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ACCIDENT BENEFIT REPORTER

Volume 15 Issue 1
SPRING 2014

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HOANG V. PERSONAL INSURANCE COMPANY: INSURANCE COMPANY PUNISHED FOR DENYING TREATMENT FOR FUTURE RATHER THAN CURRENT NEEDS OF A BRAIN INJURED CHILD.

Robert M. Ben
ASSOCIATE | THOMSON, ROGERS

Although traumatically brain injured children can sometimes make a remarkable recovery initially, they often go on to develop significant problems as their brain matures through adolescence and into young adulthood. These children may require costly treatment or rehabilitation services that are aimed at preventing or mitigating anticipated future problems as opposed to their current needs. What happens when an insurance company denies much needed benefits to such children on the basis that they do not require the proposed treatment now? How can insurers be deterred from this type of conduct?

The case of six-year-old Christopher, which I wrote about in an earlier issue of the *Accident Benefits Reporter* (see: Thomson, Rogers, *Accident Benefit Reporter Updater, Issue 11: Hoang v. Personal Insurance Company: An Insurer Must Remain Open to Additional Information as it Becomes Available*), provides some guidance. Young Christopher suffered a frontal lobe brain injury after being struck by a car. He made great strides in his recovery with the assistance of a multi-disciplinary rehabilitation team. Outwardly, he appeared to be doing very well. He was able to return to school. He got good grades. However, he continued to suffer from brain-injury related cognitive and behavioural deficits, including: difficulties with dual attention tasks such as listening and writing simultaneously; slowed mental processing; persistent behavioural difficulties with aggression and frustration; fatigue; and, anxiety.

Despite Christopher's satisfactory scholastic functioning, his paediatric neurologist considered him to be at very high risk for emerging deficits in frontal lobe functioning during his adolescence.

Christopher's rehabilitation team recommended that he attend a specialized private school equipped to work with traumatically brain injured children, so that he could get individualized support and sustain his academic success into the future and improve his socialization skills.

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YOUR ADVANTAGE,
in and out of the courtroom

Hoang V. Personal Insurance Company: Insurance Company Punished For Denying Treatment For Future Rather Than Current Needs of a Brain Injured Child.

Continued from cover story

The goal was to prevent or mitigate anticipated future problems.

Christopher turned to his insurance company to pay for a rehabilitation benefit for the cost of the specialized school, which he could not otherwise afford. The insurance company refused, pointing to the fact that Christopher was getting good grades in public school and, therefore, there was no present need for him to attend a private school. Christopher took the insurance company to arbitration where he prevailed. The insurance company was ordered to pay for the cost of tuition even though Christopher was never actually able to attend the specialized school. It was enough for Christopher to demonstrate that the rehabilitation benefit was reasonably required. The arbitrator also made a significant monetary Special Award against the insurance company as punishment for unreasonably denying the benefit.

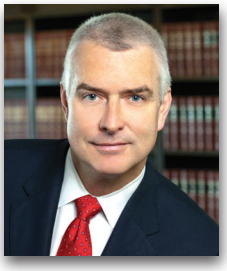
Despite two failed appeals at the Financial Services Commission, the insurance company brought the matter to the Divisional Court for a further form of appeal called judicial review. A three judge panel unanimously upheld the arbitrator's award, finding that the insurance company's reliance on past and current academic successes and socialization disregarded the fact that the specialized school claim was rooted in a concern that Christopher's *future* was at risk. The court rendered a lengthy written decision (see: *Personal Insurance Company v. Hoang*, 2014 ONSC 81 (CanLII)) confirming a number of principles that will be helpful for dealing with insurance companies in similar cases:

- The insurance company must pay a benefit if the treatment or rehabilitation measure is reasonably necessary and the amount of the associated expenditure can be determined with certainty. The injured person does not have to actually receive the treatment or rehabilitation or incur an expense in order to establish entitlement. Otherwise, insurance companies might be encouraged to deny benefits for needed services and then later argue the services could no longer benefit the injured person and should not be paid.
- A treatment or rehabilitation measure can be related to future rather than current needs. The fact that children are more vulnerable than adults when it comes to timely provision of necessary services cannot be in dispute. Children's needs change as they move from childhood to adolescence to adulthood. They will never pass through those phases again.
- When an insurance company unreasonably withholds or denies benefits, a Special Award can be made to punish the misconduct and to deter the insurance company from similar misconduct in the future. The award should be proportionate to, among other factors, the *vulnerability* of the injured person and the harm or *potential* harm directed at the injured person.

Robert M. Ben argued Christopher's case at the 6-day arbitration, two FSCO appeals and at the judicial review at the Divisional Court. ■■■

LITIGATING OUT-OF-ONTARIO ACCIDENT CLAIMS

RECENT COURT DECISIONS LAY OUT THE FACTORS DETERMINING JURISDICTION, AND HOW THEY APPLY



David R. Tenszen
PARTNER | THOMSON, ROGERS

We love our cars. With the summer driving season fast approaching, many of us soon will be packing them up and leaving home to head down East, out West or over the border on summer vacation.

Statistics Canada data shows that in July - August Canadians make more than 5.3 million same-day car trips and almost 2.3 million trips of one or more nights to the United States.

With this volume of traffic outgoing, it is inevitable that some Ontarians will be injured in car accidents in other jurisdictions.

Once injured, usually after relatively brief periods of treatment out of province, accident victims return to Ontario to undergo the bulk of their rehabilitation and resume what they can of their normal lives. It is also in Ontario where they make their claims to their own Ontario no-fault benefit insurers.

In these circumstances, the most convenient forum in which to litigate motor vehicle accident claims is almost always Ontario. It's not only the residence of the plaintiff, but also his or her family members, friends and relatives, teachers or employers, treating doctors, rehabilitation therapists and others, many of whom will have to testify to prove the plaintiff's damages. Family members or friends often are witnesses to the accident, sometimes having been in the car when the accident occurred. However, despite Ontario being the most convenient forum, the province's courts don't always have jurisdiction over the claims.

In *Club Resorts Ltd. v. Van Breda* [2012] S.C.J. No. 17, the Supreme Court set out four presumptive factors that would allow an Ontario court to assume jurisdiction for foreign accident cases (subject to a defendant's ability to rebut any presumption). These four factors — the defendant is resident in Ontario or carries on business in Ontario, or the tort was committed in Ontario or a contract connected with the dispute was made in Ontario — may well be absent in many car accident cases. Therefore, if a foreign defendant does not voluntarily submit to the jurisdiction of the province, the plaintiff may well be forced to bring his or her claim out of province.

Ontario courts have recently had opportunity to consider the effect of Van Breda with respect to two car accidents occurring in the state of New York.

In the first case, *Paraie v. Cangemi* [2012] O.J. No. 5390, an Ontario motorist was struck from behind by a car owned and operated by a New York resident. The Ontario plaintiff brought a claim against the New York motorist and also his own Ontario automobile insurer with respect to uninsured and underinsured motorist coverage. The plaintiff argued that the claim against his own insurer was with respect to a contract that was connected with the dispute which was made in the province and, therefore, the Ontario court should accept jurisdiction.

Justice Lederer held that a plaintiff should not be able to "boot strap" defendants into an action in Ontario by relying on a contingent claim against their own insurer which just happens to be resident in Ontario. The action was therefore stayed.

In the second case, *Cesario v. Gondek* [2012] O.J. No. 5644, an Ontario motorist had the misfortune to be involved in two motor vehicle accidents four weeks apart. The first accident occurred in New York and the second accident occurred in Ontario. The plaintiff sued the New York and Ontario motorists and his own insurer, all in the same action, claiming that the injuries received in the two accidents could not be separately identified and assessed.

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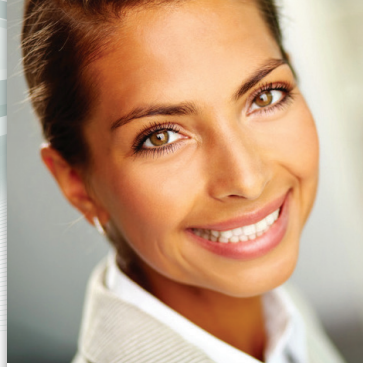

Litigating Out-of-Ontario Accident Claims

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Justice Mark Edwards held that as long as one defendant (not necessarily the moving defendant) was domiciled in the province, Ontario would have jurisdiction. Significant to this ruling was Justice Edwards' finding that if Ontario did not assume jurisdiction then the plaintiffs might be forced to litigate three separate actions, one in New York and two in Ontario. This course might result in the "unjust prospect of inconsistent verdicts". Justice Edwards also considered as a significant factor that the New York defendant's insurer had registered in Ontario with the Financial Services Commission of Ontario. It should be noted that over 800 American and Canadian Insurers have registered with FSCO. Therefore, in this case, the Ontario court remained seized of the claim.

Practically speaking, plaintiff's counsel, once retained with respect to an out-of-province accident, should immediately retain a lawyer in the state or province where the accident occurred. This out-of-province counsel will have to advise with respect to the foreign jurisdiction's substantive law. In *Tolofson v. Jensen* [1993] 3 S.C.R. No. 1022, the Supreme Court held that, generally, the substantive law of the place where the accident/tort occurred will be applied to the case, even when the case is litigated in another jurisdiction. However, the procedural rules of the jurisdiction where the case is proceeding will govern all procedural steps. Foreign jurisdictions can have very different substantive laws that govern car accident cases. Substantive laws include limitation periods, heads of damages recoverable and liability for, and the amount of, interest payable. Especially with respect to limitation periods, Ontario lawyers must be fully informed so that they do not inadvertently miss a foreign limitation period (which as a substantive matter of law would be applied in the Ontario action).

Additionally, Ontario counsel may well want to instruct counsel in the foreign jurisdiction to issue a claim in that jurisdiction. This foreign claim would only be served and prosecuted if the Ontario court does not accept jurisdiction. It would also be prosecuted if a foreign defendant refused to submit to the Ontario jurisdiction and it was anticipated that there may be difficulty enforcing an Ontario judgment in that foreign jurisdiction.

In any event, with summer on its way, Ontario lawyers should be prepared to be retained to prosecute claims with extra-jurisdictional complications.

David Tenszen is a partner with Thomson Rogers in Toronto and practises plaintiffs' personal injury law. ■■■

ACCIDENT VICTIMS SHOULD BE CAREFUL ABOUT DISCUSSING YOUR LEGAL ADVICE

Darcy R. Merkur
PARTNER | THOMSON, ROGERS

Personal injury tort plaintiffs have zero privacy.

Explaining that sad reality to accident victims is a major challenge. Innocent accident victims can't understand why their entire life is thrown under a microscope simply by suing the person that they claim destroyed their life.

People want their privacy and feel that they should not have to divulge their personal information in order to obtain the fair compensation they deserve. Even when you explain that a tort insurer must know about their lives before and after the accident to evaluate the impact of the accident, accident victims still hate the idea of having to disclose and share all of their medical, employment and tax information, as well as potentially their social media information, as a prerequisite to their pursuit of justice.

With respect to medical records, in the context of a personal injury claim, the clinical notes and records of all treating health practitioners from a few years before the accident to date are producible, but what happens when your client discusses your confidential legal advice with their treatment providers, like a psychologist? Is your advice then 'public' and subject to production in the psychologist's clinical notes and records?

In the case of *Dupont v. Bailey* et al, (2013) ONSC 1336, Master Pierre E. Roger of the Ontario Superior Court of Justice had to grapple with exactly that issue in relation to a motion by defence counsel to access redacted portions of a psychologist's clinical notes and records.




In *Dupont*, the plaintiff claimed injuries arising from a motor vehicle accident including depression and trauma. The plaintiff was being treated by a psychologist and the psychologist's clinical notes and records were requested by defence counsel.

While the vast majority of the psychologist's clinical notes and records (over 200 pages) were produced, some 17 pages were partially redacted on the basis that the redacted information was either not relevant or privileged. The redacted information related to information and discussions associated with the plaintiff's tort claim, namely advice from her lawyer regarding settlement and legal strategy.

The two questions for the Master were whether the redacted portions were relevant and whether they were privileged.

With respect to the issue of relevance, the Master noted that a relevant document, like the psychologist's records, must be produced in its entirety without portions redacted on the basis of relevancy, subject only to certain exceptions.

One exception noted is where the objecting party establishes that the redacted portions are irrelevant and, if produced, would cause significant harm while at the same time not assist in resolving the issues in dispute.

Another exception is where the redacted information is relevant but is protected by any type of privilege.

Master Roger suggests that where portions are being redacted, counsel should try to resolve the issue without the need for a motion by having off the record discussions or by explaining very clearly what was redacted and why.

In the end, Master Roger reviews the redacted portions and concludes,

> *"…that the redacted portions are irrelevant and if produced would only embarrass and potentially prejudice the Plaintiff while serving no purpose in resolving the issues in this action."*

On that basis, Master Roger concludes that the records can be redacted. Master Roger therefore declines to address whether or not the redacted portions would have qualified as privileged.

In cases where a client shares privileged information with a treatment provider in the course of therapy, it would make good sense to allow that information to remain privileged in order to facilitate productive and effective treatment. However, without a decision about whether the legal advice, once shared with a psychologist in the course of treatment, remains privileged, the Dupont decision provides little comfort to personal injury lawyers worried that their legal advice will end up being disclosed via treatment providers to defence counsel.

Darcy Merkur is a partner at Thomson, Rogers in Toronto practicing plaintiff's personal injury litigation, including plaintiff's motor vehicle litigation. Darcy has been certified as a specialist in Civil Litigation by the Law Society of Upper Canada and is the creator of the Personal Injury Damages Calculator. ■■■

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UPDATE: HENRY V. GORE MUTUAL INSURANCE

On February 1, 2014, the Ontario Government introduced Ontario Regulation 347/13 negating the findings of the Ontario Court of Appeal in *Henry v. Gore Mutual* and seriously constraining the amount of attendant care benefit payable when a family member is providing the attendant care.

When a person is injured, a close family member is often the main caregiver during recovery. It is simply human nature to lend a hand when a close relative is struggling. After all, what mother is not going to care for their injured child? In such a circumstance, in which a family member is essentially acting as a free personal support worker, should the accident benefits insurer compensate them for their efforts?

In the past, this question has been answered with reference to economic loss as defined in the SABS. In accordance with section 3 of the SABS, one of the criteria for payment of an attendant care benefit is establishing an economic loss. Initially the economic loss criteria was interpreted by the Court in *Henry v. Gore Mutual* as simply being a threshold requirement. Once the person claiming the benefit established an economic loss, regardless of the amount, the benefit was payable in accordance with the amount set out by Form 1.

In *Henry*, the Plaintiff was catastrophically injured as a result of a motor vehicle collision. His attendant care needs were assessed at approximately $9,500 per month. The maximum payable to the applicant by Gore under the SABS for attendant care is $6,000 per month with a lifetime maximum of $1,000,000.00. The Plaintiff's mother took a leave of absence from her fulltime employment as an assistant manager for a retail store in order to provide care to her son. At the time of the collision, she worked 40 hours per week with a salary of approximately $2,100 per month.

The Court of Appeal upheld the decision of Justice Ray and found there was no correlation between the quantum of the caregiver's economic loss and the amount of the insured's benefit entitlement. This makes sense given that the amount of attendant care required is connected to the injuries sustained and not the economic loss of the caregiver. Rather, the Court stated that economic loss was a "threshold decision", which once found would trigger an insurer's obligation to pay the benefit at the assessed amount according to the injured person's needs. As a result, Gore was required to pay Mrs. Henry $6,000 per month despite the fact that her economic loss was only $2,100 per month.

In the lower court decision, Justice Ray notes the change in the SABS requiring an "economic loss" be demonstrated by an attendant care provider. He notes this change:

> *"…was apparently to prevent a member of an insured's family who was not ordinarily an income earner or working outside the home, from profiting from an attendant care benefit when they would be at home anyway – and would have looked after the injured insured without compensation."*

Further, Justice Ray finds that the amended regulation *"retained the requirement that an insurer pay all reasonable and necessary expenses but required that they be incurred by or on behalf of the insured person"* and that ***"the person who has provided the service has 'sustained an economic loss' as a result of providing the services"***. In footnote 7 below, Justice Ray notes:

> *"In 1994 the attendant care benefits were expanded to include payment to family members, and in 2002 the benefit was clarified in [a case in which I acted for the Applicant] F. (L.) and State Farm (FSCO P02-00026, June 3, 2004) that payment by an insured to a family member for attendant care was not a pre-condition to payment by the insured for attendant care benefits for a*

family member. The only requirement was that the services be reasonable and necessary. This was seen as something that needed to be changed and was addressed in the amended Statutory Accident Benefits Schedule – Effective September 1, 2010 Ont. Reg. 34/10, Section 19."

Changes to entitlement to an attendant care benefit made as of September 1, 2010 substantively altered the rights of accident victims and their attendant care providers to receive payment for services delivered. Family members who did not suffer an economic loss as a result of providing attendant care were not entitled to be paid for their services. Therefore, stay-at-home moms of injured children who provide attendant care are expected to do so for free, since as Justice Ray put it, "They would be at home anyway". There is no compensation contemplated for the massive disruption, strain, and labour involved in providing extraordinary care to her child. Instead, because she is not employed outside the home, her labour as an essentially free personal support worker becomes a benefit to the insurer.

The recent changes affected by Regulation 347/13 provide that the payment to the attendant care provider shall not exceed the amount of the economic loss. In effect, the attendant care will now be measured according to the economic status of the family member providing care and not the actual value of the care provided. For example, if two working mothers took time off work to care for their children, and the children had the same injury and required the same level of attendant care, the mother taking time off of a minimum-wage job to care for her child would receive less attendant care benefits than the mother who took time off a high paying corporate job. This is obviously problematic as it further devalues the care provided by lower income family members.

Even more problematic is paragraph 5 of the Regulation which states: ***"This Regulation comes into force on the later of February 1, 2014 and the day it is filed"***. As a result of this Regulation, not only do automobile insurers have the statutory right to pay less than the amount of care quantified in the Form 1, they are taking the position this Regulation is retroactive and applies to all claims for attendant care benefits after September 1, 2010. This change directly impacted the insured person's substantive right to this benefit. There are two types of rights defined in law. A substantive right which addresses a person's right and benefits and a procedural right which deals with the rules that govern those rights and benefits. A change to a substantive right cannot be retroactive in accordance with the prevailing case law which prevents substantive changes from being applied retroactively in relation to accidents which have occurred before the date on which an Amending Regulation comes into effect.

Insurers applying this Regulation retroactively to claims for attendant care arising out of collisions occurring after September 1, 2010 and before February 1, 2014, are doing so at their peril. It is a breach of the insurer's duty of good faith and obligations under the *Unfair and Deceptive Act and Practice* pursuant to Section 439 of The Insurance Act, Section 6.1. of part XV of the SABS and contrary to the plain reading of Ontario Regulation 347/13. These breaches should not be looked upon lightly. The Financial Services Commission will be flooded with Applications for Mediation and requests that insurers consent to fail as a matter of urgency and safety followed by Applications for Arbitration and Motions for Interim Benefits seeking reinstatement of the attendant care entitlements.

In the end, Ontario Regulation 347/13 does exactly what insurers intended it to do. It limits the attendant care benefit to an amount equal to the economic loss. But that may not be the final statement on this issue. Let's not forget that family members who have been forced to quit work in order to care for their loved ones not only lose the income they earned at the time of the collision but will continue to suffer further economic losses associated with lost overtime, annual cost of living increases and performance bonuses. This is especially relevant, given that lower income caregivers will be more likely to quit or lose their jobs as a result of providing care to their loved one. ■■■

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  Should you have any questions, please contact Joseph Pileggi at **jpileggi@thomsonrogers.com**.

UPCOMING EVENTS

Thomson, Rogers will be in attendance at the following events - drop by and say hello.

- **How You Can Help Your Patients Understand Their Legal Rights**
  May 2, 2014 | Lakeridge Health - Oshawa Campus
  For more information please visit:
  www.thomsonrogers.com/event-lakeridge-seminar-oshawa-2014

- **21st Annual Conference on Neurobehavioural Rehabilitation in Acquired Brain Injury**
  May 8-9, 2014 | Hamilton Convention Centre
  For more information please visit:
  www.thomsonrogers.com/event-hhsc-conference-2014

- **BIAQD 2014 Acquired Brain Injury Conference**
  May 15, 2014 | Core Centre | Belleville
  For more information please visit:
  www.thomsonrogers.com/event-biaqd-conference-2014

- **Piecing Together the Trauma Rehab Journey: Multiple Injuries, Issues and Interventions**
  May 30, 2014, The Old Mill, Toronto
  For more information please visit:
  www.thomsonrogers.com/event-tri-conference-2014

- **Back to School Conference**
  September 11, 2014 | Four Seasons Hotel | Toronto
  For more information please visit:
  www.thomsonrogers.com/event-back-to-school-2014

For more information on the conferences, please visit:
www.thomsonrogers.com/upcoming-events-seminars

Thomson, Rogers holds various *Lunch & Learn seminars* throughout the year to assist health care providers, and other interested parties, in understanding the automobile insurance system. If you would like to arrange a *Lunch & Learn seminar* with Thomson, Rogers, please contact Joseph Pileggi at **jpileggi@thomsonrogers.com**.

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YOUR ADVANTAGE,
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