COURT OF APPEAL DEDUCTS SETTLEMENT PROCEEDS FROM DAMAGES AWARDED TO PLAINTIFFS

by Joe Oppenheim, Associate, Insurance Law

In the recent case of *Bedard v. Amin*, 2010 ABCA 3, the Alberta Court of Appeal upheld a trial decision wherein damages awarded to a plaintiff as against a non-settling defendant must be reduced by an amount equal to settlement funds paid by a settling defendant. At trial, the fact that a settlement had been reached was disclosed to the trial judge, but the details of the settlement were withheld. On application by the remaining defendant, the trial judge ruled that the terms of settlement were relevant in determining the appropriate quantum of damages.

Echoing the trial judge's reasoning, the Court of Appeal weighed the competing policy objectives of encouraging settlement on the one hand, and the rule against double compensation in Canadian tort law on the other. They cited the Supreme Court of Canada decision in *Ratych v. Bloomer*, [1990] 1 S.C.R. 940 in highlighting the concern to prevent double recovery:

> It is a fundamental principle of tort law that an injured person should be compensated for the full amount of his loss, but no more...
>
> ... [T]he purpose of awarding damages in tort is to put the injured person in the same position as he or she would have been in had the tort not been committed, in so far as money can do so. ... In each case the task of the Court is to determine as nearly as possible the plaintiff's actual loss.

The Alberta Court determined that this principle outweighed the public interest in encouraging settlement. The Court was quick to note that incentives to settlement still remained. Plaintiffs will benefit from partial settlement in the form of lowered risk and the certainty of receiving at least a set amount from some of the defendants. Defendants will benefit from certainty, the avoidance of further litigation and its associated cost and inconvenience, as well as avoiding the publicity associated with trial.

The Court did recognize that there was an element of "unfairness" in the result, as a party who was at fault and who required the matter to go to trial might benefit from monies paid by the settling defendants. However, it reasoned that this potential unfairness was justified:

> Although the policy adopted by the Canadian courts may lead to inconsistent or unsatisfactory results in some cases, the general principle is sound and in a broader sense is not unfair; no plaintiff will be left under-compensated through its application. Even if settlement proceeds are deducted from the plaintiff's ultimate award for damages, he will still receive full compensation for his injuries as assessed by the trial judge.

The case is significant because it alters the playing field on which multi-party litigation is conducted. Plaintiffs in particular will feel its effect because they must now consider whether the cost of ongoing litigation will exceed the amount that might be deducted from damages awarded as against the non-settling defendants.

Joe Oppenheim, (joppenheim@mross.com) Associate, McLennan Ross LLP Calgary Office

One question left unanswered in *Bedard v. Amin* is whether the quantum of such settlement agreements will be producible at all phases of litigation (regardless of whether they are marked "Without Prejudice"). It seems plausible that this result will flow. Two cases that shed light on this issue are *Pikus – Pace v. Calgary Olympic Development Association*, 2008 ABQB 688 and *Amoco Canada Petroleum Company Ltd., v. Propak Systems Ltd.*, 2001 ABCA 110. Both cases were dealing with a motion for approval of a *Pierringer* Agreement for the purposes of removing the settling defendants from the lawsuit. The Courts held that the quantum of settlements had to be disclosed to the non-settling parties in order to reduce potential prejudice. It seems logical that a natural consequence of the decision in *Bedard v. Amin* will be that defendants will seek to compel disclosure of the amounts of proportionate settlements agreements at all stages of litigation, and not just where motions are filed to approve settlement agreements.

Bedard v. Amin harmonizes Alberta law with that of British Columbia and Ontario, whose Courts of Appeal made similar rulings in 2008 and 2009, respectively.[1] In those cases, applications for leave to appeal to the Supreme Court of Canada were denied.

[1] See *Laudon v. Roberts*, 2009 ONCA 383 and *Ashcroft v. Dhaliwal*, 2008 BCCA 352.