Mayor, and Councillors in Misfeasance in Public Office Action

Ontario Superior Court of Justice, August 29, 2019

The applicants were a municipal township corporation, its mayor, and four elected municipal councillors. The respondent was the liability insurer of the township. The applicants were all insureds under the policy. The plaintiff in the underlying action was a resident of the township who alleged that the mayor demonstrated acts of animosity and harassment in public office toward him since 2014 and that these acts were endorsed by the other individual applicants. In 2017, the municipal council issued a letter of notice under the *Trespass to Property Act* based on the plaintiff's alleged assault of the mayor. Pursuant to the letter, the plaintiff was banned entry to or upon any municipal premises. The plaintiff alleged that the letter of notice was unlawful and lacking in legal authority and that it arose through malice.

In the underlying action against the defendants/applicants, the plaintiff sought damages for misfeasance in public office and breach of his section 2(b), (c), and (d) Charter rights, under *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK)*, with the township being vicariously liable for the intentional tortious conduct of the mayor and councillors. The claim sought damages relating to harm to reputation, hurt feelings, damage to self-esteem and damage to emotional well-being. The insurer advised that it was denying coverage to the individual defendants/applicants and that it did not have a duty to defend. It took the position that the misfeasance in public office claim and the Charter breach were centered in deliberate, targeted, bad faith misconduct by the township, which was akin to a claim for punitive damages and which was therefore excluded from coverage. The insurer then agreed to pay the defence costs of the township based on the vicarious liability of the individually named defendants/applicants, with the issue of indemnification to await the outcome of the trial. The applicants applied for an order finding that the insurer is required to defend all of them in the underlying action.

The application was allowed. The named defendants/applicants were all insured under the policy, which required the insurer to defend the action brought against them for damages for bodily injury, personal injury, or wrongful act attributable to an "occurrence" during the policy period. The nature of the damages alleged in the underlying action fell within the policy's definition of bodily injury and personal injury, which resulted from the plaintiff's alleged exposure to unsavory conditions, with the defendants' "occurrence" being the issuance of the letter of notice as part of their alleged misfeasance in public office. The policy defined "loss" as claims arising from "an isolated repeated or continuing incidence of abuse committed by one or more persons." There were no exclusions in the policy that operated to exempt the claim.

The Court noted that the successful defence of the township will be predicated on a successful defence of the mayor and councillors, and their alleged wrongful acts are intertwined with their relationship to the township. Accordingly, the

defence of the individual defendants/applicants was conjoined with that of the township to the point that it was indistinguishable for defence purposes. The Court ordered that the insurer was required to defend all of the plaintiff's claims against all of the applicants.

Township of St. Joseph v. Lloyd's, [2020] I.L.R. ¶1-6185

Injured Passenger Who Had Taken Keys from Owner Was "Operating" Vehicle, Making Owner Vicariously Liable

Supreme Court of British Columbia, August 28, 2019

In August 2013, the plaintiff was injured as a passenger in a motor vehicle accident while in a vehicle being driven by his cousin, the defendant Mr. Bowe. The plaintiff and Mr. Bowe were 15 years old at the time of the accident and neither had a driver's licence. The vehicle was owned by the plaintiff's stepfather, the defendant Mr. Boltz. At the time of the accident, the plaintiff lived with his mother and step-father. The plaintiff had taken the car keys without permission and contacted his cousin, and the boys drove around for several hours before being involved in an accident. Mr. Bowe's evidence was that the plaintiff initially tried to start the vehicle but did not know how, and Mr. Bowe took over.

The plaintiff brought an application seeking to find Mr. Boltz vicariously liable for Mr. Bowe's negligence, pursuant to section 86(1)(a) of the *Motor Vehicle Act* (the "MVA"). Under section 86(1)(a), an owner of a vehicle may be vicariously liable for injuries caused by another person "driving or operating" the vehicle if the two live together as a family. The parties agreed that the plaintiff was living with Mr. Boltz as a "family member" at the time of the accident and Mr. Bowe was not. The defendants argued that, as the plaintiff was not the driver at the time of the accident, section 86(1)(a) was not engaged.

The application was allowed. The Court considered whether section 86(1)(a) is engaged in a situation where Mr. Bowe was driving and the plaintiff was a passenger in Mr. Boltz's vehicle. Section 86(1)(a) expressly extends to individuals who "drive or operate" a motor vehicle owned by a family member. Due to the use of "or," the provision is not limited to individuals who "drive." Part 1 of the MVA does not define "drive" or "operate." The ordinary definition of "operate" is: to "function or control the functioning of." Having considered the definitions in other parts of the MVA, *The Motor Vehicle Act Regulations*, the *Insurance (Vehicle) Act*, and the *Insurance (Vehicle) Regulation*, the Court concluded that in the MVA, the provisions that contain "drive or operate" are prohibitive, restrictive, or mandatory provisions and the provisions that contain "drive and operate" often refer to a person's fitness and ability to "drive and operate" a vehicle. The Court found that "operate" does not hold the same meaning as "drive" in the context of "drive or operate" and "drive and operate."

Having regard to the case law, the Court found that possession and use of the keys to a vehicle meets the definition of "operating," as the keys convey possession and "the required degree of exclusivity of control" over the vehicle. This result was consistent with the definition of "operate" derived from the legislation. The Court found that when the plaintiff obtained the car keys, and initially sat in the driver's seat holding the keys, the vehicle was in his "care, custody or control." The Court did not find that this changed when the keys were handed over to Mr. Bowe, as the plaintiff still had "care and custody" and it was open to him to ask that the car be returned to his house.

The Court further considered the intended remedial purpose of section 86(1), which was the protection "of innocent third parties seeking compensation for injuries suffered at the hands of negligent automobile drivers and, vicariously, owners." Having regard to the above, the Court concluded that the plaintiff was "operating" the vehicle and, pursuant to section 86(1)(a), Mr. Boltz was vicariously liable for the accident.

Bowe v. Bowe, [2020] I.L.R. ¶1-6187

Judge Erred in Finding Employee Who Rented Truck for Boss Was "Lessee" Under Insurance Act

Ontario Court of Appeal, September 10, 2019

In October 2010, Mr. Mahamood rear-ended Mr. Liu's vehicle while in the course of delivering furniture for his employer, Fine Furnishings, in a rental truck. Mr. Mahamood did not own a vehicle or a credit card. He paid for the rental truck with his boss's credit card and was not permitted to use the truck for any purposes other than the employer's furniture

deliveries. The employer had a business account with the car rental company. The rental agreement listed only Mr. Mahamood, his home address, and his employer's phone number as his contact number. Mr. Liu brought an action against Mr. Mahamood, his employer, and the car lessor, claiming damages of \$3 million. The appellant Aviva Insurance Company ("Aviva") was the car lessor's insurer. The respondent Wawanesa Mutual Insurance Company ("Wawanesa") was Mr. Mahamood's employer's insurer. On an application to determine the insurers' priority dispute, the application judge found that Mr. Mahamood was the "lessee," as defined in section 277(1.1) of the *Insurance Act*, which established Aviva as the priority insurer under section 277 ([2019] I.L.R. ¶ I-6099 (Ont. Sup. Ct.)). The application judge had found that there was nothing in the rental agreement that signalled that Fine Furnishings was involved, other than its phone number. Aviva appealed.

The appeal was allowed. The Court found that the application judge erred in determining the identity of the lessee by restricting himself to the face of the two-page rental agreement. The application judge failed to consider whether Mr. Mahamood was acting as an authorized representative or agent of Fine Furnishings when he signed the rental agreement. Following *Insurance Corp. of British Columbia v. Lloyds Underwriters*, [2017] I.L.R. ¶ I-5949 (Ont. Sup. Ct) and *Intact Insurance Co. of Canada v. American Home Assurance Co. of Canada*, [2013] I.L.R. ¶ I-5426 (Ont. Sup. Ct.), the determination of the identity of the "lessee" for section 277(1.1) may require courts to apply agency principles where a contract, on its face, and the surrounding circumstances, show that the signatory was signing on behalf of another party.

The Court found that Mr. Mahamood's boss had implicitly authorized him to be his agent by telling him that he could rent a vehicle from the lessor and have that vehicle be billed to Fine Furnishings's credit card. The lessor was aware of this grant of authority. Mr. Mahamood entered into the rental agreement pursuant to a long-standing arrangement between Fine Furnishings and the lessor. The Court declared that Fine Furnishings was the lessee. As the Court was not provided with the Wawanesa policy and there was a dispute as to the extent of coverage, the Court could not declare that Wawanesa was the priority insurer.

Aviva Insurance v. Wawanesa Mutual Insurance, [2020] I.L.R. ¶ I-6188

Other Insurance Decisions

Appeal Allowed Where Judge Gave Insufficient Reasons for Finding Lack of Indemnity — *McKay v. Park*, [2020] I.L.R. ¶ I-6181, Ontario Court of Appeal (August 19, 2019)

Unsuccessful Appeal Seeking Title Insurance Coverage for Home Defects Did Not Warrant "No Costs" Award — *Steer v. Chicago Title Insurance*, [2020] I.L.R. ¶ I-6182, Court of Queen's Bench of Alberta (August 29, 2019)

No Error in Finding Insured Detrimentally Relied on Insurer's Conduct in Temporarily Defending Him — *The Commonwell Mutual Insurance Group v. Campbell*, [2020] I.L.R. ¶ I-6183, Ontario Court of Appeal (August 26, 2019)

Insured Under Commercial General Liability Policy Entitled to Independent Counsel Due to Conflict of Interest — *Markham (City) v. AIG Insurance Co. of Canada*, [2020] I.L.R. ¶ I-6184, Ontario Superior Court of Justice (August 23, 2019)

Error in Insurer's Denial Letter Did Not Extend Limitation Period Beyond Reasonable Time for Investigation — *Condominium Corp. No 0427067 v. Aviva Canada Inc.*, [2020] I.L.R. ¶ I-6186, Court of Queen's Bench of Alberta (September 3, 2019)

Torts — Motor Vehicle

Plaintiff With Wrist Injury Awarded \$125,000 in Non-Pecuniary Damages

Supreme Court of British Columbia, August 20, 2019

The plaintiff was involved in a motor vehicle accident in July 2014. The defendant admitted liability. At the time of the accident, the plaintiff was 67 years old and had retired from working as an elementary school teacher in 2002. Before the accident, the plaintiff provided regular childcare for her grandson, played instruments, participated in a dance group, was active in home renovations, painting, and gardening, and walking her dogs. The plaintiff had met her spouse in 2010 and purchased a mobile home in California. The plaintiff broke her right wrist in the accident and underwent four surgeries on her wrist between August 2014 and May 2017. The plaintiff did not do any rehabilitation for her arm for

over two years after the accident and experienced weight gain. She claimed that the accident also caused back and neck pain and depression. She claimed that she was unable to enjoy her California property and expected to sell it in the near future. She was unable to engage in her pre-accident pursuits. The plaintiff brought an action for damages related to her personal injuries. The defendant disputed that the accident caused the plaintiff's back, neck, and psychological injuries.

The action was allowed. The evidence established that the plaintiff suffered an injury to her right wrist, resulting in significant derangement that impacted her performance of basic tasks. The plaintiff's limitations would most likely be lifelong. The Court accepted that the plaintiff would not have experienced neck and back pain regardless of the accident. While the plaintiff's post-accident weight gain made the pain worse, the pain was traumatically induced. The plaintiff also suffered deconditioning and decreased tolerance for daily activities due to the accident. She suffered a mild psychological injury, experiencing anxiety and sadness as her wrist experienced ongoing complications. The plaintiff was an active individual in the early part of her retirement when the accident occurred. The Court found that she was entitled to non-pecuniary damages of \$125,000. The plaintiff was entitled to \$45,487 for costs of future care. The plaintiff was entitled to a nominal award to compensate her spouse who provided housekeeping and care for a reasonable time after the plaintiff's surgeries. The Court found that \$15,000 was a reasonable award for an in-trust claim. The Court did not accept that the plaintiff was entitled to damages for lost opportunities for the inability to renovate her new home, enjoy the California home, and tutor her grandson. There was insufficient evidence to establish entitlement to the awards sought and the Court attempted to reflect these losses in the non-pecuniary award. The plaintiff was entitled to special damages of \$12,111. The total award was \$194,111.

Sarginson v. Nordquist, [2020] I.L.R. ¶ M-3179

Plaintiff Did Not Establish Entitlement To Advance Payment of Special Damages in Action for Personal Injury Damages

Court of Queen's Bench of New Brunswick, August 21, 2019

The plaintiff was involved in a rear-ending motor vehicle accident in January 2011. The defendant admitted liability. The plaintiff was 36 years old. She alleged that before the accident, she was healthy and active and that after the accident, she suffered from severe lumbar strain that resulted in bladder incontinence, pain in her hip and leg, pain during sexual intercourse, and weight gain. The plaintiff claimed that she attended physiotherapy for her injuries but confirmed that no record of this exists. Before the accident, the plaintiff worked as a caregiver until 2008. In 2010, she worked as a waitress. From 2011 to 2013, she worked part-time at two restaurants, and from 2014 to 2015, she worked part-time cleaning houses. The plaintiff brought an action for damages related to her personal injuries. She brought a motion seeking an advance payment of special damages of \$65,000, based on lost income and future income, day-care costs, loss of valuable services, future care costs, and disbursements. The defendant disputed the plaintiff's entitlement to an advance payment, claiming that there was insufficient evidence on the specific heads of damages that would be awarded at trial.

The motion was dismissed. Pursuant to case law, the plaintiff must establish that she will, on a balance of probabilities, prove at trial that the defendant is liable for the special damages. The plaintiff is required to identify the special damages by class and amount. The Court found that the plaintiff did not present substantive medical evidence supporting her claim for lost income. The Functional Capacity Evaluation (the "FCE") of the plaintiff only assessed housekeeping and homemaking tasks. The Court accepted the defendant's argument that, if the plaintiff were to work a minimum wage job, she could earn her pre-accident income by working 12.4-hour weeks. There was no evidence that a physician opined that the plaintiff would not be able to work that number of hours. The Court also did not find that the plaintiff could rely on the FCE report to support her claim for losses for cost of care and valuable services. The FCE report was flawed, as it acknowledges its findings are limited due to the plaintiff's failure to participate in the second day of testing and that its findings are based to a great degree on self-reporting. There was also no objective evidence, other than the plaintiff's submission, that she had incurred day-care expenses. While the plaintiff was referred to physiotherapy, there was no evidence that she attended since 2013 and no evidence that she incurred expenses related to physiotherapy. The evidence was insufficient to establish that a trial judge is more likely than not to award damages for costs of care and loss of valuable services or that the plaintiff would be awarded non-pecuniary damages. Further, disbursements were not recoverable on a motion for advance payment.

Comeau v. Thomas, [2020] I.L.R. ¶ M-3181

Plaintiff With Post-Traumatic Stress Disorder Awarded \$180,000 in Non-Pecuniary Damages

Supreme Court of British Columbia, September 17, 2019

The plaintiff was involved in a motor vehicle accident in December 2014. The defendant admitted liability. At the time of the accident, the plaintiff was 43 years old. The defendant died as a result of the accident and the plaintiff had witnessed the defendant's death. As a result of the accident, the plaintiff sustained myofascial injuries to his back and neck and developed carpal tunnel syndrome. The plaintiff had a high-school diploma and worked as a general manager for car dealership as of 17 years. He returned to work three months after the accident, as he was not in receipt of sick benefits from his employer. He worked 50-hour weeks and earned \$160,000 annually. The plaintiff began experiencing anxiety after the accident and was diagnosed with post-traumatic stress disorder ("PTSD"). He claimed that he had ongoing pain in his neck and lower back and tingling in his hands. He claimed that he became anxious and irritable at work when dealing with colleagues and required his wife, who took a job at his dealership, to assist him with his moods. He brought an action for damages related to his personal injuries.

The action was allowed. The evidence indicated that, as a result of the accident, the plaintiff experienced myofascial pain symptoms, hand numbness, and headaches. The plaintiff had chronic pain. He suffered trauma in watching the defendant die and developed PTSD as a result of the accident. The prognosis for improvement of the PTSD was guarded. The plaintiff was formerly a social and friendly person who was successful at work and was at the height of his career. The plaintiff now dreaded going to work and was rarely sociable. He had, however, continued to play hockey, cook, hike, and travel with his family. The Court found that an award for non-pecuniary damages of \$180,000 was appropriate.

The plaintiff lost \$30,000, gross, as a result of his three months of unemployment after the accident. The Court found that but for the accident, the plaintiff would have likely worked in the position of general manager to age 65, enjoying earnings commensurate with his current income. The plaintiff's psychological issues would restrict his employment options into the foreseeable future. If his support system were to be disrupted, there was a real and substantial possibility that he would be unable to continue in his current position. Applying the capital-assets approach, the Court awarded \$425,000 in loss of future earning capacity. The Court also awarded \$55,000 for costs of future care and special damages of \$3,372. The Court found that the plaintiff failed to mitigate his damages by discontinuing the use of antidepressants and by refusing counselling treatment. The Court, however, noted that avoidance is part of PTSD and it was not clear what part of the PTSD would have improved, if any, with medication and continued counselling. The plaintiff's damages awards were reduced by 15 per cent to account for his failure to mitigate. The total award was \$594,372.

Redmile v. Beaulieu, [2020] I.L.R. ¶ M-3184

Other Motor Vehicle Tort Decisions

Plaintiff With Chronic Back Pain and Post-Traumatic Headaches Awarded \$100,000 in Non-Pecuniary Damages — *Briggs v. Guliker*, [2020] I.L.R. ¶ M-3180, Supreme Court of British Columbia (August 27, 2019)

Plaintiff With Chronic Back Pain Awarded \$100,000 in Non-Pecuniary Damages — *Bain v. Goodridge*, [2020] I.L.R. ¶ M-3182, Supreme Court of British Columbia (August 29, 2019)

Plaintiff With Anxiety Disorder and Depression Awarded \$170,000 in Non-Pecuniary Damages — *Macie v. DeGuzman*, [2020] I.L.R. ¶ M-3183, Supreme Court of British Columbia (September 9, 2019)

Plaintiff With Soft Tissue Injuries and Chronic Pain Awarded \$120,000 in Non-Pecuniary Damages — *Popove v. Attisha*, [2020] I.L.R. ¶ M-3185, Supreme Court of British Columbia (September 19, 2019)

CANADIAN INSURANCE LAW REPORTER

Published monthly as the newsletter complement to the *Canadian Insurance Law Reporter* by LexisNexis Canada Inc. For subscription information, contact your Account Manager or 1-800-387-0899.

For LexisNexis Canada Inc.

Harris Weening
Editor
905-479-2665
email: harris.weening@lexisnexis.ca

©2020, LexisNexis Canada. All rights reserved.

Customer Support
Phone: 1-800-387-0899
Email: service@lexisnexis.ca

Customer Service is available from 7 a.m. to 11 p.m. (ET) Monday to Friday, and from 9 a.m. to 11 p.m. (ET) on Weekends.

Notice: *This material does not constitute legal advice. Readers are urged to consult their professional advisers prior to acting on the basis of material in this newsletter.*

LexisNexis Canada Inc.
111 Gordon Baker Road
Suite 900
Toronto, Ontario
M2H 3R1