THAT IS MOST ILLOGICAL, CAPTAIN. "WE HAVE THEM JUST WHERE THEY WANT US": TIMING OF SUMMARY JUDGMENT MOTIONS

Dutton Brock LLP

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" You may find that having is not so pleasing a thing as wanting. This is not logical, but it is often true."
-Spock

Defending a case against a self-represented Plaintiff can be challenging regardless of the merit of the case. The challenges increase dramatically when the self-represented Plaintiff makes bold allegations in a Statement of Claim that are unsupported by evidence. The Defendant client will often hope for an early resolution of the claim whereas the self-represented Plaintiff often has a different agenda, preferring to seek "justice" often as a matter of "principle". The most efficient way to deal with claims without merit is by way of summary judgment motion. The purpose of this article is to determine when the motion should be initiated in the litigation process.

In the recent case of *McGlynn v. OLG Slots Operations* (2013) ONSC 1063, the self-represented Plaintiff claimed damages in the amount of $1 million against the Defendant casino. The Plaintiff's wallet was stolen on the premises and the Plaintiff alleged that the Defendant was negligent in allowing the theft to have occurred. According to the Plaintiff, his wallet contained a number of sensitive documents.

The Defendant brought a summary judgment motion prior to the examination for discoveries. In support of the motion, an affidavit was produced in which casino staff confirmed that video footage was reviewed on the date that the Plaintiff alleged that his wallet was stolen. The video surveillance suggested that prior to playing at a slot machine, the Plaintiff removed his wallet and placed it next to the machine where he played for some time. The video surveillance suggested that before leaving the machine, the Plaintiff took his wallet and put it back in his pocket and exited the casino. The Defendant's affidavit confirmed that they had reviewed all lost and found items in their possession and did not have the Plaintiff's wallet. The Plaintiff chose not to cross examine the Defendant on its affidavit and instead produced some handwritten notes which he claimed supported his allegations.

Prior to the motion, the parties had three appearances before Master Roger who ordered the parties to follow a timetable and to produce all relevant documents before the summary judgment motion. The Plaintiff failed to comply with the timetable.

Justice Kershman dismissed the Plaintiff's action, granting summary judgment to the Defendant. The "full appreciation test" discussed in *Combined Air Mechanical Services Inc. v. Flesch* (2011), 108 O.R. (3d) 1 (C.A.),was considered by the judge, holding that in this particular case, a full appreciation of the evidence could be achieved. Justice Kershman held that the Statement of Claim was without merit and that the Plaintiff had failed to put his best foot forward by not responding to the Defendant's materials.

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The *McGlynn* decision is interesting because it confirms that a Defendant can be successful on a summary judgment motion initiated relatively early after the close of pleadings. In *McGlynn,* Justice Kershman noted that in his view, there did not appear to be any material facts in dispute. Indeed, Justice Kershman appears to have accepted that the Plaintiff was in possession of his wallet when he left the casino. The court explained that a Plaintiff is not entitled to sit back and rely on the possibility that more favourable facts may develop at trial.

Presumably, the types of cases where a summary judgment motion will be appropriate at such an early stage are likely limited to claims where bold allegations are made that appear to be without merit. A Defendant should consider summary judgment if the Plaintiff does not produce any evidence, despite numerous requests, to support the bold allegations.

The costs of having a summary judgment motion dismissed are substantial so Defendants have to be careful with these motions. More often than not, a full appreciation of the case cannot be made prior to the examination for discovery of all parties. This is especially true in cases where credibility of the parties is in question or where there are a number of documents available.

S. Alex Proulx is an Associate in Dutton Brock's tort group. He articled at the firm before being called to the Bar in 2010. Being an avid gambler, his practice includes the passionate defence of occupiers' claims against casinos.

KEEP YOUR SPACESHIP IN YOUR OWN WORMHOLE

On December 11, 2005, Pauchanathan Panjalingam was driving his vehicle on an icy, slippery road in Ottawa. Unfortunately, Mr. Panjalingam lost control of his car, crossed the centre line and collided with Walid El Dali's car. As a result, El Dali sustained personal injuries.

The subsequent lawsuit was heard before a jury. Somewhat surprisingly, the jury concluded that Panjalingam's negligence did not cause or contribute to the accident. Panjalingam had not even testified at trial. The investigating police officer did testify, and her evidence was that Panjalingam admitted at the time of the accident that he had lost control of his car. Taking into consideration that he was not impaired and that the conditions on the day of the accident were quite poor, the officer decided not to lay charges under the *Highway Traffic Act.* Presumably, this evidence persuaded the jury to find that Panjalingam's negligence was not a causal contributor to El Dali's injuries.

However, this result seems somewhat unreasonable. El Dali was driving in the same conditions, yet he did not lose control of his car. Moreover, El Dali took prudent steps to avoid an accident including driving at a reduced speed, pulling his car over to the side of the road and stopping once he did see Panjalingam lose control of his car. In light of this information, the jury's decision becomes even more mystifying. Did the judge fail to properly instruct the jury on the concepts of negligence and contributory negligence? Perhaps the trial judge's charge to the jury was in Klingon?

As it turns out, the trial judge instructed the jury properly. This case was recently elevated to the Ontario Court of Appeal in *El Dali v. Panjalingam,* [2013] Carswell Ont, and the Court overturned the jury's verdict and called it unreasonable. The Court's reasoning not only offers important insights into the general concept of when a jury's verdict will be overturned but also the specific consequences that should affect a negligence analysis when one driver crosses the centre line.

BEAM ME UP SCOTTY. THIS PLACE IS AN ARCTIC WASTELAND.

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Regarding overturning a jury's decision, the Court cited *McLean v. McCannell,* a 1937 Supreme Court of Canada decision, which says that a jury's verdict will only be set aside where it is "so plainly unreasonable and unjust as to satisfy the Court that no jury reviewing the evidence as a whole and acting judicially could have reached it".

Although jury verdicts must typically be treated with deference, they must not be treated "with awe". As the Court of Appeal in *El Dali* concluded, "juries are not infallible. Occasionally they make mistakes. When they do, an appellate court should intervene. This is one of those cases where appellate intervention is called for".

The Court also discussed the implications of Panjalingam having crossed the centre line. Crossing the centre line is a violation of s. 148 (1) of the *Highway Traffic Act*. Citing a 2001 Ontario Court of Appeal decision, the Court held that when a driver breaches s. 148(1) and an accident occurs, the driver is held to be *prima facie* negligent. The offending driver then bears the onus of explaining that the accident could not have been avoided by the exercise of reasonable care.

In other words, the fact that Panjalingam crossed the centre line and was subsequently in an accident created a reverse-onus; he needed to adduce evidence rebutting the presumption that he was negligent, or else no reasonable conclusion could be adduced other than a finding of negligence against him. In this case, no evidence was adduced as to why he crossed the centre line, about his driving before he lost control of his car, about what caused him to lose control of his car, etc.

Two important principles thus emerge from *El Dali*. Firstly, a jury's verdict will be overturned only where it is "plainly unreasonable". Secondly, crossing the centre line creates a rebuttable presumption of negligence against the offending driver. In *El Dali*, the presumption of negligence was not rebutted by Panjalingam, so the Court ordered a new trial on liability only.

Elie Goldberg is an Associate at Dutton Brock LLP whose practice includes a wide variety of tort litigation.

INCURRED AND ECONOMIC LOSS: TO BOLDY GO WHERE NO LAW HAS GONE BEFORE

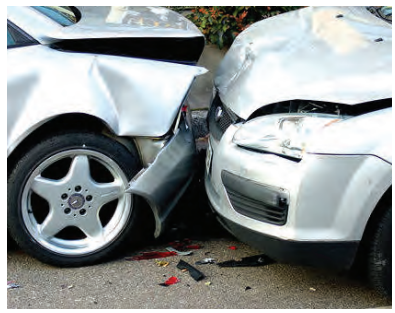
A hot topic in the world of accident benefits is the interpretation of the definition of "incurred" in the Statutory Accident Benefits Schedule – Accidents On or After September 1, 2010. The definition is particularly important where there is a claim for "economic loss" and claims for attendant care and housekeeping benefits as insurers are required to pay for reasonable and necessary expenses that have been incurred by or on behalf of the insured person as a result of the accident.

The SABS provides that "an expense in respect of goods or services referred to in the Regulation is not incurred unless:

(i)the insured person has received the goods or services to which the expense relates;

(ii)the insured person has paid the expense, has promised to pay the expense or is otherwise legally obligated to pay the expense; and

(iii)the person who provided the goods or services,



(a) did so in the course of the employment, occupation or profession in which he or she would ordinarily have been engaged but for the accident; or

(b) sustained an economic loss as a result of providing the goods or services to the insured person."

There have been two recent cases (one at Superior Court and the other at FSCO) that have looked at the definition of incurred and economic loss and both decisions are currently the subject of appeals.

In the decision of Mr. Justice Ray in *Henry v. Gore Mutual Insurance Co.* (2012), 351 D.L.R. (4th) 572 (SCJ), the insured was catastrophically impaired in a motor vehicle accident which occurred on September 28, 2010. His attendant care needs were assessed in the amount of $9,500 per month and were payable up to the maximum of $6,000 per month for catastrophic impairment.

The insured's mother took a leave of absence from her full-time employment as an assistant manager in a retail store in order to provide attendant care to her son. It was accepted that she worked 40

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hours per week and earned a salary of about $2,100 per month prior to the accident. Gore Mutual took the position that the attendant care payable should be limited to the number of hours that she had been working as a proportion of the total attendant care benefit payable.

The Court rejected Gore Mutual's argument and indicated that:

"Economic loss" is not defined in the regulations…[it] has been defined in very broad terms in claims for compensation in tort law cases, and has been the subject of a great deal of jurisprudence because of the difficulty in quantification. This omission implies that no such calculation is relevant beyond a finding that the person has 'sustained an economic loss' – or not. It is a threshold finding for 'incurred expense' but is not intended as a means of calculating the quantum of the incurred expense".

The Court therefore did not attempt to quantify the quantum of attendant care and concluded that all reasonable and necessary attendant care expenses must then be paid to the insured.

In the FSCO case of S*imser v. Aviva Canada Inc.* (2012), two of the Applicant's relatives indicated that they provided attendant care and housekeeping services to the Applicant following his motor vehicle accident. One of the relatives continued to work at her normal job and the Arbitrator felt that her economic losses alleged were unquantifiable, abstract, and lacking in detail with no documentation from her workplace to support any reductions in working hours or loss of overtime hours. Another relative indicated that she lost time from her schooling but the Arbitrator was also unable to determine how her schooling had been affected with no records provided.

Counsel for the Applicant argued that the insurer had recognized that one of the relatives had sustained an economic loss by paying for some very modest gas and food expenses totalling $50 while travelling from her home to the hospital where the Applicant was initially convalescing. The Arbitrator distinguished this case from the facts of *Henry v. Gore Mutual* and rejected this argument indicating that:

"…if I were to accept [the Applicant's] submission, every service provider would be able to circumvent the amended regulations by purchasing a single meal in a restaurant, a tank of gas or as suggested by counsel, by paying '…$0.01 for a bus ticket'. This interpretation would render the amendment meaningless and superfluous."

We suspect that insured persons will need to prove a certain threshold of economic loss in order to fall under the definition of "incurred" but it is unclear as to what that threshold will be. We will watch with interest as the appeals in both of these cases are heard and hopefully decided in the near future in order to provide direction on this issue.

Sharon Dagon is an Associate in Dutton Brock's accident benefits group. She represents a host of insurers with first party and inter-insurer disputes.

Ontario's New Anti-Fraud Measures Take Effect: Count Your Quatloos

Effective June 1, 2013, Ontario automobile insurers have new weapons at their disposal to fight fraud in the accident benefits system. In November 2012, the Ontario Automobile Anti-Fraud Task Force, commissioned by the Minister of Finance, rendered its final report containing 38 recommendations on how to battle the persistent issue of fraud in automobile insurance claims. The recommendations are based on a 16-month inquiry and focus generally on prevention, detection, investigation and enforcement of fraudulent practices by individual health care practitioners, treatment clinics, tow truck drivers and legal professionals involved in the automobile claims system.

The fraud issue in Ontario is a cause for concern for the government, insurers and consumers alike. According to the Task Force report, fraud and abuse in the Ontario automobile insurance industry may have cost Ontarians up to $1.6 billion in 2010 alone. The Task Force identified numerous fraudulent practices including overbilling for assistive devices and health care services as well as invoicing insurers for unnecessary or unperformed medical assessments. In some cases, fraudulent clinics and practitioners require injured claimants to sign blank forms, which are later submitted to insurers with recommendations for treatment or assessments that are not actually required. In other cases, insurers are invoiced for treatment or services, such as physiotherapy and acupuncture, which were never actually provided to claimants. Other industry players, such as tow truck drivers, forward injured drivers and passengers on to clinics who pay them a lucrative referral fee for business.

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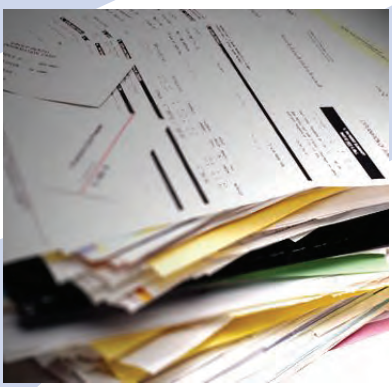
The Task Force's final report includes a recommendation that the *Insurance Act* be amended to give the Financial Services Commission of Ontario (FSCO) greater powers in investigating and preventing fraud. Other recommendations include licensing certain health clinics and sanctioning healthcare providers for unfair or deceptive acts or practices. The Task Force also recommends granting FSCO authority to oversee and/or audit the business and billing practices of health clinics and health practitioners who render invoices to them under the accident benefits regime. With respect to recommendations for changes to insurers' practices, the Task Force recommends increased disclosure by insurers regarding their methods for selecting certain service providers, such as independent medical examiners, tow truck services and vehicle repair centres. The report also suggests making a fraud hotline available so that the public can participate in cracking down on fraudsters.



Recently, automobile insurers in Ontario have turned to civil courts to bring fraudulent health clinics and practitioners to justice. In such cases, insurers aim to recoup funds paid out to claimants who allegedly received treatment from such providers. Insurers are also intent on deterring other clinics and practitioners from engaging in fraud by seeking punitive damages awards. At the same time, FSCO is using its powers to pursue fraudulent players within the auto insurance system. It recently laid 84 charges under the *Insurance Act* against two Toronto clinics, alleging various acts such as submitting false documentation and invoices to insurers and committing unfair or deceptive acts and practices. In this regard, the Task Force has recommended that claimants be required to confirm their attendances at clinics submitting invoices to their insurers.

The Task Force's final report emphasizes the urgency of its mandate of cracking down on fraud. It estimates that up to $236 of each average automobile insurance premium paid in Ontario is lost to fraud perpetrated in this province. As such, the aim of the Task Force is unquestionably to reduce fraudulent activities with the hope of reducing premiums for Ontario drivers. Despite the ever-looming presence of fraud within the auto industry, an important consideration throughout the Task Force's report is Ontario's need to find a balance between eliminating fraud and ensuring that legitimate claims advanced by injured individuals are addressed appropriately.

Jennifer Arduini is an Associate of Dutton Brock who practices both accident benefits and tort defence work.

THE SPACE-TIME CONTINUUM AND MATTER VS. ANTI-MATTER

The Ontario Superior Court of Justice released its decision of Hayward v. Cloutier (2012), ONSC 3738 on August 8, 2012. This is a precedent case as it is the first in Ontario to consider the issue of the vicarious liability of a school board for the alleged unauthorized sexual assaults committed by its teacher in a strictly classroom setting. Justice Patterson, sitting alone, held that there was no finding of liability against the teacher or the school board in this case.

The Plaintiff, who is now 56 years old, alleged that he was improperly touched in a sexual manner outside and inside his clothing in 1964 by his grade 4 teacher, the Defendant Mr. Cloutier. These assaults allegedly occurred on several occasions all within school property—at the back of a full classroom, in the nurse's room (which was shared with the teacher's lounge), and in the yard. The Plaintiff did not report these alleged assaults. This action was initiated on May 23, 2007.

The Plaintiff also suffered a second alleged sexual assault in 2004 during a colonoscopy wherein he alleged that he was sexually touched by an unauthorized and ungloved clinic employee. A claim was initiated with similar allegations as the current case. This "colonoscopy incident" was later argued by the Defence to be a successive tortious event contributing to the alleged injuries suffered by the Plaintiff.

The issues before the court were twofold: (1) on a balance of probabilities, had the Plaintiff proven that the sexual assault on him by the Defendant Cloutier took place; and

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(2) is the Defendant school board vicariously liable for the actions of the teacher.

While some inconsistencies in the Plaintiff's recollection of events could be explained by the passage of time, Judge Patterson found the Plaintiff's description of the events did not have "a ring of truth" and were "highly implausible." The Defendant Cloutier testified and denied any inappropriate conduct on his part. The Plaintiff ultimately failed to meet the onus in establishing on a balance of probabilities that the events happened.

The economic loss claim advanced by the Plaintiff was not accepted by the Judge as the Plaintiff testified to having been self-employed, owning a tire business for over 10 years, being successful as a horse trainer, and earning income as a weekly poker player. The lack of business records and supporting documentation posed a significant evidentiary problem and the Plaintiff failed to substantiate claims that he had lost income over the years.

According to Justice Patterson, if there was liability, general damages would be set at $25,000.00, with no award for punitive or aggravating damages.

Of more importance to jurisprudence going forward, Justice Patterson concluded that there was no vicarious liability in this case. According to Madam Justice McLachlin in the Supreme Court of Canada decision of *Bazley v. Curry*, [1999] 2 S.C.R. 534, the question in each case is whether there is a connection or nexus between the employment enterprise and the wrong that justifies the imposition of vicarious liability on the employer for the wrong:

"A wrong that is only coincidentally linked to the activity of the employer and duties of the employee cannot justify the imposition of vicarious liability on the employer"… The policy purposes underlying the imposition of vicarious liability on employers are served only where the wrong is so connected with the employment that it can be said that the employer has introduced the risk of the wrong."

Justice Patterson held that the school board operating the St Vincent de Paul School did not cause or increase the risk of a sexual assault. The Defendant Cloutier carried out normal teacher duties within the school board system according to the guiding principles in place at the time. There was nothing unusual in terms of his duties as a teacher and those duties did not give rise to special opportunities for wrongdoing. Furthermore, he was subject to supervision, there was no contact with the Plaintiff outside of the school system, and no evidence of grooming.

This case is a notable addition to the existing case law. It serves as a precedent in fact scenarios where the teacher has not assumed the role of the parent (as is the case in the residential school cases) or assumed additional/extra-curricular duties that might increase the risk of assault (ie., overnight school trips).

Teri Liu joined the firm as an Associate in 2011. She assisted Wayne Morris with the above trial.

PHASERS ON STUN CONTEST

Before getting to this month's trivia challenge, we had a great response to the March trivia question for which the correct answer was Lucille Fay LeSueur, the birth name of Joan Crawford. The winner was Tom Hammers, whose name was drawn from the following very smart persons who had the correct answer: Ken Jones, John Baines, Joanne Mackenzie, Marilla Mulligan, Jennifer Minicuci, Mike Sandoz, Lorraine St-Onge, Joan Falcioni, Nancy Clements, Cassandra Phillips, Stephen Kelly, Mark Cosgrove, Beth Buss, Jennifer Bethune, Michelle Rumbelow, Caron Sharpe, Jean Ryan, and Catherine Dowdall.

This edition's trivia question is: The original Star Trek tv series had two non-American born actors in the Enterprise crew. One was born and raised in Montreal. The second was the youngest of four children of a couple that emigrated from County Down in Northern Ireland. Before appearing in Star Trek, both actors appeared in a long forgotten TV series. What was the name of that TV series and what was the character played by the second actor of Irish heritage in that show?

Editors' note

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