

THE LAWYERS WEEKLY

Vol. 29, No. 3

www.thelawyersweekly.ca

May 22, 2009



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'Mary Carter'-type deal backfires on plaintiff

Injured man must foot tortfeasor's legal bill

CRISTIN SCHMITZ OTTAWA

A joint tortfeasor hurts a man in a boat crash and is responsible for causing the plaintiff damages of \$121,688, according to the jury.

Yet the Ontario Court of Appeal rules that the negligent co-defendant need not pay a cent to the plaintiff because the other defendant has already settled with the plaintiff and paid more than the damages assessed by the jury.

The appeal court also rules that the injured plaintiff is on the hook for a portion of the first co-defendant's hefty legal bill, which will probably reach several hundred thousand dollars following a lengthy trial, and an appeal.

That result in *Laudon v. Roberts* vividly illustrates how "Mary Carter"-type partial settlement agreements in multi-defendant cases can present dangers for plaintiffs. The dangers include the risk that a plaintiff — who signs a larger pre-trial partial settlement with one of the co-defendants than the damages that are actually awarded at trial — will be faced with the hefty legal costs of the remaining at-fault co-defendant(s) who did not settle out-of-court.

The unanimous May 7 ruling by Justices Jean MacFarland, Karen Weiler and Russell Juriansz also underscores that "double recovery" for plaintiffs is permitted only in very limited circumstances under



PAUL LAWRENCE FOR THE LAWYERS WEEKLY

Toronto's Martin Forget won a ruling at the Ontario Court of Appeal that a non-settling defendant can benefit from a co-defendant's Mary Carter-type settlement.

Canadian tort law.

"In my view, the Court of Appeal simply reaffirms the longstanding principle that there are few exceptions to the rule against double-recovery, and settlements are not part of the exception," said Linda Matthews, who with Martin Forget of Toronto's Forget & Matthews represented Keith Sullivan, the non-contracting defendant who succeeded on appeal.

"For years in Ontario, counsel in the personal injury Bar have often flexed their muscles by threatening a

non-contracting defendant with Mary-Carter type settlement agreements," Matthews observed. "This has allowed plaintiffs to achieve large settlements with one defendant and then try to ransom the non-contracting defendant for more. This decision essentially levels the playing field."

Forget told *The Lawyers Weekly* the decision "is generally significant to the extent that it represents the first decision where the court has deducted a payment by one joint co-defendant

See **Laudon** Page 23

Highlights

RESPECTABLE REFUGE

Why bankruptcy is now acceptable

PAGE 5

PINK SLIP STRATEGIES

How to resolve termination disputes by summary judgment

PAGE 7

CANADIAN, EH?



The new *Citizenship Act* redefines what it means to be Canadian

PAGE 12

PUBLIC SERVICE

Vancouver firm offers 'unique' way to do public service work

PAGE 18

PANDEMIC

How your firm can prepare for the worst

PAGE 19

B.C. law society approves mentoring as 'professional development'

Teaching non-lawyers will also count for credit

JANE MUNDY VANCOUVER

The Law Society of British Columbia (LSBC) has broadened its criteria for accredited professional development by allowing lawyers to obtain credit by teaching law in an organized

program that doesn't necessarily comprise lawyers and law students and to mentor for accreditation beginning in 2010.

B.C. lawyers are the first in Canada to be subject to a comprehensive continuing professional development (CPD) requirement and responses from lawyers and the media have been largely positive. However, concerns have related largely to subject-matter requirements, geo-

graphic barriers and cost.

The CPD program was implemented at the beginning of this year and the rules require all practising lawyers, both full-time and part-time, to complete at least 12 hours of CPD annually in accredited educational activities. At least two of the 12 hours must pertain to any combination of professional responsibility and ethics, client care and relations and practice man-

agement.

The Lawyer Education Advisory Committee made two recommendations (which the benchers adopted) with respect to the current CPD requirements. "In 2008 the Law Society of British Columbia decided there would be credit for teaching and writing and we are now broadening that audience," said Alan Treleaven, director of

See **Mentor** Page 3



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Associates not being mentored on issues they need help with

Mentor

Continued From Page 1

education and practice at the LSBC. Treleven said the LSBC received numerous inquiries from lawyers asking if they could get accreditation for teaching law in commerce programs, or to RCMP or university students. "We think teaching law is an excellent way for lawyers to advance their learning where the level of law is reasonably high," said Treleven.

High school doesn't count — yet. "We will revisit these rules and see how it goes," added Treleven. "Right now we are focusing on what will be effective continuing education for lawyers and what will equip them to provide better services to their clients."

The second recommendation is a program for accredited mentoring: Working with one mentee, a mentor will qualify for up to 6 of the 12 hours required annually for CPD credit and if a mentor works with two mentees, the mentor qualifies for 12 hours credit.

The committee recognized that mentorship plays a major role in both sharing of knowledge and training; it also found that mentoring has decreased in the profession. For some lawyers, mentor-mentee relationships were out-of-reach or even non-existent. But many people want guidance: Mentoring is more than making someone feel "warm and fuzzy."

The committee approached lawyer Linda Robertson, lawyer coach and practice consultant with Phoenix Legal.com, mainly because she co-founded and designed the CBA B.C. Women Lawyers mentoring program that has now seen 550 women lawyers participate over the past six years. Robertson is the chair of the CBA B.C. Women



Robertson

Lawyers Forum and former co-chair of the Women Lawyers Forum Mentoring Program. She said a lot of firms have programs that aren't

working for a number of reasons.

"Firstly, lawyers are very busy and a lot of mentors don't have the time to devote that they once had, mainly due to pressure on billings and other business," she said, "and because of this, the law society was interested in including mentoring as part of the professional developing requirements."

According to Robertson, gone are the days when senior partners spent a lot of time mentoring associates, when junior lawyers were able to attend court with a partner to observe. These days firms can't afford to have someone simply watching if they aren't able to bill

their time. But Robertson said young litigators are anxious to get mentoring in court. And in the past, when a large corporate transaction was completed, the senior lawyers would spend a few hours debriefing — as a way of mentoring younger lawyers. "That doesn't happen too often these days either," said Robertson. "As a rule, lawyers finish one transaction and move right on to the next one."

"The second biggest reason that associates are dissatisfied with their mentoring program is that they aren't being mentored on issues they need help with," added Robertson. "For example,

the mentoring will often focus on file issues, but a young lawyer can get that advice from almost everyone in the firm. What they really want to know are issues like how to build a practice; resiliency and work-life balance (e.g., how do I survive in the practice without burning out); and career development."

And the gender issue is still most important. "Women typically don't get the same amount of mentoring — they have won the battle of being accepted as lawyers but they carry a dual burden of child-bearing and they need assistance from someone on how to juggle," said

Robertson. "They have a hunger to find other women who have survived." Women don't find mentors as readily as men, so Robertson and the LSBC believe this formal program will really be useful.

Robertson pointed out that peer mentoring also works. "We typically think of a senior mentor and the mentee sitting at their feet, but a mentor can be a junior," she explained. "Say you have never done family law; you could ask a colleague to spend six hours on the phone with you in that area next year."

Mentoring will also be a boon for sole practitioners and people

in rural communities who are challenged to attend courses. Frequently in small communities it's tough to find a mentor because of conflict issues or confidentiality. At the beginning of 2010, lawyers will be able to find a mentor outside their firm or community by accessing the mentoring program; they can converse by phone or the Internet (such as Skype or other video conferencing, e-mail doesn't count).

"And we are hoping this new program will encourage senior members — it will be an incentive for both parties," said Robertson. ■

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