MAY, 2004
VOLUME 3, ISSUE 1

APT LAW

NEWSLETTER OF THE ATLANTIC PROVINCES TRIAL LAWYERS ASSOCIATION

IN THIS ISSUE:

VICTIM EQUALITY: THE CONSTITUTIONALITY OF THE $2,500 THRESHOLD NO-FAULT CAP

MATT LETSON, LAWSON & CREAMER, APT LAW EDITOR

Have the respective governments of New Brunswick, Nova Scotia, and Prince Edward Island violated section 15 of the Canadian Charter of Rights and Freedoms in their reckless pursuit of lower automobile insurance premiums? Most lawyers have a passing familiarity with section 15(1) of the Charter that, among other things, prohibits discrimination based on physical disability.

In New Brunswick, the recently passed *Injury Regulation*, N.B. Reg. 2003-20, restricts an accident victim's right to sue and imposes a $2,500.00 limit on the recovery of non-pecuniary damages for an individual suffering a "minor personal injury". Similar legislation now exists in Nova Scotia and Prince Edward Island.

In Martin v. Worker's Compensation Board of Nova Scotia, [2002] 2 S.C.R. 506, the Supreme Court of Canada found that the failure by the WCB to provide meaningful benefits to injured workers suffering from various "chronic pain" disorders constituted discrimination on the basis of disability. The Court held that:

> the denial of the reality of the pain suffered by the affected workers reinforces widespread negative assumptions held by employers, compensation officials and some members of the medical profession, and demeans the essential dignity of chronic pain sufferers. (Martin, *supra*, at para. 5)

The stripping away of an MVA victim's right to sue for compensation is based on a widely touted falsehood, which is that insurance costs are exceedingly high due to the inordinate number of "soft tissue" claims. One year ago, we all bore witness to media campaigns launched by the insurance industry that, in part, labelled "soft tissue" injury victims as greedy and willing to exaggerate their injuries in the hopes of higher general damage awards. This image is no less stereotypical than the "negative assumption" identified in Martin that chronic pain sufferers are malingerers. The Court said:

> The essence of stereotyping... lies in making distinctions against an individual on the basis of personal characteristics attributed to that person not on the basis of his or her true situation, but on the basis of association with a group... the treatment of injured workers suffering from chronic pain under the Act is not based on an evaluation of their individual situations, but rather on the indefensible assumption that their needs are identical... the chronic pain regime under the Act... removes the appellants' ability to seek compensation in civil actions [and] excludes [them] from the protection available to other injured workers...

INSIDE APT LAW:

MATTHEW LETSON •
APT LAW EDITOR

PRESIDENT'S MESSAGE

CHESLEY F. CROSBIE

Although bowed after a challenging year, APTLA is not beaten. We remain a potent force for civil justice and the advancement of the professional needs of members.

Corporate greed and gullible politicians landed some blows to civil justice in the last year. Governments in New Brunswick and Prince Edward Island were swept up in insurance industry-generated hysteria and imposed threshold no-fault on auto injury victims. A minority government in Nova Scotia imposed a species of threshold no-fault, but in Nova Scotia the picture is politically and legally more fluid. The government is in a minority position, and the scheme is ripe for challenge on both Charter and *ultra vires* grounds.

Feeling unloved by judges, politicians, and everyone but your mother? Join friends and colleagues at Brudenell in June and recover your faith in justice, and the inspiration to achieve it!

In Newfoundland and Labrador, the newly-elected Williams government has proposed a modest deductible of $2,500 on "minor" claims. This is wrong in principle, but the impact on victim rights is not great. Congratulations to the Coalition Against No-Fault for its largely successful defence of access to civil justice in Newfoundland and Labrador! The Coalition's success in defending the civil justice system and shaping public opinion is illustrated in the conclusion of an editorial from *The Telegram*, Saturday, April 10, 2004:

> "The only real way to cut insurance costs is to reduce accidents.
> And we forget that at our peril."

APTLA's Constitutional Challenge Committee is actively reviewing test cases. The Martin case, reviewed by Matt Letson in this newsletter, has been selected by an across-country panel of experts as one of the Supreme Court of Canada's five leading constitutional cases of 2003. The story in *The Lawyer's Weekly*, April 23, 2004, quotes the Dean of Osgoode Hall as saying "the result in the case could be far-reaching, as benefits legislation often includes caps or exclusions that may appear arbitrary." Right on!

Bob Creamer is spear-heading a drive to increase membership in New Brunswick. George McAllister has assumed the helm of the Education Committee, and has put together another superb program for the Halifax conference on November 19, 2004, entitled "Chronic Pain Cases: Winning Strategies in the Threshold Era".

We rolled out a new website with more practice-enhancing features and resources. Have a look at www.aptla.ca and see what it has to offer you. Contribute documents you think may benefit colleagues.

And there is the June 11-12 conference at Brudenell, PEI – not to be missed by seasoned and novice jury lawyers alike. We have assembled a team of great civil jury experts from Ontario and British Columbia, and some outstanding local talent, to not just tell, but to show, how to win before the jury. Feeling unloved by judges, politicians, and everyone but your mother? Join friends and colleagues at Brudenell in June and recover your faith in justice, and the inspiration to achieve it!

VICTIM EQUALITY, CONT'D.

> The Act sends a clear message that chronic pain sufferers are not equally valued and deserving of respect as members of Canadian society. (Martin, *supra*, at paras. 99-101)

Like chronic pain sufferers in Martin, those with minor personal injuries are now "deprived of recognition of the reality of their pain and impairment, as well as of a chance to establish their eligibility for benefits on an equal footing with others" (Martin, *supra*, at para. 105) based solely on the assumed characteristic that all [or most] minor soft tissue injury sufferers overstate their injuries in order to bilk insurers out of money.

Those who suffer injuries that fall short of a "permanent serious impairment of an important bodily function" (the definition for minor personal injury) are equally entitled to the dignity of a right to seek fair and reasonable compensation for their injuries as those suffering a serious personal injury.

Those who suffer injuries that fall short of a "permanent serious impairment of an important bodily function" (the definition for minor personal injury) are equally entitled to the dignity of a right to seek fair and reasonable compensation for their injuries as those suffering a serious personal injury. This right is fundamental to our legal system and is supported by the Canadian Charter of Rights and Freedoms and other human rights codes. It must be protected above the alleged financial concerns held, sincerely or otherwise, by the powerful insurance industry.

I urge all APTLA members to be proactive in asserting their clients' rights in the face of general damage threshold no-fault caps and I challenge all trial lawyers, on either side of the aisle, to creatively and forcefully defend the sanctity of our legal system. I am encouraged that APTLA itself is taking up the issue and seeking support and funding for test cases in Nova Scotia, New Brunswick and Prince Edward Island for the purpose of challenging the constitutionality of these insurance changes.

APTLA PRESENTS THE SECOND PHASE OF PERSONAL INJURY CLAIMS STEM TO STERN: WINNING AT TRIAL

APTLA's "PI Claims Stem to Stern" program in November '03 brought attendees from client intake through case development and settlement attempts. The next and final step is WINNING AT TRIAL.

APTLA is working with renowned personal injury experts Roger Oatley & Jim Vigmond, of Oatley Vigmond, and John McLeish of McLeish Orlando to present WINNING AT TRIAL - the Civil Trial "Gold Standard". The program will include Mock Trials and Focus Groups, the Fundamentals of Persuasion, Opening to the Jury, Preparing for Trial, Judicial Expectations, Conduct of the Trial, Demonstrative Evidence, and Closing to the Jury; as well as Litigation Short-Snappers and Trial Reflections from both the perspective of client and counsel.

Attendees will learn the skills of effective trial advocacy from some of Canada's most prominent and successful jury lawyers. In addition, the program will include a not-to-miss session entitled Effective Strategies for Threshold Cases.

Personal Injury Claims Stem to Stern Pt. II: WINNING AT TRIAL is being presented at the Rodd Brudenell River Resort, Roseneath, PEI, Friday & Saturday, June 11th & 12th, 2004. Registration is on-going, and space is limited.

Also, on Sunday, June 13th, APTLA is holding its Annual General Meeting, including a Members' discussion of No-Fault and related issues. All APTLA Members are encouraged to attend.

THE PIPER DOESN'T PLAY FOR FREE:

EDITORIAL EXCERPT FROM *THE TELEGRAM* [ST. JOHN'S]

It was a relatively common motor vehicle accident. Out for a Sunday drive in 1997 in Silversprings, County Cork, Ireland, O'Driscoll accidentally rearended a car driven by Paul O'Connor.

O'Connor suffered that most common of injuries, one most Newfoundlanders and Labradorians would be familiar with: soft-tissue injuries to his neck and back, and they have plagued him ever since.

Is the solution to limit damages to the O'Connors of the world? Perhaps not. That only serves to transfer costs to someone else – either to the injured party or, eventually, the taxpayer. But someone, somewhere, has to pay the piper.

The same injuries dog insurance companies almost anywhere there is car insurance; they are difficult to diagnose, difficult to treat, and can cause significant pain.

They are probably the most common type of injuries that are the subject of automobile insurance settlements in this province, which often range in the area of $40,000.

But the O'Connor accident was different in two significant ways. O'Connor was 52 years old and a senior executive with the Bank of Ireland and, in addition to his soft-tissue injuries, the accident caused O'Connor to develop post-traumatic stress disorder.

A meticulous professional and perfectionist, O'Connor found he could no longer deal with people.

"The least thing would make me mental," he testified, adding "I realized that I was finished."

The judge in the case described it simply: "Lying on the floor crying was not the Paul O'Connor that he knew."

By 2001, it became clear the O'Connor would never work again, at least, not at the same level that he had become used to for most of his adult life.

By the time a lawsuit over the accident was over and the judge delivered his verdict in February, the amount to be paid to O'Connor totalled more than $926,000, in addition to a severance package still under negotiation from the Bank of Ireland. [A substantial contingency reduction was imposed in view of mental health issues potentially arising even absent the injury.]

The fact is, wherever there are cars, there are accidents – and injuries. While this province continues to examine ways to bring premiums in line, it's clear that settlements everywhere are costing insurers vast amounts of money. And anyway you look at it, there has to be some relief to protect the system from financial collapse.

Is the solution to limit damages to the O'Connors of the world? Perhaps not. That only serves to transfer costs to someone else – either to the injured party or, eventually, the taxpayer. But someone, somewhere, has to pay the piper.

The only real way to cut insurance costs is to reduce accidents.

And we forget that at our peril.

This editorial first appeared in the *The Telegram* on April 10, 2004.

MEMBERSHIP MATTERS

At the Members' Meeting in November, Ches Crosbie challenged APTLA to raise its membership to 300 by the June conference. This was not specifically a challenge to APTLA's staff, but rather a strong message to individual Members to educate their colleagues on the benefits of joining the region's plaintiff lawyers in APTLA.

According to the wisdom and guidelines available from the American Trial Lawyers Association, the benchmark figure for trial lawyer association membership is approximately 10% of the practicing bar in any given jurisdiction. APTLA has four separate and unique provinces, each with challenges for membership development. While we are near the target for NL and PEI, there is work to be done in Nova Scotia and even more to be accomplished in New Brunswick.

For the last few months the office has been working with Board Members in each of the Atlantic Provinces to identify plaintiff lawyers who have not become members of APTLA. From this list a recruitment effort is underway in order to attempt to meet Ches Crosbie's challenge.

It appears that a personal invitation - colleague-to-colleague - is the best way for APTLA to generate new members. Therefore, we ask you to please become familiar with the names of APTLA Members in your province, and assist the office in identifying whose names are missing from our membership list. Information about membership, and an application form, may be obtained from our website at www.aptla.ca.

Finally, as you know, APTLA has two levels of membership for lawyers: Regular and Sustaining Member. ***Charles Broderick, Joe Cantini***, and ***Ben Taylor*** have joined ***Cindy Bourgeois, Ches Crosbie, Barry Mason, Dick Murtha*** and ***Ray Wagner*** as Sustaining Members of APTLA. Thanks and congratulations!

A larger, stronger APTLA benefits all APTLA Members, plaintiff-lawyers and their clients. Please assist us in our work to build our membership base.

MAKING APTLA'S WEBSITE WORK FOR ALL

As you know, APTLA has been working on an interactive website to enhance the sharing of information and resources amongst Members. We have collected numerous documents, articles and other resources for you at www.aptla.ca; including: scholarly articles on threshold no-fault CAPS and the Ontario threshold system; statistical information relating to auto insurance; documents and presentations used by APTLA and provincial Coalitions during the NB and NS governmental investigations into auto insurance and "tort reform"; legislative documents from each of the Atlantic Provinces; CVs of our Associate Members (experts in their fields); precedents, and more.

As the APTLA website is your tool, we need you to upload documents to the site that would be of interest to other members. Where in the past you might have wished to post notice of an interesting article or case on the ListServ, you should now post the actual document on the website – as opposed to having to fax it around to various members.

If you have a file to share with the APTLA Membership, you can easily upload it to the Members Only area of the website. If, for whatever reason, you do not wish to upload documents yourself - please forward them to the office. We will post them for you and alert Members as to their presence at our website.

For easy reference, here is a step-by-step guide to posting documents to the APTLA website.

1. Go to www.aptla.ca in your internet browser;
2. Click on the "Member Sign In" section at the top right of the site;
3. Enter your User Name and Password (previously provided by the office);
4. Click on "Add an Article" or "Add a Document", depending on the type of file to be added. Document categories include Court Decisions, Expert CVs; Images / Demonstrative Aids; Internet URLs; Legislative Documents; Precedents (Word format); Precedents (Wordperfect format); Statistical Info; Tort Reform files; Trial transcripts; and Video Clips.
5. Add in the requested identifying information, such as title and a brief description of the file being added;
6. Locate the file on your own system by clicking on the "Browse" button, thereby adding the specific file name in the "File" or "Article File Name" section;
7. Hit "Submit".

NEW BRUNSWICK AUTO INSURANCE REPORT

The IBC used as a sword the threat of no-fault insurance against the consumers of this province when it was convenient for them to do so. Now, with a legislative government report recommending public no-fault, the industry is threatened and making every effort to protect their hugely profitable financial turf.

The report of the Committee on Public Automobile Insurance was tabled in the legislative assembly on April 2, 2004, by Committee Chair Elizabeth Weir (MLA-Saint John Harbour). The 12 member committee worked for seven months, beginning in September, 2003, conducting public hearings throughout the province, and examining public automobile insurance to come up with a model.

The idea of striking the select committee was made by the NB Government in mid July, 2003, shortly after threshold no-fault caps were introduced by the Province to limit awards for pain and suffering to $2,500.00 for all but the most serious of injuries, in response to the Canadian Union of Public Employees New Brunswick and the New Brunswick Senior Citizen Council organization of a symposium on public auto insurance. These two groups were convinced that threshold no-fault caps would have little, if any, effect on reduction of cost of premiums.

The Insurance Bureau of Canada (IBC) strongly favoured no-fault insurance when they initially mounted their public relations campaign to eliminate payment of claims. Not surprisingly, and in an about face, the insurance industry took a very strong stance against public insurance immediately after the Committee was struck.

Full page adds began appearing in newspapers from the IBC suggesting that a public auto insurance system would completely remove competition and choice for consumers, leaving them with a government monopoly. Further, prior to the committee being struck, the IBC felt strongly that the $2,500.00 threshold no-fault caps were not sufficient to reduce premiums. After the Committee was struck, again, not surprisingly, in another about face, the IBC was quoted as strongly favouring the threshold no-fault caps.

> New legislation has done its job and now we can do ours. Our customers can benefit from government introduced cost controls (meaning caps) that lead the way to all the advantages of competition and choice (parenthesis added).

Less than three months before the adds ran, the IBC threatened that insurers would pull out of New Brunswick if no-fault insurance was not introduced. The IBC used as a sword the threat of no-fault insurance against the consumers of this province when it was convenient for them to do so. Now, with a legislative report recommending public no-fault, the industry is threatened and making every effort to protect their hugely profitable financial turf.

Highlights of the Report:

- $ Awards for pain and suffering are eliminated; at-fault drivers pay higher premiums;
- $ Discounts for safe drivers; penalties to risky drivers;
- $ Crown corporation will be a not for profit public entity operating at arms length from the Provincial Government;
- $ Consumers will purchase both mandatory and optional vehicle damage coverages exclusively from the crown corporation;
- $ Additional third party liability coverage available from private insurers or the crown corporation;
- $ Age, gender, marital status, where one lives, payment history and any lapses in insurance are not taken into account when the cost of insurance is determined;
- $ Average premium estimated at $993.00;
- $ Displacement of 1,134 people working in New Brunswick working in insurance industry.

NB REPORT, CONT'D.

The creation of the Select Committee is not unlike the All Party Select Committee that was struck by the Provincial Government for New Brunswick in 2001 in response to extensive media campaigns launched by the insurance industry, blaming losses on an increase in accident related personal injuries. The All Party Select Committee addressed and responded to the very issues that were being raised by the IBC's public relations campaign at that time.

The Government received the report, did not place any import on the recommendations of the Committee and did not carry out its suggested recommendations. Elizabeth Weir's committee for public insurance will be dealt with in the same way.

The Provincial Government of New Brunswick could meet the needs of both New Brunswickers and the Insurance Industry by (a) implementing the recommendations of the All Party Select Committee (2001) not Elizabeth Weir's public insurance (b) stabilize rate increases by regulation, and (c) cut down motor vehicle accidents by implementing safety programs. Threshold no-fault caps and public insurance are not the answer.

Robert M. Creamer, Lawson & Creamer

NO-FAULT ON PRINCE EDWARD ISLAND

During the 2003 fall sitting of the PEI Legislature, the *Insurance Act,* R.S.P.E.I., 1988, Cap 1-4 was amended to add s.254.1, which is headed "Damages". This section limits damages for the non-pecuniary loss of the plaintiff for minor personal injury to a maximum of $2,500.00. **The section came into force April 1, 2004.**

"Minor personal injury" is defined as an injury that does not result in permanent serious disfigurement, or permanent serious impairment of an important bodily function caused by continuing injury that is physical in nature.

"Serious impairment" is defined as an impairment that causes substantial interference with a person's ability to perform his or her usual daily activities or his or her regular employment.

The legislature did not provide for any new benefits to offset this major limitation on the rights of all PEI citizens, and PEI's Section "B" benefits remain meager: a maximum of $140.00 per week for weekly indemnity and $25,000.00 per person for medical and rehabilitation expenses.

Because the amendment is so new, no challenge to the section has been mounted as yet, and, obviously, there have been no court decisions dealing with the amendment.

Public awareness of the ramifications of the amendment is limited, but I think that it can be said that the average citizen has some level of awareness of two things:

- Automobile insurance companies are making record profits; and
- Unless you are really badly hurt, you can only recover peanuts for pain and suffering.

People do not seem to understand that even if you are really badly hurt, if it is not permanent, you may still only be entitled to peanuts for pain and suffering.

Benjamin B. Taylor, Q.C., Taylor McLellan

NOVA SCOTIA NO-FAULT & PAC REPORT

You will all recall that Ray Wagner, in his Nova Scotia No-Fault/PAC update contained in the last APT Law, commented that "the Hamm government is making back room deals to make the definition of "minor injury" more palatable to the billion dollar Insurance Industry". As it turned out, the Hamm government made a draconian deal where a series of regulation were brought in by Order-in-Council which substantially changed the definition of "minor injury" from that democratically legislated in the NS Legislature.

As such, a strong argument can be made that the regulations can be challenged and defeated as being *ultra vires*. APTLA's NS PAC will be rallying the troops to assess and act on this challenge.

It therefore behooves me to repeat what Ray said in the concluding paragraph of the above-noted article,

> "It seems Nova Scotians are still waiting for good government to arrive in our province."

The Insurance Industry has lost some more credibility since Ray's last report as evidenced by the news stories a couple of weeks ago that the industry had made billions of dollars in profits in 2003. The media in Nova Scotia seemed surprised by this announcement, but we certainly weren't - the "I told you so" phenomenon strikes again. Even more astonishing is that these profits were made before any real tangible benefit could be realized from the threshold no-fault systems implemented in NB, PEI and NS.

We are excited about recent additions to our Political Action Committee: Kevin C. MacDonald practices at Coady Filliter; J. Gordon Allen practices at Auld Allen. Both are regular contributors to the APTLA ListServ. Welcome aboard!

I'd like to close with some inspirational words I read in the April 23rd, 2004 edition of *The Lawyers Weekly*. In a letter to the Editor entitled "Thresholds Keeping Rates Up", new APTLA Member Barbara Legate of London states,

> "The judicial system is not just a system for addressing economic loss. It is a system developed by and for our society which has as one of its purposes reflection of the values of society. The only vehicle we have to express the loss of tangible but incalculable loss such as the loss of the ability to experience a roll in the grass, hugging a child, feeling the warmth of spring sunshine, is an award of money damages."

Hope to see you all in Brudenell in June.

Sean Layden, Boyne Clarke

MARK YOUR CALENDARS !

ALBERTA CIVIL TRIAL LAWYERS ASSOCIATION
Auto Insurance Reform 2004
Calgary - June 21st, 2004
Edmonton - June 23rd, 2004

ONTARIO TRIAL LAWYERS ASSOCIATION
Persuasion through the Magic of Storytelling
Inn on the Park, Toronto
May 27th - May 29th, 2004

TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA
Timesavers & Moneymakers
The Westin Bayshore Resort & Marina, Vancouver, BC
June 11th, 2004

ATLANTIC PROVINCES TRIAL LAWYERS ASSOCIATION
Chronic Pain Cases: Winning Strategies in the Threshold Era
Delta Halifax, Halifax, Nova Scotia
November 19th, 2004

ATLANTIC PROVINCES TRIAL LAWYERS ASSOCIATION
2005 Spring Conference & AGM
Fairmont Newfoundland, St. John's, Newfoundland
June 24th-26th, 2005

ATLANTIC PROVINCES TRIAL LAWYERS ASSOCIATION
Fall 2005 Conference
Delta Halifax, Halifax, Nova Scotia
November 18th, 2005

THRESHOLDS KEEPING RATES UP

(RE: "EVIDENCE SHOWS THRESHOLDS LOWER INSURANCE RATES" BY SHELLEY MILLER*, *THE LAWYERS WEEKLY*, APRIL 2, 2004)

Shelley Miller suggests, on the strength of the experience in New South Wales (a verbal threshold-only scheme) and Pennsylvania (an opt-out system adopted by 44 per cent), neither of which are similar to Ontario legislation, that the evidence supports the proposition that thresholds reduce premiums.

The NSW study showed drops in premiums over the first two years of the program. The same is true of the Ontario system under Bill 59, which saw huge declines in premiums initially. Judy Maddox, industry spokesperson and outspoken advocate of insurance reform, described the industry in Ontario as engaged in a "feeding frenzy" during that initial two to three year period. I am unconvinced by these two studies.

In a comprehensive study reviewing U.S. insurance rates from 1997 to 2001, those states with verbal thresholds had the greatest insurance price inflation. In some cases the threshold states increased rates at five times the rate of tort, non-no-fault states. (See AIS Risk Consultant, Inc. "Automobile Insurance Costs in the United States: Comparison of Personal Injury Costs for Private Passenger Automobile Insurance in Tort, No-Fault and Add-on States," June 13, 2002.)

The North America-wide study conducted by A.T. Weissenberger, an economist, at the request of the Ontario Trial Lawyers Association found that Canada and Ontario are falling behind the rest of the continent. The United States, the leader in promoting no-fault, is abandoning it in droves. At last count, only 12 states continue to use no-fault schemes. Those states which have a no-fault threshold scheme lead the continent in premium inflation. Ontario, which has had threshold legislation since 1990, has followed this trend of increasing insurance premiums in recent years. That thresholds keep premiums down has not been borne out by the Ontario experience. The Winter 2004 issue of The Litigator reproduces the Weisssenberger study, one which considers the authorities including those cited by Miller.

The cause is easily identified. Threshold states tend to match the threshold with increased no-fault insurance. It is more expensive because giving a benefit to everyone simply has to be more costly than benefiting primarily those who are not at fault.

Ontario has mastered the concept of keeping insurance costs high by maintaining a threshold (the most severe on the continent), a deductible (again, the highest true deductible), the richest no-fault benefits on the planet, and the most cumbersome, procedurally dense and paper-intensive system that one could devise. Added on to that is a medical evaluation system that has not been shown to add a thing to the process and costs millions annually.

A return to tort with severely scaled back no-fault will remedy the problem, if there is one. (Recent reports of huge profits in the insurance sector in the first three quarters of 2003 bring that seriously into question.)

Miller cites academics and scholarly writing in support of the assertion that damages for pain and suffering are of little value and have little economic justification. One need only sit opposite parents of a profoundly injured child to learn that psychic damages do play a role in demonstrating justice to those who interact with the system.

In my practice, I conduct focus groups regularly. Their view of what non-pecuniary damages ought to be would alarm Miller and the academics she cites. The judicial system is not just a system for addressing economic loss. It is a system developed by and for our society which has as one of its purposes reflection of the values of society.

The only vehicle we have to express the loss of tangible but incalculable loss such as the loss of the ability to experience a roll in the grass, hugging a child, feeling the warmth of spring sunshine, is an award of money damages. While the scholars may think there is no value in non-pecuniary damages, I must disagree in the company of most of my fellow citizens. Excising this from our system of compensation is mean-spirited and unproven as a method of reducing premiums.

On this most serious issue, care should be taken to ensure that the people of Ontario and indeed Canada are getting good information about auto insurance. Thresholds do not keep premiums down.

Barbara L. Legate, Legate & Associates

This letter appeared originally in *The Lawyers Weekly* of April 23, 2004

* Shelley Miller is an insurance industry consultant to government and the author of the Atlantic Canada Harmonization Task Force Report.

AXA INSURANCE COMPANY v. ROLFE, 2004 NBCA 14

Interpretation of necessary medical services by the NB Court of Appeal to include massage therapy and likely physiotherapy.

This case marked the first time that the New Brunswick Court of Appeal addressed the question of whether the cost of massage therapy treatments could be recovered under subsection 1(1) of Section B of New Brunswick's Standard Automobile Policy.

Ms. Rolfe was injured in an automobile accident. Her treating physician prescribed massage therapy treatments. After receiving over 60 treatments paid for by Axa, its consulting physician concluded that no further massage therapy treatments would be helpful. Ms. Rolfe's treating physician disagreed with Axa's physician, noting that Ms. Rolfe's pain was relieved by the treatments. She received further treatments worth nearly $1,000.00. Axa refused to pay for such treatments.

Ms. Rolfe sued in the Small Claims Court to recover the amounts she had paid for the massage therapy treatments. The Small Claims Adjudicator, and subsequently the New Brunswick Court of Queen's Bench, agreed with Ms. Rolfe that the treatments were covered under Section B as a "medical service". Both courts concluded that the treatments were necessary and reasonable.

The New Brunswick Court of Appeal recognized that the benefits provided under Section B fall under three categories:
1. necessary medical, surgical, dental, chiropractic, hospital, professional nursing and ambulance services;
2. services in the meaning of entitled services in the *Hospital Services Act* or the *Medical Services Payment Act*; and
3. other services and supplies which are, in the opinion of the physician of the insured person's choice and that of the insurer's medical advisor, essential for the treatment, occupational retraining or rehabilitation of said person.

The case centred on whether massage therapy treatments are a "necessary medical... service" within the meaning of the first category. This necessarily involved an interpretation of the Section B provisions. It should be noted that both parties agreed that, if massage therapy was covered under category 1, the insured could collect all reasonable expenses even if the insurer's physician deemed them not to be necessary.

Despite the fact that the category 1 services were, with one exception, lifted entirely from section 256(1) of the *Insurance Act*, 1973 R.S.N.B. c. I-12, the Court accepted the principle that "whenever the wording of an insuring provision, whether legislative or contractual, is open to more than a single reasonable interpretation, courts should opt for the one that benefits the insured" (Rolfe, *supra*, at para 25). This is clearly related to the principle of *Contra Proferentem*, however, the Court shied away from specifically labelling it as such.

Relying on the Supreme Court of Canada's decision in Re Rizzo and Rizzo Shoes Ltd., [1998] 1 S.C.R. 27, the Court examined the context of the category 1 provisions and their historical treatment, both by the courts and by the Superintendent of Insurance. On this basis, the Court held that the legislature, in creating section 256(1) of the *Insurance Act*, *supra*, intended for the terms "medical services" to be interpreted broadly. As such, the Court held that such services need not be provided by licenced medical practitioners, but,

> [w]hatever its precise reach may be, the expression "medical services" in Category 1 of Subsection 1(1) of Section B of New Brunswick's Automobile Policy certainly includes therapeutic services prescribed by a physician and rendered by a duly qualified health professional. (Rolfe, *supra* at para. 67)

The Court's decision, while clearly allowing payment of massage therapy treatments under Section B, also broadly defined medical services. In our opinion this decision should settle the question of whether physiotherapy is a category 1 medical service given that the Court closely links physiotherapy and massage therapy (at paragraph 26), and

AXA INSURANCE COMPANY V. ROLFE, CONT'D.

favourably mentions an earlier Court of Queen's Bench decision approving physiotherapy as a category 1 medical service (see Lamrock v. Wellington Insurance Co., (1999), 222 N.B.R. (2d) 374). In any event, hopefully, due to the broad definition applied by the Court of Appeal, insurers will begin to cover other therapeutic services not yet subject to judicial interpretation from the Court of Appeal, without insureds having to resort to costly court processes.

Robert M. Creamer and Matthew Letson

TRIM V. BEAUDET AND CITY MOTORS LIMITED, 2003 NSSC 216, 2003 NSSC 238 (AS TO COSTS), PER WRIGHT, J.

Facts:

The plaintiff entered into what she thought was a purchase agreement with City Mazda for a vehicle. Both parties signed the purchase agreement. She was required to, and did, give a $500 deposit. Prior to picking up the vehicle the dealer changed the terms. She therefore purchased a vehicle elsewhere and requested the return of her $500. The dealer refused.

The Plaintiff sued in Small Claims Court (SCC) for return of the $500. She then amended the claim, adding other heads of damage to increase the value of the claim so that it would be heard in the Nova Scotia Supreme Court (NSSC), in the hopes that the Defendant would seek counsel and concede the case. They did not concede and discovery revealed a further document (lease agreement) which became key to the decision.

The dealer paid the $500 into court but the Plaintiff proceeded to trial on the other claims and costs.

Result:

1. The Plaintiff's claims for general, aggravated and punitive damages were dismissed;
2. The Plaintiff was awarded $10,000 in costs and $1,300 for disbursements.

Reasons:

1. The case was properly brought in NSSC because the claims for general, aggravated, and punitive damages, while unsuccessful, were not without merit;

2. It was through the discovery process, available only in NSSC, that key evidence (the lease agreement) was discovered.

Lesson:

1. This $500 case cost the Defendant $20,000 ($11,300 - plaintiff's lawyer, $8,500 - defendant's lawyer).

2. Bumping cases from SCC to NSSC can be very useful where the facts and conduct warrant more than the minimal costs and disclosure in Small Claims Court.

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