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## Damages & Liability update: *Leddicote* NS Court of Appeal reviews duty, housekeeping, earning capacity principles

***Leddicote v. Nova Scotia (Attorney General)*** (April 5, 2002, NSCA) provides helpful analysis of several important issues in liability and damages, including the need for proper evidence in support of housekeeping and valuable services claims.

### **Background**

Leddicote encountered a slushy stretch of highway and kept driving, thinking she could drive safely through it. She then lost control of her vehicle and a following motorist struck her from behind.

At trial, the drivers split liability, with the plaintiff absorbing 90% of the blame. The trial judge dismissed the action against the provincial road authority, finding that its maintenance procedures met the reasonableness standard.

The trial judge concluded that the plaintiff suffered from chronic pain. He awarded \$30,000 in general damages, a small amount in special damages, and dismissed the substantial claims for loss of housekeeping capacity and diminished earning capacity.

### **Appeal and cross-appeal**

Issues on appeal included liability and several heads of damages, including costs. There was a cross-appeal on the award of compound interest on general non-pecuniary damages.

In a 2-1 split, the majority re-apportioned liability, decreasing the plaintiff's share to 60% and increasing the other driver's share to 40%.

All three judges affirmed the decision to dismiss the action against the province. The panel was also unanimous in dismissing all aspects of the appeals on damages.

### **Future loss of valuable services**

Leddicote's \$38,000 housekeeping claim failed in the absence of supporting evidence. The Court rejected what appears to have been an argument that a separate housekeeping award follows automatically, once the plaintiff proved an injury compensable by general damages, by virtue of ***Carter v. Anderson*** (1998, NSCA).

The housekeeping award does not compensate physical injuries or pain and suffering, the Court wrote, but rather the resulting abilities and limitations around the house.

The claimant must offer evidence of an impairment for this type of work, and the Court agreed that Leddicote had offered no such evidence.

Whether the claimant pays anyone or not, the decision also says that pre-trial expenditures on household chores are relevant but not determinative of the future claim.

### **Loss of future earning capacity**

Leddicote presented a claim based on an alleged inability to follow her dream of becoming an RCMP officer. Actuarial evidence projected a loss based on the difference between that salary level and Leddicote's actual earnings at trial.

Leddicote also stressed the importance of medical evidence that she had restricted use of her right arm, asserting that this left her less able to earn income from all types of employment.

The Court, in response, wrote that this argument mistakenly equates 'function' with 'capacity': function involves a physical limitation, while capacity refers to the ability to earn an income.

On the facts, Leddicote had not returned to her pre-accident employment, but she had held two jobs for most of the time up to trial. The new work did not involve the physical limitations alleged to have been caused by the accident. The evidence also showed that her medical condition had not contributed to her failure to join the RCMP.

In these circumstances, the Court held, the trial judge had properly ruled that Leddicote had not proved a diminished earning capacity.

### **Demand, not award, is "amount involved"**

Court costs typically reflect the "amount involved." In this case, the trial judge decided that this amount was the \$250,000 claimed in Leddicote's brief, not the considerably smaller sum actually awarded to her.

This had a significant impact on Leddicote, as the costs award went *against* her. As it turned out, the costs awarded to the defendants exceeded the plaintiff's trial award after it was apportioned for liability.

In affirming this decision, the Court of Appeal stated that it expects "that a claimant's demands for relief are intended to be taken seriously." Demands have consequences, the Court continues, adding that in the right circumstances,

*"linking the 'amount involved'...to the claims put forward may be a useful tool in reminding litigants of the financial risks attendant upon suing and losing."*

### **Compound interest**

The defendant motorist cross-appealed the trial judge's decision to award not simple but annually compounded pre-judgment interest on the non-pecuniary general damages award.

The cross-appeal failed, although the ruling appears to be confined to cases where—as here—the trial judge does *not* take inflation into account in assessing general damages.

### **Duty, standard of care**

The Court of Appeal upheld the dismissal of the plaintiff's action against the provincial highway maintenance authority. The appeal decision endorses a succinct approach to assessing duty and standard of care:

#### *1. Did the Province owe a duty of care?*

As the highway maintenance authority, there was no doubt that the Province owed a duty of care to highway users.

#### *2. If so, what was the standard of care?*

There was a duty to take "reasonable care...to best ensure the safety of the driving public"—but the Province was not "a virtual insurer against harm...."

#### *3. Did the Province breach that standard?*

In light of the "considerable documentary and testimonial evidence" presented at trial, the Appeal Court affirmed the trial judge's ruling that the Province (a) had a reasonable snow and ice removal policy that (b) was adequately carried out on the day in question.

### **Apportionment**

On appeal, a 2-1 majority re-apportioned liability, increasing the defendant motorist's share from 10% to 40% on evidence that she was following too closely and failed to react properly to the events unfolding in front of her.

### **Mitigation**

The trial judge made no specific deduction for the plaintiff's failure to heed certain medical advice, but did conclude from it that her suffering was not so extreme as the other evidence might suggest.

### **Summary**

**Leddicote** reads like a primer on several important issues in damages and liability. By distinguishing between "function" and "capacity," for example, the case provides helpful guidance in assessing diminished earning capacity claims. Plaintiffs are also reminded of the need for proper evidence in support of loss of housekeeping and valuable services claims.