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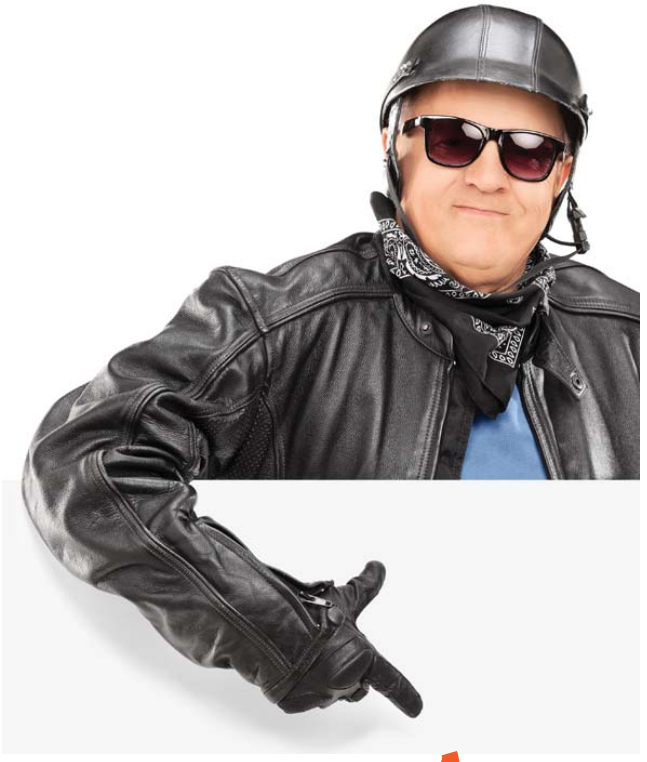

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"You do not need a therapist if you own a motorcycle." ~ Dan Aykroyd

BORN TO BE WILD: COMMUNICATIONS WITH EXPERTS

In Moore v. Getahun, Blake Moore lost control of his motorcycle, flew over the handlebars and struck a parked Hummer. Following his accident, Moore went to the hospital where Dr. Getahun applied a full circumferential cast to his wrist and arm. The next day, Moore went to another hospital. He was diagnosed with compartment syndrome – a painful condition that puts pressure on the tissue, interferes with circulation and impacts the function and health of the tissue itself. He suffered permanent muscle damage.

Moore commenced an action against the first doctor and hospital alleging negligence. What would follow turned out to be the most important decision in Canada on communications between experts and lawyers.

The defence called Dr. Taylor to address causation at the trial. Dr. Taylor had previously provided defence counsel with two expert reports. During his testimony at trial, the plaintiff's counsel found notes of a 90 minute telephone conversation between Dr. Taylor and defence counsel. Dr. Taylor testified that as a result of the call, no changes were made to his opinion and that only stylistic changes were made. However, the trial judge held that the meeting involved more than superficial or cosmetic changes. While Dr. Taylor's opinion was "not changed" by counsel, it was "certainly shaped".

The trial judge went on to hold that the practice of counsel reviewing draft reports should stop, that discussions to "review and shape" a report were unacceptable and that reviewing expert reports puts counsel in a position of conflict and undermines expert independence. She suggested that if subsequent clarification or amplification is needed then all communication should be in writing and disclosed to the other party.

To no surprise, this decision caused significant concern to litigators across Ontario and throughout Canada. The Court of Appeal heard this matter in September 2014 and submissions were made by several intervener groups, including the Canadian Defence Lawyers Association.

In its decision, the Court of Appeal strongly disagreed with the trial judge's decision. The Court held that there were no significant changes to Dr. Taylor's report and nothing in the record to suggest that Dr. Taylor or defence counsel acted improperly.

The Court went on to hold that the trial judge was incorrect to find that it was unacceptable for counsel to review and discuss draft expert reports. Such communications on their own do not affect an expert's impartiality. Instead, lawyers play a vital role in ensuring that experts understand legal issues and that complex expert evidence is presented in a coherent manner to the court.

Three principal factors were identified as fostering the independence and objectivity of expert witnesses. First, lawyers have ethical and professional standards which forbid them from interfering with an expert's opinion. Second, many experts are subject

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to ethical and professional obligations from their own governing bodies. Third, the adversarial process, in particular cross-examination, should expose partisan expert evidence

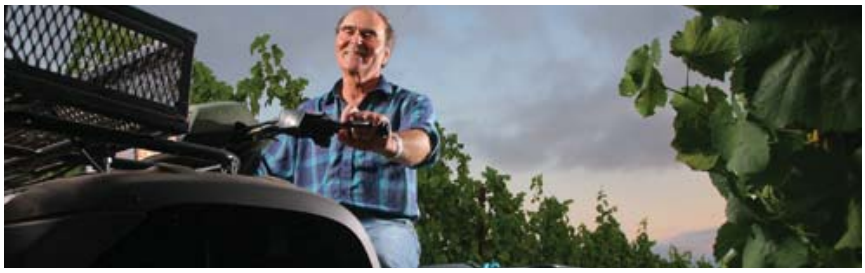
The Court further explained that consultation between experts and counsel, including draft reports, notes and records of consultations, is subject to litigation privilege. Moreover, such privilege is not automatically waived when the expert testifies. Counsel can, however, access an expert's complete file if there is a factual foundation to support a reasonable suspicion that counsel improperly influenced the expert.

This decision ends a period of uncertainty within the legal community and affirms counsel's ability to work with experts during the report drafting stage under the protection of litigation privilege. It is still to be seen how this will affect the trial process and what evidence will be required to compel production of an expert's file.

Stephen N. Libin is an associate at Dutton Brock and represented the Canadian Defence Lawyers Association as an intervener before the Court of Appeal in this matter. His principal focus is insurance defence including product liability, personal injury and property matters.

Zen and the Art of Open Air Highway Driving

In the recent Court of Appeal decision of *Matheson v Lewis*, the Defendants appealed the motion judge's ruling which held that a farmer's ATV was a "self-propelled implement of husbandry," despite regulations which provided otherwise. The Plaintiff, Matheson, was driving an ATV on a highway because it was shorter to take the highway to reach a field where he kept livestock than cut through his own property. Matheson had no insurance on the ATV and was struck by a passing truck.



The question on appeal was whether an unmodified all-terrain vehicle (ATV) owned by a farmer and used in farm operations was a "self-propelled implement of husbandry" and therefore not subject to the province's compulsory motor vehicle insurance regime.

The motion judge held that it was. In reaching his decision, the motion judge accepted evidence introduced by Matheson about the evolving nature of the use of ATVs. The motion judge also considered opinions of the farming community and placed weight on the fact that Matheson was not at fault for the accident. The motions judge further stated "the statutory and regulatory definitions have not kept pace" with the changing nature of farming and that ATVs need to be "recognized as [implements of husbandry] and responded to appropriately by our laws."

The motion judge accepted the foregoing evidence despite the fact that a regulation under the *Off Road Vehicles Act*, explicitly classifies the plaintiff's exact model of ATV as an "off road vehicle." The *Off Road Vehicles Act* prohibits a person from driving an off-road vehicle on land not occupied by the owner of the vehicle and necessitates insurance for off-road vehicles driven on a highway.

The Court of Appeal held that the motions judge, in considering the foregoing, took matters into consideration that were not pertinent to the exercise of statutory interpretation. The Court of Appeal held that the motion judge strayed outside the role of the Court, which is to interpret and apply the laws enacted by the legislature.

The Court of Appeal further added that no technique of statutory construction allows a court to decline to apply legislation that, in its opinion, has not kept pace with changes in society. The motion judge's failure to give effect to the relevant regulation was a sufficient basis for allowing the Defendant's appeal. The Appeal Court further held that the motion judge erred by not giving effect to the means the legislature chose to further its broad goal of protecting innocent victims of motor vehicle accidents. Legislative means of ensuring universal insurance would be rendered nugatory if they were made applicable only to those who cause accidents.

The Court of Appeal reversed the motion judge's finding. It held that the Plaintiff's ATV is an off-road vehicle that had to be insured when operated on a public road as the legislation required. The Plaintiff's action was therefore statute-barred by section 267.6(1) of the *Insurance Act*, which provides that a person is not entitled to recover damages for bodily injury or death arising from the use or operation of an automobile if, at the time of the incident, the person was operating an uninsured motor vehicle on a highway contrary to section 2(1) of the *Compulsory Automobile Act.*

In this case, the Court of Appeal confirmed that there is no room for opinions as to whether statutes are out of date, whether the Plaintiff was not at fault, or the views of the community in statutory construction in deciding whether to apply the applicable laws.

Melissa Miles graduated from the University of New Brunswick before starting her articles at Dutton Brock LLP

Summary Judgment in Occupiers' Liability cases: How to Safeproof your Biker Gang Hideout

In the 2014 decision in *Nandlal v. Toronto Transit Commission,* Mrs. Sarojanie Nandlal broke her clavicle when she slipped and fell on the stairs at the Kennedy subway station. She sued the TTC and the Defendant brought a summary judgment motion.

At discovery Mrs. Nandlal testified that she had slipped on the floor tiles. In her response to the motion, however, she claimed that she had slipped on debris. She did not notice debris on the stairs before her fall. She simply believed that she stepped on something. She based this belief on her earlier observation of debris in the station, and the fact that she had seen debris at the station in the past. There were no witnesses.

The TTC's evidence demonstrated that their janitor had looked for any immediate hazards when he had begun his shift that morning. He then followed his daily maintenance and cleaning schedule. The janitor had two supervisors. One was specifically responsible for monitoring and addressing hazards. Furthermore, it was agreed that the tiles on the stairs were non-slip tiles, and they were not damaged or defective.

The TTC submitted that the Plaintiff couldn't prove that it had been negligent, in light of the reasonable system of maintenance and inspection that it had in place. Further, she could not prove that debris had caused her fall.

In a pithy reminder that negligence does not necessarily precede a fall, Mr. Justice Perell agreed with the TTC on all fronts, and granted its motion for summary judgment. His Honour stated that the first step needed to succeed in an occupier's liability claim was to "pinpoint some act or failure to act on the part of the occupier". Mrs. Nandlal had not done so. Despite her belief, she had provided no direct evidence that there was debris on the stairs.

Mr. Justice Perell pointed out that "the presence of a hazard does not in itself lead inevitably to the conclusion that the occupier has breached its duty". Furthermore, even if there had been litter on the stairs at the time of the fall, Mrs. Nandlal did not establish that the TTC failed to meet its obligation as occupier. In fact, the contrary was true in that there was evidence to show that the TTC had taken steps to make its premises reasonably safe. The TTC was not obliged to "continuously and immediately" clean up after its patrons, given that "the standard of care is one of reasonableness and not perfection".

His Honour called for courts to use common sense in occupiers' liability cases, and commented that sometimes a fall down the stairs is just an unfortunate accident for which the occupier is not responsible. During cost submissions, counsel for Mrs. Nandlal sought relief on the basis of financial hardship. He argued that she shouldn't be punished with costs, because it had been reasonable for her to bring her claim. Justice Perell denied that costs are punitive, citing five key purposes of cost awards. Ultimately, Mrs. Nandlal was ordered to pay the TTC $17,500.00. This case serves as an excellent reminder that counsel should be continuously assessing the direct evidence for and against their client as an action proceeds.

Donna Polgar is an associate at Dutton Brock. Her practice encompasses a wide range of property and casualty matters.

Limits and Expansion Regarding Attendant Care: How far Can a Den Mother Go?

On December 30, 2014, Mr. Justice Garson released his decision in *Shawnoo v. Certas Direct Insurance Company,* on a motion brought by the plaintiff regarding attendant care services. The decision is tight on the interpretation of "incurred" expenses under section 3(7)(e) of the Statutory Accident Benefits Schedule, but expansive on what qualifies as "custodial care/basic supervisory care" under the Form 1 Assessment of Attendant Care Needs.

The Plaintiff, Misty Shawnoo, suffered behavioural issues as a result of injuries sustained in a December 12, 2010 accident. Two individuals provided services to the plaintiff after the accident, namely her mother, Cheryl, and her roommate. Their assistance included indirect supervision and monitoring, such as telephone calls, texts, FaceTime, etc.

Under s. 3(7)(e)(iii) of the *SABS*, in order for services to be considered "incurred", a provider must have either performed the services "in the course of the employment, occupation or profession in which he/she would ordinarily have been engaged, but for the accident", or "sustained an economic loss as a result of providing the services". The parties agreed that the mother and roommate did not sustain an economic loss, and therefore the Court was asked to determine if they performed the services in the course of the employment, occupation or profession in which they would ordinarily have been engaged, but for the accident.

Ms. Shawnoo's mother had a personal support worker/healthcare aid certificate but had not been working for remuneration in this field for at least two years pre-accident. She had been, however, providing some care for a relative with schizophrenia without remuneration. The roommate had

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a child and youth worker certificate and had been employed in this field before the accident with the John Howard Society.

Justice Garson held that the mother's services did not qualify under s.3(7)(e)(iii)(A) because she was not receiving remuneration before the accident as a personal support worker/healthcare aid and was not actively seeking such employment, even though she was providing similar services to a family member for free. In other words, the interpretation of "employment, occupation or profession" under this section includes the requirement of remuneration.

The roommate's services did not qualify either, because a "child and youth worker" would not ordinarily provide personal care services. In other words, the provider's pre-accident "employment, occupation or profession" must involve the provision of personal care similar to what is set out on a Form 1, not a loosely related health care field.

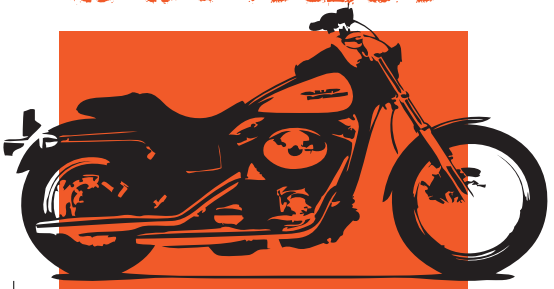
This decision somewhat narrows the field of providers who can be paid for their attendant care services under the *SABS*, thereby increasing exposure on the tort side to such health care costs. The decision is not a radical departure from existing jurisprudence, however, and was expressly decided with the legislative intent of the 2010 SABS reforms in mind, to reduce eligibility for attendant care where payment would represent a windfall to the provider, especially family members.

The Court was also asked to determine if indirect supervision, in the form of electronic communication, qualifies as custodial care/basic supervisory care. Following the broader interpretation of custodial care in *T.N. and Personal Insurance Company,* Justice Garson held that indirect electronic supervision qualifies as attendant care, in particular custodial care/basic supervisory care under the Form 1. If a claimant requires someone to monitor their activities and whereabouts, to provide regular cueing for activities, to provide emotional support, etc. as a result of her injuries, there is no requirement that it be provided in person considering the proliferation of electronic communication in today's age. The need for this type of supervision must still be medically justified and set out on a Form 1, and the case does not address entitlement to custodial or supervisory care from a disability perspective. It does not broaden the scope of claimants who would require these services due to accident-related injury.

Overall, the *Shawnoo v. Certas* decision represents something palatable for both claimants and AB insurers when it comes to attendant care services under the current SABS, but broadens exposure to such health care costs on the tort side to some degree.

Michelle Mainprize is an associate at Dutton Brock. She practices exclusively in insurance defence, with a primary focus on accident benefits and priority disputes.

WEB CONTEST



The Toronto Motorcycle Show is set for March 21 and 22, so motorcycling is this issue's E-Counsel theme. This edition's trivia quiz is framed around one of the most famous motorcycle aficionados who was a TV star who made the leap to the big screen and was known as the "King of Cool". He was in fact so cool that a 1980s British pop band from Newcastle was enamoured with him. The first part of this quiz is to name the pop band and what connection did they have with the actor? The second part of the quiz relates to the actor's grandson, with whom he shares a name, who stars in the Vampire Diaries. This TV show features a Canadian actor in one of the main roles. What is her name?

Email your answers to dlauder@duttonbrock.com. Do NOT email answers by hitting reply to this email address, as it will get lost in spam-limbo.

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