Atlantic Insurance Counsel

LEGAL DEVELOPMENTS OF INTEREST TO THE INSURANCE INDUSTRY IN ATLANTIC CANADA

Fall 2009
Volume 3, No. 12

Editors:

Christopher E. Lewis
St. John's Office
709.570.8820
clewis@smss.com

Susanna P. Duke
St. John's Office
709.570.8844
sduke@smss.com

In this issue

New Brunswick Court of Appeal Affirms Position on Duty to Defend

In **Optimum Insurance Company Inc. v. Donovan** (2009) (leave to appeal to the Supreme Court of Canada granted), the New Brunswick Court of Appeal affirmed its position on an insurer's duty to defend.

In this case, the 23 year old Defendant hosted a party at the family home while his parents were away on holidays. During the party, Mr. Donovan unintentionally shot and killed one of his guests. A negligence action was commenced under the **Fatal Accidents Act** and the **Survival of Actions Act** against Mr. Donovan and his parents. Although Optimum, the insurer under the homeowner policy, provided a defence for the parents, it refused to provide a defence for Mr. Donovan. Consequently, he initiated Third Party proceedings against Optimum as a result of its failure to defend him pursuant to the policy. Although Optimum admitted that the policy was in full force and effect and that Mr. Donovan was an "insured," it denied that it owed a duty to defend, relying upon the "criminal act" exclusion.

According to the terms of the policy, Optimum was bound to pay, subject to specified limits, all sums which Mr. Donovan became legally liable to pay as compensatory damage resulting from unintentional bodily injury arising out of "personal actions anywhere in the world." The policy also provided that Optimum would defend Mr. Donovan, at no cost to him, against any suit making a claim against him for which he was insured. The policy defined "claim" as "any event causing damages."

Both Optimum and Mr. Donovan applied to the court under Rule 23 of the New Brunswick **Rules of Court** for a determination of questions before trial. In support of its motion, Optimum attempted to rely upon affidavit evidence of one of its claims examiners which stated that at discovery, Mr. Donovan acknowledged both that he committed a criminal act which caused the death of his friend and confirmed that he pled guilty and was convicted of manslaughter.

The Motions Judge found that the affidavit evidence Optimum intended to rely upon was inadmissible because generally, disputes concerning an insurer's duty to defend should be resolved solely on the basis of the allegations made in the pleadings. Optimum acknowledged that the Statement of Claim did not assert that the friend's death arose from a criminal act by Mr. Donovan. The Motions Judge reaffirmed that the duty to defend is independent of and broader than the duty to indemnify and that the

duty to defend arises where the pleadings allege acts or omissions which potentially fall within policy coverage whereas the duty to indemnify only arises where such obligations are proven at trial. Overall, the Motions Judge found that the claim was framed in negligence even though it tracked some wording from the **Criminal Code**. In light of the fact that the suit against Mr. Donovan was only framed in negligence, there was no basis, on the record, for the application of the "criminal act" exclusion. The Motions Judge held that Optimum was required to provide for Mr. Donovan's defence in the main action. He also stated that: (1) Mr. Donovan was at liberty to conduct his own defence with counsel of his choice; (2) counsel need not report to Optimum "on the matter bearing on the issue of the criminal act exclusion"; and, (3) Optimum pay all reasonable past and future legal fees and disbursements.

Optimum appealed, but was unsuccessful. In its decision, the Court of Appeal noted significant evidential constraints under Rule 23 and a number of deficiencies in Optimum's Notice of Motion. Most importantly, the Court of Appeal noted that Rule 23.02 prescribes that, without leave of the court, evidence is inadmissible on a motion for judgment under Rule 23.01(c) unless the evidence in question is a transcript of a relevant examination. Moreover, leave to admit such transcript evidence should be denied absent exceptional circumstances. Optimum did not produce a transcript of Mr. Donovan's discovery evidence nor did it request leave of the Motions Judge to adduce secondary evidence. Accordingly, the Court of Appeal held that there was no principled basis upon which the affidavit evidence would be admissible in the circumstances.

The Court of Appeal also took the opportunity to affirm that the duty to defend arises where there is a "mere possibility" that the claim advanced against the insured is covered by the policy. This is true even where the actual facts differ from the allegations in the pleadings. If the insured is able to meet this low threshold, it becomes incumbent upon the insurer to establish that a plaintiff's claim falls outside the coverage provided by the policy because of an exclusionary provision. Where it is clear that the allegations in the pleadings fall outside the policy or are subject to exclusion, the duty to defend will not arise. In this case, the Court of Appeal held that Optimum failed to establish that the allegations in the pleadings fell outside the policy.

Melanie L. Cassidy – Associate
Moncton Office
506.853.1959
mcassidy@smss.com

Publication mail agreement no. # *40006693*

Return undeliverable Canadian Addresses to:
Stewart McKelvey
Suite 601, Blue Cross Centre
644 Main Street
P.O. Box 28051, Moncton, NB E1C 9N4

Personal Injury Matter Highlights Importance of Providing Details of Claim and Detailed Notices of Expert Witness

Stewart McKelvey lawyers Gregory S. Sinclair and Sarah-Ann H. Price recently represented the Defendant in **McLaughlin v. Levesque** (2009), which serves as a cautionary tale to Plaintiff's counsel who do not provide sufficient notice to the Defendant of the case they intend to make at trial.

The Plaintiff, Michele McLaughlin, sustained injuries in a motor vehicle accident in New Brunswick in October of 2002. As she was approaching a tractor trailer loaded with logs, the tractor trailer swerved and several logs fell from the trailer, hitting the front and sides of the Plaintiff's vehicle. Liability was admitted, thus the matter only involved an assessment of damages.

Initially her injuries were not thought to be severe. However, the Plaintiff eventually began to complain of a number of symptoms. She alleged that as a result of the accident she suffered from a mild-traumatic brain injury ("MTBI"), resulting in major cognitive impairments and constant pain. The Defendant admitted that the Plaintiff likely suffered initially from soft-tissue injuries and post-traumatic stress disorder ("PTSD"). Nonetheless, the Defendant maintained the position that after some improvement in the Plaintiff's condition, her complaints began to evolve due to the significant functional overlay of depression, anxiety and stress in somatic form.

Prior to the accident the Plaintiff worked full-time and led an extremely active life as a wife and mother of three. She managed the household and performed the majority of housekeeping duties. In addition, she engaged in a number of hobbies and activities, including artistic, physical and musical pursuits. She was employed as an office manager for a local electrical contractor and was recognized as a hardworking and valued employee.

The Plaintiff alleged that following the accident she was incapable of working or performing most of her household duties and was no longer able to engage in any of the recreational activities she once enjoyed. She blamed this largely on the cognitive impairments resulting from the alleged MTBI. For example, Plaintiff's counsel led evidence that the Defendant had been reading the same book for six years, as she continually re-read the first chapter, forgetting from one day to the next that she had already completed the chapter.

In attempting to prove that she suffered from an MTBI, Plaintiff's counsel led evidence from her family physician, a consulting psychologist, a neuropsychologist and a psychiatrist who examined her on one occasion. However, the Plaintiff failed to call her treating neurologist. The Defendant relied on the testimony of a neurosurgeon, who conducted an IME of the Plaintiff and found that she did not suffer from an MTBI. Furthermore, through careful cross-examination, the Defendant was able to identify a number of inconsistencies in the Plaintiff's cognitive abilities, which were incompatible with an MTBI diagnosis. The Court concluded that the Plaintiff did not suffer from an MTBI, but did suffer from fluctuating cognitive abilities affected by pain, difficulties sleeping and medication. Surveillance evidence supported greater abilities then testified to by the Plaintiff, her family and friends.

During the initial ten days of trial, the Plaintiff adduced significant evidence as to special damages that had not been particularized despite demands from the Defendant. The Defendant objected to a number of questions and lines of questioning, on the basis that they were irrelevant because the head of damages had not been claimed or substantially varied from such particulars of damage as appeared in the Plaintiff's pre-trial brief and/or exceeded the bounds of opinion as contained in the Plaintiff's Notices of Expert. Due to time constraints, Justice LaVigne chose not to deal with the objections individually as they were raised, and instead ruled on all of the objections simultaneously at the conclusion of the trial.

In response to these objections, the Plaintiff sought leave of the Court to file an Amended Statement of Claim, which quantified all the additional claims to which the Defendant had objected, included past cost of medication, future cost of medication, future cost of psychological therapy, future cost of massage therapy, an investment management fee and a substantial increase in the claim for loss of homemaking capacity, thereby nearly doubling the claim.

The Court adjourned and heard arguments on these issues in October of 2008. In its deliberations the importance of complying with the **Rules of Court** that require particularization of special damages (Rule 27.06 (10) and (12)) was weighed against the Court's discretion to allow amendments to the pleadings at any stage in the proceedings (Rule 27.10(1) and (8)). It was found

that the test set out in current case law focuses on the prejudice caused to the opposing party and whether such prejudice can be compensated for by costs or an adjournment.

The Court allowed the Plaintiff's claim for past cost of medication, finding that the Defendant knew or ought to have known about the medications the Plaintiff was taking. It also allowed the Plaintiff's claim for the investment management fee, but not the actuarial evidence in support of the claim. The amendment to the claim for loss of homemaking capacity was allowed; however, due to the element of surprise and prejudice against the Defendant, an adjournment was granted to allow the Defendant to gather expert evidence. With regard to the claim for future health care costs, including medication, psychological treatment and massage therapy, which totalled $594,426.00, the Court found that in order to allow the claim, the Defendant would have to be permitted to lead new evidence and recall witnesses. Justice LaVigne determined that this was "far from the least expensive and most expeditious manner of resolving the dispute between the parties" and did not allow the amendment, stating that to allow the amendment would be "a circumvention of the judicial process such as to unfairly complicate and delay the present action and do injustice to the defendant."

Following an adjournment until February 2009, the Defendant was permitted to call its own expert on the issue of cost of care. The Defendant's expert's methodology was preferred by the Trial Judge and led to a significant reduction under this head of damage.

In closing arguments, the Plaintiff claimed a damage award in the amount of $3,552,367.00, while the Defendant submitted the Plaintiff's reasonable damages were between $959,896.00 and $1,013,058.00. The Court found that the Defendant's assessment of damages, particularly with respect to the cost of care and loss of valuable services, was more accurate and awarded the plaintiff $1,094,719.00.

It should be noted that due to the Plaintiff's conduct at trial, which unnecessarily lengthened the trial and delayed its completion, the Court sanctioned her by reducing the costs awarded by one scale on Tariff A of Rule 59.

This case brings to light the importance of thorough preparation and treating every matter as though it is destined for trial. By failing to provide an accurate and detailed Statement of Claim and Notices of Expert Witness and by failing to provide the Defendant with particulars of special damages, the Plaintiff's claim for damages and costs was seriously weakened. The Defendant's assiduity in objecting to elements of the claim which were affected by the Plaintiff's non-compliance with the Rules of Court substantially damaged the Plaintiff's claim.

Sarah-Ann Price – Associate
Fredericton Office
506.443.0138
sprice@smss.com

Observations on the Rights of New Brunswick Plaintiffs With Respect to Language of Choice in Insurance Litigation

Some insured are keen to assert their right to interact with governmental institutions in the official language of their choice. Members of linguistic minorities in particular are aware and purposely make use of services offered in the official language of the minority to ensure that they continue to be available. They are also increasingly making the same kinds of demands from the private sector, namely in asking for services and products to be provided in the language of their choice. In most respects, the consumer's bargaining chip is the ability to take their business elsewhere. But in the field of insurance, once a consumer is faced with demanding service in the language of his or her choice, taking one's business elsewhere is often no longer an option.

In New Brunswick, where roughly one-third of the population speak French at home, government services are generally available in both official languages. New Brunswick is the only constitutionally bilingual province, therefore the provincial government has the obligation to offer services in both official languages and bilingualism is carried over to the private sector, to a certain extent, by virtue of regulatory design.

The insurance industry in New Brunswick, like many others, has certain basic linguistic obligations to discharge. The official languages provisions of the NB **Insurance Act** (the "Act") provide that certain documents must be available in the official language of the insured's choice and that legal services on behalf of an insured must be provided by a lawyer who uses the language of the insured's choice.

Basic linguistic rights are provided at section 20.1(1) of the Act as follows:

> *No insurer carrying on business in the Province shall use any form or document relating to a contract of insurance and which is to be provided to an applicant for insurance, an insured, a beneficiary or a claimant unless that form or document is provided or made available in both official languages; and every insurer shall, if the Superintendent so requests, file a copy of the form or document in each official language in the office of the Superintendent.*

Section 20.1(3) of the Act creates an offence for failure to comply with these dispositions.

This provision has been interpreted by the Court of Queen's Bench in **Wooldridge-Vincent v. Assumption Mutual** (2008). In that case, the Plaintiff sought from her disability insurance carrier, Assumption, a translation of its policy manual entitled "Procédures en invalidité." She had issued a claim for damages for benefits and alleged bad faith against Assumption on the basis that she was fully disabled and entitled to benefits beyond the period during which Assumption paid. At examination for discovery, the witness for the Defendant acknowledged that when dealing with the Plaintiff, Assumption relied on an internal policy manual entitled "Procédures en invalidité" to administer the claim. The witness disclosed that Assumption administered its claims in French, and no English version of the policy manual existed. The manual was produced by the Defendant on an undertaking. By way of motion, the Plaintiff requested that the Defendant produce an English translation of the manual. In the alternative, the Plaintiff requested that a witness for Assumption be ordered to attend further discovery and provide its translated understanding in English of each relevant provision of the manual, and details of how each provision was applied with respect to the Plaintiff's claim.

The Motions Judge provided a restricted interpretation of section 20.1 of the Act and found that an internal policy manual of the Defendant was not a document "which is to be provided to an applicant for insurance, an insured, a beneficiary or a claimant" and therefore that section 20.1 of the Act did not apply. The Judge further ruled that the Plaintiff had no right to an on-discovery translation of the manual. It was further remarked that such would indirectly defeat the concept that the documents can be presented at discovery in whatever language they are without being translated.

This requirement, no doubt designed to assure a certain level of services to insurance clients regardless of language, is certainly not the most onerous the industry in New Brunswick has to meet. For the most part, the industry has understood that common documents need to be available to an insured in the official language of their choice and this is rarely an issue, except perhaps with insured who receive documentation in a language other than that which they have chosen.

In New Brunswick, the insurance industry also has a positive duty to make an inquiry about the insured's preference in language before counsel is retained to act on the insured's behalf. The insurer then has the obligation to hire a lawyer who will use that language.

These linguistic rights are provided at 20.2 of the Act, supra, as follows:

> *20.2(1) No insurer carrying on business in the Province shall engage a solicitor to act on behalf of an insured unless the insured has indicated to the insurer the official language he wishes to be used by the solicitor acting on his behalf.*
>
> *20.2(2) Where an insurer is required or wishes to engage a solicitor to act on behalf of an insured, the insurer shall, after the insured has indicated the official language he wishes to be used by the solicitor acting on his behalf, engage a solicitor who uses that official language.*

An offence is also created by section 20.2(3) the Act for failure to discharge these obligations.

This provision can be seen as enhancing the linguistic rights of insured involved in litigation beyond those rights generally available to parties in the judicial process. A New Brunswick litigant's rights to use the official language of his or her choice is assured by sections 19(1) and (2) of the **Canadian Charter of Rights and Freedoms** ("Charter") which assures the right to use one or the other official language in courts established by Parliament and in any court of New Brunswick, respectively.

The insured being the party to a litigation in which his or her coverage is being engaged, the insured's choice of language in a proceeding rightfully trumps the insurer's. As most insurance matters proceed through the NB Court of Queen's Bench and Court of Appeal, and then possibly onward to the Supreme Court of Canada, they are caught by 19(1) and (2) of the Charter. Insurance matters falling within the purview of the Federal Court are caught by 19(2).

In non-insurance litigation, a party's linguistic rights afford him a certain level of ongoing flexibility with respect to his choice of language.

A party's choice of the language of proceeding need not necessarily be based on that party's ability to speak that language. The NB Court of Appeal endorsed the Supreme Court of Canada's qualification of the rights afforded by s. 19 of the Charter as fundamental rights in **Chiasson v. Chiasson** (1999. This was an appeal of a Small Claims Court matter where the Francophone Defendant was denied the opportunity to testify in English. He went on to testify in French, in which he was fluent, after the Judge reacted inappropriately to his request. A new trial was ordered by the Court of Appeal. In its brief reasons, the Court of Appeal underscored the importance of a litigant's right to choose the language of proceedings. At paragraph 4, the Court of Appeal said:

> *In New Brunswick, the only province in Canada with two official languages, when a party indicates his wish to be heard in one official language and the judge's reaction is so hostile that the party ends up being heard in the other official language, the court's judgment cannot be allowed to stand. The right to use the official language of one's choosing is not a privilege; it is a fundamental right unrelated to trial fairness as such. See R. v. Beaulac (J.V.) [1999] 1 S.C.R. 769 […].*

Mere inconvenience is not a bar to the plaintiff's election to proceed in one language, and once a choice has been made, a party is not locked in to his choice. This conclusion is suggested in **McGraw v. Oceanis Seafoods Ltd** (2002), a decision on a motion to amend pleadings and thereby change the language of the proceedings. After having filed a Statement of Claim in French, which was responded to in French by the Defendant, the Plaintiff retained alternate counsel who was a unilingual Anglophone. The Defendant opposed the amendment to the pleading on the basis that the proceedings should be in French, as both parties and all witnesses spoke French and the Plaintiff had previously elected to proceed in French. The Plaintiff's election to proceed in English would trigger the requirement for consecutive interpretation, thereby increasing the duration of the proceedings and costs to the Defendant.

The Court allowed the amendment and remarked that to compel the Plaintiff to file his pleading in French would be tantamount to denying him the right to be represented by Counsel of his choice.

The NB Court of Appeal reaffirmed the fundamental nature of a party's right to proceedings in the language of his or her choice in **Whelton v. Mercier** (2004). In that case, the Plaintiff was appealing a Summary Judgment obtained by the Defendant. The motion for Summary Judgment had been brought by the Defendant in English and the Plaintiff failed to file the necessary notice to the effect that he intended to address the court in French at the motion. He had presupposed his intentions were clear as he had filed affidavits in French and had elected to proceed in French in the Notice of Action with Statement of Claim. At the hearing, as counsel for the Plaintiff began to plead in French, the Motions Judge noted that translation resources were unavailable due to the absence of notice and that this would put Defendant's counsel at a disadvantage due to his

inability to understand French. Plaintiff's counsel was compelled to proceed in English, contrary to her wishes. All counsel, except for counsel for the Defendant, was bilingual, as was the Judge.

The Plaintiff did not raise this as a ground for appeal, but the NB Court of Appeal nevertheless commented on the situation as follows, at paragraph 24:

> *The judge who heard the motion for summary judgment in the instant case was not dealing with an urgent matter. A few weeks' adjournment would have enabled Mr. Whelton to comply with rule 39.05 (1) [to issue notice of his intention to proceed in French]. With the greatest respect, I am of the opinion that the motion judge erred in disregarding Mr. Whelton's wishes and in insisting that he employ the English language at the hearing. The judge should have raised the possibility of an adjournment and sought representations from the parties as to whether such a measure would be appropriate.*

The NB **Official Languages Act** also provides at section 19 that a court must understand without the help of an interpreter the official language chosen by a party to a proceeding before it. This provision was interpreted in **Noble Security v. Tremblay** (2006) to give high priority once again to a litigant's linguistic rights. In that case, Default Judgment was obtained against a self-represented defendant. To the point of default, the matter proceeded in English as both the Plaintiff and the Defendant had elected to proceed in English.

The Defendant hired counsel to bring a motion to set aside the Default Judgment. A motion for recusal of the English-speaking Judge was also brought on the basis that the Defendant was now proceeding in French. The same Judge had previously been unfavourable to his position in the same proceeding.

Interestingly, the Motions Judge at the hearing on the recusal issue was the same one with whom the Defendant was taking issue for the hearing of the motion to set aside the Default Judgment. That Judge heard the Defendant in French and confirmed in his decision on the issue of recusal that although he was not bilingual, he did have a degree of facility in the French language and had been able to read and understand the Defendant's affidavit and the oral submissions. However, he did recognize that he did not have sufficient facility in the French language to forgo the assistance of an interpreter in the context of a motion to set aside the Default Judgment in this case, which was more complicated. He therefore recused himself from hearing the motion to set aside the Judgment, even though it was apparent that the motive behind the motion for recusal was that the Defendant was judge shopping. At paragraphs 20 to 22, the Judge said:

> *The argument of "judge shopping" is a difficult one to answer in most situations and that is particularly so in this matter. Mr. Tremblay prepared pleadings and affidavits in English, he elected to proceed in English and the documents he prepared in English are as good as many of the documents I see from English lawyers. Consequently, I have concerns with respect to the issue of "judge shopping" raised by the Plaintiff. That being said, I believe the language contained in sections 16, 17, 18 and 19 of the Official Languages Act are mandatory, and override the order of this Court and override the issue of "judge shopping". The use of the word "must" and the words "without the assistance of an interpreter" are clear given the plain meaning of these words. The wording does not limit when or how a person exercises this fundamental right. It therefore must have been the legislature's intention that citizens have an unfettered language right in court which is available to a citizen at any time.[…] While I have concerns with an election to proceed in one language which is subsequently changed because this could cause delays, disrupt a trial or have an adverse effect on the other party, that issue is not before me.*

This can be contrasted with the conclusion attained in one of the key decisions on the matter of linguistic rights in the context of litigation of insurance claims. In **Gagnon v. Rousselle** (2002), the Court restricted the insureds' stated choice over the language of the proceedings, most likely over the untold inference that the insureds' choice had been influenced by the insurer or its counsel. The **Gagnon** case is the most notable touching on section 20.2 of the Act.

The decision drafted by Deschênes J, as he then was, provides an interesting and insightful treatise on the history and desired purpose for the enactment of the provision, on which the Motions Judge eventually based his decision.

In that matter, the insurer had retained for its French-speaking insured the services of a lawyer to defend a claim related to a motor vehicle accident. According to the evidence, that lawyer spoke French and he had in fact used French almost exclusively at the hearing of the motion. However, the lawyer for the Defendants wished to examine one of the parties in English with the assistance of consecutive translation services because he felt more comfortable with the English language. It was admitted that the insured, if they had in fact been consulted with respect to their language of choice, would no doubt have elected to proceed in French. A few days before the hearing, the Defendants signed affidavits in which they confirmed that they gave their lawyer permission to use English for the examination of the other parties.

Deschênes J. studied the purpose and scope of section 20.2 of the Act. He rejected the Defendants' argument that the only duty of an insurer arising from s. 20.2(2) of the Act was to retain the services of a solicitor who can adequately speak the official language chosen by the insured under s. 20.2(1). He found that in enacting this section, the Legislature had the wider intention to promote linguistic rights and that therefore the insurer's duty was to engage a solicitor who would in fact use the language of the insured's choice. At paragraphs 15 and 16 of the decision, he said:

> *The insurer cannot and must not retain the services of a solicitor to act on behalf of an insured before the insurer has obtained some indication from the latter of the official language the insured wishes the solicitor to use. Once the insurer has obtained the insured's choice, the insurer must retain a solicitor who is able and willing to use the official language chosen by the insured and who will in fact use it. The solicitor whose services have been retained must master the official language the insured has chosen to a degree such that he or she will never jeopardize the insured's interest by reason of his or her linguistic ability. If an insurer subsequently has to negotiate with an insured to obtain a waiver of the rights conferred by s. 20.2(1) of the Act because of a lack of linguistic ability, it is obvious to me that the insurer has not fulfilled its statutory duty under s. 20.2(1) of the Act. […]*
>
> *In my opinion, if the solicitor the insurer intends to engage does not sufficiently master the official language of the insured's choice, the insurer cannot retain his or her services and the solicitor himself or herself must refuse to act if the insurer has failed in its duty. [Underlining original to the cited text]*

This is of course interesting as it appears on its face to offend the general proposition that linguistic rights of litigants are so fundamental that a litigant can elect to proceed in one official language regardless of the fact that he or she is more proficient in the other (as suggested by the **Cormier** decision, supra), that he or she can change the language of the proceeding on the basis of the language spoken by his counsel (such as in **McGraw**, supra), that he or she can use the fundamental rights of s. 19 of the Charter for ulterior purposes, such as Judge shopping (as in **Noble Securities**) and possibly to secure an adjournment (as suggested by **Whelton**). It is clear that the basis for Mr. Justice Deschênes's finding in **Gagnon** that an insured's rights under the Act are breached when counsel retained by the insurer can speak French but will not use it at all times is that he felt that the insured had accommodated the insurer with its choice of counsel, and not the other way around. Procedurally, **Gagnon** has raised some questions, and it remains to be determined if a court, faced with a similar situation, would again deny the insured their stated wish to continue to proceed with their appointed counsel. It will then be interesting to see if, in future consideration of section 20.2 of the Act, this disposition has the perverse effect of locking the insured into his or her choice of language throughout the proceedings. If it does not, insurers would be well advised to ensure that litigants who might want to use either or both languages are assigned fully bilingual counsel, or risk having to assign alternate counsel down the line if the insured changes his or her mind.

Stéphanie Luce – Associate
Moncton Office
506.383.2234
sluce@smss.com

Causation Resulting from Improper Stair Construction – The Stair Case: *Lane v. Alcock Enterprises Limited & Pynn (2009)*

George Lane ("Lane") was injured on December 21, 2001, when he slipped and fell on stairs outside a commercial building in the City of Mount Pearl, NL, owned by the First Defendant, Alcock Enterprises Limited ("Alcock"), and leased to the Second Defendant, Pynn. According to the Trial Judge, Alcock and Pynn's negligence arose from poor stair geometry and the lack of a handrail. The Trial Judge also concluded that the lack of non-slip treading on the stairs did not constitute negligence. Alcock cross-appealed the Trial Judge's finding that, as owner of the building, he owed a duty of care to Lane. The NL Court of Appeal examined the issues on appeal and found in favour of the Respondents. Consequently, the cross-appeal was not considered.

After discussing the appropriate standard of review, the Appeal Court examined the grounds advanced by the Appellant. Lane alleged that the absence of non-slip treading on the stairs constituted negligence. The Court of Appeal reviewed the evidence tendered by Lane and concluded that it was not persuasive. Lane's expert had taken neither photographs nor measurements of the stairs and the expert admitted that wooden steps, by their very nature, are slip resistant.

A building inspector for the City of Mount Pearl testified that the landing, handrail, and steps complied with the National Building Code as interpreted by the City. The inspector had viewed the stairs on two separate occasions prior to issuing an occupancy permit in September of 2001. As evidence indicated that the handrail was knocked out of place between September of 2001 and the date of the injury, the Trial Judge concluded that the lack of a handrail was evidence of negligence on behalf of Alcock and Pynn.

However, the Trial Judge concluded that Lane had failed to prove causation. With respect to the improper stair geometry, he determined:

> *Lane's own evidence does not indicate that he lost his footing in a manner likely caused by an unanticipated discrepancy in stair geometry... I therefore find that the apparently deficient stair geometry did not cause [Lane's] injuries.*

Concerning the lack of hand railing, the Trial Judge noted:

> *[Lane's] own evidence as to how he fell does not support him being in a position to grab a handrail had one existed: he fell backwards on ascending stairs, on the first or second step. [Lane] gave the Court no evidence that he reached out for a handrail when he lost his balance, nor did he explain how he could have grasped it as he fell... His evidence is such that I am unable to infer from it that "but for" there being no handrail, he would have sustained injury.*

The Appeal Court agreed with the Trial Judge by concluding:

> *Lane failed to show that the injury would not have occurred but for the negligence of Alcock and Pynn. Lane's suggestion that the onus was rather on Alcock and Pynn to prove they were not the cause of his fall is without merit.*

What this means to you...

Lane v. Alcock serves as an important reminder that the fundamentals of tort law cannot be forgotten - Lane was unsuccessful because he failed to prove the element of causation. The existence of injury and proximate negligence is immaterial if the negligence cannot be tied to the loss. Consequently, it is imperative to remember that a Plaintiff must be able to establish all the requisite elements in order to succeed in their claim. While the cost of defending an action can be significant, it pales in comparison to the true cost of paying an unsubstantiated claim for damages.

Christopher E. Lewis – Associate
St. John's Office
709.570.8820
clewis@smss.com

Implied Consent and the Family Car: *Metro General Insurance v. Dinn & Snow (2008)*

The key issue in **Metro General** was whether the operator of a vehicle was driving with the consent of the owner; and, if consent was found, whether the driver and owner made false statements to the insurer.

Ernest Snow Senior ("Snow Sr.") allowed his son, Ernest Snow Junior ("Snow Jr.") to live in the basement apartment in his home. Snow Jr. had full access to Snow Sr.'s house and had a key to the garage where Snow Sr. kept his vehicle. On the day of the accident, Snow Jr. received a phone call requesting his presence at a job interview and, rather than bothering his father, Snow Jr. went to the garage, used the extra set of car keys left there and drove himself to the interview. En route to the interview, Snow Jr. impacted Dinn's car.

Shortly after the accident, the insurance adjuster contacted the Snows seeking their statements. As usual, the statements were given by means of the adjuster asking questions and drafting a statement on the basis of the answers given. Neither of the Snows read their statement prior to signing, and both admitted that they had difficulty with literacy.

Snow Sr.'s statement read, in part:

> *My son does have a key to the garage. I have specifically told my son that he cannot drive my car as he is not insured on it. To my knowledge he has never driven my car.*

Snow Jr.'s statement read, in part:

> *Prior to [the accident] I believe I only took the car on 1 (one) previous occasion without his permission to run a short errand. On [the date of the accident], my father took me 2 or 4 places to drop off resumes. Around lunch time he was across the street. I went in the garage and took the key to the car without his permission.*

Both Snows testified that they understood the adjuster's questions to relate to whether Snow Jr. had obtained express permission on the day of the accident. The adjuster admitted that both Snows referred to permission on the day of the accident, but that information was not included in the statements.

The Trial Judge concluded that s. 200(2) of the NL **Highway Traffic Act** creates a general presumption of consent where "a person driving a vehicle [is] living with and as a member of the family of the owner," unless the contrary can be demonstrated. The Court of Appeal concluded that the Trial Judge made no error in concluding that the statements were not sufficient to rebut the presumption in s.200 of the Act. Furthermore, the Court of Appeal concluded that the Trial Judge did not make a palpable and overriding error in concluding that Snow Jr. had the implied consent of Snow Sr. to operate the vehicle.

The insurer then argued that if consent was provided to Snow Jr. by Snow Sr., the statements provided by the Snows were false. Section 7(1) of the NL **Automobile Insurance Act** provides that where an insured wilfully makes a false statement, the claim by the insured is invalid and the right of the insured to recover indemnity is forfeited. The Snows argued that while the statements were inaccurate, the inaccuracy was better attributed to the adjuster than the Snows. Based on the inconsistencies of the statements, the Court of Appeal agreed with the Trial Judge in concluding that neither of the Snows made a wilfully false statement.

Consequently, the decision of the Trial Judge remained and the insurer was required to indemnify Snow Sr. for the accident.

What This Means to You...

The clear message from **Metro General** is that the accuracy of the adjusters' statement is paramount if the statement is intended to be relied upon at a later date. Further, when it appears that a deponent may be limiting the scope of his or her answer, supplementary questions should be asked in order to "flesh out" the response. As with any evidence tendered to the Court, statements to adjusters have to be sufficiently reliable for the Court to base their decision upon. Consequently, the current model of statements may have to be adjusted in order to satisfy the Court's requirement of accuracy.

Christopher E. Lewis – Associate
St. John's Office
709.570.8820
clewis@smss.com

Court of Appeal Considers Trial Court Finding of No Liability in Moose-Vehicle Collision

On October 30, 1998, a motor vehicle traveling east to St. John's, NL, on the Trans Canada Highway was involved in a collision with three moose. A passenger in the vehicle was severely injured and sued the driver of the motor vehicle in negligence. At trial, the Judge held there was no negligence on the driver's part that caused or contributed to the accident. Upon the passenger's appeal of the decision, the two issues dealt with by the Court of Appeal were:

1. The appropriate standard of review; and,

2. Whether the Trial Judge erred in finding that the driver was not negligent.

A finding of negligence or an absence of negligence involves the application of a legal standard to a set of facts and is considered to be a question of mixed fact and law. When an appellate court reviews such questions, the standard of review will vary depending on whether the appeal focuses on factual aspects or applicable legal principles. Where an appeal focuses on factual aspects a trial judge's decision should not be overturned unless there is a palpable and overriding error. Conversely, when an appeal focuses on the applicable legal principles, a trial judge's decision will be held to the standard of correctness. In this particular case, the appeal focused on the factual aspects of the claim. As such, the applicable standard of review was that of palpable and overriding error.

The fact that the driver owed a duty of care to the passenger was considered to be non-contentious and was not argued on Appeal. In order to discharge the duty of care, a driver must exercise the standard of care required by the common law; that is, what would be expected of an ordinary, reasonable and prudent person in the same circumstances (the "reasonable person standard"). Although the standard of care does not change from one portion of the highway to another, the conduct required to meet the standard of care will vary according to the circumstances.

The Court of Appeal found that the Trial Judge's decision did not adequately address the important factor of vehicle speed in the determination of negligence. The driver testified that he was traveling at the posted speed limit. However, the Court pointed out that the law is clear that compliance with the posted speed limit does not necessarily satisfy the underlying obligations of reasonableness. Further, the effect of section 110(1) of the NL **Highway Traffic Act** is that it is a violation to drive at the posted speed limit if that speed limit would not be reasonable and prudent in the prevailing conditions. The Court of Appeal held that a reasonably prudent driver would have decreased his speed appreciably in an area specified by a moose warning sign. It also found that the risk of encountering moose was real. In such a situation, the choices open to a motorist are limited, but do include reducing speed so as to be able to have more time to react to the presence of moose. As such, the Court of Appeal found that the Trial Judge committed a palpable and overriding error in failing to consider the totality of the circumstances in respect of the reasonableness of vehicle speed.

Having established that the driver was negligent in driving at an unreasonable speed, the Court of Appeal then had to assess whether the breach of the duty of care caused the passenger's injuries. It held that the driver's negligence resulted from failing to decrease his speed appreciably in the moose warning area under those conditions. The presence of moose, being wild animals of unpredictable behaviour, on or near the highway in that area was a reasonably foreseeable risk which directly affected the conduct required to meet the standard of care. As such, the Court of Appeal inferred that the driver's negligence was part of the cause of the accident. The Appeal was allowed, with costs to the passenger on a party and party basis.

Steven A. Scruton – Associate
St. John's Office
709.570.8837
sscruton@smss.com

Court Refuses Summary Judgment in Claim of Negligent Supervision of an Adult Child

In **Connick v. Ramsay** (2008) the Plaintiff was injured in 2000 in a watercraft accident that was alleged to have occurred as a result of the actions of N.R., the Defendants' adult son. N.R., who was operating a sea-doo, struck the Plaintiff causing him serious leg injuries. The claim filed in 2001 in PEI Supreme Court alleged that the Defendants were negligent in the supervision and control of N.R. and that such supervision and control was necessary as N.R. suffered from a mental deficiency. Discovery had not yet occurred, having been cancelled in January 2008 due to the health of counsel.

The Defendants' brought a motion to dismiss the matter for delay or, alternatively, for summary judgment. After reviewing the lengthy chronology of facts, the Court was not satisfied that the delay was unreasonable in the sense that it was inordinate and inexcusable. Some delay had been occasioned by consent of the parties, some due to settlement discussion, and some due to medical reasons, namely the health of one counsel and the death of one of the Defendants. Accordingly, the Court declined to dismiss the matter for delay.

Alternatively, the Defendants had applied for summary judgment. They took the position that there was no judicial authority in Canada to impose a duty of care on a parent for the actions of an adult child. Absent a propensity to act and an awareness of the propensity by the parent, the Defendants argued that no liability could attach to them. The Motion's Judge rejected this argument holding that there was a genuine issue for trial. The Court accepted that the categories of relationships giving rise to a duty of care were not closed and held that the facts required discovery examinations in order to further investigate the Plaintiff's claim. The Court acknowledged that the Plaintiff's claim may ultimately be a weak one, but this was not sufficient reason to grant summary judgment.

Gary G. Demeulenaere – Associate
Charlottetown Office
902.629.4540
gdemeulenaere@smss.com

Charity Hogan – Summer Student

Addition of Contributory Negligence Claim Does Not Require Further Discovery

In **Peardon v. Long** (2008), the Plaintiff appealed an interlocutory ruling allowing the Defendant's motion to amend the Statement of Defence. A Statement of Claim had been issued in which the Plaintiff pleaded that a motor vehicle accident occurred as a result of the Defendant's negligence. The Plaintiff was a passenger in the vehicle at the time of the accident. In the Statement of Defence, the Defendant did not plead contributory negligence. During the discovery examination of the Defendant, questions arose with respect to whether the Plaintiff had been wearing a seatbelt. In addition, there was some evidence given as to the possibility of the consumption of drugs.

The Defendant subsequently brought a motion to amend the Statement of Defence to include reference to the Plaintiff's alleged negligence and contributory negligence. It was agreed by counsel that the requested amendments should be granted. However, the parties disagreed on the terms of the amendment, specifically the Plaintiff's position that the Defendant be required to pay the costs of further discovery. The Judge refused this request.

The Court of Appeal upheld the Judge's decision and dismissed the appeal. In its decision, the Court of Appeal held that no error in principle had occurred and it identified five findings of the Judge in support of his position: (1) the revelations of the Defendant during oral discovery were within the scope of the issue of liability; (2) liability was at play; (3) those were matters upon which the Plaintiff would have had knowledge within her own version of events; (4) those were matters upon which Plaintiff's counsel could have and, for the most part, did carry out a full oral discovery of; and, (5) it was not made apparent to the Judge that there were matters remaining that would necessitate further discovery.

Gary G. Demeulenaere – Associate
Charlottetown Office
902.629.4540
gdemeulenaere@smss.com

Charity Hogan – Summer Student

PEI Appeal Court Reinstates Statement of Defence Previously Struck for Failure to Produce Documents

In **Jay v. DHL Express (Canada) Ltd.** (2009), the Plaintiff sued for breach of contract. Several motions for production were made by the Plaintiff with respect to the Defendant's waybills and invoices, which the Plaintiff required to establish his claim for damages. The Defendant applied for and was denied Summary Judgment and was also ordered to produce the documents, despite claims that they were not retrievable. It was alleged that the Defendant had suffered a computer crash in 2005 that resulted in the loss of data and/or data retrieval capability. When the Defendant did not produce the documents, the Plaintiff brought a motion to strike the Statement of Defence. The Judge was not impressed with the Defendant's efforts to produce the records and determined that it had no other recourse but to strike the Statement of Defence.

On appeal, the Statement of Defence was reinstated. The Court of Appeal held that the missing records were only relevant to the issue of damages, not to the other issues before the Court and stated that the Judge erred in not considering the Defendant's lack of bad faith, the limited relevance of the documents sought, and the relative prejudice to the parties. It was further held that, as there was no finding of contempt against the Defendant, punitive sanctions were not appropriate. Interestingly, the Court of Appeal granted costs of the motion in favour of the Plaintiff as it was held to be a reasonable step in the proceeding.

Gary G. Demeulenaere – Associate
Charlottetown Office
902.629.4540
gdemeulenaere@smss.com

Charity Hogan – Summer Student

A Review of Minor Injury Legislation in Nova Scotia

History

On November 1, 2003, the Nova Scotia legislature amended the automobile insurance provisions of the **Insurance Act** by enacting Bill 1 (otherwise known as the **Automobile Insurance Reform Act**) and the **Automobile Insurance Tort Recovery Regulations** (the "Regulations"), collectively referred to as the "Insurance Reforms." The key change brought about by the Insurance Reforms related to the assessment of general damages for "minor" injuries.

By virtue of the amendments to the **Insurance Act**, the general damages awarded to an individual who suffers a "minor injury" in a motor vehicle accident, as that term is defined by the **Insurance Act** and the **Automobile Insurance Tort Recovery Regulations**, are subject to a "cap" of $2,500.00 (the "Cap"). The Cap does not impose any limit on recovery for other compensable heads of damages.

A plaintiff's injuries will be considered "minor" where they do not result in substantial interference with a person's ability to perform their usual daily activities or regular employment beyond the one (1) year anniversary of the accident.

First Interpretation

Farrell v. Casavant (2009), was the first case in Nova Scotia to interpret and apply the Cap legislation. The Plaintiff suffered a broken right wrist, broken bones in his left hand, two broken ribs, broken blood vessels in his nose and back injuries. He returned to work full time within five (5) months of the accident but continued to complain of pain in his right wrist and back past the twelve (12) month mark. The Court found that while he had suffered a personal injury which resulted in a permanent disfigurement and a permanent impairment of important bodily functions, neither was serious and his injuries had resolved within the meaning set out the Cap legislation within twelve (12) months of the accident. General damages were therefore assessed at $2,500.00.

Constitutional Challenges in Nova Scotia

In September of 2008, Justice Goodfellow presided over the hearing respecting the validity of the Cap. The challenge was considered in the joint-hearing of two (2) test-cases, and two (2) main issues were raised: (1) the constitutionality/Charter validity of provisions in the **Insurance Act** and the Regulations; and (2) whether the **Regulations** are *ultra vires* the **Insurance Act**.

On January 12, 2009, Justice Goodfellow released the first part of his lengthy decision dismissing both challenges and upholding the Cap. This was followed on February 9, 2009, when Part 2 of Justice Goodfellow's decision was released dealing with the Section 1 Charter arguments. Justice Goodfellow found that if he was wrong and the **Insurance Act** and Regulations violated s.15 of the Charter, the Cap would not be saved by Section 1.

The Gionet Challenge

The Gionet Plaintiffs claimed that the Cap discriminates against motor vehicle accident victims on the basis of physical disability and sex. This group also brought forward a challenge that the Regulations were *ultra vires*.

Their challenge was defended by the Attorney General of Nova Scotia ("AG"), while the Insurance Bureau of Canada ("IBC") acted as an intervenor. The Gionet Plaintiffs argued as follows:

> *1. The Cap discriminates on the basis of physical disability, because individuals suffering from chronic pain and soft-tissue injuries have been historically stereotyped in society as "fakers" and/or malingerers. The Plaintiffs thus argued that a cap on their general damages further perpetuates this stereotype and the resulting marginalization.*

Justice Goodfellow found that the Plaintiffs failed to meet their evidentiary burden to establish an infringement – there was no evidence of stigmatization or marginalization of the claimant group. Any seeming stigma would more properly be attributed to the adversarial nature of tort law.

> *2. The Cap discriminates on the basis of sex, because women generally receive the majority of their damages in the form of non-pecuniary damages. Therefore, the Plaintiffs argued that the Cap disproportionately affects a woman's right to compensation. In this respect, the Plaintiffs relied on the evidence and opinion of Professor Lucinda Finley, a law professor from the United States.*

In response to the allegation of discrimination on the basis of sex, Justice Goodfellow found that the Plaintiffs had not selected the appropriate comparator group. In his view, the appropriate comparator group for consideration is men with similar injuries to women (*i.e.* minor injuries). In this comparator group, there is no difference in treatment and therefore no discrimination against women. In other words, the Cap treats both men and women the same.

> *3. The definition of "resolves" in the regulations is contrary to the "plain and ordinary" meaning that was intended by the Legislature in the Insurance Act. Effectively, the Plaintiffs argued that the Government does not have the power to define the word "resolves."*

Justice Goodfellow found that the definition of "resolves" did not take away any substantive rights of the Plaintiffs, but was merely a definition of a term used in a statute that was consistent with the objectives of the **Insurance Act**. As such, it was entirely within the right of the Government to define "resolves."

On his alternative section 1 Charter analysis, Justice Goodfellow ultimately concluded that if he had found a violation of section 15 of the Charter, the impugned legislation would not be otherwise justifiable.

The McKinnon Challenge

The McKinnon Plaintiff claimed that because she had suffered post-traumatic stress disorder ("PTSD") from a motor vehicle accident (as opposed to what she characterized as a "physical injury"), her general damages were automatically capped at $2,500.00. This is because, in her view, the legislation does not allow for general damages above $2,500.00 for any mental injury.

The McKinnon challenge was defended by D. Geoffrey Machum, Q.C. and Christa Brothers of Stewart McKelvey, who represented the Defendant driver, Roy McKinnon. The AG and IBC also defended this claim.

In response to the mental disability claim, all three parties presented evidence that the Plaintiff was not suffering from a purely mental injury. Rather, their uncontroverted expert evidence demonstrated that PTSD is a physical injury as it does manifest itself physically in the brain. Therefore, as the Plaintiff's injury was "physical in nature," the Plaintiff is not discriminated against in the manner alleged, because no distinction is actually drawn by the legislation.

Justice Goodfellow found the expert evidence of the responding parties persuasive and accepted their opinion that structural changes happen to the brain in moderate to severe PTSD. He concluded that "the brain is part of the body and PTSD has been established as an injury which is 'physical in nature'." The Plaintiff provided no evidence to the contrary. Therefore, if the Plaintiff had a permanent, serious impairment of an important bodily function which had not "resolved" within twelve (12) months, then she would not be restricted in terms of her claim for general damages. As such, no distinction was made with respect to her injury on the basis of mental disability, and Justice Goodfellow did not need to further consider the four (4) contextual indicators of discrimination.

The Plaintiff also argued that the Regulations impose a discriminatory burden on the basis that she is not yet of legal working age. Justice Goodfellow dismissed the age discrimination argument in short order, finding the Plaintiff seemed to "ignore" the definition of "usual daily activities" found in the Regulations. Nevertheless, he also went on to reject the opinion provided by Professor Lucinda Finley that minors were discriminated against by the Cap.

The appeal of both test cases is scheduled to be heard from October 13-15, 2009.

Nova Scotia in Comparison to Alberta

Alberta has also introduced legislation similar to the Nova Scotia Cap. The outcome of the Gionet and McKinnon challenges in Nova Scotia can be compared with similar claims in Alberta. The Alberta Plaintiffs' bar, in **Morrow v. Zhang** (2008) ("Morrow"), was initially successful in having their Cap on general damages struck down following a challenge under s. 7 and s. 15 (1) of the Charter. In Morrow the Trial Judge found that the Alberta Cap infringed the Plaintiff's rights under s. 15(1) of the Charter. In particular, the Trial Judge found that the insurance reforms as a whole perpetuated a stereotype against individuals suffering from minor tissue injuries, marginalizing or stereotyping those so injured. This is the same challenge which was unsuccessful in Gionet. The s. 7 challenge was unsuccessful.

However, upon appeal of the Morrow decision, the Alberta Court of Appeal found that the Trial Judge failed to examine the insurance reform in its entirety, as various regulations clearly recognized that injuries suffered by the Plaintiffs were real and required treatment. The legislation, as a whole, was designed to meet the needs of those suffering minor soft tissue injuries. Although the legislation made a distinction on the basis of disability, it did not discriminate and s. 15(1) of the Charter was not infringed. Consequently, like the decision by Justice Goodfellow, there is a finding that a reduction in soft tis-

sue injury damages pursuant to a statutory regime does not result in a violation of Charter rights. The Alberta Court of Appeal further held that there is no fundamental right to non-pecuniary damages and concurred with the Trial Judge's findings regarding s.7.

It must be noted that the system in Alberta differs from the system in Nova Scotia. The Alberta system provides claimants with additional benefits (such as increased Section B benefits) while, at the same time, reducing soft tissue injury general damages to $4,000.00.

It is quite likely that the constitutionality of statutorily imposed Caps will one day be considered by the Supreme Court of Canada.

J. Gregory Clooney – Associate
Halifax Office
902.444.1704
gclooney@smss.com

What Qualifies as a "Minor Injury" Under Nova Scotia "Cap" Legislation?

The recent decision of Associate Chief Justice Smith in **Farrell v. Casavant** (2009) ("Casavant") is the first case in Nova Scotia to apply the $2,500.00 "cap" on general damages introduced by s. 113B of the **Insurance Act** (the "Act")and the accompanying **Automobile Insurance Tort Recovery Limitation Regulations** (the "Regulations").

The Plaintiff was injured in a head-on collision when the Defendant's vehicle skidded on an icy bridge and travelled into the oncoming lane. At trial the Defendant was found not to be liable, having used the ordinary care, caution, and skill expected of a driver under the conditions. In provisionally assessing damages, though, A.C.J. Smith provided the first judicial interpretation of the meaning of "minor injury" in the context of the cap provisions.

In Casavant, the Plaintiff suffered a right wrist fracture, left hand chip fracture, contusions of the left ankle and right chest area, and a low back injury. The Plaintiff was off work for 4½ weeks, and performed modified duties for a few weeks after that. The wrist fracture resulted in permanent stiffness and an obvious deformity. At the time of trial, the major ongoing complaints related to continuing pain in the right wrist and low back.

A.C.J. Smith concluded that in order to determine whether the Plaintiff had suffered a minor injury as defined by the legislation, she must decide the following:

1. Did the Plaintiff suffer a "personal injury"?

2. If so, did the personal injury result in a permanent serious disfigurement?

3. Did the personal injury result in a permanent serious impairment of an important bodily function caused by a continuing injury which is physical in nature?; and,

4. Did the personal injury resolve within twelve months following the accident?

It was concluded that the Plaintiff had suffered a personal injury as a result of the accident. The Court further went on to find that while the Plaintiff had suffered a disfigurement, which the medical evidence showed would be permanent, it was not "serious" as defined by the legislation. In reaching this conclusion, she relied on Ontario jurisprudence on "permanent serious disfigurement," which states that in order for an injury to constitute a disfigurement, it must have the effect of

marring or detracting from an individual's appearance. Not every disfigurement will be serious enough to fall outside the cap. Whether it does so cannot be answered by reference to generalities, but only to the particulars of the injured person's life. In this case, she noted that although the Plaintiff's wrist was visibly bent, there was no evidence that he had ceased to wear short-sleeved shirts or roll up his sleeves, exposing the wrist. The Plaintiff confirmed that the appearance of the wrist did not bother him.

A.C.J. Smith noted the Nova Scotia legislation separates analysis of disfigurement, which goes to appearance only, from analysis of impaired function. With respect to impairment, she again referred to Ontario cases interpreting "permanent serious impairment of an important bodily function caused by a continuing injury which is physical in nature." She concluded that the Plaintiff had sustained impairment of his wrist and low back affecting his ability to grip, lift his grandchildren, climb ladders at work, maintain his home, and participate in activities such as horseshoes; that the impairment was permanent; and, that those functions were important to the Plaintiff. She ultimately found that the impairment was not "serious" within the meaning of the legislation, though. Again, whether a bodily function is important to a plaintiff or whether impairment is serious must be determined with respect to the plaintiff's particular circumstances. Impairment is serious, according to s. 113B(1)(b) of the Act if it causes "substantial interference" with usual daily activities or regular employment, as those terms are defined in the Regulations. The Court noted that the term "substantial interference" is defined only as it relates to ability to perform regular employment, and not in relation to ability to perform usual daily activities. The term "usual daily activities" is defined to mean the essential elements of activities that are necessary for the person's provision of their own care and are important to people who are similarly situated considering, among other things, age. The Court suggested that the list of activities that are necessary for a person's provision of their own care would include dressing oneself, cooking, feeding oneself, cleaning oneself and one's home, mobility and any other activities necessary for living on one's own.

In this case, while the Plaintiff continued to have pain in his wrist and back, the Court concluded that the injuries did not cause substantial interference with either his work or his daily activities. The Court was not convinced that the Plaintiff was unable to perform the essential elements of his job as assistant manager at Walmart, particularly because he had not missed any time since returning to work in June of 2004. Only a few weeks of modified duties were necessary before he returned to his usual duties. The Court also found that the Plaintiff's age contributed to his continuing problems.

Finally, the Court concluded that the Plaintiff's injuries had resolved (as defined by the Regulations) by June of 2004, when he returned to work, less than twelve (12) months after the accident. Accordingly, general damages would have been limited to $2,500.00. A.C.J. Smith added that had the Plaintiff not been subject to the legislated definition of "minor injury" and to the "cap," she would not have considered his injuries to be minor and would have awarded him a greater sum for general damages.

This case is an important one for insurers and defence counsel in Nova Scotia. In assessing whether an injury is likely to be "minor" and therefore come in under the cap, it is important to note, as A.C.J. Smith stressed, that the legislation focuses on disfigurement and impairment in the plaintiff's particular circumstances, not on the nature of the injury itself. Even if the injury is one that most people would consider serious, such as a broken back, if no permanent serious disfigurement or permanent serious impairment of an important bodily function results and if the injuries resolve within twelve (12) months, the injury will qualify as minor. Conversely, if the injury is one that most people would consider minor, such as a broken finger, it will not be considered minor if that finger belongs to a harpist and the harpist's ability to play the harp is permanently impaired. The emphasis is therefore on the effect of the injury on a particular plaintiff. Evaluation of potential cap injuries will therefore continue to require a nuanced, fact-specific approach.

Tanya L. Butler – Associate
Halifax Office
902.444.1703
tbutler@smss.com

Self-Represented Litigants and the Issue of Competency

In July of 2009, the Nova Scotia Court of Appeal released a decision that touches upon the sometimes difficult situation of self-represented litigants: **Ocean v. Economical Mutual Insurance Co.** (2009).

Background Facts

This case has a complicated procedural history. What follows is simply a summary of relevant details.

The matter began as a result of a motor vehicle collision in December of 2000, during which the Appellant (Ocean) was allegedly struck by an uninsured motorist. The Appellant commenced proceedings in 2002 against this motorist and the Appellant's own motor vehicle insurer, Economical Mutual Insurance Co. ("Economical"), the latter pursuant to Section D of the insurance policy. Among other things, the Appellant alleged to have suffered post-traumatic stress disorder ("PTSD").

Initially represented by counsel, the Appellant chose to self-represent in or about August of 2006. Thereafter, and on the eve of Trial, the Appellant sought to amend the pleadings to include a claim of bad faith against Economical.

This amendment was contested. During the resulting hearing, the Appellant made comments to suggest that she did not feel mentally competent. She had also filed voluminous materials with the Court, in part alleging a coordinated effort by the insurance industry to silence her claim. In addition, the Appellant had promoted her discovery of certain theories as a result of her PTSD-related hyper-vigilance.

In initial response, and after hearing submissions of opposing counsel, the Trial Judge requested a note from the Appellant's physician to confirm competency. The Appellant provided a brief note from her physician in that regard, stating that "[the Appellant] is competent to defend herself in court."

Nevertheless, the Economical remained concerned. It therefore made a formal motion for a pre-trial determination of the Appellant's competency, which the Appellant contested.

After hearing evidence and submissions from all parties in September of 2008, Associate Chief Justice Smith ordered a psychiatric assessment of the Appellant on certain terms and conditions. She concluded, in part:

> *I have an obligation as a trial judge to help to insure that the parties to this action receive a fair trial. In order to insure that the plaintiff [appellant] receives a fair trial, I must be satisfied that she is competent to represent herself in this proceeding. The evidence that has been presented satisfies me that it is appropriate to order a psychiatric examination of [the appellant] to determine the issue.*
>
> *I want to make it clear that I am not in any way finding that [the appellant] is incompetent. I am satisfied, however, that it is appropriate for me to grant an Order requiring an assessment to insure that [the appellant] receives a fair trial.*

The Appeal

The Appellant appealed this order. Her appeal was grounded in her submission that the Associate Chief Justice was biased and that the resulting Order violated certain of her constitutional rights as protected by the Charter. She also requested that the Nova Scotia Court of Appeal order an RCMP / CIA investigation into the alleged wrongdoings of Economical.

Leading up to the Appeal, there were a number of procedural motions heard at the request of the Appellant. Ultimately, the full-day appeal was heard on May 28, 2009. A decision was reached on July 17, 2009, allowing the Appeal and setting aside the Order requiring the Appellant to submit to a psychiatric assessment.

Writing for the unanimous Court of Appeal, Justice Bateman generally, though equivocally, affirmed the lower court's authority to grant an order in the nature sought by Economical. In doing so, however, Justice Bateman cautioned that such an order can only be granted in exceptional circumstances:

> *Whether a court has the discretion to order that a civil litigant undergo a competency assessment pursuant to its inherent jurisdiction is not directly addressed in the authorities I have reviewed … However, I will assume, without deciding, that in certain exceptional circumstances the inherent jurisdiction may be used for that purpose.*

Justice Bateman then went on to conclude that the Associate Chief Justice should not have made such an order on the instant facts and circumstances. She noted

that a distinction must be made between the high threshold of whether someone is psychiatrically "incompetent" (as that phrase is contemplated by mental health and adult protection legislation) or dangerous to the court's process and the more benign allegation that a self-represented litigant may be unable to effectively present her case in the same manner and skill as a trained and licensed member of the bar. Ultimately, the question of whether to order a psychiatric assessment involves a balancing act on the facts of each case:

> *Adult persons are presumed to be competent to manage their own affairs. Access to justice is an important right to be limited only in exceptional circumstances. Being able to represent oneself is a fundamental part of our judicial system.*
>
> …
>
> *I have accepted without deciding that in exceptional circumstances a court can rely upon its inherent jurisdiction to inquire into a litigant's competence. Such a situation might occur, for example, where a litigant by his or her conduct poses a threat to witnesses, litigants, the judge, court staff, himself or herself where his or her conduct otherwise amounts to an abuse of the court's process and where there is no statutory vehicle to address the issue. In my view an assessment order would be an extraordinary step to be taken only as a last resort in the clearest of cases where the assessment is necessary to control the court's process.*

According to the Court of Appeal, the evidence surrounding the Appellant's circumstances was insufficient to rise to the level required to affirm the order under appeal. In this regard, Justice Bateman relied in part on her following conclusions:

- "There is no suggestion that this is a vexatious action or that [the appellant] is abusing the process of the court,"
- "The transcripts of the proceedings reveal that [the Appellant] is articulate, coherent and respectful in court and responsive to direction from the judge,"
- "Although [the Appellant] may have difficulty confining her oral and written submissions to material which the judge and opposing counsel view as clearly relevant to her case she is able to provide a rational explanation which connects her reference to her writings and discoveries to the matters at issue in the litigation;" and,
- "Permitting an opposing litigant to raise the question of a party's mental capacity in a proceeding sets a dangerous precedent …"

Accordingly, the Court of Appeal set aside the order under appeal. In doing so, however, it dismissed the Appellant's allegation that the Associate Chief Justice was biased. It further refused to order an RCMP / CIA investigation and found it unnecessary to engage with the appellant's allegations of Charter violation.

Scott R. Campbell – Associate
Halifax Office
902.420.3383
srcampbell@smss.com

Service First

Clients expect and have the right to receive full value for the fee charged. We have earned a reputation for providing value to business, the public sector and individuals. Service First defines the standards of client service at Stewart McKelvey. Our lawyers and staff hold themselves accountable to deliver the following standards of service to each of our clients:

1. We will work to provide you with the highest quality of confidential, ethical legal services.

2. We will work with you to develop a full understanding of your business / organization and expectations.

3. We will pursue your work conscientiously and without delay. We will work together with you to establish time specific goals and objectives that meet your needs.

4. We will delegate work to our lawyers who have the legal expertise and experience appropriate to both the nature and complexity of the matter and our understanding of your expectations. Where deemed appropriate by you, we will designate a qualified lawyer as an alternative service contact to ensure continuity of service when the lawyer responsible for your matter is not available. At your request, we will work with you to develop practical fee estimates. We will always strive to add value.

5. At your request we will provide documentation that outlines the scope of the legal services to be provided; the potential timeline for handling the matter; a list of the client team members and alternate service contact, with their fields of expertise; and our lawyers' contact information.

6. We will meet and strive to exceed your expectations and always welcome your feedback. We will from time to time, seek from you, either formally or informally, an assessment of our performance.

7. We will maintain effective channels of communications including keeping you informed of all significant developments in the legal matter and responding to your contact in a timely fashion.

8. Accounts will be easy to understand. We will always be receptive to client feedback on our billing practices. When issues arise, we will treat them seriously and respond promptly.

9. If you are dissatisfied with our services, or if you feel we have failed to meet any of these commitments, we ask that you call the service lawyer on your matter, the alternate service lawyer, the local Practice Manager or Managing Partner to discuss your concern. We will honestly and fairly address your concerns.