Atlantic Case Law Update

Kristen Fulton • New Brunswick
Brandon Gillespie • Newfoundland and Labrador
Jennifer Taylor • Nova Scotia
Andrea Leclair Shefler • Prince Edward Island

STEWART McKELVEY
LAWYERS • AVOCATS

Atlantic Case Law Update:

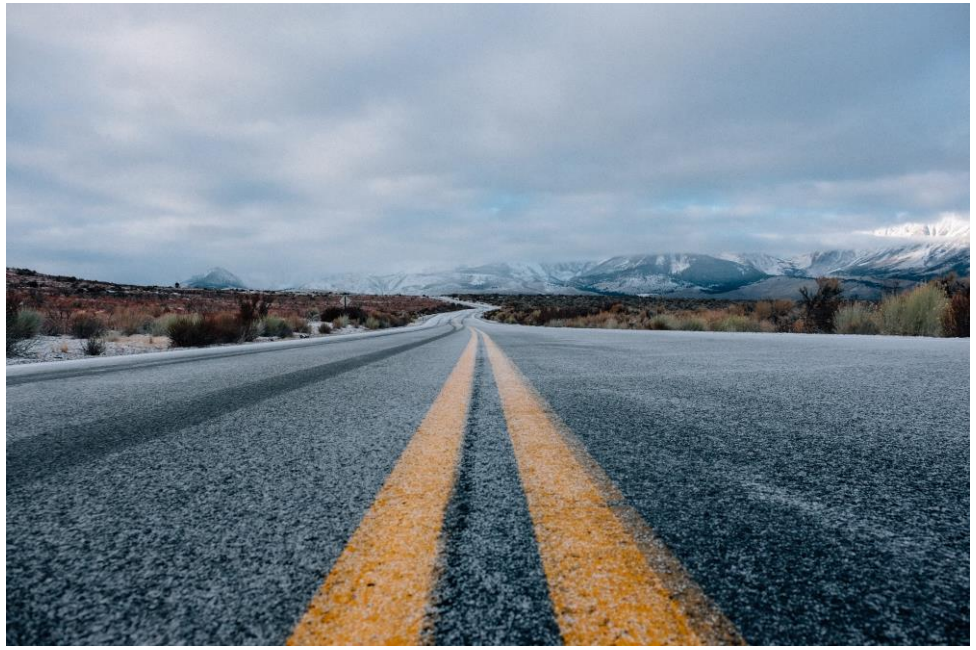
New Brunswick

Overview

- Rule 22: is discovery necessary?
- Losses from house flipping business
- Section B & private surgery
- $688,697.77 for soft tissue injuries

Case Law Review

Trevors v Doucet (2018, unreported)



- Motion for summary judgment
- 2015 – head-on collusion between two Enterprise Rent-A-Car rental vehicles on Route 11
- Doucet was operating a Nissan Altima, travelling south
- Plaintiff was a passenger in the Altima
- Allard was operating a Dodge Journey travelling north
- Journey crossed the centre line and collided with the Altima in the southbound lane

Trevors v Doucet (2018, unreported)

- Plaintiff sued Doucet, Allard, Enterprise and her own excess insurer
- Doucet brought a motion for summary judgment and refused to attend discovery while the motion was pending
- Plaintiff argued the motion was premature prior to discovery of all parties
- Justice Robichaud rejected this → Rule 22 does not require discoveries to be held prior to filing a motion
- Further, not improper to avoid the costs of discovery by filing a summary judgment motion, if there was no genuine issue requiring trial

Trevors v Doucet (2018, unreported)

- In support of motion, Doucet sought leave to file accident reconstruction report
- Expert obtained crash data from both vehicles, which clearly showed that the Journey crossed the centre line to collide with the Altima in the southbound lane and that the Altima never left the southbound lane
- Although Plaintiff argued that Doucet was speeding, Justice Robichaud was not persuaded this was a genuine issue for trial
- Plaintiff did not prove that if Doucet's speed had been at the speed limit, the accident could have been avoided

Johnston v Jones, 2018 NBQB 123

- 2011 – Jones turned left in front of Johnston's motorcycle, causing a collision
- Lost consciousness and suffered numerous fractures
- Liability was admitted at trial

Johnston v Jones, 2018 NBQB 123

Two issues at trial with respect to income:

1. Plaintiff claimed loss of earning capacity on the basis that prior to the accident, he would have become a police officer
2. Plaintiff claimed that he has lost the ability to make money by flipping houses due to his injuries

Johnston v Jones, 2018 NBQB 123

- Loss of Earning Capacity
  - At time of the accident, Plaintiff was 35 years old
  - Had been employed as an operations manager at the Regent Mall for 15 years
  - Continued to work at the Regent Mall after the accident until he accepted job of mall manager at McAllister Place in Saint John
  - Test for loss of earning capacity: *Vincent v Abu-Bakare*, 2003 NBCA 42
    - Real & substantial possibility loss of earnings will occur
    - Award must reflect the chances of loss occuring

Johnston v Jones, 2018 NBQB 123

- Loss of Earning Capacity
  - Plaintiff testified that it was his desire to change careers and become a police officer
  - 2009 – applied to join the auxiliary police program with the Fredericton City Police as “try before you buy”
  - Evidence showed he never declined an auxiliary police shift and was well-respected
  - Following the accident, staff sergeant noticed many limitations in his physical abilities
  - Defendant argued career change not a “real & substantial possibility” as, at the time of the accident, the Plaintiff had a five month old son, his wife was on maternity leave and he had a good job
  - Justice Grant disagreed → claim not speculative, but assessed likelihood at 50% and damages reduced by that amount
    - Also found Plaintiff would have retired by 58

Johnston v Jones, 2018 NBQB 123

- "House Flipping"
  - Prior to accident had bought, flipped and sold two houses
  - In the process of renovating 3rd house at the time of the accident
  - Eventually sold 3rd house at a loss, which they alleged was due to incomplete renovations as a result of his accident-related injuries
  - No evidence before the Court that they could have made a profit on 3rd house
  - Court was satisfied based on Plaintiff's evidence that he had the ability to earn money flipping houses before the accident, and the accident prevented him from earning money in this manner
  - Noted difficulty quantifying loss → awarded $25,000

Eccleston v Wawanesa, 2018 NBQB 75

- Applicant involved in accident in May 2015, alleged to have caused labral tear to her hip
- Referred to two orthopedic surgeons, neither of whom could treat injury
- Referred to Dr. Ivan Wong, orthopedic surgeon in NS

Eccleston v Wawanesa, 2018 NBQB 75

- Dr. Wong was of the opinion that Plaintiff needed left hip arthroscopy
  - Stated best chance at best outcome was surgery as soon as possible and that outcomes tended to decrease significantly after 3 years
  - Recommended private surgery to decrease the amount of permanent disability – private wait-time was 2 to 3 months
  - Cost was estimated between $22,000-$28,500
- Plaintiff brought an application for a declaration for coverage

Eccleston v Wawanesa, 2018 NBQB 75

- Wawanesa opposed on the basis that the material facts relied on in support of the claim were in dispute
  - Not clear accident caused labral tear
  - Unclear whether Medicare would cover the cost of surgery if performed in Nova Scotia
  - Necessity of Dr. Wong and the availability of other surgeons to perform the surgery in the public system
- Justice McNally held that dispute went well beyond "interpretative disagreement of the terms of the insuring agreement"
- Applicant granted leave to convert application into an action within 20 days

Chiasson v Theriault, 2018 NBQB 177

- Chiasson was 30 year old passenger in rear-ended vehicle in 2009
- At time of accident, had never had a permanent full-time job
- Claimed damages in excess of $1,400,000

Chiasson v Thériault, 2018 NBQB 177

- Plaintiff alleged she developed chronic pain as a result of her injuries
- In support, she called several experts, including Dr. Dumais, Dr. Giroux and Dr. Wade
- Defendant called Dr. Milczarek, who testified her chronic pain was of unknown etiology
- Justice Landry "categorically rejected" Dr. Milczarek's opinion
  - Relying on *Bent v MacFarlane*, 2018 NBCA 17 → "chronic pain meets "the test to pass the threshold for exceeding the cap on general damages"
  - Awarded $75,000 in general damages

Chiasson v Thériault, 2018 NBQB 177

- Plaintiff claimed she would have begun to work full-time in 2013 but for the accident
  - Justice Landry found there was a 50/50 chance she would have obtained full-time employment, although she had never done so before
  - Awarded full loss of income to age 62, which amounted to $669,120 → this was reduced to $389,697.46, the amount contained in the Plaintiff's Statement of Particulars
- Claimed $140,000 in future care costs for medical marijuana
  - Evidence showed she was using marijuana prior to the accident
  - Awarded a lump sum of $35,000
- Plaintiff ordered to hold in trust for the Defendant the WIBs provided under Section B and remit these amounts to the defendant as they are paid to her, up to a total of $389,697.46
- Awarded total damages of $688,696.77

STEWART McKELVEY
LAWYERS • AVOCATS

Atlantic Case Law Update:
Newfoundland and Labrador

Cases and topics covered

- *Jadhav v Kielly*
  - Stay of enforcement pending appeal
- *Temple v Aviva Insurance Company of Canada*
  - Section B (loss of income) and seasonal employment
- *Ryan v Curlew*
  - Are future CPP benefits deductible from damages for loss of income/earning capacity?

Case Law Review

Jadhav v Kielly, 2018 NLCA 50

- Mr. Jadhav, dressed entirely in black, is walking down the right side of an unlit road and is struck by Mr. Kielly's vehicle
- At trial, the issues are Mr. Kielly's liability for the MVA and the assessment of damages
- At the time of the accident, Mr. Jadhav was a temporary foreign worker who, as a result of his injuries, was unable to return to his work

Jadhav v Kielly, 2018 NLCA 50

- Trial Judge – Jadhav is 10% at fault, damages awarded in the amount of $338,097.19
- Jadhav appeals on the issue of damages. Kielly cross-appeals on finding of liability
- Kielly makes an application to stay the enforcement of the order for payment of damages per Rule 42 of the *Court of Appeal Rules,* NLR 38/16

Jadhav v Kielly, 2018 NLCA 50

- Applying the test for granting a stay of enforcement – *Weir's Construction Limited v Warford Estate*, 2016 NLCA 65 – the Court must consider:
  - Whether there is a serious issue to be argued on appeal;
  - Whether the applicant for the stay will suffer irreparable harm if the stay is not granted; and
  - The balance of inconvenience for the parties

Jadhav v Kielly, 2018 NLCA 50

- The Court found that there was a serious issue to be argued on appeal
- Jadhav conceded the second branch of the test on the basis that he was impecunious and did not have legal status to work in Canada. He agreed that the risk that any money paid to him could not be recovered was sufficient to conclude irreparable harm
- Regarding balance of inconvenience the Court found that it favoured Kielly because if Jadhav left the country, the money payable would not be recoverable if Kielly's cross-appeal was successful
- This case really demonstrated a method by which the Court can intervene to balance the inconvenience of the parties and shield the litigants from the harm resulting from the enforcement of an order
- The Court ultimately separated the cross-appeal as to negligence from Jadhav's appeal on damages. The Court concluded that the risks of non-recovery outweighed any delays arising from the special circumstance

Temple v Aviva Insurance Company of Canada, 2019 NLSC 80

- Aviva applied for a declaration with respect to the Plaintiff's qualification to seek loss of income payments under Section B of an auto insurance policy
- Temple (the Plaintiff) was injured in a MVA on April 22, 2012. There was no dispute that Temple was an insured under the policy

Temple v Aviva Insurance Company of Canada, 2019 NLSC 80

- Temple sought Section B benefits from Aviva under Subsection 1 but was denied loss of income benefits under Part II, Subsection 2 on the basis that he did not meet the conditions to be considered employed at the time of the accident
- Temple disputed this, claiming that while he was not actively working on the date of the accident, he had been working on vessels involved in the seasonal fishery for many years prior

Temple v Aviva Insurance Company of Canada, 2019 NLSC 80

Part II – Loss of Income

Subject to the provisions of this Part, the weekly payment for the loss of income from employment for the period during which the insured person suffers substantial inability to perform the essential duties of his or her occupation or employment, provided,

a) **such person was employed at the date of the accident;**

…

For the purposes of this Part,

…

(3) a person **shall be deemed to be employed**,

a) **if actively engaged in an occupation or employment** for wages or profit at the date of the accident; **or**

b) **so engaged for any 6 months out of the preceding 12 months** and in these circumstances shall be deemed to have suffered loss of income at a rate equal to that of his or her most recent employment earnings;

Temple v Aviva Insurance Company of Canada, 2019 NLSC 80

- On discovery and cross Temple asserted that he was looking for work on the date of the accident and had not committed to or confirmed employment
- He conceded that he had not been actively engaged in employment for wages or profit for any six months of the preceding twelve. He had no other employment for the twelve months preceding the accident and therefore did not meet either criteria in sub s. (3) above
- Temple argued that the season had not yet started and as a self-employed seasonal fisher, he met the criteria of someone who was employed at the time of the accident

Temple v Aviva Insurance Company of Canada, 2019 NLSC 80

- "… the Policy condition requiring that an insured be employed at the date of the accident must be interpreted such that **there must be an existing contract of employment or actual employment at the date of the accident. It is not necessary that such a contract of employment be in writing but the evidence must establish that the plaintiff had an ongoing employment relationship with an employer such that he or she was either actively employed, on call, or on temporary lay-off with a right of recall or with a definite commitment for future work.** As such, in certain circumstances, seasonal workers not actively working at the date of the accident may be considered employed at the date of the accident. However, in other circumstances, seasonal workers may not qualify"

Temple v Aviva Insurance Company of Canada, 2019 NLSC 80

- "On the evidence before me, I find that the Plaintiff has not established that he had an ongoing employment relationship at the date of the accident. **He acknowledged that he was actively seeking employment at the date of the accident with no definite future employment arrangement.** While he may have had an expectation that he could obtain work with his uncle if his efforts at finding higher paying work were not fruitful, he had no commitment from or right to work with his uncle. Further, he had not even worked with his uncle the prior fishing season so he could not successfully advance an argument that he was on temporary lay-off or on call"

Ryan v Curlew, 2018 NLSC 72

- Are CPP benefits deductible from an award of damages for loss of income or earning capacity?
- The old common law position in NL was **NO!**
- This changed following the addition of section 26.5 to the *Automobile Insurance Act* in 2004

Ryan v Curlew, 2018 NLSC 72

- Section 26.5 is effectively the same as section 113A of the Nova Scotia *Insurance Act*
- NL's provision, unlike Nova Scotia's section 113A, does not include the language of "before the trial of the action"
- The effect is likely the same: CPP disability benefits should be deductible from damages for past and future loss of income/diminished earning capacity, if paid "in respect of the incident"

Ryan v Curlew, 2018 NLSC 72

- In the present case, Handrigan J considered section 26.5 and its parallels with the NS legislation
- Justice Handrigan made a clear finding on past benefits: “the CPP benefits of $48,904 that Ms. Ryan received between January 1, 2012 and November 14, 2017 [the first day of trial] will be deducted from any award I make for past loss earnings”
- However, Justice Handrigan did not account for CPP when he calculated the award for loss of future earning capacity

Ryan v Curlew, 2018 NLSC 72

- Following *Ryan v Curlew*, it remains an open question whether future CPP disability benefits will be deducted from damages for loss of future earning capacity / income under section 26.5
- However, Justice Handrigan accepted *Tibbetts v Murphy*, 2017 NSCA 35 as "persuasive authority" which likely indicates that NL courts will also consider *Sparks v Holland*, 2019 NSCA 3 to be persuasive authority, and will deduct future CPP disability benefits

STEWART McKELVEY
LAWYERS • AVOCATS

Atlantic Case Law Update:

Nova Scotia

Theme: "Know Your Limits"

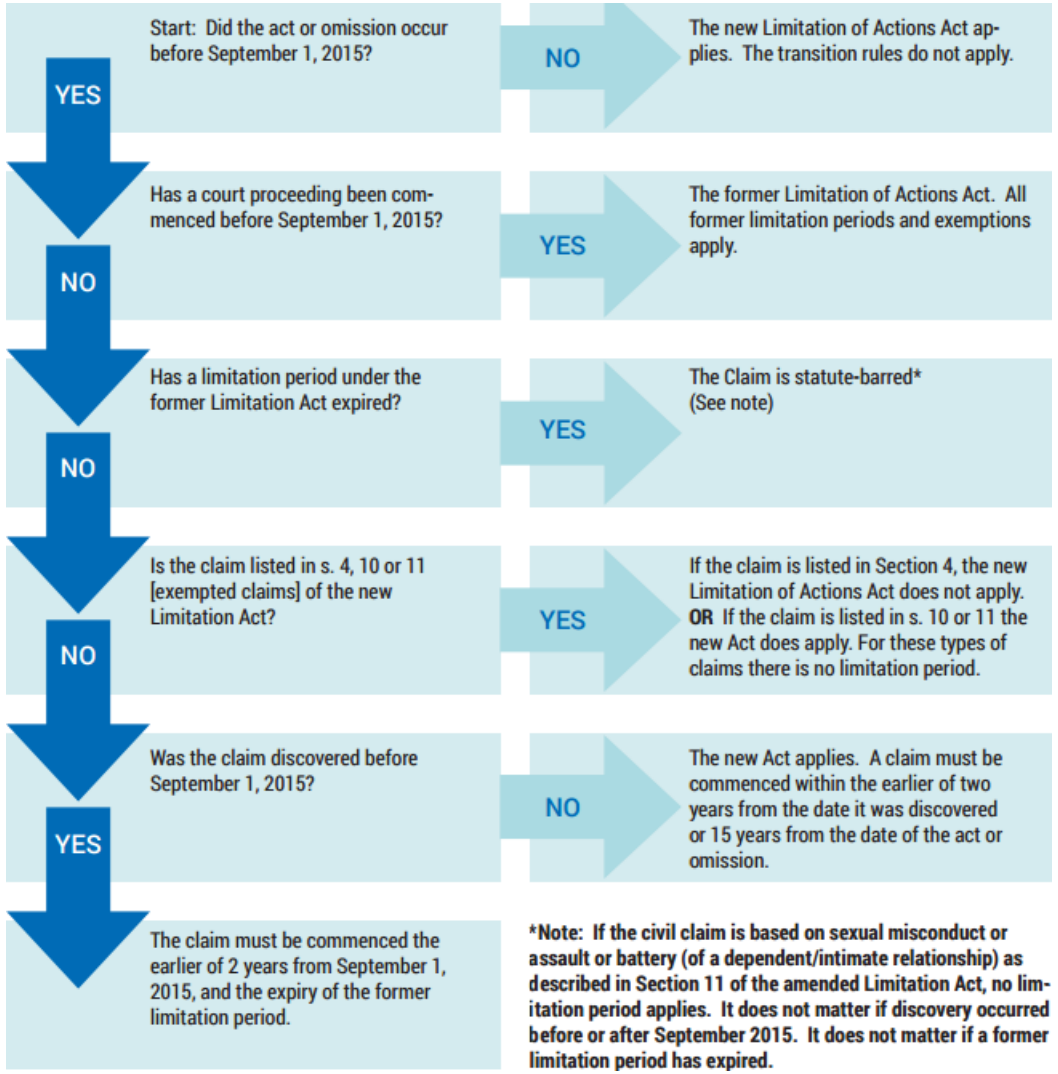
- *Barry v Halifax (Regional Municipality)*, 2018 NSCA 79
- *Richards Estate v Industrial Alliance Insurance and Financial Services*, 2019 NSSC 3
- *MacPhee v Christansen*, 2019 NSSC 79
- *Willson v Bond Estate*, 2019 NSCA 24

First, A quick refresher

"New" *Limitation of Actions Act*

- In force September 1, 2015
- Creates basic limitation period of **2 years** "from the day on which the claim is discovered"
  - *Includes negligence claims arising from MVAs*
- Section 12 provides possible extension of **2 additional years** after expiry of limitation period
  - *"Only applies to claims brought to recover damages in respect of personal injuries"*
- Limitation periods in other statutes prevail in case of conflict
- Section 23 sets out transition rules for claims arising before September 1, 2015

Helpful flowchart from NS Justice



Case Law Review

Barry v Halifax (Regional Municipality)

- **March 2013**: Plaintiff injured on Halifax Transit bus
  - She said bus stopped suddenly when cut off by unidentified motorist
- **October 2015**: Plaintiff sued HRM
- **November 2016**: Plaintiff moved to add RSA (HRM's transit insurer), seeking Section D coverage

Barry v Halifax (Regional Municipality)

- Applicable limitation period was **2 years** (Section D)
- Limitation period for claim against RSA expired in **March 2015**
- Plaintiff did not notify RSA until **September 2016**, 18 months after expiry date
- HRM had no duty to advise Plaintiff of insurance details
- Section 12 did not assist Plaintiff
  - *"Hardship" must be examined from defendant's perspective too – not just plaintiff's*
- RSA could not be added to proceeding

Richards Estate v Industrial Alliance

- Mr. Richards became unable to work in 2008
- Richards received LTD benefits until 2011, when benefits were cancelled
- Insurer found Richards no longer met criteria
- His appeal was dismissed in March 2012
- Richards died in September 2015
- His children and estate sued in November 2015

Richards Estate v Industrial Alliance

- LTD insurer was successful on summary judgment
- Limitation period was **1 year**, as found in the Policy and the *Insurance Act* (section 209)
- No applicable saving provision in *Limitation of Actions Act* or *Insurance Act*
- Relief from forfeiture was not available
- Limitation period had also expired for bad faith claim
- Action dismissed against LTD insurer

MacPhee v Christansen

- MVA occurred in **December 2014**
- Statement of Claim not filed until **March 2018** (by Plaintiff's second lawyer, retained in 2016)

MacPhee v Christansen

- Defendant's insurer had made +60 attempts to contact Plaintiff's lawyers
  - Key to defence position on summary judgment
- Plaintiff did not participate in summary judgment motion
- Lawyer for LIANS, representing Plaintiff's second lawyer, argued against expiry of limitation period
- Court agreed that section 23 of new Act applied
- Limitation period expired on **September 1, 2017**
- Court did not address section 12
- Summary judgment granted and Plaintiff's action dismissed

Willson v Bond Estate

- **May 3, 2016**: Ms. Bond filled prescription
- **June 16, 2016**: Ms. Bond died
- **June 15, 2017**: Plaintiff (Ms. Bond's son and executor) sued pharmacy, pharmacist, and unknown pharmacy assistant
  - *Plaintiff claimed pharmacy gave wrong dosage of medication, which caused Ms. Bond's death*
  - *Defendants relied on expiry of* Pharmacy Act *limitation period*

Willson v Bond Estate

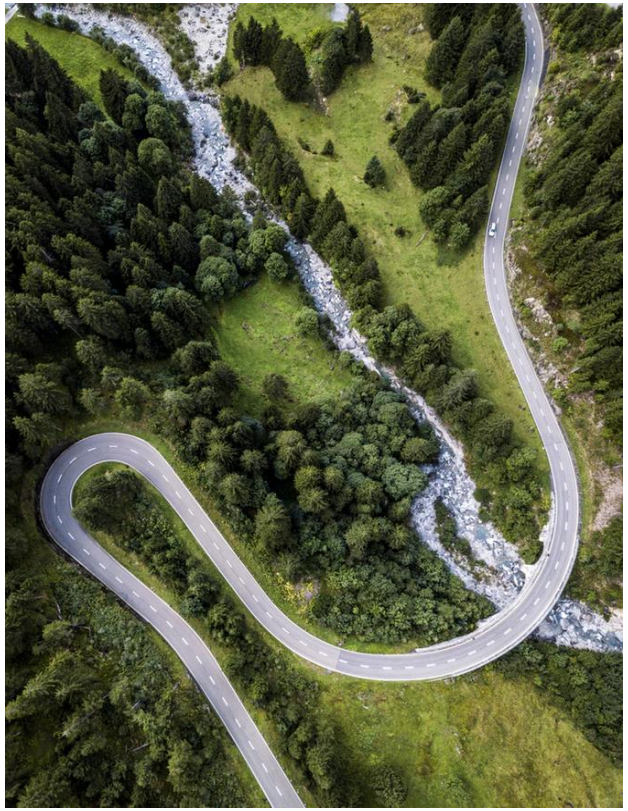
- Plaintiff brought motion to disallow limitations defence
- Claim was filed six weeks **after** 1-year *Pharmacy Act* limitation period had expired, but **within** 1-year period under *Fatal Injuries Act*
- Motion Judge found *Fatal Injuries Act* applied, so action was within time
  - In the alternative, Motion Judge would have disallowed limitations defence under section 12 of the *Limitation of Actions Act*, finding that a *Fatal Injuries Act* claim is “in respect of personal injuries”
- Court of Appeal agreed that *Fatal Injuries Act* applied
  - Deceased had viable cause of action under *Pharmacy Act* at time of her death
- Court of Appeal did not have to address *Limitation of Actions Act*
- Action allowed to continue

STEWART McKELVEY
LAWYERS • AVOCATS

Atlantic Case Law Update:

Prince Edward Island

Road Map

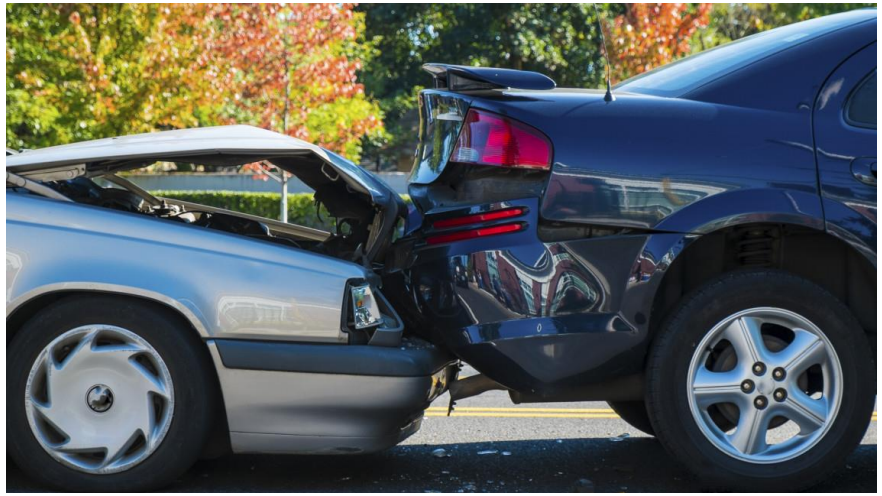


- Themes:
  - Amendments to Pleadings
  - Occupiers' Liability
  - Advance Payments for Damages

- Cases:
  - *McKenna v Stewart,* 2018 PESC 46
  - *Mallett v Richard,* 2018 PESC 50
  - *Fraser v Runighan,* 2018 PESC 26

Case Law Review

McKenna v Stewart, 2018 PESC 46



- Motor vehicle accident which resulted in injuries
- Plaintiff filed statement of claim against defendant shortly before expiration of two-year limitation period
- Plaintiff amended statement of claim six months later to reflect that defendant's son had been driving vehicle and to plead vicarious liability
- Defendant brought motion for the determination, before trial, of a question of law. Whether or not the plaintiff's cause of action was statute barred?

McKenna v Stewart, 2018 PESC 46

- The Supreme Court found that the amended statement of claim did not contain a new cause of action but rather clarified inconsistency in the original statement of claim regarding the driver of defendant's vehicle
- The original statement of claim was less than clear, particularly in relation to the identity of the driver and nature of defendant's personal liability
- However, it clearly stated that the defendant was the owner of the vehicle involved in the collision and clearly stated that the collision occurred when driver of defendant's vehicle proceeded through a stop sign
- In this case, the Defendant had received sufficient notice of the plaintiff's claim against her, such that she would suffer no prejudice if required to meet the amended claim
- Consequently, the motion was dismissed
- The Supreme Court took a functional approach which was consistent with finding a balance between procedure and access to justice and also ensuring fair adjudication upon the merits

Mallett v Richard, 2018 PESC 50

- Old Home Week is the time when Prince Edward Island celebrates with agriculture and livestock shows, handicraft displays, the midway rides and games, Island art and music, and the Gold Cup Parade
- Defendant, Richard, owned a business in cattle penning
- The organizer held a cattle penning competition at the civic centre
- Plaintiff was a volunteer for the cattle penning competition; her role was to operate a gate located between the chute holding area for horses and the arena
- Plaintiff was injured when a rider slammed into the gate, which sprang open and struck her
- Defendants brought motion for summary judgment to dismiss Plaintiff's action

Mallett v Richard, 2018 PESC 50

- The Supreme Court found that the organizer and civic centre were occupiers and that the Plaintiff was a lawful entrant
- The duty of care owed as occupier by civic centre was minimal. Therefore, there was no reasonable basis to impose a duty on the civic centre to oversee and supervise running of cattle penning event
- Organizer and civic centre discharged their duties of care as occupiers
- Richard had full control of the cattle penning event and was an independent contractor employed by the organizer
- Organizer and civic centre discharged their duties of care as occupiers
- The Motion for summary judgment was granted. Plaintiff did not have real chance of success in relation to her claims against the organizer and civic centre. There was no genuine issue requiring a trial

Fraser v Runighan, 2018 PESC 26

- Plaintiffs were husband and wife, who were injured in motor vehicle accident
- Husband and wife claimed that summary judgment was appropriate on the issue of liability
- Wife sought advance payment for damages and disbursements
  - Damages sought covered past loss of income, past costs of care and treatment, and past loss of valuable services

Fraser v Runighan, 2018 PESC 26

- Motion granted for summary judgment and advance payments for damages
  - Past loss of income advance payment was made in the amount of $90,816
  - Past cost of care advance payment was made in the amount of $16,561
  - Valuable services advance payment was made in the amount of $9,150
- Summary judgment was appropriate as it was clear that defendants were at fault for accident, based on undisputed facts
- However, the Motion was dismissed as to disbursements. Disbursements were properly characterized as costs, which could not be recovered under provisions of advance payment

Questions?

STEWART McKELVEY
LAWYERS • AVOCATS

Buffet Lunch (12:00-12:15pm)

Food and Beverage Area

Keynote Speech with Peace by Chocolate Founder and CEO, Tareq Hadhad (12:15pm-1:05pm)

Argyle Suite

STEWART McKELVEY
LAWYERS • AVOCATS

These materials are intended to provide brief informational summaries only of legal developments and topics of general interest.

These materials should not be relied upon as a substitute for consultation with a lawyer with respect to the reader's specific circumstances. Each legal or regulatory situation is different and requires review of the relevant facts and applicable law.

If you have specific questions related to these materials or their application to you, you are encouraged to consult a member of our Firm to discuss your needs for specific legal advice relating to the particular circumstances of your situation.

Due to the rapidly changing nature of the law, Stewart McKelvey is not responsible for informing you of future legal developments.