Law Society of Ontario | Barreau de l'Ontario

7th Motor Vehicle Litigation Summit

CO-CHAIRS

Susan Gunter
Dutton Brock LLP

Adam Wagman, C.S.
Howie, Sacks, & Henry LLP

September 18-19, 2024

CLE24-009010-A-REG

Law Society of Ontario | Barreau de l'Ontario

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CO-CHAIRS: **Susan Gunter,** *Dutton Brock LLP*

Adam Wagman, C.S., *Howie, Sacks & Henry LLP*

September 18, 2024
8:30 a.m. to 4:30 p.m.

September 19, 2024
8:30 a.m. to 1:30 pm

Total CPD Hours = 8 h 30 m Substantive + 2 h 30 m Professionalism
+ 1 h EDI Professionalism

Law Society of Ontario
Donald Lamont Learning Centre
130 Queen St. W.
Toronto, ON

SKU CLE24-00901

Agenda

DAY 1: Wednesday, September 18

8:30 a.m. – 8:40 a.m.	**Welcome** Susan Gunter, *Dutton Brock LLP* Adam Wagman, C.S., *Howie, Sacks & Henry LLP*
8:40 a.m. – 9: 25 a.m.	**Road Authority Liability in Motor Vehicle Cases** Liane Brown, *Oatley Vigmond LLP* Lida Moazzam, *Dutton Brock LLP*
9:25 a.m. – 9:55 a.m.	**E-Bikes and E-Scooters** (5 m e) David Shellnutt, *The Biking Lawyer LLP*
9:55 a.m. – 10:35 a.m.	**Employment and Self Employment Income in the "Gig" Economy** (5 m e) Sophia Chaudri, *Flaherty McCarthy LLP* Jim Muccilli, MBA, CPA, CA, *Crowe Soberman LLP*
10:35 a.m. – 10:45 a.m.	**Question and Answer Session**
10:45 a.m. – 11:05 a.m.	**Break**
11:05 a.m. – 11:35 a.m.	**LAT Procedural Law Update** Phyllis Bergmans, FCIP, Paralegal/Accident Benefits Consultant, *Kompass Claims Management Group Inc.* Pamela Vlasic, *Schultz Law Group LLP*

11:35 a.m. – 11:55 a.m.	**Update on Limitations: Threshold, and Family Protection Coverage** (5 m P) Devan Marr, *Lawyers' Professional Indemnity Company (LAWPRO®)*
11:55 a.m. – 12:25 p.m.	**Bifurcation – Has Its Time Come?** Jiku Elamathail, *Benson Percival Brown LLP* Barbara Legate, C.S., *Legate Injury Lawyers*
12:25 p.m. – 1:25 p.m.	**Lunch Break**
1:25 p.m. – 2:10 p.m.	**My Life in the Motor Vehicle Litigation Trenches – A Plaintiff and Defence Perspective** (25 m P + 15 m e) Heidi Brown, C.S., *Bogoroch & Associates LLP* Jean-Claude (J.-C.) Rioux, *Flaherty McCarthy LLP*
2:10 p.m. – 2:40 p.m.	**Strategies at Mediation – Breaking the Impasse** (20 m P + 10 m e) Vance Cooper, *Cooper Mediation Inc.* Judy Neger, *JN Mediations Inc.*
2:40 p.m. – 3:00 p.m.	**Break**
3:00 p.m. – 3:40 p.m.	**Post Discovery Evidentiary Issues: Sanctions for Failing to Answer, Produce, or Correct** (25 m P) Associate Justice Ronna Brott *Superior Court of Justice* Serena Genova, *Desjardins General Insurance Group*

Jaclyn Habas, *Greg Monforton and Partners*

3:40 p.m. – 4:20 p.m. **Civil Justice Reform** (20 m P)

The Honourable Doug Downey, Attorney General of Ontario, *Ministry of the Attorney General*

Lisa Pool, *Evans Philp LLP*

Sandev Purewal, C.S., *Lerners LLP*

4:20 p.m. – 4:30 p.m. **Question and Answer Session**

4:30 p.m. **End of Day One**

4:30 p.m. – 6:00 p.m. **Reception**

Registrants attending in-person are invited to join us for a reception immediately following Day One.

7th Motor Vehicle Litigation Summit

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Agenda

DAY 2: Thursday, September 19

8:30 a.m. – 8:40 a.m.	**Welcome and Opening Remarks** Susan Gunter, *Dutton Brock LLP* Adam Wagman, C.S., *Howie, Sacks & Henry LLP*
8:40 a.m. – 9:10 a.m.	**Auto Insurance Coverage Complexities – What You Need to Know** Dennis Ong, *Aviva Trial Lawyers*
9:10 a.m. – 9:40 a.m.	**Stolen Vehicles** Katherine Di Tomaso, *Stieber Berlach LLP*
9:40 a.m. – 10:20 a.m.	**Statutory Accident Benefit Caselaw Update** Eric Grossman, C.S., *Zarek Taylor Grossman Hanrahan LLP* Anandi Naipaul, *Ross & McBride LLP*
10:20 a.m. – 11:00 a.m.	**Settlement Strategy: Mary Carter and Pierringer Agreements** (20 m P) Colleen Burn, C.S., *Burn Tucker Lachaine PC* Barry Cox, C.S., *Boghosian + Allen LLP*
11:00 a.m. – 11:10 a.m.	**Question and Answer Session**
11:10 a.m. – 11:30 a.m.	**Break**

11:30 a.m. – 12:15 p.m.	**Trying a Case Under Rule 76** (25 m P) Robert Becker, *Gowland, Boriss Injury Lawyers* Gillian Mays, *Aviva Trial Lawyers*
12:15 p.m. – 12:45 p.m.	**Introduction to Trauma-Informed Lawyering** (25 m e) Mitchell Brown, *Lerners LLP*
12:45 p.m. – 1:15 p.m.	**Getting Ready for Appeal** (10 m P) Gavin MacKenzie, *MacKenzie Barristers Professional Corporation*
1:15 p.m. – 1:25 p.m.	**Question and Answer Session**
1:25 p.m. – 1:30 p.m.	**Closing Remarks**

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SKU CLE24-00901

Table of Contents

TAB 1 **Road Authority Liability:**
An Update and Refresher (PPT)……..…1 - 1 to 1 - 23

The Evolving Landscape of Municipal/Road
Authority Liability: Top Ten Takeaways …… 1 - 24 to 1 - 29

Liane Brown, *Oatley Vigmond LLP*

Lida Moazzam, *Dutton Brock LLP*

TAB 2 **E-Bikes, E-Scooters & the Law (PPT) ……. 2 - 1 to 2 - 12**

E-Bikes & the Law: ……. 2 - 13 to 2 - 27

E-Scooters & the Law: ……. 2 - 28 to 2 - 32

David Shellnutt, *The Biking Lawyer LLP*

TAB 3 **Employed v. Self-Employed**
Implications of the new "Gig" Economy (PPT) …….……3 - 1 to 3 - 28

Jim Muccilli, MBA, CPA, CA, *Crowe Soberman LLP*

Sophia Chaudri, *Flaherty McCarthy LLP*

TAB 4 **LAT Procedural Update 2024 (PPT)…… 4 - 1 to 4 - 11**

Pamela Vlasic, *Schultz Law Group LLP*

Phyllis Bergmans, FCIP, Paralegal/Accident Benefits Consultant
Kompass Claims Management Group Inc.

TAB 5 **Limitation Periods I have know and loved:**
OPCF – 44r, Threshold, and More* from the ONCA (PPT) … 5 - 1 to 5 - 27

Limitation Periods I Have Known and Loved
Threshold, OPCF-44r and More from the ONCA…… 5 - 28 to 5 - 47

Devan Marr, *Lawyers' Professional Indemnity Company*
(LAWPRO®)

TAB 6 **Bifurcation (PPT) ……6 - 1 to 6 - 9**

Barbara Legate, C.S., *Legate Injury Lawyers*

Jiku Elamathail, *Benson, Percival, Brown*

Bifurcation of Personal Injury Actions:
New Rule and New Responsibility ……6 - 10 to 6 - 18

Barbara Legate, C.S., *Legate Injury Lawyers*

Jiku Elamathail, *Benson, Percival, Brown*

Isabella Finkel, *Benson, Percival, Brown*

TAB 7 **My Life in the Motor Vehicle Litigation Trenches –**
A Plaintiff and Defence Perspective (PPT) …… 7 - 1 to 7- 18

Heidi Brown, C.S., *Bogoroch & Associates LLP*

Jean-Claude (J.-C.) Rioux, *Flaherty McCarthy LLP*

TAB 8A **Don't Read This Paper (If You're Content with the Status Quo) - Re-Thinking Personal Injury and Insurance Mediation Process ……..……8A - 1 to 8A - 13**

Mediation Design and Process for Complex Claims ……8A - 14 to 8A - 21
Mediating a Complex Multi-Party Matter ……8A - 22 to 8A - 27

Vance Cooper, *Cooper Mediation Inc.*

TAB 8B **Virtual vs. In person Mediations ……8B - 1 to 8B - 3**

Judy Neger, *JN Mediations Inc.*

TAB 9 **Post-Discovery Evidentiary Issues: Sanctions and Remedies (PPT) ……9 - 1 to 9 - 9**

Associate Justice Ronna Brott
Superior Court of Justice

Serena Genova, *Desjardins General Insurance Group*

Jaclyn Habas, *Greg Monforton and Partners*

Post Discovery Evidentiary Issues: Sanctions and Remedies ……9 - 10 to 9 - 30

Jaclyn Habas, *Greg Monforton and Partners*

Serena Genova, *Desjardins General Insurance Group*

TAB 10A **Submissions and Letters by Canadian Defence Lawyers ……10A- 1 to 10A - 41**

Lisa Pool, *Evans Philp LLP*

TAB 10B **Submissions by the Ontario Trial Lawyers Association ……10B - 1 to 10B - 53**

Sandev Purewal, C.S., *Lerners LLP*

TAB 11 **Auto Insurance Coverage Complexities**
What You Need to Know (PPT) ……11 - 1 to 11 - 25

Relief from Forfeiture:
The Keeper of the King's Conscience ……..11 - 26 to 11 - 37

Dennis Ong, *Aviva Trial Lawyers*

TAB 12 **Insurance Issues Arising From Stolen Vehicles (PPT) …….12 - 1 to 12 - 23**

Insurance Issues Arising From Stolen Vehicles ……..12 - 24 to 12 - 60

Katherine Di Tomaso, *Stieber Berlach LLP*

Thomas Russell, *Stieber Berlach LLP*

TAB 13A **LAT: Latest Trends (PPT) ……13A - 1 to 13A - 17**

Eric Grossman, C.S., *Zarek Taylor Grossman Hanrahan LLP*

Anandi Naipaul, *Ross & McBride LLP*

Statutory Accident Benefit Caselaw Update ……13A - 18 to 13A - 53

Materials Prepared by:
Rebecca Brown Greer, *Zarek Taylor Grossman Hanrahan LLP*

TAB 13B **Ontario Statutory Accident Benefits Chart ……13B - 1 to 13B - 2**

Anandi Naipaul, *Ross & McBride LLP*

TAB 14 **Partial Settlements:**
Everything You Ever Wanted to Know (PPT) ……14 - 1 to 14 - 19

Pierringer Agreement ……14 - 20 to 14 - 24

Mary Carter Agreement ……14 - 25 to 14 - 28

Colleen Burn, C.S., *Burn Tucker Lachaine PC*

Barry Cox, C.S., *Boghosian + Allen LLP*

TAB 15A **Trying a Case Under Rule 76 (PPT) ……15A - 1 to 15A - 11**

Robert Becker, *Gowland, Boriss Injury Lawyers*

Gillian Mays, *Aviva Trial Lawyers*

Trying a Case Under Rule 76:
The Defendant's Perspective ……15A - 12 to 15A - 16

Gillian Mays, *Aviva Trial Lawyers*

TAB 15B **Trying a Case Under Rule 76 –**
The Simplified Rules of Procedure –
The Plaintiff's Perspective ……15B - 1 to 15B - 15

Form 76C ……15B - 16 to 15B - 16

Form 76D ……15B - 17 to 15B - 17

Citation: Maxine Lidia Reid v. 1865088 Ontario Limited
2024 ONSC 4296 ……15B - 18 to 15B - 27

Robert Becker, *Gowland, Boriss Injury Lawyers*

TAB 16 **Introduction to Trauma-Informed Litigation (PPT) ……16 - 1 to 16 - 24**

Introduction to Trauma-Informed Lawyering ……16 - 25 to 16 - 169

Mitchell Brown, *Lerners LLP*

TAB 17 **The Video Guide to Written Advocacy (PPT) ……17 - 1 to 17- 47**

Gavin MacKenzie
MacKenzie Barristers Professional Corporation

Materials Prepared by:
Ellen Vandergrift*, Vandergrift Legal*

Law Society of Ontario | Barreau de l'Ontario

TAB 1

7th Motor Vehicle Litigation Summit

Road Authority Liability: An Update and Refresher (PPT)

The Evolving Landscape of Municipal/Road Authority Liability: Top Ten Takeaways

Liane Brown
Oatley Vigmond LLP

Lida Moazzam
Dutton Brock LLP

September 18-19, 2024

cpd

Road Authority Liability: An Update and Refresher

Liane Brown

Oatley Vigmond
ONTARIO'S PERSONAL INJURY LAW FIRM

Lida Moazzam

Dutton Brock LLP

Agenda

Overview of Applicable Legislation

History of Crown Immunity and the Recent Enactment of the CLPA

Interaction of the CLPA with Common Law Principles

Added Complication: The Municipal Act and Statutory Defences

Overview of Legislation Framework

- **Crown Liability and Proceedings Act, 2019** *(replacing Proceedings Against the Crown Act)*
- **Public Transportation and Highway Improvement Act**
- **Municipal Act**
- **Minimum Maintenance Standards for Municipal Highways**
- **City of Toronto Act**

Crown Liability and Proceedings Act, 2019 (Ontario)

- See sections 11 and 17 for new changes
- Expanding the limits of Crown immunity?

Public Transportation and Highway Improvement Act

- Ministry to maintain and repair
- Section 33(1) outlines the obligations of the municipality and ministry to maintain and repair the roadways

Municipal Act, 2001

- **Maintenance**
- **44** (1) The municipality that has jurisdiction over a highway or bridge shall keep it in a state of repair that is reasonable in the circumstances, including the character and location of the highway or bridge.
- **Liability**
- (2) A municipality that defaults in complying with subsection (1) is, subject to the *Negligence Act*, liable for all damages any person sustains because of the default.

Municipal Act, 2001

- Section 44(3) lays out defences that the municipality can rely on:
- a municipality is not liable for failing to keep a highway or bridge in a reasonable state of repair if,

(a) it did not know and could not reasonably have been expected to have known about the state of repair of the highway or bridge;

(b) it took reasonable steps to prevent the default from arising; or

(c) at the time the cause of action arose, minimum standards established under subsection (4) applied to the highway or bridge and to the alleged default and those standards have been met.

Minimum Maintenance Standards for Municipal Highways

- **2.** (1) This Regulation sets out the minimum standards of repair for highways under municipal jurisdiction for the purpose of clause 44 (3) (c) of the Act.

- **2.1** The purpose of this Regulation is to clarify the scope of the statutory defence available to a municipality under clause 44 (3) (c) of the Act by establishing maintenance standards which are non-prescriptive as to the methods or materials to be used in complying with the standards but instead describe a desired outcome.

City of Toronto Act

Maintenance of highways and bridges

- **42** (1) The City shall keep a highway or bridge over which it has jurisdiction in a state of repair that is reasonable in the circumstances, including the character and location of the highway or bridge.

Liability

- (2) If the City defaults in complying with subsection (1), the City is, subject to the *Negligence Act*, liable for all damages any person sustains because of the default.

City of Toronto Act

- See s. 42(3) for Defences
- Section 391 provides for general liability in torts

Notice Periods

10 day notice periods

- Section 33(4) of the *Public Transportation and Highway Improvement Act*
- Section 44(10) of the *Municipal Act*
- The notice should include clear description of accident, injury, date of accident, and location

Notice Periods

- Exceptions to the rule
  a) “reasonable excuse”
  b) Municipality/Crown not being prejudiced in its defence

“Reasonable Excuse”

- *Crinson v. City of Toronto, 2010 ONCA 44*
- *Azzeh v Legendre*, 2017 ONCA 385
- *Marderosian v. Niagara Falls* (2024) ONSC 1043

Historical Crown Immunity

- Proceedings Against the Crown Act
- Private Law Duty of Care
  - The Anns/Cooper Test

Enactment of the Crown Liability and Proceedings Act

Expanding Government Immunity

Section 11: Policy versus Regulatory Decisions

Section 11

Extinguishment of causes of action respecting certain governmental functions

Acts of a legislative nature

11 (1) No cause of action arises against the Crown or an officer, employee or agent of the Crown in respect of any negligence or failure to take reasonable care while exercising or intending to exercise powers or performing or intending to perform duties or functions of a legislative nature, including the development or introduction of a bill, the enactment of an Act or the making of a regulation.

Section 11

- Policy decisions
- (4) No cause of action arises against the Crown or an officer, employee or agent of the Crown in respect of any negligence or failure to take reasonable care in the making of a decision in good faith respecting a policy matter, or any negligence in a purported failure to make a decision respecting a policy matter.

Definition of a “Policy Matter”

The manner in which a program, project or initiative is “carried out”

Francis v Ontario

Nelson (City) v Marchi

- **Policy versus Operational**

1. The level and responsibilities of the decision maker
2. The process by which the decision was made
3. The nature and extent of budgetary considerations
4. The extent to which the decision was based on objective criteria

The Municipal Act

- Statutory Defences
- Minimum Maintenance Standards

TABLE

SNOW ACCUMULATION - ROADWAYS

Class of Highway	Depth	Time
1	2.5 cm	4 hours
2	5 cm	6 hours
3	8 cm	12 hours
4	8 cm	16 hours
5	10 cm	24 hours

O. Reg. 47/13, s. 4; O. Reg. 366/18, s. 5 (5).

Thank You

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Dutton Brock LLP

Oatley Vigmond

ONTARIO'S PERSONAL INJURY LAW FIRM

The Evolving Landscape of Municipal/Road Authority Liability: Top Ten Takeaways

By Liane Brown (Oatley Vigmond LLP) and Lida Moazzam (Dutton Brock LLP)

1. **Jurisdiction:** When initiating a claim, the first question should be: what level of government should I sue? The applicable legislation will change based on whether the claim is being advanced against the federal, provincial or a municipal governmental entity.

   Highways in Canada (including the Trans-Canada Highway and the National Highway System) fall within provincial/territorial jurisdiction. Provincial/territorial governments are therefore responsible for the planning, design, construction, operation, maintenance and financing of highways within their jurisdiction. Therefore, this paper will focus on the applicable legislation in provincial or municipal claims.

2. **Overview of Applicable Legislation:** There are various legislations that govern road authority and municipal liability:
   - **Crown Liability and Proceedings Act, 2019** *(replacing Proceedings Against the Crown Act)*
     i. For changes, see sections 11 and 17
   - **Public Transportation and Highway Improvement Act**
     i. See section 33 regarding Ministry's obligation to maintain and repair
   - **Municipal Act**
     i. See section 44
   - **Minimum Maintenance Standards for Municipal Highways**
   - **City of Toronto Act**
     i. The City of Toronto is exempted from the Municipal Act, and is governed by its own Act, *The City of Toronto Act*
     ii. Section 391(2) of the *City of Toronto Act* replicates the provision of the Municipal Act providing for general liability in torts (i.e. s. 448(2)). S. 42, much like s. 44 of the *Municipal Act*, provides for statutory duties of care relating to the maintenance and repair of highways and roadways within its jurisdiction.

3. **Notice Periods:** In personal injury cases arising from the non-repair of roads or highways, there is a 10-day notice period requirement set out in section 33(4) of the *Public Transportation and Highway Improvement Act* and one set out in section 44 of the *Municipal Act.*
    - The notice should include the date, location and a clear description of the accident and the injury in order to allow the road authority to investigate the accident.
    - If the plaintiff fails to comply with this 10 day notice period requirement, they may argue that they had a "reasonable excuse" for missing the 10 day limitation period or the insufficiency of the notice does not prejudice the defense of the municipality/Crown.
    - See: *Crinson v. City of Toronto, 2010 ONCA 44*, *Azzeh v Legendre*, 2017 ONCA 385 and *Marderosian v. Niagara Falls* (2024) ONSC 1043.

4. **Historical Immunity of the Crown:** The Crown historically enjoyed immunity from civil suits for tort liability, which began to change in the 1950s with the enactment of statutes allowing tort claims against Crown entities for operational decisions. Policy decisions, however, remain protected.

5. **Historical Case Law:** Since the 1950s, a body of case law has developed around what decisions relate to matters of policy – and therefore immune from liability – and what decisions relate to operational matters. Most notably, is the "*Anns/Cooper test*", which is set out in the Supreme Court of Canada decision, *Cooper v Hobart*.

6. **Private Law Duty of Care and the Anns/Cooper Test:** As with any negligence claim, to establish a cause of action against a government entity, a plaintiff must first demonstrate that they were owed a duty of care. Whether a government entity owes a private duty of care is determined using the two-stage *Anns/Cooper* test. It is the test used to determine if a duty of care exists, focusing on foreseeability and whether the claim arises from operational or policy decisions.

i. ***Proximity & Foreseeability:*** At the first stage, the Court asks whether the harm that occurred was a reasonably foreseeable consequence of the defendant's conduct. This first stage need not be undertaken if there is a statutory duty of care or the duty of care has already been recognized by the courts. This includes situations where the defendant's conduct causes physical harm to the plaintiff or plaintiff's property. Similarly, governmental authorities who have undertaken a policy of road maintenance have been held to owe a duty of care to execute the maintenance in a non-negligent manner.

ii. ***Policy v Operational***: At the second stage, the Court asks whether there are any residual policy concerns outside the parties' relationship that should negate the prima facie duty of care. In other words, does the proposed claim arise from a governmental policy decision? In contrast, operational decisions, which involve the practical *implementation* of a government policy, will not attract immunity.

Note that the SCC has recently affirmed that – even where the first stage of the Anns/Cooper test has been established through a previously recognized duty of care – an analysis of whether it is a policy or operational decision must still take place. See: *Nelson v Marchi*.

7. **Crown Liability and Proceedings Act (CLPA):** In 2019, the CLPA was introduced to expand the scope of Crown immunity. Specifically, section 11(5)(c) of the CLPA broadens the definition of what constitutes a "policy matter" by providing immunity for "the manner in which a program…is carried out." This appears to provide immunity for the *implementation* of policy decisions. As noted above, the implementation of policy decisions has historically been considered an operational decision at common law.

8. **Recent Interpretation of the CLPA by Ontario Courts:** Ontario courts appear to be struggling with this new legislation. There have been a few cases that have interpreted section 11 of the CLPA. Most notably, the Court of Appeal interpreted section 11 of the CLPA in *Francis v Ontario*. In *Francis*, the Court of Appeal held that the CLPA was enacted to codify the case law on policy versus operational decisions and therefore, refused to

give effect to section 11(5)(c) as it was "inconsistent with the object of the legislation." Many legal critics see this decision as judicial overreach into the legislative sphere. Other cases that have considered section 11 of the CLPA (and are well-worth a read) are *Leroux v Ontario* and *Seelster Farms v Ontario*.

9. **Recent Supreme Court of Canada Decision:** Subsequent to the enactment of the CLPA and the Ontario Court of Appeal's decision in *Francis v Ontario*, the SCC released the *Nelson v Marchi* decision. In *Nelson*, the SCC developed a framework to assist courts in distinguishing policy v operational decisions. Nelson arguably expands the scope of operational decisions at common law and is thus in conflict with a strict interpretation of the CLPA.

   In the SCC decision of *Nelson v Marchi*, the plaintiff brought a claim for damages sustained while she crossed a snowbank created by the City of Nelson, in order to access a sidewalk. Employees of the City had plowed the snow in such a manner that they created a snowbank along the curb of the parking lot adjoining the sidewalk. The City did not clear an access route through the snowbank to the sidewalk for drivers.

   The trial judge held that snow removal was a core policy decision. The appellate court overturned the decision and sent the case back to trial. At the SCC, the Court upheld the appellate decision but decided on the duty of care element.

   The SCC found that the decision to clear snow, in this case, was not a core policy decision, and the City was not immune from liability. The Court stated that the purpose of core policy immunity is to protect decisions "as to the course or principle of action that are based on public policy considerations, such as economic, social and political factors, provided they are neither irrational nor taken in bad faith." Policy has a wide meaning, and simply using the word "policy" is not enough to create immunity. The Court elaborated that the fact that the word "policy" is found in a written document, or that a plan is labelled as "policy" may be misleading and is certainly not a determinative factor.

Importantly, the Court provided four factors to determine whether a municipal decision was a core policy, and immune from liability:

1. **The level and responsibilities of the decision maker:** Decisions made by senior employees or those working closely with the elected officials are more likely to be protected and immune than those made by lower-level staff. The higher the level of the decision-maker within the executive hierarchy, or the closer the decision-maker is to an elected official, the higher the possibility that judicial review for negligence will raise separation of powers concerns.

2. **The process by which the decision was made:** Decisions that involve deliberation, debate, and input from various levels of authority are more likely to be granted immunity, as they engage the separation of powers rationale and reflect core policy decisions. In contrast, decisions made solely based on an employee's discretion do not typically benefit from this level of protection.

3. **The nature and extent of budgetary considerations:** Decisions regarding budgetary allocations for departments or agencies are more likely to be classified as policy decisions and thus granted immunity, compared to day-to-day budgetary decisions made by individual employees, which are generally not considered policy decisions.

4. **The extent to which the decision was based on objective criteria:** Decisions involving the weighing of competing interests are more likely to be immune than decisions made on technical or general standards.

The Court noted that in weighing these factors, the "key focus must always be on the underlying purpose of the immunity and the nature of the decision." None of the factors is necessarily determinative alone and more factors and hallmarks of core policy decisions may be developed; courts must assess all the circumstances.

Importantly, however, the Nelson decision arose from a British Columbia case and therefore did not involve interpretation of the CLPA.

10. **Further Considerations for Municipal Liability:** In addition to the CLPA, claims against municipalities are governed by the *Municipal Act* (or *City of Toronto Act* for claims in Toronto). These pieces of legislation add further barriers for plaintiffs and additional defences for government defendants. Specifically, section 44(3) of the Municipal Act provides for three statutory defences. The municipality will not be liable if:
    i. It did not and could not reasonably have known of the state of disrepair;
    ii. If it took reasonable steps to prevent default from arising; or
    iii. If it met the minimum maintenance standards.
        i. *Wasylyk v. Simcoe (County),* 2023 ONCA 781.
        ii. *Fadler v Milton (Town),* 2024 CanLII 71124 (ON SC).

11. **Future Implications:** The evolving landscape of government liability, particularly regarding the CLPA and its interpretation by the courts, suggests that the legal tensions will continue to develop. Keep your eye out for future cases interpreting the CLPA!

Law Society of Ontario | Barreau de l'Ontario

TAB 2

7th Motor Vehicle Litigation Summit

E-Bikes, E-Scooters & the Law (PPT)

E-Bikes & the Law:

E-Scooters & the Law:

David Shellnutt
The Biking Lawyer LLP

September 18-19, 2024

cpd

E-Bikes, E-Scooters & the Law

TODAY'S TOPICS

- Regulations, Bylaws & Rules
- Confusion & Case Law
- Q&A

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LEGISLATIVE INCONSISTENCIES

Highway Traffic Act

HTA Regulations

Federal *Motor Vehicle Safety Act* Regulations

Municipal Bylaws

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What is an E-Bike

Generally, a power-assisted bicycle under the *HTA*, not a motor assist bicycle.

"**power-assisted bicycle**" means a bicycle that,
(a) as defined in subsection 2 (1) of the *Motor Vehicle Safety Regulations* (Canada),
(b) bears a label affixed by the manufacturer in compliance with the definition referred to in clause (a),
(c) is fitted at all times with pedals that are operable to propel the bicycle, and
(d) is capable at all times of being propelled on level ground solely by using muscular power

Additional points in Oreg 369/09
- Not more than 120kgs
- Battery and motor securely fastened to bicycle
- Motor must cease to propel if pedaling stops, the accelerator is released or brakes applied

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E-Bike Requirements & Rules

- Age Requirement: 16 years of age or older.
- Helmet Requirement: Riders of e-bikes, regardless of age, must wear an approved bicycle or motorcycle helmet.
- Traffic Rules: When riding an e-bike, you are required to follow the same rules of the road as other cyclists.
- a maximum assisted speed of 32 km/h
- an electric motor not exceeding 500 watts
- two independent braking systems.
- Cannot ride on 400 series highways
- Cannot ride on municipal roads, sidewalks, bike paths, bike trails or bike lanes where e-bikes are prohibited
- More than one person can ride an e-bike (power assisted only) if it was made for that number of people

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E-Scooters & the Law

- 2 wheels max diameter 17” (and brakes) separated by a platform
- A steering handlebar
- An electric motor not exceeding 500 watts that provides a maximum speed of 24km/h
- The *OReg* 389/19 s. 1(2) confirms an electric kick-scooter is deemed not to be a motor vehicle under the *Act*.
- A maximum weight of 45 kg;
- You must be 16 years of age;
- You must wear a helmet if you are 18 years or younger;
- Only one person permitted on the e-scooter
- Must not be operated on sidewalks

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Legislative Inconsistencies

It remains illegal to operate an e-scooter in the City of Toronto as it has not signed on to the pilot project. However, confusingly you can rent and buy e-scooters throughout Toronto, which sends a very mixed message to its citizens.

Municipalities that currently allow e-scooters include: Ottawa, Hamilton, Waterloo Region, Windsor, London, Markham, Brampton, Guelph, Mississauga and more.

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Legislative Inconsistencies

Types of E-bikes

pedelec & pedal-assisted cargo E-bikes

Pedal-assisted ("pedelecs") are e-bikes requiring pedaling for propulsion (i.e., the power is cut to the motor when the rider stops pedaling). These are treated like bicycles in the Toronto Municipal Code if they weigh less than 40kg and require pedaling for propulsion, and may be used on roads and all types of cycling infrastructure: painted bicycle lanes, cycle tracks (separated bike lanes) and multi-use trails and paths.

Pedal-assisted cargo cycles are legal for use in Toronto on roads, painted bike lanes and cycle tracks.

Power-assisted (throttle only)

Power-assisted are E-bikes that are capable of being propelled solely by its electric motor (throttle only). Power-assisted E-bikes may be bicycle-style, scooter-style or moped-style and regardless of style of appearance, they do not require any muscular power or pedaling for propulsion.

Power-assisted E-bikes are not allowed on cycle tracks (separated bike lanes) or multi-use trails or paths, because they pose safety risks when mixing with slower, human-powered modes like bicycles. It is also difficult and risky for such E-bikes to exit cycle tracks which can have raised curbs or vertical elements (e.g., posts, planters, etc.) when passing slower cyclists, whereas painted bike lanes do not present such issues.

For more information, please visit the Ontario Ministry of Transportation's page on E-bikes.

Toronto City Council adopted 2014 Decision on electric bikes. In a 2014 report adopted by Toronto City Council, power-assisted bicycles are considered similar to scooters and mopeds, and called "E-scooters" (not to be confused with standing electric kick-scooters which are also called E-scooters).

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Interesting, but Limited Case Law

- *R. v. Pizzacalla* – a series of cases on e-bike definitions
- Criminal Code specific cases
- Accident Benefits Cases
- Cases outside of Ontario

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TORT & ACCIDENT BENEFITS CLAIMS

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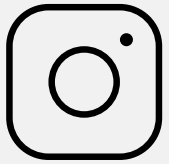

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E-Bikes & the Law:

E-Bikes have surged in popularity in Ontario after being a relative novelty not too long ago. Increasingly, we see both working cyclists and recreational riders come to enjoy the use of E-bikes to get around in nearly all conditions and seasons.

However, there are naturally a lot of questions surrounding E-bikes, their classification, and what laws may apply. This article serves as a guide on how E-bikes are viewed in Ontario and how they may differ from a traditional bicycle. We anticipate legislative changes to occur in the future and this to be an ever-evolving area of law. It will remain important to constantly keep oneself abreast of legal developments.

What is an E-Bike?

Under the current Regulations, some types of off-road or slow-moving vehicles (such as power-assisted bicycles, scooters and electric or low-speed all-terrain vehicles) are required to meet regulatory safety requirements. Owing to their low speed and off-road use, Transport Canada is proposing that it will no longer regulate these vehicles, thus excluding them from any prescribed class.

Under Ontario's *Highway Traffic Act*, bicycles are defined as follows:

"bicycle" includes a tricycle, a unicycle and **a power-assisted bicycle but does not include a motor assisted bicycle.**

"motor assisted bicycle" means a bicycle,

> (a) that is fitted with pedals that are operable at all times to propel the bicycle,
>
> (b) that weighs not more than fifty-five kilograms,
>
> (c) that has no hand or foot operated clutch or gearbox driven by the motor and transferring power to the driven wheel,
>
> (d) that has an attached motor driven by electricity or having a piston displacement of not more than fifty cubic centimetres, and
>
> (e) that does not have sufficient power to enable the bicycle to attain a speed greater than 50 kilometres per hour on level ground within a distance of 2 kilometres from a standing start; ("cyclomoteur")

"motor vehicle" includes an automobile, a motorcycle, a motor assisted bicycle unless otherwise indicated in this Act, and any other vehicle propelled or driven otherwise than by muscular power, but does not include a street car or other motor vehicle running only upon rails, a power-assisted bicycle, a motorized snow vehicle, a traction engine, a farm

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tractor, a self-propelled implement of husbandry or a road-building machine; ("véhicule automobile")

"motorcycle" means a self-propelled vehicle having a seat or saddle for the use of the driver and designed to travel on not more than three wheels in contact with the ground, and includes a motor scooter, but does not include a motor assisted bicycle; ("motocyclette")

"**power-assisted bicycle**" means a bicycle that,

> (a) is a power-assisted bicycle as defined in subsection 2 (1) of the *Motor Vehicle Safety Regulations* made under the *Motor Vehicle Safety Act* (Canada),
>
> (b) bears a label affixed by the manufacturer in compliance with the definition referred to in clause (a),
>
> (c) is fitted at all times with pedals that are operable to propel the bicycle, and
>
> (d) is capable at all times of being propelled on level ground solely by using muscular power to operate the pedals; ("bicyclette assistée")

However, the Federal definition cited in the *HTA* of power assisted bicycles was repealed by June 2020, and not replaced subsequently: *Motor Vehicle Safety Regulations*, CRC, c 1038

In Ontario, E-bikes are covered under the term "power-assisted bicycle" and have been defined under the *Power-Assisted Bicycles Regulation* **ONTARIO REGULATION 369/09** to include the following characteristics:

- Weight of no more than 120 kilograms;
- Has wheels with a diameter of at least 350 mm and width of at least 35 mm;
- The battery and motor must be securely fastened to the bicycle;
- The motor must cease to propel the bicycle forward if pedaling stops, the accelerator is released or the brakes are applied; and,
- It must comply with the limits set in federal regulations on E-bikes.

The Government of Ontario further identifies the following considerations:

To operate an E-bike in Ontario, the E-bike must have:

- Age Requirement: To operate an E-bike in Ontario, you must be 16 years of age or older.

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- Helmet Requirement: Riders of E-bikes, regardless of age, must wear an approved bicycle or motorcycle helmet.
- Traffic Rules: When riding an E-bike, you are required to follow the same rules of the road as other cyclists, including obeying traffic signals and using hand signals for turns.
- A maximum assisted speed of 32 km/h.
- An electric motor not exceeding 500 watts.
- Two independent braking systems that apply force to each wheel and are capable of bringing the E-bike, while being operated at a speed of 30 km/h, to a full stop within 9 metres, on a level asphalt surface, from the point at which the brakes were applied.

Removing the pedals could render the E-bike a motor vehicle, which requires a licence, insurance and registration to operate (see case law below). It is also illegal to modify your E-bike's electric motor to make it more powerful or to increase the assisted speed of the bike.

The *HTA* further adds that power-assisted bicycles should be capable of being propelled on level ground solely by using muscular power to operate the pedals.

You cannot ride your E-bike on:

- Certain provincial controlled access highways, such as the 400 series, the Queen Elizabeth Way, the Queensway in Ottawa or the Kitchener-Waterloo Expressway;
- Municipal roads, including sidewalks, where bicycles are banned under municipal bylaws; and,
- Municipal roads, sidewalks, bike paths, bike trails or bike lanes where E-bikes are prohibited.

Passengers on an E-bike

The *HTA* definition of bicycle includes power-assisted bicycle, and so a review of s. 178(2) confirms that two people can ride an E-bike (power assisted only) if it was made for two people.

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HTA on Bicycle passengers

> 178 (2) No person riding or operating a bicycle designed for carrying one person only shall carry any other person thereon. R.S.O. 1990, c. H.8, s. 178 (2); 2015, c. 14, s. 52 (2).
>
> **Motor assisted bicycle passengers**
>
> (3) No person driving a motor assisted bicycle shall carry any other person thereon. R.S.O. 1990, c. H.8, s. 178 (3).

Here's where it gets confusing…

The City of Toronto defines power assisted bikes as pedal-assisted ("pedelecs").

According to the City of Toronto, pedelecs are E-bikes requiring pedaling for propulsion (i.e., the power is cut to the motor when the rider stops pedaling). These are treated like bicycles in the Toronto Municipal Code if they weigh less than 40kg and require pedaling for propulsion, and may be used on roads and all types of cycling infrastructure: painted bicycle lanes, cycle tracks (separated bike lanes) and multi-use trails and paths.

They define motor assisted bikes (with electric motors only) as power-assisted E-bikes. These they define as capable of being propelled solely by electric motor (throttle only). Power-assisted E-bikes may be bicycle-style, scooter-style or moped-style and regardless of style or appearance, they do not require any muscular power or pedaling for propulsion.

Power-assisted E-bikes are not allowed on cycle tracks (separated bike lanes) or multi-use trails or paths, because they pose safety risks when mixing with slower, human-powered modes like bicycles.

Possible *MOMs Act* changes:

The definition of "power-assisted bicycle" in subsection 1 (1) of the *Highway Traffic Act* is repealed and the following substituted:

> "power-assisted bicycle" means,
>
> (a) a pedal-driven bicycle of conventional exposed fork-and-frame bicycle design and appearance that does not resemble a motor scooter or motorcycle and that,
>
> (i) has two or three wheels,

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(ii) is fitted at all times with pedals that are always operable to propel the bicycle,

(iii) is capable at all times of being propelled on level ground solely by using muscular power to operate the pedals,

(iv) has steering handlebars,

(v) has wheels that have a width of not less than 35 millimetres and a diameter of not less than 350 millimetres,

(vi) has one or more electric motors that, singly or in combination, have a continuous rated output power not exceeding 500 watts and that is incapable of providing propulsion assistance when the bicycle attains a speed of 32 kilometres per hour or more, and

(vii) weighs not more than 55 kilograms,

(b) a vehicle that has the appearance of a motor scooter, with a seat and an open frame that may be stepped through and a platform on which the rider's feet may rest and that,

(i) meets the description in subclauses (a) (i) to (vi), and

(ii) weighs not more than 120 kilograms,

(c) a vehicle that has the appearance of a motorcycle, with a saddle designed to be straddled and a footrest, pedals or pegs where the rider's feet may remain secure, and that meets the description in subclauses (b) (i) and (ii); ("bicyclette assistée")

No person under 14 years of age shall operate a power assisted bicycle under 1(a).

No person under 16 shall operate a power assisted bicycle under 1(b) and (c).

Motor assisted bicycle you must be 16.

Practically Speaking:

Do you Need Insurance on Your E-bike?

As long as your E-bike has pedals that allow it to be self-propelled using muscle power, then it is not required to have insurance. Since a "power-assisted bicycle" is not included in the definition of "motor vehicle" under the *Highway Traffic Act*, it is not required to be

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insured under the Compulsory Automobile Insurance Act. However, if you remove the pedals, this could make your E-bike a motor vehicle (see case law below).

Additionally, while E-bikes are not considered to be motor vehicles under the *Highway Traffic Act*, they do fall under the definition of "motor vehicle" under the Criminal Code. This means that you are not allowed to operate your E-bike while impaired. As well, if your driver's license has been suspended you should seek legal advice from a criminal lawyer based on your suspension reason to determine whether you are allowed to operate an E-bike.

Disadvantages To Electric Bicycles[1]

Since electric bicycles are a hybrid of a bicycle and motorcycle, several issues have arisen lately, including:

- **The lack of licensing, permits, and plates:** Anyone can buy an E-bike and start driving without a formal process in place, even if they don't have a regular **driver's license**. This could potentially lead to inexperienced and uneducated riders on the road, increasing the risk for accidents and endanger pedestrians.
- **No insurance requirements:** While riders are not required to have E-bike insurance, many insurers offer coverage through **home insurance**. If you are involved in an accident with a pedestrian or other rider, you cannot claim any **accident benefits**, unless the accident involved an insured automobile.
- **Spacing issues on roads:** Since E-bikes tend to be bigger and faster than traditional bicycles, but also are to be treated the same, it is difficult for drivers to gauge spacing, leave enough room when passing, and accommodate them in other situations.
- **Lack of education about E-bikes:** There is a general lack of education about the rules, role, and what is and is not allowed.

We recommend checking out the following links to familiarize yourself with the rules of the road and safe cycling habits:

- Cycling and the Highway Traffic Act
- Cycling Skills: Ontario's guide to safe cycling

[1] E-Bike Laws in Ontario and Toronto (online)

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- The Toronto Cyclists Handbook

E-bikes are a great way to get around, but they do come with risk, just like any other form of transportation.

In comparison to traditional bicycles, E-bikes are generally heavier and can allow you to travel faster than the average cyclist on the road. While drivers of motor vehicles are required to check their surroundings before making any maneuver, we know all too well that this check is not always performed. In addition, not all drivers are familiar with the speed at which an E-bike can travel. Unfortunately, we have seen this result in collisions taking place due to a driver underestimating how fast someone on an E-bike is travelling.

Care should also be used when riding an E-bike in and around cyclists on traditional bicycles. Given the increased weight and speed capabilities of E-bikes, cyclists of traditional bicycles may be at an increased risk of harm if a collision was to take place. Please be mindful to provide each rider with adequate space to ride comfortably and only attempt to pass when it is safe to do so.

Please give a heads up of your imminent pass by ringing your bell!

Finally, always be wary of pedestrians, especially if you believe they will try to cross your path of travel. Like motorists, they may not appreciate the speed an E-bike can travel at which, in turn, could result in a collision.

Interesting Cases:

The *Pizzacalla* Cases:

R. v. Pizzacalla, 2013 ONCJ 31 (CanLII)

https://www.canadianlawyermag.com/news/general/ruling-confirms-e-bikes-are-not-motor-vehicles/271826

Charges under the HTA and Compulsory Automobile Insurance Act. Justic of the Peace Donald Dudar stated that the definition of “motor vehicle” in the *Criminal Code of Canada* is far more expansive and does not contemplate an exception for “power-assisted bicycle”. JP Dudbar ultimately found that since the legislation was not explicit on penalty as related to the removal of pedals, as they were with modifications to increase speed, the removal of pedals that could be replaced did not render the power-assisted bicycle a motor vehicle under the HTA.

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At the roadside Mr. Pizzacalla produced the pedals for the vehicle – which had been stored under the seat of the vehicle - and affixed them prior to departing the location of the traffic stop. He was charged with driving a motor vehicle without a license and fought the definition of motor vehicle as applied to his power-assisted bicycle.

The parties took opposing views as to whether the vehicle was "capable of being propelled solely by muscular power". On the one hand, at the time of the first observations, the pedals were not attached. By contrast, they were readily available and were in fact attached before the defendant left the area of the traffic stop.

Justice Dubar helpfully states:

> 48. Notwithstanding, my answer to the question would have to be no. Ontario *Regulation 369-09* gives support for this view. It prescribes that a "power-assisted bicycle" that has been modified in certain ways disentitles the rider from operating it. The primary concern of the legislators appears to be to prohibit changes that would allow the vehicle to go faster. There is no evidence that the change created by removing pedals (and keeping them close at hand and ready to be re-attached) makes the vehicle go any faster.
>
> 49. Based upon the *ratio decidendi* in *R. V. Vanberlo*, it is clear that a change to a vehicle must be substantial to establish a basis for finding that it has converted from one use to another. The corollary of this is that only with such a change does its status in law change.
>
> 50. Justice Nadel's decision, dealing with a charge under the *Criminal Code* a portion of which is set out above, is persuasive and supports the Crown's view of the case. However, it can be distinguished because he was deciding a charge pursuant to the *Criminal Code* and his comments with respect to the *HTA* would have been *obiter* in nature, and, as such, is not binding on me. Notably, the definition of "motor vehicle" in the *Criminal Code of Canada* is far more expansive and does not contemplate an exception for "poser-assisted bicycle".

R. v. Pizzacalla, 2013 ONSC 771 (CanLII)

Justice Ramsay dealt exclusively with a *Criminal Code* conviction and determined the *HTA* definition of motor vehicle would only have been relevant if the disqualification had arisen from the provincial legislation or an order made under it. In other words, whether the appellant needed a licence to drive the vehicle or not, he was prohibited from driving it. The prohibition order in this case was federal in nature, under the *Criminal Code*.

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> *[5] The Criminal Code (s.2) defines a motor vehicle as "a vehicle that is drawn, propelled or driven by any means other than muscular power, but does not include railway equipment". I agree with the trial judge that the appellant's vehicle met this definition. The definition of motor vehicle under the Highway Traffic Act would only have been relevant if the disqualification had arisen from the provincial legislation or an order made under it. In other words, whether the appellant needed a licence to drive the vehicle or not, he was prohibited from driving it.*

R. v. Pizzacalla, 2014 ONCJ 776

Justice Wilkie presided over two appeals by the Crown under Part III of the *Provincial Offences Act* (the "*POA*") from the Respondent's acquittals following two separate trials on various charges under the *Highway Traffic Act* (the "*HTA*") and the *Compulsory Automobile Insurance Act* (the "*CAIA*").

All charges related to certain duties and obligations that these Acts impose upon persons operating a motor vehicle, including the requirements that they be insured and licensed. In both instances the Respondent's acquittals rested on the determination that he was not in fact operating a motor vehicle, but rather a "power assisted bicycle", an electrically powered device commonly referred to as an e-bike, which is specifically exempted from the definition of "motor vehicle" and carries its own definition under the *HTA*.

The power assisted bike was being operated with at least one pedal removed.

Justice Wilkie found that the power-assisted bike was not brought within the definition of motor vehicle under the HTA:

> [69] …In my view removing the pedals or a pedal so as to temporarily disable the muscular power function, especially in circumstances where they are readily available for reattachment, is not enough to transform the essential function of the item for use as a motor vehicle. It also seems to me contrary to the finding in *Van Berlo* that the classification of any vehicle can turn a matter as ephemeral as the snapping on or off by hand of a single pedal.
>
> **[70]** Indeed I find it difficult to accept the Crown's assertion that the absence of pedalling function alone, without more, alters the fundamental classification of this vehicle when the federal portion of the definition specifically includes a class of these vehicles that require no muscular power function to operate.

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[71] Furthermore, it seems to me that the Legislature would have to speak much more clearly than it has to infer an intention for a deviation of this sort from the definition to displace an exemption from the "motor vehicle" definition. After all, Regulations have been enacted to create offences where persons would deliberately modify one of these vehicles in other ways which would have the effect of taking it outside the definition.

[72] An example is Regulation 369/09 which prohibits under penalty of a fine the operation of any e-bike with an electric motor that has been adjusted or changed to exceed specifications thereby permitting it to go faster. The specifications regarding the motor are built right into the definition of "power-assisted bicycle" meaning that with modifications to increase the speed, the vehicle would no longer be in compliance. Tellingly, even with an obvious safety issue such as this, the legislative response is not to deem the item a "motor vehicle", but to prohibit its operation.

[73] The Regulations, do not address the removal or disabling of the pedals but there is no reason why they could not do so.

[…]

[75] While it is not this court's place in this context to give direction to the Legislature, it is hard to avoid the common sense observation that if the absence of an operable pedalling function is deemed to create a pressing problem, a more proportionate response, and one more in keeping with the exempted status of these vehicles, is to prohibit the sale of those with detachable pedals or simply make it an offence to operate without them.

You'll note that the fitted at all times language in the motor-assisted bicycle definition now has been added to the power-assisted bicycle definition, which could have made the outcome different in at least one of the *Pizzacalla cases.* But perhaps, since OReg 369/09 still only mentions modifications affecting power or speed then the pedals not being affixed at all times may not render the e-bike a motor vehicle as JP Dudbar and Justice Wilkie held.

R. v. Clifford 2014 ONSC 2388

Criminal Code order prohibiting Mr. Clifford from operating a motor vehicle for 5 years. Following receipt of this order Mr. Clifford used an e-bike around town and was stopped

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under the Criminal Code for operating a motor vehicle while being disqualified from doing so.

> 7 The definition section of the *Criminal Code* defines a "motor vehicle" as follows:
>
> > "Motor Vehicle" means a vehicle that is drawn, propelled or driven by any means other than muscular power, but does not include railway equipment;
>
> 12 Mr. Clifford testified that he only charged the battery on his bike through the act of pedaling, and he did not use an outside source such as a battery charger. He submits that since the original source of the battery power which propelled his bike was muscular, the court should find that his **e-bike** was not a vehicle which was propelled by means "other than muscular power", and therefore does not fall within the definition of "motor vehicle" under the Code.
>
> 13 In my view, Mr. Clifford's argument fails. Mr. Clifford admits that for at least some of the time while he was being followed by Constable Kewaquado he relied on battery or electrical power. Regardless of the source of the power which charged the battery on Mr. Clifford's **e-bike**, battery power remains fundamentally different than muscular power. Battery power transmits electrical charges to a motor, which in turn propels an **e-bike** forward. The act of pedaling also propels an **e-bike** forward but this is a form of direct muscular propulsion.
>
> 14. I find that during those times that Mr. Clifford operated his **e-bike** with the assistance of battery power the **e-bike** was operated by means "other than muscular power". It is only in those circumstances where a vehicle is propelled exclusively by muscular power, as is the case with a conventional bicycle, that a vehicle is excluded from the definition of "motor vehicle" under the *Code.*
>
> [37] In summary, and for the reasons I have stated, I find that an e-bike is a motor vehicle as defined in the Criminal Code. Mr. Clifford was under a court ordered prohibition not to operate a motor vehicle, and by operating his e-bike, Mr. Clifford breached section 259(4) of the *Criminal Code*.

R. v. Morrison 2015 ONSC 7616

The trial judge accepted the police officer's evidence that there were no pedals on the e-bike at that time, only foot pegs, and that Mr. Morrison was driving it with the motor running. Appeal of an impaired operation of a motor vehicle under the *Criminal Code*.

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10 The Appellant submits that because the Scout e-bike is capable of being propelled by muscular power, "it would be incorrect to say that the device is the kind that is drawn, propelled or driven by means other than muscular power. As its name suggest, it is a "bike" and not a motor vehicle." Following the Court's reasoning in Saunders, he suggests, it is irrelevant to the analysis whether there is a battery in the device and whether the pedals are functional. So long as the device is the kind that is capable of being drawn, propelled or driven by muscular power, the device is not a motor vehicle as defined in the Code.

11 I would note that in R. v. Pizzacalla 2013 2012 ONSC 771 Ont. S.C.J. (leave to appeal refused, 2014 ONCA 706 (Ont. C.A.)), the summary conviction appeal judge Ramsay J. agreed with the trial judge's determination that there must be operable pedals on the device in order to be excluded from the definition of a motor vehicle under s.2 of the Code. Similarly, in R. v. Clifford, 2014 ONSC 2388 (Ont. S.C.J.), the trial judge Koke J. held at para. 14 that "it is only in circumstances where a vehicle is propelled exclusively by muscular power, as is the case with a conventional bicycle, that a vehicle is excluded from the definition of 'motor vehicle' under the Code."

12 I disagree with the Appellant's submission on this issue, and consider rather that the position taken by the Crown on the appeal is the correct one: in Saunders, the Supreme Court of Canada set out the purpose of the care and control sections. Rather than reading down the s.2 definition of motor vehicle in the Code, it expanded the definition to include not only those things that are driven by non-muscular power, but those that can only be driven by non-muscular power. To interpret Saunders in the manner submitted by the Appellant would be inconsistent with the stated intention of the legislation, and would afford carte blanche to impaired individuals to operate a motorized vehicle on a public highway.

13 I therefore agree with the Crown's submission that while the Appellant correctly states that the definition of motor vehicle captures the kind of vehicle, its essential character, and not the contextual operability or condition of it, in this context there is not practical distinction between a motorized scooter and an automobile: both can be operated with or without muscular power. One can push an automobile that is out of gas, or drive it down a hill, and it would still be a motor vehicle, and one could be found guilty for operating it if impaired. Therefore, a scooter capable of being operated by non-muscular power, but actually being operated by muscular power at a given moment, is a motor vehicle, just as an automobile would be.

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14 To be clear: I consider that a Davinci Scout e-bike is a "motor vehicle" within the definition of s.2 of the Criminal Code.

R. v. Goryachev, 2015 CarswellOnt 14729

1 Mikhail Goryachev is charged under s. 253(1)(a) and (b) of the Criminal Code with operating a motor vehicle while impaired and over 80. The vehicle in question is an electric scooter. The issues before me involve a consideration of whether this was a motor vehicle, and if so, whether the Crown has proven that the blood-alcohol concentration of Mr. Goryachev was over 80 at the time of operation.

10 In *R. v. Saunders*, [1967] S.C.J. No. 21 (S.C.C.) the Supreme Court held that the definition applies to the nature of the vehicle, not its operability at a particular moment. The court indicated that a car that was out of gas was still a motor vehicle. In modern parlance, an electric car that is out of battery power would still be a motor vehicle. The Supreme Court in Saunders noted that the definition in s. 2:

...contemplates a kind of vehicle, not its actual operability or functioning.

11 In *R. v. Kulbacki*, 2012 ONCJ 532 (Ont. C.J.), my colleague, Justice Radley-Walters in a well reasoned decision, found that an e-bike or a European-style moped was a motor vehicle as defined in s. 2 of the Criminal Code.

12 The decision of the Superior Court in *R. v. Clifford*, [2014] O.J. No. 1880 (Ont. S.C.J.), is somewhat confusing on the issue of whether an electric bike that is out of power is a motor vehicle. In that case, at paragraph 14, Justice Koke allowed that:

> *During those times that Mr. Clifford operated his e-bike with the assistance of battery power the e-bike was operated by means other than muscular power.*
>
> *That would appear to allow for the possibility that in the times that an e-bike is not operated on battery power that it falls outside the definition of s. 2 of the Criminal Code. This reasoning was followed by my colleague Justice Webber in R. v Belland, which is an unreported decision. However, as I read the reasoning in R. v. Saunders and R. v Kulbacki and R. v. Shanahan, [2006] O.J. No. 2022 (Ont. C.J.), I am of the view that Justice Koke's*

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> *following line is a correct interpretation of the law as it relates to electric bikes.*
>
> *It is only in those circumstances where a vehicle is propelled exclusively by muscular power, as is the case with a conventional bicycle, that a vehicle is excluded from the definition of a motor vehicle under the Code.*

13 The evidence is clear that Mr. Goryachev's bike had a key that was in the "on" position. It had a battery which was connected. It appears to have had a platform for feet and to have had electric lights. There is no evidence that it had pedals, and if it did, Mr. Goryachev was apparently not using them. The evidence is that at the end of his ride he was not pedalling the bike but was pushing it with his feet. This strikes me as similar to the way a driver would push a motorcycle or a car that was out of gas. This does not take away from the fact that those vehicles are motor vehicles as explained in *R. v. Saunders*.

17 As an aside, I am further satisfied in accordance with the cases cited, that even if Mr. Goryachev had been coasting on the vehicle with it out of power, that he was still operating a motor vehicle. This was an electric scooter that had a key, a battery and headlights and had all the characteristics of a motor vehicle even if it did not have power at that moment. As such, it presented all the dangers and hazards of a motor vehicle as Mr. Goryachev rode on it and steered it - in other words "operated it" - through a park filled with children at play. At the very least Mr. Goryachev was in care or control of a motor vehicle which is an included offence of impaired operation according to the Court of Appeal in *R. v. Plank* (1986), 28 C.C.C. (3d) 386 (Ont. C.A.).

R. v. Hutchinson, 2022 ONCJ 276

This is a case where a driver was convicted following a serious collision with an e-biker. E-biker was so seriously injured he remained hospitalized for several years until he ultimately passed. It is not entirely clear from the decision what happened civilly, but it sounds like the victims and family were compensated. This despite the acknowledgement that the e-bike speed outlet had been modified contrary to the *HTA*.

Finally some concerns from our friends ZTGH, Sharla Bandoquillo:

The outcome of not falling within the definition of “motor vehicle” in the *Highway Traffic Act* is that a person operating an e-bike while intoxicated will not be subject to penalties

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for impaired driving found in the *Highway Traffic Act*. In *R. v. Pizzacalla* 2014 ONCA 706, the Court of Appeal refused to enforce *Highway Traffic Act* offences of driving with a suspended license, without a helmet and without a license plate, on the basis that the HTA specifically excludes e-bikes from its purview. By extension, one might expect that a person operating an e-bike while intoxicated will not be subject to penalties for impaired driving found in the *Highway Traffic Act* either. This means avoiding license suspensions, treatment programs, or the installation of an Ignition Interlock Device, all of which are penalties found in the *HTA*. That said, the *Criminal Code* driving offences, including dangerous driving, driving while impaired, and refusing a sample are all still operative, because the e-bike is a "motor vehicle under the *Criminal Code*

Access to accident benefits under the *Statutory Accident Benefits Schedule* is limited to a person involved in an "accident" which is defined as an incident in which the use or operation of an automobile directly causes an impairment. Where the e-bike or power-assisted bicycle is not considered a "motor vehicle" or "automobile" under the *Highway Traffic Act*, the *Compulsory Automobile Insurance Act* and the *Insurance Act*, benefits under the *Statutory Accident Benefits Schedule* cannot be accessed.

By: David Shellnutt,

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For further discussion please review our online resources at: https://www.thebikinglawyer.ca/blog

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E-Scooters & the Law:

Like Cycle Toronto, other active transportation and mobility justice advocates, we support all manner of active mobility and e-mobility device use that allows people to move around safely. If an e-scooter gets someone out of a car to help us fight congestion, climate change and the dangers inherent with motor vehicles, we are all for it.

That said, these devices are not without risks. We want people who use them to know their rights and be prepared should the unfortunate occur.

SickKids Hospital recently raised alarm bells noting that in June and July of 2024, they had seen 16 injuries related to kids on e-scooters, highlighted by a lack of helmet usage and interaction with motor vehicles.

E-Scooter Law

On November 27, 2019, the Province of Ontario passed *Highway Traffic Act (HTA) Regulation 389/19*, launching a 5-year pilot to permit municipalities to regulate the use of e-scooters (defined as "Electric Kick-Scooters"). Under Regulation 389/19 e-scooters must include the following characteristics:

- Two wheels placed along the same longitudinal axis, one placed at the front of the kick-scooter and one at the rear,
- A platform for standing between the two wheels,
- A steering handlebar that acts directly on the steerable wheel, and,
- An electric motor not exceeding 500 watts that provides a maximum speed of 24km/h *[IMPORTANT: If your e-scooter has been modified to travel faster than 24km/h and you get in a collision, you may have voided your protections under the Insurance Act and not be able to sue or seek benefits.]*

The *OReg* 389/19 s. 1(2) confirms an electric kick-scooter is deemed not to be a motor vehicle under the *Act*, but they must follow the rules of the road.

Additional requirements for e-scooters include:

- A maximum weight of 45 kg;
- Two wheels and brakes;
- A horn or bell;

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- At least one white light on front, one red light on rear and reflective material on sides;
- A maximum wheel diameter of 17 inches;
- You must be at least the age of 16 to operate an e-scooter;
- You must wear a helmet while riding an e-scooter if you are 18 years or younger;
- It is illegal to operate an e-scooter while under the influence of alcohol and/or drugs;
- Keep a safe distance, yield to, and pass pedestrians safely;
- Only one person permitted on the e-scooter and no towing; and,
- Don't leave it in the middle of the road or sidewalk when not in use.

If you are pulled over by police, you are not required to have a license to operate an e-scooter and so, providing only your name, address and date of birth is permissible and advisable [s. 11 O.Reg 389/19].

Where can I ride my e-scooter?

It remains illegal to operate an e-scooter in the City of Toronto as it has not signed on to the pilot project. However, confusingly, you can rent and buy e-scooters throughout Toronto, which sends a very mixed message to its citizens.

Municipalities that currently allow e-scooters include: Ottawa, Hamilton, Waterloo Region, Windsor, London, Markham, Brampton, Guelph, Mississauga and more. It is important to check for any additional requirements in each municipality prior to operating an e-scooter such as:

- Where e-scooters may be operated;
- Where e-scooters may park;
- Whether a business permit or license is required for e-scooter companies; and,
- Whether insurance is required (the type of coverage).

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E-scooter Accident

If you are involved in a collision with a motor vehicle on your e-scooter, the same rules apply as if you were a pedestrian, cyclist, or another motorist.

We recognize that e-scooters present both an opportunity and challenge on our roadways.

E-scooter riders, like all road users, must understand and follow the rules of the road. E-scooter riders must always prioritize the safety of pedestrians and be respectful of fellow road users.

However, we are firmly against any police enforcement of e-scooter riders. Government has completely failed the people of this province. From downloading e-scooter regulation responsibility to Municipalities, this has created a confusing and contradictory patchwork of laws and rules.

Municipalities have also erred in downloading responsibilities onto their citizens by either permitting e-scooter rentals without helmets or like in Toronto, allowing shops to sell e-scooters but expecting people not to use them.

We expect and demand our governments to take the lead on e-scooters, e-bikes, and all transportation to ensure that safe, fun and environmentally friendly transportation modalities are allowed to flourish appropriately.

Limited Caselaw:

R. v. Ryan, 2012 BCPC 67 (CanLII)

BC Case, motor assisted bicycle for all intents and purposes, but for a gas powered motor, but what's interesting here is the point about ambiguity in statute and laws.

Justice Gordon at para. 25 opines:

> *Although it was not argued, from the evidence in the case I find that Mr. Ryan has established due diligence. He asked those who reasonably might be expected to know, including police officers, if he was operating a motor assisted cycle. They advised him it was a motor assisted cycle. To be fair, others who also would be knowledgeable had advised him it was not. This is a grey area of law and even in the administration of the provisions and it is not surprising that he received conflicting advice. Both he and his mother had researched the matter fairly extensively. They mistakenly put too much reliance on what might be*

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> *acceptable federally under its standards than what is required under provincial law. I find Mr. Ryan made reasonable efforts to learn what this vehicle was or was not. He was mistaken and that mistake led him to believe he was a bicyclist and not a motorcyclist.*

Hamilton (City) v. Portillo 2020 ONCJ 152

Interesting case about what sounds to be an e-skateboard and how without provincial direction, a municipality cannot ban devices like this from the roadway.

> 9 The device in question consists of a platform, mounted between two wheels. The device propels the single rider forward or back according to the depression of the toes on the platform, or to the left or right based on manipulation of a control stick that protrudes up from the middle of the platform to a height somewhere between the knees and waist of the rider. The platform sits perpendicular to the direction of travel. Propulsion is achieved by a motor, which is energized by a battery.
>
> 22 What I do find helpful is the existence of the various *Regulations*, one of which has been referenced in the City *By-law*. These are relevant because they establish that the Province maintains jurisdiction over motor vehicles, and their operation can be regulated by municipalities to the extent set out in any governing *Regulation*. As noted above, there appear to be none in relation to this particular device.
>
> 23 A further review of the *By-law* draws attention to the fact that the devices which are set out therein are not motorized. This is consistent with the idea that the Province regulates motor vehicles and the City only does so with express authority.
>
> 24 For that reason, I would find that the *By-law* cannot and does not apply to this device, and for that reason, find the defendant not guilty.

Recommended Reading:

Disabled Pedestrians, Micromobility, and Furthering Disability Equality Law through Consultation: A Case Study of the Toronto E-Scooter Ban, 2024 CanLIIDocs 2286

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Law Society of Ontario | Barreau de l'Ontario

TAB 3

7th Motor Vehicle Litigation Summit

Employed v. Self-Employed
Implications of the new "Gig" Economy (PPT)

Jim Muccilli, MBA, CPA, CA
Crowe Soberman LLP

Sophia Chaudri
Flaherty McCarthy LLP

September 18-19, 2024

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Employed v. Self-Employed

Implications of the new "Gig" Economy

Presented to

Law Society of Ontario
7th Motor Vehicle Litigation Summit

Jim Muccilli - Crowe Soberman LLP and Sophia Chaudri – Flaherty McCarthy LLP

September 18, 2024

What’s a Gig?

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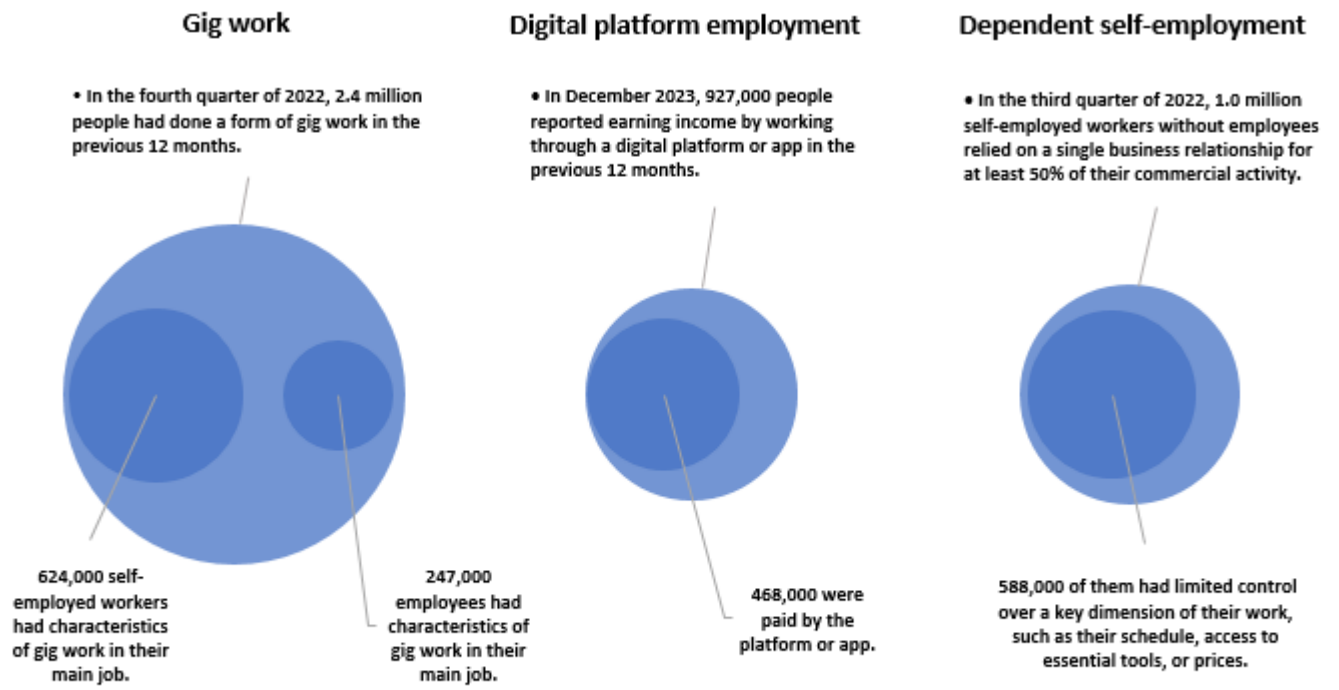
Gig data from Statistics Canada



Note(s): Population aged 15 to 69 years. Excludes people living in the territories, on Indigenous reserves and in institutional settings, as well as full-time members of the armed forces.
Source(s): Statistics Canada, Labour Market Indicators (5375), and Labour Market and Socio-economic Indicators (5377), 2022 and 2023, custom tabulation.

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GIG ECONOMY – WHAT IS IT?

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WHAT IS A “GIG”

- Traditionally used by Musicians to define a performance engagement
- It is a free market economy in which individuals earn income from on-demand, short-term assignments, tasks or job
- Typically it is a job that lasts for a specified period of time
- Examples – Delivery Driver, dog walker, door dash, rideshare, marketing, on-line tutors, virtual assistants,

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PRACTICAL PROBLEMS

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- Consider Various Scenarios

  - A Full Time Employee with a Second Stream of Income
    - Working as an Uber driver during working hours
    - Working as an Uber driver working after hours

    - Two Online GIG jobs
      - One full time and one part time
      - Two part time
      - Two full time

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Implications on our work of a Gig Worker

- Is a Gig Worker employed or self-employed?
  - Short-term contracts;
  - Micro tasks vs specialized services (web development, call centre, Uber Eats)
  - Independent versus dependent contractors (nature and number of gigs);
  - Remote work (platform driven Fiverr, Clickworker, Uber Eats);
- Income Tax – must report and pay on all income T2125 Statement of Business/Professional Activities (may include foreign income and related tax credits)
- GST/HST obligations
- Gig workers can also be employed and given a T4 or T4A and T2200 (employment expenses).

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Additional nuances

- Foreign income sources more prevalent (easier to not report?)
  - Information available may be limited or more difficult to obtain
- Cash unreported less an issue than for traditional self-employed.
- More likely to be both employed AND self-employed

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01	Technical Issues – Employed versus Self-employed
02	Income Replacement Benefit (“IRB”) Claims
03	Tort Claims

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Technical Issues – Employed versus Self-employed

- Wages or management salaries to owner/operators
- Family-owned corporations
- Independent contractors – Canada Revenue Agency position
- If uncertain, information to ask for

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Wages or Management Salaries to Owner/Operators

Self-employed income statement

- Revenues
- Minus: Expenses (including wages)
- Equals: Net profit

Observations

- Expenses may include wages paid to owner/operators
- If so, net profit does not include wages paid to owner/operators
- True self-employment “income” equals:

  Net income plus wages paid to owner/operators

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Family-Owned Corporations

Technical Issues

- Owner/operators may receive employment income, reported on personal tax returns
- Income splitting considerations (are family members paid fairly for services rendered?)
- Fiscal year financial statements for corporation may not be based on a calendar year

Challenge – Reconciliation of owners' employment income

- Employment income is reported on personal tax returns
- Management wages are deducted (as expenses) in corporation financial statements
- Employment income should be able to be reconciled to management wages
- There may be timing differences if corporation uses non-calendar fiscal year

True income from self-employment

- Net income plus management wages paid to (self)
- Do not add back management wages paid to other family members for services rendered
- Unreported income?

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Independent Contractors – Canada Revenue Agency Position

Factors to consider

- Control – *can payer exercise control over the worker?*
- Tools and equipment – *does worker use his/her own tools and equipment?*
- Subcontracting work or hiring assistants – *does worker have to do the work personally?*
- Financial risk – *does worker incur own expenses (not reimbursed) and/or incur ongoing costs?*
- Responsibility for investment and management – *is a financial investment in the business required; does the worker manage staff?*
- Opportunity for profit – *does the worker have the opportunity to make a profit and the risk of incurring a loss?*

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If Uncertain, Information to Ask For

Documents

- Contract(s) between worker and payer(s)
- Other unreported benefits?
- Invoices or other documents evidencing amounts paid
- Timesheets showing hours of work performed
- Expense reports if expenses are reimbursed
- Worker’s HST returns

Information

- What is the basis of compensation for work performed?
- Does worker work for other entities, or just for one entity?
- Is worker treated as an employee for purposes of employment benefits or Workers’ Compensation?

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Income Replacement Benefit (“IRB”) Claims

- Employed versus self-employed
- Pre-accident income calculation – general rules
- Self-employment losses – pre or post-accident

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IRB Claims: Employed Versus Self-Employed

Statutory Accident Benefits Schedule (SABS) - Self-employed person

- In SABS, the term “self-employed person” means a person who,
  - (a) engages in a trade, occupation, profession or other type of business as a sole proprietor or as a partner, other than a limited partner, of a partnership, or
  - (b) is a controlling mind of a business carried on through one or more private corporations some or all of whose shares are owned by the person; (“travailleur indépendant”)
  - “self-employment” means a trade, occupation, profession or other type of business the essential tasks of which are carried on by a self-employed person; (“travail indépendant”)
- Includes a sole proprietor or a partner in a partnership (excluding a limited partner)
- Also includes the “controlling mind” of a business operated through a private corporation where the person owns some of the shares

Income Tax versus SABS

- Therefore, a person may be an employee (of a private corporation) for income tax purposes but is to be treated as self-employed for IRB purposes.

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IRB Claims: Pre-Accident Income Calculation – General Rules

Basic rules (see Section 4 of SABS)

- Employed = choice of last 4 weeks or last 52 weeks (for employment income)
- Self-employed = last taxation year (for self-employment income)
- Unemployed (and qualify) = last 52 weeks (for employment income)

If both employed and self-employed (is this more likely in Gig economy?)

- Employed = choice of last taxation year and last 52 weeks (for employment income)
- Self-employed = last taxation year (for self-employment income)

If self-employed (and not employed) with no completed taxation year

- ????

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IRB Claims: Self-Employment Losses – Pre or Post-Accident

Pre-accident (see Section 7(2), paragraph 1(i))

- Any loss from self-employment is subtracted in the calculation of pre-accident income

Post-accident (see Section 7(2), paragraph 2)

- Any loss from self-employment incurred as a result of the accident is considered in calculation of IRB

Comparison

- Pre-accident calculation considers full self-employment loss
- Post-accident calculation considers additional loss “as a result of the accident” (?)

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Tort Claims

- Contrasting short-term impacts: employed versus self-employed
- Contrasting long-term impacts: employed versus self-employed
- Relevance of statistical data where plaintiff is self-employed
- Retirement considerations: employed versus self-employed

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Contrasting Short-Term Impacts: Employed vs. Self-Employed

Employed persons – short-term impacts

- Employment income often continues for a limited period
- Or, employed person may receive sick pay or short-term disability benefits
- Claimable loss may be relatively easy to calculate

Self-employed persons – short-term impacts

- Business continues in the short-term, sales may not be affected for a period of time
- Family members help out, often without (or with below market) compensation
- Often difficult to determine whether revenues and wages are affected by the accident

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Contrasting Long-Term Impacts: Employed vs. Self-Employed

Employed persons – long-term impacts

- Seriously injured employee ceases work
- Employed person may receive long-term disability (“LTD”) benefits
- Many persons apply for Canada Pension Plan disability benefits
- LTD benefits may be taxable or non-taxable, depending on who bore the premiums
- Pension may be protected, with a waiver of employee pension contributions
- There may be a possibility of future return to work (possibly, with modified duties)

Self-employed persons – long-term impacts

- Business is unlikely to continue in the longer-term (it may be transferred to family member, closed down or sold)
- Probably less likely to achieve a return to work with modified duties
- There may be no compensation other than Canada Pension Plan disability benefits

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Relevance of Statistical Data Where Plaintiff is Self-Employed

Employment contingencies

- Probability of labour force participation may be above average for the self-employed
- Probability of unemployment is not relevant for self-employed persons
- Employment benefits may be unavailable (or paid for by self-employed person)
- Negative contingencies may be implicitly reflected in determination of annual income

Self-employed persons' income levels

- Is self-employed person operating a business or simply selling his/her own services?
- If only selling own services, attainable income may be similar to attainable wages
- Statistical data often suggests that self-employed persons earn lower annual incomes
- Self-employed persons may be able to gain employment to improve income level

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Retirement Considerations: Employed Versus Self-Employed

Employed persons with defined benefit pensions

- Pension plans may provide a significant financial incentive to retire
- Retired persons may choose to return to work in different work
- Proportionately more persons have defined benefit pensions in the public sector
- Pension plans normally provide for retirement no later than age 65

Employed persons without defined benefit pensions

- Mandatory retirement was eliminated in Ontario in 2006
- Retirement ages are increasing gradually (modest impact in claim for income loss)
- Employed persons may earn less closer to retirement

Self-employed persons

- Generally, self-employed persons retire later then employed persons
- Nevertheless, self-employed persons may earn lower incomes before retirement
- Possibility of working to age 70 may be reasonable, depending upon circumstances

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LAT DECISIONS

A.M. v The Dominion of Canada General Insurance Company, 2019 CanLII 58194 (ON LAT)

- The Applicant was found to be an employee at the time of the accident and the IRB calculation was based on s.7 of the *Schedule*
- The Applicant was not precluded from earning additional self-employment income
- Just because he earned self-employment income from Uber seven weeks prior to the accient did not result in him being self-employed at the time of the accident
- There is a distinction between income earned as the result of being an employee and having that income supplemented by self-employment income versus income earned solely through being self employed
- Therefore, you can have a scenario where someone is both employed with self-employment income

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Sophia Chaudri - Bio

- Called to the Ontario Bar, 2002
- LL.B., Osgoode Hall Law School, 2001
- B.A. (Hons.), York University, 1997

Sophia has practiced in insurance and personal injury litigation for over 20 years. She has been with Flaherty McCarthy LLP since 2004 and has been a Partner since 2016.

As part of her commitment to the profession and legal education, Sophia taught Health Care Law at George Brown College and has taught Insurance Law at the University of Queen's Faculty of Law.

She has attended before the Ontario Court of Appeal, Superior Court of Justice, the Financial Services Commission, License Appeal Tribunal, Criminal Injuries Compensation Board and private arbitrators. Most recently, she has successfully defended a motion for leave to appeal to the Supreme Court of Canada. Her recent advocacy has been featured in Law260 Canada.

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Jim Muccilli, MBA, CPA, CA, CBV, CFE, ASA, CFF, CEIV, ABV

Partner, Valuations | Forensics | Litigation

Canada

Experience

- Jim Muccilli is a Partner in the Valuations | Forensics | Litigation Group at Crowe Soberman.
- He joined the firm in 2010. He consults on matters involving economic loss assessment, business valuation and forensic accounting.

Professional Summary

- Jim has qualified as an expert witness in Federal and various Provincial Courts and has testified at Arbitration and Mediation Hearings before the Ontario Municipal Board and Ontario Insurance Commission.
- Jim has practical experience assisting in resolving financial disputes, preparing expert reports for trials and preparing business valuations for a variety of purposes. He also performs critical analysis and commentary of reports prepared by other specialists.

Professional Affiliations

- American Society of Appraisers
- Canadian Institute of Chartered Business Valuators
- Chartered Professional Accountants of Canada (CPA Canada)
- The Canadian Institute of Chartered Accountants (CICA)
- Chartered Professional Accountants of Ontario (CPA Ontario)
- National Association of Certified Fraud Examiners and Life Member (CFE)
- AICPA Forensic and Valuation Services (FVS) Section
- Certified in Financial Forensics (CFF)
- Certified in Entity and Intangible Valuations (CEIV)
- Accredited in Business Valuation (ABV)

Education

- Bachelor of Business Administration (BBA), York University
- Master of Business Administration (MBA), York University

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Crowe-Soberman LLP - Who we are

- Crowe Soberman LLP is a leading Canadian accounting and business advisory firm providing audit, tax and advisory services – locally, in Ontario, and across the globe to privately-owned, not-for-profit and publicly-listed organizations
- Independent member of Crowe Global, ranked as a top 10 global accounting network
- With exceptional knowledge of business, local laws and customs we provide lasting value to clients
- Our professionals work closely with one another across service lines to enhance knowledge sharing and creativity, resulting in our award-winning client service
- We have the expertise and capability expected of a large firm, while still maintaining a close and hands-on relationship with our clients
- At Crowe Soberman, our professionals share one commitment - to deliver excellence

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Who we are (cont'd)

Top 20 Largest Public Accounting Firm in Canada

One of the largest single-office accounting firms in Canada

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In a fast paced, constantly changing world, we help clients to make smart decisions that have a lasting value

Full Business Support

Providing audit, tax and advisory services, our professionals work closely with one another across service lines to enhance knowledge-sharing, creativity and client service

66 Years in Service

Established in 1958, this year marks Crowe Soberman's 67th year in the Greater Toronto Area community we serve

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Law Society of Ontario | Barreau de l'Ontario

TAB 4

7th Motor Vehicle Litigation Summit

LAT Procedural Update 2024 (PPT)

Pamela Vlasic
Schultz Law Group LLP

Phyllis Bergmans, FCIP, Paralegal/Accident Benefits Consultant
Kompass Claims Management Group Inc.

September 18-19, 2024

cpd

LAT PROCEDURAL UPDATE 2024

Pamela Vlasic, Schultz Law Group & Phyllis Bergmans, Kompass Claims Management Group

KOMPASS
CLAIMS MANAGEMENT GROUP

Schultz Law Group LLP

Flashback AUGUST 2023 – RULE CHANGE

- ***New Licence Appeal Tribunal Rules*** ("The LAT Rules")
- Any appeal on or after August 21, 2023 **and** any appeal before August 21, 2023 for which first notice of CC issued on or after August 21, 2023
- Rule 3.2: Tribunal **may now vary or waive any Rules**, may now give any order/direction to control its process and to prevent abuse of process
- Rule 8.1, 8.2 Summons: Tribunal will only issue summons for witnesses, documents or things that are **relevant to the issues in dispute** and admissible at hearing, requests must be made using form provided on Tribunal website and must demonstrate relevance to disputed issues, **served 10 days prior to hearing**

HIGH LEVEL – RULE CHANGES CONT

- Rule 9.1 Document Exchange: Tribunal may order at any state production of particulars, documents, relevant to disputed issues – **Tribunal will not make production order for a document not relevant to disputed issues, repetitious.** Submissions can be made.
- Rule 9.4.1 & 20 Docs and Case Conference: CC Summary filed 10 days before CC, 21 days before hearing witness list, summary evidence, briefs, etc. – **otherwise LATE and considered via preliminary issue**

KOMPASS CLAIMS MANAGEMENT GROUP

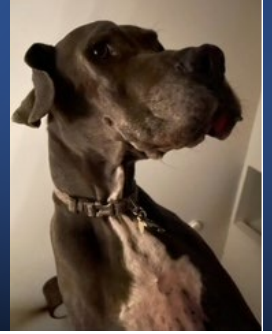
Schultz Law Group LLP

HIGH LEVEL – BIG CHANGES CONT

- **Adjournments-** Form, 5-page limit, multiple factors to consider – only reconsider denied request for same event if "new and exceptional circumstance"

  - Age of file, Prejudice to parties, position of parties, length of notice provided, timeliness, previous adjournments, principles of natural justice and fairness, type of event …and several other factors (also "any other relevant factors")

Schultz Law Group LLP



One Year Later: Procedural Impact

Adjournments: See *DiPietro v Aviva General Insurance Company*, 2024 CanLII 4266 (ON LAT); *Lavigne v Aviva General Insurance*, 2024 CanLII 13088 (ON LAT)

- *DiPeitro v Aviva:* One request already granted for medical reasons. Applicant counsel's health condition not improving. Filed 2nd adjournment request to be heard at hearing. On consent – DENIED
  - Consent is not determinative. This file was 931 days old, hearing notice sent 3 months before date of hearing, knew he had ongoing health issues. Also denied 30 day adjournment for applicant to seek new counsel (not compelling circumstances where parties could not have known circumstances giving rise) Applicant withdrew
- *Lavigne v Aviva:* Request made on consent at outset of hearing. The matter is "quite old", not first adjournment, made outside timelines per Rules.

More Procedure in Action

- **Adjournment and Removal of Counsel**: *Sonnet Insurance Company v Kallaa*, 2024 CanLII 70374 (ON LAT)
  - Respondent retained counsel one day before hearing, counsel had another hearing, had not reviewed file. Respondent had hard time finding new counsel.
  - Opposed by Applicant. Denied by Tribunal
  - Rule 16.2 factors – compelling circumstances where party could not have known the circumstances giving rise to request prior to event. He had tried to adjourn at CC. Notice of hearing sent 6 months in advance. Not compelling
  - Respondent proceeded as self-represented party

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More Procedure in Action

- **Adjournment and Productions:** *Arulvelchandran v Allstate Insurance Company of Canada*, 2024 CanLII 4274
  - Applicant brought motion for Order re: documents Respondent failed to produce & Adjournment of hearing to allow for documents to be provided
  - Denied: Order from CC still in force – second Order would be repetitious. Parties can make arguments re: weight
  - Adjournment request not made on form mandated per Rule 16.1 – not considered

More Procedure in Action

- **Summons**: See *Bouganim v Aviva Insurance Company of Canada*, 2024 CanLII 70373 (ON LAT) and *Kaur v TD General Insurance Company*, 2024 CanLII 67349 (ON LAT)
  - *Bouganim v Aviva:* Applicant asked for oral motion re: summons a witness
  - Under 8.2 the summons was denied
  - Tribunal Rules are clear – summons must be served no later than 10 days before hearing
  - *Kaur v TD (**Summons and Hearing Length**):* At CC set for 12 days. At hearing, Adjudicator (at own discretion) issued order shortening 6 days (2 witnesses a day)
  - Would not issue summons for witness who could not attend new shortened hearing because summons was not issued 10 days before hearing

From the Tip Jar

- Advice from Adjudicators?
  - **Always focus on Rules**
  - **Summons early – do not wait! There will not be exceptions for experts who cannot attend hearing**
  - **Efficiency – LAT will limit witnesses and hearing days – be critical of the witnesses you intend to call → can you rely on the report alone? What value add is there to in-person witness?**
  - **Productions – make requests early and often**

KOMPASS CLAIMS MANAGEMENT GROUP

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From the Tip Jar

- **Thoughts from counsel and representatives?**
  - **Prepare production chart as soon as Application filed/Response Requested**
  - **Be strategic with requesting documents**
  - **Adjournment requests: Be Strategic – timing (you only get one kick at the can), use factors listed via LAT, use LAT form**
    - **Technical interpretation of Rules: ex. Adjournment denied where date range included form and not "start date"**
  - **Look at CC Summaries from other party before CC – prepare your position and response to production requests and witnesses – and any case law if necessary**
  - **Summons your own experts**

From the Tip Jar

- **Canvass your witnesses for their availability before agreeing to hearing dates**
- **Strategize your medical evidence before filing the Applicant's Application – deadlines for productions provided at the CC may restrict obtaining new / rebuttal documents**
- **Prioritize your witnesses – treating providers / experts / lay witnesses**

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TAB 5

7th Motor Vehicle Litigation Summit

Limitation Periods I have know and loved: OPCF – 44r, Threshold, and More* from the ONCA (PPT)

Limitation Periods I Have Known and Loved
Threshold, OPCF-44r and More from the ONCA

Devan Marr
Lawyers' Professional Indemnity Company (LAWPRO®)

September 18-19, 2024

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Limitation Periods I have known and loved: OPCF-44r, Threshold, and More* from the ONCA

Presented by:

Devan Marr
Research Lawyer, LAWPRO

LSO 7th Annual MVA Summit,
September 18, 2024

Road Map

1. Introductions
2. Statistics!
3. Refresher on Discoverability
4. Threshold - *Sanei v. Debarros*
5. OPCF-44r - *Schroeder v. Co-operators*
6. The Wrap Up

Introductions

Who am I?

- Short Order Cook at LAWPRO's Legal Pantry and Fast Law Carry Out **AKA** Claims Research Lawyer

What do I do?

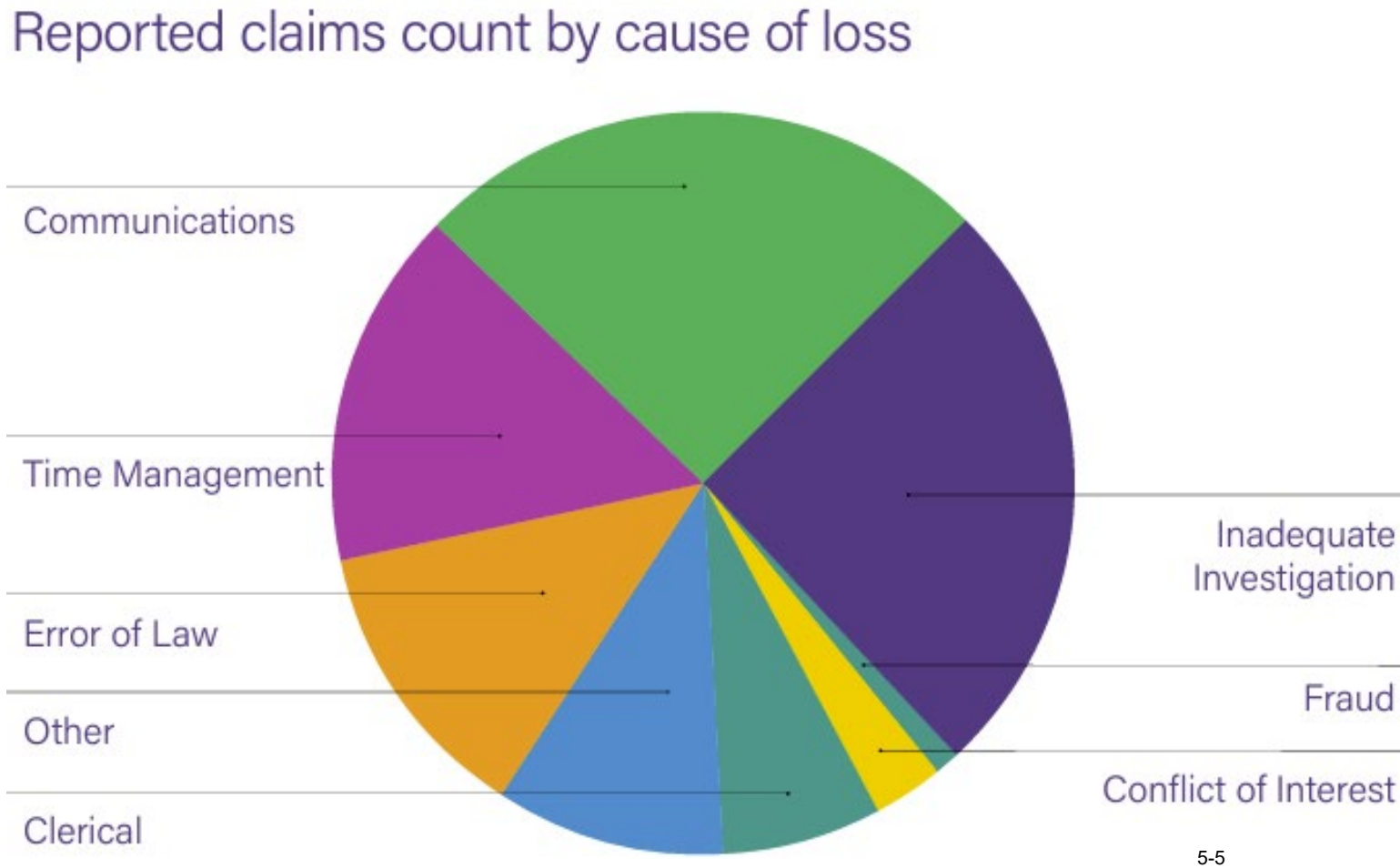
- Service both parts of LAWPRO's claims portfolio: defending legal malpractice actions & repair portfolio

Why do you care?

- "Missed Limitations"
  - 4% of **all claims**
  - 12% of **all litigation claims**

But first....statistics!

Why you care about this presentation….



Why you care about this presentation….

Claims by outcome

55%

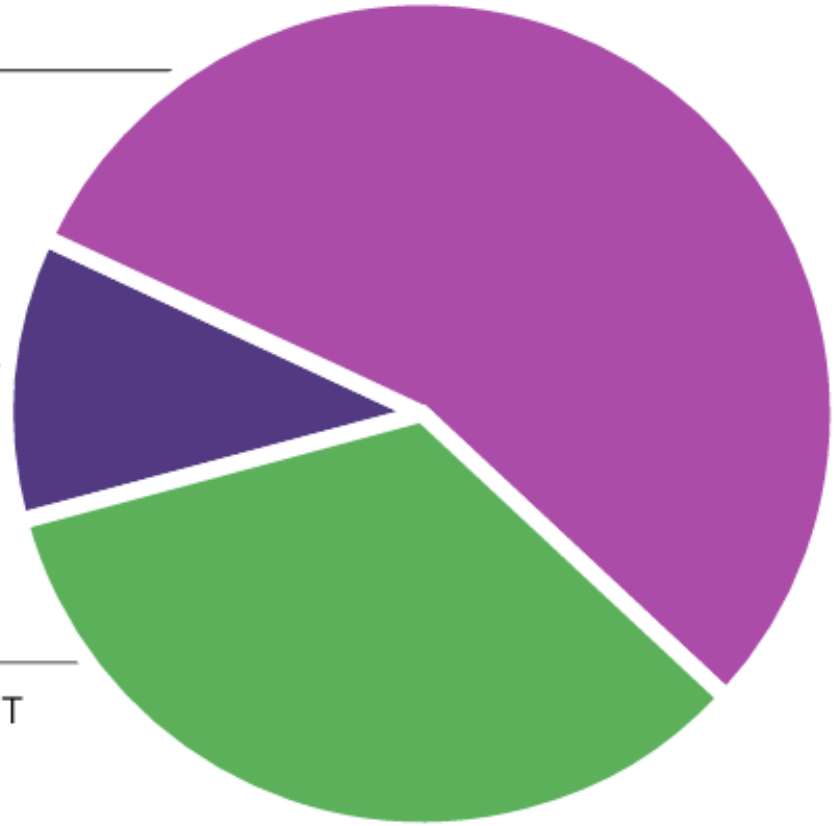
CLOSED WITH DEFENCE COSTS ONLY

11%

CLOSED WITH INDEMNITY PAYMENT

34%

CLOSED WITHOUT ANY PAYMENT



Re-discovering…discoverability

Discoverability…. *generally*

Limitations Act 2002

- S. 4: Two years from when "claim" is "discovered"

- S. 5(1)(a)&(b): Must know (or ought to have known) **FOUR** things:
  i. The loss.
  ii. The cause.
  iii. Who to blame.
  iv. Is it legally appropriate to start a proceeding?

- S. 5(2) Presumed discovery on the day loss occurred.

- S. 12(2) Knowledge of litigation guardian/agent/lawyer imputed to person with claim.

Discoverability…. *generally*

"Legally Appropriate"

…depends on the specific **factual** or **statutory setting** of each individual case, including taking into account the particular interests and circumstances of the plaintiff.

- Laskin J.A., *407 ETR Concession Company Limited v. Day*, 2016 ONCA 709

Discoverability ….*motor vehicle context*

"Why'd you have to go and make things so complicated?"

– Avril Lavigne

Discoverability ….*motor vehicle context*

Common Issues (for today's purposes)

Threshold

- When does the clock run?
- When is summary judgment appropriate?
- What evidence is required?

OPCF-44r

- When is a demand a demand?
- How can an insurer speed up the process?

Threshold & Discoverability

Sanei v. Debarros, 2024 ONCA 104

MVA claims are "discovered" when the plaintiff knows, or reasonably ought to have known, that their injuries meet the "statutory deductible" **and** "threshold"

2024 Deductible – Non-pecuniary loss

$46,053.20 for awards valued under $153,509.39

Threshold – Non-Pecuniary Loss

Permanent serious disfigurement **OR**

Permanent serious impairment of an important physical, mental or psychological function.

Threshold & Discoverability

Sanei v. Debarros, 2022 ONSC 6758

- February 2, 2013 – DOL
- February 2, 2015 – Presumptive limitation
- March 2, 2016 – SOC issued (13 months late)

Was the claim discoverable **before** March 2, 2014?

Threshold & Discoverability

What happened between?

- **Feb 2013 – Jan 2015**

  Consistent accident related complaints to family physician

- **Sept-Nov 2013**

  Three IMEs for SABS identifying consistent complaints

- **Dec 2013**

  Psychiatric report Dx'ing MDD & Pain Disorder [not before the Court]

- **Sept 2014**

  Psychological report – Dx'ing serious and permanent injuries "remarkably similar" to Dec 2013 report

Threshold & Discoverability

Sanei v. Debarros, 2024 ONCA 104

Motion judge erred by not finding **when** claim was "discovered" [para 16]

But evidence still supported claim was "discovered" prior to March 2, 2014 [para 18]

Reports **after** March 2, 2014 were consistent with pre-March 2, 2014 reports [para 26]

Threshold & Discoverability

Sanei v. Debarros, 2024 ONCA 104

Take Aways

"Discovered" when the plaintiff knows, or reasonably ought to have known, that their injuries meet the "statutory deductible" **and** "threshold"

Test remains: knowing they have a "substantial chance to succeed" [para 25]

No specific type of evidence required

Threshold & Discoverability

Practical Thoughts

"Threshold" opinions are not required to start the clock.

"2 for 1" SABS reports are a double-edged sword.

Doesn't help if your client fully agrees with reports that support the claim was untimely.

Summary judgment still a gamble for Defendant.

OPCF-44r…

Schroeder v. Co-operators General Insurance Co.
2024 ONCA 54

December 12, 2014: DOL (Seattle, Washington)

January 20, 2015: OPCF-44r Notice to Coseco

June 18, 2015: Request for consent to settle for US policy limits

April 15, 2016: Coseco confirms settlement for US policy limits ($25k)

February 13, 2019: Demand for indemnification with quantum and particulars

February 10, 2020: Plaintiff issues underinsured claim against Coseco.

OPCF-44r…

Schroeder v. *Co-operators*

Defendant Insurer's Position	Court's Determination
Demand given by April 15, 2016	No. No money requested. No legally valid claim for Coseco to respond to. No denial by insurer. No prejudice.
Denial given by December, 2016	No. Coseco admitted no denial prior to Feb 13, 2019.

OPCF-44r…

Schroeder v. Co-operators General Insurance Co.

2024 ONCA 54

Important take aways:

- US policy limits are a nightmare.
- *Schmitz v. Lombard* 2014 ONCA 88 remains good law. Clock starts first day **after** demand given.
- Plaintiff notice != Demand for indemnification.
- Insurer **can** trigger the running of the limitation clock (but should you?).
- Facts & admissions matter.

Final Thoughts

Final Thoughts

- Limitation periods still exist in MVA claims
- Opportunities to obtain “Threshold” admissions from Insurer
- Almost always “fact cases”
- Summary judgment motions still a gamble for both sides, but **catastrophic** for plaintiff
- **LAWPRO IS YOUR FRIEND(LY INSURER)**
- **Call us** so we can help repair the problem.

Order up!

(Questions? Now is the time.)

LAWPRO resources

- Managing Conflict of Interest Situations **is a PDF of how to better manage this risk.**

- LAWPRO magazine **provides mental health and wellness resources**

- Homewood Health **online courses qualify for Risk Management Credits**

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Limitation Periods I Have Known and Loved: Threshold, OPCF-44r, and More[1] from the ONCA

Author: Devan Marr, Research Lawyer, Claims, LAWPRO[2]

This paper accompanies my presentation on two recent Ontario Court of Appeal decisions involving limitation periods in the MVA context:

- ***Sanei v. Debarros*** 2024 ONCA 104, which addresses limitations issues in the context of "Threshold" injuries, and
- ***Schroeder v. Co-operators*** 2024 ONCA 54, which addresses when a claim under the OPCF-44r is timely.

This paper is not going to discuss those two decisions at length. That's why you (hopefully) watched the presentation. It won't discuss *Schroeder* at all. It is a short endorsement and it would take longer to read the paper than to read the decision. I ***will*** provide the main take aways from these two cases:

Sanei

- A "Threshold opinion" is not required for there to be a "sufficient body of information" to trigger discovery of a claim;
- A judge must look at the totality of the evidence available at the relevant time;
- Do not confuse the presumption of discovery under s. 5(2) of the *Limitations Act* 2002 with the "reasonable person" of s. 5(1)(b).

[1] I was hoping to address a pending ONCA decision dealing with misnomer and leave motions following setting a matter down for trial. Unfortunately, it remained on reserve at the time this paper was due to be submitted.

[2] I want to extend my thanks to LAWPRO and current Research Director Laurie Murphy for letting me escape the office to present on this topic, and LAWPRO's (now happily retired) Research Director, Debra Rolph, for spending 30+ years assembling an arsenal of caselaw on this topic in our internal resources. Similarly, my thanks go out to all our repair counsel who, win or lose, have contributed to the development of the law in this area.

- The plaintiff's subjective opinion or knowledge is not determinative, but do not think it won't influence a judge's findings;
- Plaintiffs, beware the "2 for 1" SABS reports that opine on Threshold at an early stage.

Schroeder

- *Schmitz v. Lombard General Insurance Company of Canada*, 2014 ONCA 88 remains good law. The limitation clock for a claim under the OPCF-44r endorsement begins the day after the plaintiff sends a demand for indemnification;
- A notice of claim is not the same as a demand for indemnification;
- The insurer can trigger the start of the limitation period by denying the claim prior to the demand for indemnification;

In both cases, the specific facts matter. Every case is different.

Instead, this paper is going to provide a refresher on the principles of discoverability generally and review a series of decisions involving limitation periods involving threshold. This is an MVA conference after all. By the end of this paper, you should understand the following:

1. What "discoverable" really means.
2. Why asking "are there any cases involving an X year delay?" in MVA cases is the wrong question.
3. What to consider when bringing a summary judgment motion for a limitations issue.

This is meant to be an accessible, and practical, guide. Where possible, it will use plain language without extensive formal citations other than hyperlinks and the neutral cite. It is 2024 and this is not a law journal.

Let's get started.

Discoverability and the Limitations Act 2002

In Ontario, the *Limitations Act 2002* is our starting point. Section 4 gives a plaintiff two years from the date their "claim" is "discovered" to commence a "proceeding" against the alleged wrongdoer.

Section 5(1)(a) sets out **four** criteria for when a claim is discovered. The plaintiff (or a reasonable person with the abilities and circumstances) must know

i. The loss
ii. The cause
iii. Who to blame
iv. Whether it is "legally appropriate" to start a proceeding.

If you have all four criteria, then a claim is discovered. The clock begins to tick.

Section 5(2) creates a legal presumption that a claim is "discovered" on the day the loss occurred, **unless proven to the contrary.**

If a proceeding is started more than 2 years after the loss, it is up to the plaintiff to establish that the loss could not have been discovered within those two years. The rebuttal of this presumption does **not** require due diligence. Due diligence is an element of s. 5(1)(b), the "reasonable person" with the abilities and circumstances of the plaintiff.

Nine times out of ten, establishing a later discovery date comes down to the fourth criteria: was it legally appropriate to start a proceeding? Whether a proceeding is "legally appropriate" will depend on the specific facts and statutory circumstances of the specific claim.

At this stage, some readers might be thinking, "s. 5(1)(a)(iv) only says "appropriate", why do you keep adding "legally" in front of it. You're not a judge. You can't read words into statutes."

You are correct. Fortunately, the judges have already done the heavy lifting. ***Mundell v. White***, 2022 ONSC 5994, provides an excellent summary of the general law on discoverability, including "legally appropriate". It was written by Justice Perell. Frankly, if you are only interested in a primer on the basis concepts of discoverability and "legally appropriate", you should stop reading this paper and go read the decision. It is *comprehensive*.

Unfortunately, we are dealing with Ontario's "byzantine" motor vehicle liability insurance regime. It makes limitations cases...complicated.

Threshold: a brief history

In the 1990s, the Ontario government introduced a hybrid no-fault/tort system for automobile accidents. The goal was to provide no-fault first party benefits to anyone involved in an automobile accident. In exchange, the ability to sue in tort would be restricted to only the most "serious" of cases. With this goal in mind, they amended the *Insurance Act* to implement the modern day "statutory deductible" and "Threshold". Both of these mechanisms are meant to significantly restrict access to the Courts for MVA Claims.

To recover **any** award for non-pecuniary losses, a plaintiff must establish they meet Threshold. This is defined under s. 267.5(5) of the *Insurance Act* as a "permanent serious disfigurement" **or** "permanent serious impairment of an important physical, mental or psychological function."

Regulations under the *Insurance Act* (section 4.3 of *O.Reg 461/96*) mandate further evidentiary requirements to prove Threshold at trial. This includes an opinion by a medical doctor confirming the existence of a permanent and serious impairment.

Failure to meet Threshold denies a plaintiff any recovery for non-pecuniary losses.

If the plaintiff meets Threshold, they still need to account for the deductible. The statutory deducible is applied to all awards for non-pecuniary loss below a certain amount. It is

currently linked to inflation. As of January 1, 2024, the deductible is $46,053.20 for awards valued under $153,509.39. If a jury awards a plaintiff $40,000 in non-pecuniary loss, the judgment will say $0.00.

This leads to a bit of a problem for the plaintiff. If they delay issuing an action because it is unclear their injuries meet Threshold, or the deductible, they risk missing the limitation period and losing their entire claim. If they commence an action and their Threshold injuries never materialize, they have now exposed themselves to costs and clogged up the court system.

So, what's a plaintiff to do?

Threshold – Knew or reasonably knew they had a substantial chance

Ultimately, this dilemma resulted in a series of cases that pushed the law of limitations decidedly in favour of plaintiffs. It is helpfully summarized in ***Enns v. Goertzen***, 2019 ONSC 4233:

> 349 The decided cases establish that the court must have regard to s. 267.5(5) of the *Insurance Act* when applying the discoverability provisions set out in s. 5 of the Act. That makes good sense. The determination of whether a plaintiff is able to establish that his claim falls within one of the exceptions afforded by s. 267.5(5) of the *Insurance Act* is a function of the available evidence. In the absence of knowledge, or the reasonable means to acquire knowledge, of the existence of evidence with a reasonable chance of persuading a court that such an exception is operable (i.e. the "threshold" has been met), the provisions of the *Insurance Act* adequately explain why commencing a proceeding is not a *legally* appropriate means to seek to remedy "*injury, damage or loss*" on account of bodily injuries occasioned by the alleged negligent use or operation of a motor vehicle by another.

> 350 In that regard, the case law clearly recognizes that a plaintiff cannot be said to have discovered her claim before the date upon which she knows that she has a *substantial chance* to succeed in recovering a judgment for damages: see *Everding v. Skrijel*, 2010 ONCA 437, 100 O.R. (3d) 641 (Ont. C.A.), at para. 11. Similarly, a person cannot be expected to commence an action before he or she knows that the necessary elements prescribed by legislation applicable to the claim, can be established on the evidence: see *Hoffman v. Jekel*, 2011 ONSC 1324 (Ont. S.C.J.), at para. 9. As a result, a claim of the type advanced by Ms. Enns is not discoverable and the limitation period does not begin to run until a sufficient body of information is available to determine whether the statutory criteria applicable to an exception set out in s. 267.5(5) of the *Insurance Act* may be met in the circumstance of the case: see *Farhat*, at para. 39; and *Fennell v. Deol*, 2016 ONCA 249, 97 M.V.R. (6th) 1 (Ont. C.A.), at paras. 22 and 27.

Depending on which side of the personal injury bar you talked to, there was a debate as to what "a sufficient body of information" looked like. Some argued that absent medical evidence that satisfied the evidentiary requirements to prove Threshold at trial, a plaintiff could not be expected to reasonably know their injuries met Threshold (or the deductible). Certainly, many decisions leading up to *Sanei* have seemed to implicitly adopt that requirement (at least when dealing with summary judgment motions). Several have been included in this paper.

Sanei v. Debarros 2024 ONCA 104, the topic of today's presentation, confirmed that the test for discoverability in MVA cases is tied to a reasonable chance of establishing Threshold:

> [10] The limitation period in an action for personal injuries arising out of a motor vehicle accident starts to run when the claimant knows, or reasonably ought to have known, that their injuries meet the statutory deductible and threshold of serious and permanent impairment under s. 267.5 of

the *Insurance Act*: *Everding v. Skrijel*, 2010 ONCA 437, 100 O.R. (3d) 641, at paras. 9-11; *Fennell v. Deol*, 2016 ONCA 249, at para. 28.

However, the Court in *Sanei* rejected the argument that a "Threshold Opinion" was a necessary requirement to demonstrate a "sufficient body of information":

> [25] As this court stated in *Everding*, at para. 11, "[c]learly it is not the policy of the law or the intent of the limitations provisions to require people to commence actions before they know that they have a substantial chance to succeed in recovering a judgment for damages" (emphasis added). A physician's evidence that meets the strict and elevated requirements in s. 4.3 is not necessary for a plaintiff to have reasonable knowledge of a substantial chance of success. Delaying the commencement of a limitation period until a plaintiff obtains a physician's evidence in the particular form required by s. 4.3 would "move the needle too close to certainty", which is not the standard required to trigger discovery of a claim and the commencement of the limitation period: see, e.g., *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31, 461 D.L.R. (4th) 613, at paras. 47-48, citing *K.L.B. v. British Columbia*, 2003 SCC 51, [2003] 3 S.C.R. 403, at para. 55.

The Court seemed critical of the trend of conflating the evidentiary test to establish Threshold at trial with the evidentiary requirement to obtain summary judgment. On summary judgment, the Court is not being asked to decide if the plaintiff meets Threshold. It is being asked whether there is a genuine issue for trial.

Arguably, this decision is a "win" for the defence bar because it "moves the needle" back away from certainty and removes a plaintiff's ability to say "I could only reasonably know once I obtained a Threshold opinion!"

That being said, bringing a summary judgment motion to address a limitations defence in an MVA action remains a gamble for the defendant. The plaintiff *generally* has the upper hand. To be successful on summary judgment, a defendant must demonstrate there is no genuine

issue for trial **and** that the claim was discovered more than 2 years prior to the proceeding being commenced. In contrast, the plaintiff does not need to "win" by proving the claim was issued within 2 years of discovery. They only need to "not lose" by demonstrating there is a genuine issue for trial.

Proving there is no genuine issue for trial can be particularly difficult in cases where there are extensive pre-existing conditions that muddy causation. Plaintiffs can make successful arguments that difficulties with establishing causation delayed the discovery of a claim. Additionally, defendants may find themselves in an awkward position where they are arguing a plaintiff's claim is limitation barred, while simultaneously **denying** that they have sustained Threshold level injuries. Arguably, a credible limitations argument requires the defendant to concede that the plaintiff has a serious, permanent impairment. Conceding Threshold obviously raises its own challenges if the action survives summary judgment. A clever lawyer might send a request to admit to secure that admission.

Assuming the defendant passes the first hurdle of establishing there is no genuine issue for trial (or there is, but it can be addressed using the judge's expanded powers), the defendant must convince the judge that the claim was discovered (or reasonably discoverable) more than 2 years before the action was commenced. At this stage, the plaintiff will be arguing the opposite. The claim was discovered less than 2 years before the proceeding was commenced. Both parties must "lead trump". A judge is entitled to assume there will be no better evidence available at trial.

In deciding the limitations issue, the judge needs to pick a date. Failure to make that finding is an error that is subject to appeal. But, as in the case of *Sanei*, it is not always a reversible error if the evidentiary record establishes the claim ought to have been discovered more than 2 years before the claim was issued.

Summary judgment motions – how long is too long to start a claim?

Despite the recent *Sanei* decision, summary judgment motions are still a gamble for the defence. They are always a fact heavy exercise that will often, but not always, require a trial. Deciding to bring a summary judgment motion (or to rigorously oppose it) is a serious proposition that requires a hard look at the available facts. It is important to ask the right questions when making that decision.

Frequently LAWPRO must respond to summary judgment motions to dismiss a claim as being statute barred. A frequent question I receive is "are there any cases where an action was issued 3, 5, or 7 years after the accident? What is the reasonable cut off date?"

Usually, I (politely) tell my colleagues, "You're asking the wrong question."

The right questions are (in my view):

1. What medical evidence existed more than 2 years before the claim was issued?
2. Can the plaintiff point to any "new evidence" to establish a "sufficient body of information" supporting a later discovery date?
3. If there was "new evidence", did it change anything? Did the plaintiff have equivalent knowledge supporting the same substantial chance of success more than two years earlier?
4. If it didn't change anything, will a judge consider the available evidence to be a "sufficient body of information" for the plaintiff to have reasonably known they had substantial chance of success at meeting Threshold?
5. How "messy" is the record?

The following is a collection of cases which should hopefully demonstrate why those are the right questions to ask.

Defendants roll the dice…and lose.

***Cranley v. Baggieri*, 2015 ONSC 1730** was an unsuccessful limitations motion by the defendant. The accident occurred in November 2003. At that time, the plaintiff was 14 years old. She sustained significant injuries, including a closed head injury and left femur fracture. Her physical injuries healed well, but she went on to develop issues with depression, anxiety, and significant issues with her left knee. She turned 18 in May 2007. She did not issue a claim until April 2011. **This was 7.5 post accident, but only 4 years after she turned 18.** The plaintiff's argument was that she could not have known her mental health issues and knee problem were related to the accident within 2 years of her 18th birthday. It was only in 2008 and 2009 that medical evidence (and a worsening depression leading to suicide attempts) suggested these issues might be accident related.

Vallee J., heard the motion. The judge felt there was a genuine issue for trial on the issue of whether the Plaintiff knew or ought to have known that her injuries exceeded threshold.

***Rockford v. Haque*, 2019 ONSC 474** featured a claim issued **5 years and 3 months** post date of loss. It was another unsuccessful summary judgment motion on the limitation argument. Pollak J., granted a "boomerang" partial summary judgment in favour of the plaintiff dismissing the limitations defence entirely. The DOL was August 17, 2009. The plaintiff issued the claim in November 2014. She argued that the earliest her claim was discoverable was when she obtained a chronic pain report by Dr. Chen in December 2012. Dr. Chen's report did not opine on Threshold but did suggest she had ongoing chronic pain. She was subsequently diagnosed with Fibromyalgia in 2016. Pollak J., noted:

> [36] I find that the first indication that Ms. Rockford's claim could possibly meet the threshold and surpass the statutory deductible was in a report of Dr. Chen, physiatrist, on December 13, 2012.
>
> [37] Dr. Chen made a number of clinical diagnoses in his report, but none of these diagnoses provided an explanation for Ms. Rockford's ongoing pain. Dr. Chen

> noted the presence of chronic pain, but did not diagnose Ms. Rockford with Chronic Pain Syndrome. Despite not providing a medical basis for her ongoing pain complaints, Dr. Chen's opinion was that the prognosis for a full recovery to pre-accident functional and physical level was poor. Dr. Chen's report, however, offered no opinion as to whether Ms. Rockford was seriously impaired or whether the seriousness of her impairments were permanent. He opined only that she was unlikely to recover fully.
>
> [38] The evidence is that Ms. Rockford remained hopeful that she would recover until 2014. At that time, she had not been told by a treating doctor that her impairments were serious and permanent and had not been diagnosed with any particular condition.

Pollack J. went further to suggest that Dr. Chen's report might not even have been enough to trigger the running of the limitation period:

> [47] I agree with the Plaintiff's characterization of the jurisprudence as providing that a claim is only discoverable when the plaintiff receives a medical diagnosis or some other information relevant to the permanence or seriousness of her condition. I find that before November of 2014, Ms. Rockford did not have a "sufficient body of evidence" to know that a legal proceeding was the appropriate means to seek a remedy pursuant to s. 5(1)(a)(iv) of the *Limitations Act*, 2002 and that her claim had a "substantial chance" of succeeding.

Pollack J.'s commentary at paragraph 47 seems to veer quite close to suggesting a formal "Threshold opinion" would have been required for the claim to be discovered. In light of *Sanei,* that finding may lack a certain degree of precision.

***Enns v. Goertzen*, 2019 ONSC 4233**, mentioned previously, had a **4 year gap** between the DOL (2011) and the claim being issued (2015). It is a **lengthy** decision that resulted in the defendant's motion being dismissed. Verbeem J., found there was a genuine issue requiring

a full trial. This case dealt with a post-accident stroke and whether it was causally related to the accident. A large portion of the decision deals with admissibility issues. Verbeem J.'s analysis of the limitation issue starts around paragraph 259. There were three main issues: (1) Did the plaintiff have capacity to discover her claim? (2) Could she have discovered her claim by July, 3, 2013 (2 years pre-claim)? (3) Should she be granted leave to amend her SOC or deliver a Reply regarding "discoverability" and "inability" to commence a proceeding.

The analysis about discoverability starts around paragraph 336 until 420. In finding that there was a genuine issue for trial, Verbeem J. appears to take a fairly narrow approach to when the clock starts running:

> [357] In my view, the defendants' position implicitly assumes that Ms. Enns: actually received Dr. Meloff's April 13, 2012 report, in fact; had the capacity to read the report on receipt or any time thereafter (prior to July 3, 2013); had the capacity to understand the content of Dr. Meloff's report at the time of receipt, or at any time thereafter; and had the capacity to read and understand her insurer's correspondence dated April 17, 2012, and the corresponding explanation of benefits that ostensibly accompanied it. **The defendants' position also assumes that Dr. Meloff's April 13, 2012 report contains sufficient information addressing *all of the requisite components of the "threshold" analysis* mandated by s. 4.2 of O. Reg. 461/96, as amended, such that it established a reasonable chance that Ms. Enns' claim would satisfy the requisite "threshold" criteria.** As I will set out later below, the evidence available on the motion discloses genuine issues requiring a trial in respect of the foregoing propositions. [emphasis added]
>
> [358] I will now address the fundamental issues of: whether and, if so, when did Ms. Enns first know of all of the matters referred to in s. 5(1)(a) of the Act, including that there was a body of information that was reasonably capable of persuading a court that her impairments arising from the accident were "permanent" and "serious" (and her impaired bodily functions were "important"); and when a

reasonable person with Ms. Enns' abilities and in her circumstances, first ought to have known of those matters.

Again, in light of *Sanei,* this interpretation might now be overly narrow.

Verbeem J. reviewed the plaintiff's injuries in three parts, physical, psychological, and post-accident stroke. They noted that she had been assessed by s. 44 assessors who found minimal impairment.

Regarding the physical injuries:

> [365] Based on the available evidence, a claim against the defendants founded in the "nature and extent" of Ms. Enns' **soft tissue injuries and related impairments arising from the accident was not discoverable at any time before the proceeding was commenced**. That is so because the record does not disclose the existence of a substantial body of information reasonably capable of persuading a trial judge that the requirements of s. 267.5(5) of the *Insurance Act* were fulfilled by the nature of the impairments that Ms. Enns sustained as a consequence of her soft tissue injuries.
>
> [367] There was also no information *based on medical evidence* that her soft tissue impairments would: not be expected to substantially improve; continue to substantially interfere with most of her usual activities of daily living; and be expected to continue without substantial improvement when sustained by a person in similar circumstances (the relevant "*permanent*" criteria mandated by s. 4.3(3) of O. Reg. 461/96, as amended).
>
> **[368] Further, as a result of the foregoing, a claim premised on an assertion that Ms. Enns' soft tissue injuries resulted in a permanent and serious impairment could not have been discovered by a reasonable person exercising due diligence, at any time.** [emphasis added]

On the issue of her stroke impairments, the question of causation was an issue for discoverability:

> [369] Similarly, in my view**, in the absence of a consideration of the evidence of a potential causal connection between the accident and the subsequent stroke, a sufficient body of information reasonably capable of persuading a court that Ms. Enns sustained a serious permanent impairment of an important psychological function as a result of the accident, did not exist before the proceeding was commenced.** There is no evidence that Ms. Enns knew that she had sustained a permanent serious psychological impairment as a result of the accident, as distinct from her pre-accident psychological and/or psychiatric condition and the subsequent stroke-related exacerbation of her psychological and/or psychiatric condition. There is no evidence that she was aware of information, including the necessary medical evidence to satisfy the criteria prescribed by s. 4.2 of O. Reg. 461/96 (as set out above), or that such information and medical evidence was ever available.
>
> [370] To the contrary, in his report dated February 20, 2012, psychiatrist, Dr. Kiraly, opined that Ms. Enns' pre-existing depression was exacerbated by the accident and further complicated by her stroke but "*from strictly a psychiatric perspective and in direct relation to the motor vehicle accident, Ms. Enns does not suffer a complete inability to carry on a normal life*". That information militates against a finding of "*serious*" impairment in accordance with s. 4.2.1(1)(iii) of O. Reg. 461/96, as amended (I am mindful that in appropriate circumstances, the "*serious*" impairment inquiry will also include considerations with respect to the extent of an impairment's interference with a person's employment activities or career training activities, but in this instance, Ms. Enns was unemployed for a significant period of time before the accident and there is no evidence of her participation in career training contemporaneous to the accident).

For psychological issues:

> [373] Neither treating psychiatrist Dr. Rai in his April 2012 note and subsequent June 2012 report, nor treating psychiatrist Dr. Burdett in her report dated October 2015, expressed an opinion that Ms. Enns sustained a permanent serious impairment of an important psychological function as a result of the accident.
>
> [374] There is no other evidence that indicates that Ms. Enns knew or that a reasonable person with her abilities and in her circumstances ought to have known that her psychological impairments, in isolation, were serious and permanent, at any point in time after the accident.

Verbeem J., concluded:

> [375] Conversely, *the totality of the evidence* with respect to the nature, severity and permanency of Ms. Enns' stroke-related impairments (physical and cognitive) constitutes a substantial body of information that is reasonably capable of persuading a court that Ms. Enns' claim satisfies the requirements of s. 267.5(5)(b) of the *Insurance Act*, in the event that those impairments are ultimately found to be causally related to the motor vehicle accident.
>
> [376] Pursuant to s. 5(1)(i), (ii) and (iii), Ms. Enns could not be said to have discovered her claim against the defendants until, at the very least, she knew (or a reasonable person with her abilities and in her circumstances first ought to have known) that, among other things, the injury, loss or damage upon which her claim was based (stroke-related impairments), was "*caused by or contributed to by an act or omission*" and "*that the act or omission was that of the person against whom the claim is made*" (in this case the defendants).

The defendants submitted that the earliest date this evidence existed was April 2012 which was more than 2 years before the claim was issued. Verbeem J., determined this could not

be decided on the written record. The motion was dismissed because the issue of her stroke impairments and whether it was causally connected to the accident would have to be determined on a full trial.

This decision is a good example of why summary judgment motions are a gamble and why the facts matter. In *Enns,* the unsupportive s. 44 assessment reports of the SABS insurers were seen as militating **against** early discovery. In *Sanei,* the s. 44 assessments, despite being similarly unsupportive, where seen as militating **for** early discovery.

Another decision, ***Ferro v Courneyea and Vickerman*, 2015 ONSC 4357** deals with a shorter **period of "only" 3.5 years from** DOL to claim. Hood, J. granted partial summary judgment to the plaintiff, holding that her action for damages was not statute barred. The judge found the plaintiff's ability to appreciate that her injuries met the threshold was impeded by the fact that she suffered from pre-existing injuries. She was not told by any medical practitioner that her injuries would be permanent until nearly two years after the accident. The action was brought within two years of **that** date.

In ***Huang v Mai*, 2014 ONSC 1156** the plaintiff missed the limitation date by 63 days (October 2007 DOL, claim issued December 2009), and her lawyer had admitted he meant to issue the claim within 2 years but had negligently failed to do so. The defendant brought a motion to dismiss the claim on those grounds. The motion was dismissed because there was a genuine issue for trial. Perrell J. addressed the issue that it does not matter if a Plaintiff **believes** they meet Threshold versus what they **objectively know**:

> [39] That there is a distinction between what a plaintiff believes and what he or she objectively knows was a point made by Justice Langton in *Ionnidis v. Hawkings* (1998), 1998 CanLII 14822 (ON SC), 39 O.R. (3d) 427, [1998] O.J. No. 1421 (Gen. Div.), at pp. 433-34 O.R., where he stated:
>
> > [N]o one can seriously argue that the decision whether a particular injury meets the statutory criteria is an easy one or, perhaps more important, that it

> will be easy to predict the outcome of a motion to dismiss a claim which the defendant asserts is unworthy. Even in such a motion, the onus is upon the plaintiff to demonstrate that his or her injuries meet the statutory criteria. When one is seeking to apply the discoverability rule to the plaintiff in a case such as this, it behooves the court to grant a degree of latitude to a plaintiff before declaring that the limitation period has begun to run. . . . In practical terms, the question is not whether the plaintiff believes that her injury meets the criteria but whether there is a sufficient body of evidence available to be placed before a judge that, in counsel's opinion, has a reasonable chance of persuading a judge, on the balance of probabilities that the injury qualifies. When such a body of material has been accumulated, then and only then should the limitation begin to run. This is not to say that the plaintiff is entitled to wait until he or she has an overwhelming case. It is only to say that the court must afford a degree of latitude to a plaintiff in making this very individual and complicated determination.

[40] *Ionnidis v. Hawkings*, *supra*, was applied in *Fuller v. McCartney* (2003), 2003 CanLII 3273 (ON SC), 63 O.R. (3d) 393, [2003] O.J. No. 545 (S.C.J.); *Simonelli v. Halifax Insurance Co.*, [2002] O.J. No. 1354, 38 C.C.L.I. (3d) 154 (S.C.J.); *Hoffman v. Jekel*, *supra*; *Phung v. Mais*, [2012] O.J. No. 5990, 2012 ONSC 7153 (S.C.J.); and *Chan v. Abdo*, [2013] O.J. No. 2447, 2013 ONSC 3017 (S.C.J.).

[41] In the case at bar, Ms. Huang obviously believed that she had a claim that ought to be pursued when she retained a lawyer in the summer of 2009, but her lawyer's professional opinion was that there was not sufficient medical evidence to have a reasonable chance of persuading a judge that the plaintiff had sustained an injury that met the requirements of s. 267.5(5) of the *Insurance Act*. Sufficient evidence was not obtained until the report of Dr. West dated August 30, 2011 was received. [page126]

> [42] If Mr. Lee's view is correct, which is a genuine issue requiring a trial, then Ms. Huang's action commenced in 2009 was not late but rather premature until perhaps as long as 2011.

The limited 63 day gap between the limitation period and the issuing of the claim likely played a significant role in Perell J.'s decision. He dismissed the defendant's motion and granted the Plaintiff's motion to amend the statement of claim to plead discoverability.

In ***Smith v. Blackhall*****,** 2012 ONSC 4990, the plaintiff was involved in an accident and injured her knees. She was off work for many months but did eventually return She continued to have daily knee pain. She consulted several doctors some of whom stated that her problems might improve if she lost weight. Eleven years after the accident, she was told that she had degenerative arthritis and would require a knee replacement. After she issued a claim, the defendant brought a motion for summary judgment. It was dismissed. Although the plaintiff had suffered ongoing pain for eleven years, she did not believe she had a serious injury until a doctor advised her that she would require a knee replacement. The court held that a full trial was necessary to make findings as to discoverability.

The Defendants roll the dice…and win!

In ***Yelda v. Vu*****, 2013 ONSC 4973**, the plaintiff was **unsuccessful** after she issued a claim **9 years** after the accident. The accident occurred in 2002. She issued a claim in 2011. Although the claim was dismissed, there is useful commentary that suggests that the 6 or 7 year window may not be too far out to commence a claim depending on the nature of the available evidence:

> [37] Any one of these facts may not be sufficient for a reasonable person to conclude she did not have a serious permanent problem but the combination of them all, over a number of years where there was no improvement, is conclusive in my view to conclude that the plaintiff's assertion she did not suspect she had a serious and permanent health problem from the motor vehicle accident is not

> credible. She had a duty to investigate, and that duty arose long before May 25, 2009, some 7 years after the accident. Indeed that duty arose in 2005 or 2006 when she first started to attend emergency wards with no subsequent relief. At the very least it arose in November 2008 with her visit to St. Joseph's Hospital for continued back pain. [6.5 years]

And of course, there's *Sanei*.

The Wrap Up

You have made it to the end. Congratulations. Hopefully this paper has impressed a few key take-aways to you:

1. Do not gloss over the constituent elements of when a claim is "discoverable". The facts matter and every case is unique.
2. Most limitation cases will rise and fall on whether the claim was "legally appropriate."
3. "Legally appropriate" will depend on the factual and statutory setting of the claim.
4. In the MVA context, "legally appropriate" remains reasonably knowing that a plaintiff's injuries have a substantial chance of meeting Threshold.
5. A "Threshold opinion" that complies with the regulatory requirements for evidence at trial is **not** required to establish a "sufficient body of information" on summary judgment.

In my experience, both sides of the personal injury bar tend to gloss over the persnickety details of discoverability in MVA cases.

Defence counsel will confidently suggest to their institutional clients that a summary judgment is an opportunity to resolve an unmeritorious claim at an early stage. But in reality, a defendant's path to dismissal is much narrower than the plaintiff's. *Sanei* has not fundamentally changed that. Additionally, the court backlog to get a motion date in many

regions, coupled with the time it takes to write a decision, may ultimately tack on years and thousands of dollars in legal fees to a matter that could potentially have proceeded to trial/settlement.

In contrast, faced with the threat of a summary judgment motion, plaintiff's counsel will confidently claim their client did not realize their injuries met Threshold until long after the accident. *Sanei* suggests this confidence may not be as well founded as it used to be. Also, you should be calling LAWPRO. Our internal claims counsel are there to provide advice, guidance, and when necessary, assign expert repair counsel to respond to the motion on your client's behalf. They are excellent at what they do, and they have a very dedicated LAWPRO research team backing them up.

Law Society of Ontario | Barreau de l'Ontario

TAB 6

7th Motor Vehicle Litigation Summit

Bifurcation (PPT)

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Bifurcation of Personal Injury Actions: New Rule and New Responsibility

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cpd

Bifurcation

BARBARA LEGATE
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What is it? Why change?

- Extraordinary remedy
- Separate judgments
- History
- Pressure to change

Old Rule v New Rule

Old

- 6.1.01
- With the consent of the parties, the court may order a separate hearing on one or more issues in a proceeding, including separate hearings on the issues of liability and damages

New

- 6.1.01 (1) The court may order a separate hearing on one or more issues in a proceeding, including separate hearings on the issues of liability and damages,
- (a) on a party's motion, with or without the consent of the other parties; or
- (b) at a conference under Rule 50, with the consent of the parties.
- (2) In determining whether to order a separate hearing, the court shall consider,
- (a) whether ordering a separate hearing will dispose of some or all of the issues, shorten or simplify the rest of the proceeding or result in a substantial saving of costs;
- (b) whether the issues are clearly severable and can be heard separately without unduly repeating evidence or risking inconsistent findings of fact;
- (c) whether ordering a separate hearing would unduly prejudice or advantage a party, including the impact on any counterclaim, crossclaim or third or subsequent party claim or, in cases where a jury notice has been delivered, on a party's election to have the action heard by a jury;
- (d) the impact of ordering a separate hearing at the applicable stage in the proceeding; and
- (e) any other relevant matter. O. Reg. 175/24, s. 1.

When is it appropriate or not?

- *Bourne v Saunby* 1993 OJ. No. 2606 at para. 30
  - On consent or on motion
  - Not on judge's own motion
  - Will dispose of some or all issues etc
  - Duplication of evidence is a negative
  - Tactics
  - Loss of jury

First interpretation

- LaPointe v Simcoe Muskoka Catholic District School Board 2024 ONSC 4040

SCENARIO 1

- Under limits case
- Three-car collision
- Plaintiff not at fault

Issues:

1. When
2. Impact on the Plaintiff's case
3. Terms

SCENARIO 2

- Over limits case
- Three-car collision
- Plaintiff not at fault

Issues:

1. When
2. Impact on the Plaintiff's case
3. Terms

SCENARIO 3

- Under limits case
- Fault in issue
- Jury
- MSK injuries, low impact

Issues:

1. Should you
2. When
3. Terms

SCENARIO 4

- limits case
- Fault in issue
- Jury
- Severe injuries
- Big collaterals

Issues:

1. Should you
2. When
3. Terms

BIFURCATION OF PERSONAL INJURY ACTIONS: NEW RULE AND NEW RESPONSIBILITY

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Introduction

The parties to an action are entitled to have the entirety of their case heard at one time, with a caveat. The caveat is in those rare cases where hearing one aspect of the case first, separated from another, with a judgement that is also separated from the carved-out piece, is appropriate and in the service of justice. That is known as bifurcation.

It is and always has been an extraordinary remedy.

Pressures on judicial and court room time have been mounting, both before and after the pandemic, such that their efficient use and strategies to achieve same are being carefully considered. One potential strategy is to separate out issues in a trial, with the hope that resolution of one issue will lead to resolution of the other therefore saving trial time.

Consequently, the Civil Rules Committee was asked to look at revising the rule governing bifurcation, to enhance its use as a trial-shortening strategy.

History of Bifurcation

The previous amendment to Rule 6.1 respecting bifurcated hearings came into effect in 2010. Before this amendment, it was recognized that Courts have the inherent power to bifurcate issues in a non-jury trial.[1] This was to be exercised in the interests of justice and only in the clearest cases as it is a basic right of every litigant to have all issues in dispute resolved in one trial.[2] Particularly, just before the enactment of the 2010 amendment, the Ontario Court of Appeal in *Kovach* confirmed that the court lacked jurisdiction to bifurcate issues where a valid jury notice was in place.[3] Blair J.A. stated "…a trier of fact must remain seized of an action until judgment is pronounced".[4] In other words, the same panel of jurors would ultimately decide both sets of issues regarding liability and damages.

[1] *LaPointe v. Simcoe Muskoka Catholic District School Board*, 2024 ONSC 4040 at para 24.
[2] *Elcano Acceptance Ltd. Et al. v. Richmond, Richmond, Stambler & Mills*(1986), 55 O.R. (2d) 56 (ONCA) at para 11.
[3] *Kovach (Litigation Guardian of) v. Kovach*, 2010 ONCA 126
[4] *Ibid* at para 25.

As of January 1, 2010, Rule 6.1.01 of the Ontario *Rules of Civil Procedure* stated that a court can bifurcate a trial with consent of the parties to the litigation.[5] The wording of the rule suggested that a court has the discretion to order separate hearings, but only with consent of the parties.[6] However, there was conflicting caselaw on the issue of whether the court retains inherent jurisdiction to bifurcate a trial without the consent of the parties in non-jury trials.[7] On the other hand, others held that the Court cannot bifurcate a trial without the consent of the parties.[8]

The burden of proof was on the moving party to demonstrate "a clear benefit to be gained, in terms of time and expense, from severing an issue from the trial."[9] It must be in the interest of justice to bifurcate a hearing.[10] If the responding party was able to demonstrate a "real prejudice that outweighs any such expediency", the court would be unlikely to grant the motion.[11]

However, the *Duggan* decision made this analysis moot holding that the court may not bifurcate a trial without the consent of all the parties.[12] It is important to note the term "may" implies that though the court cannot bifurcate the trial without consent of the parties, the court also has the inherent jurisdiction not to grant the motion even when both parties consent.[13]

<u>The Former Rule</u>

6.1.01

> With the consent of the parties, the court may order a separate hearing on one or more issues in a proceeding, including separate hearings on the issues of liability and damages.

---

[5] *Rules of Civil Procedure*, R.R.O. 1990, REGULATION 194 as amended by O. Reg. 175/24: RULES OF CIVIL PROCEDURE
[6] Sean Petrou and Adam Dobkin, Rules of Civil Procedure Chapters, Parties and Joinder, Rule 6.1 - Separate Hearings in Civil Procedure and Practice in Ontario, Noel Semple (ed.), Canadian Legal Information Institute, 2nd ed, 2022 CanLIIDocs 1104, <https://canlii.ca/t/7j1rb>, retrieved on 2024-08-23
[7] *Ibid*.
[8] *Ibid.*
[9] *Ibid.*
[10] SS & C Technologies Canada Corp. v. The Bank of New York Mellon Corporation, 2021 ONCA 601 at para. 38.
[11] *Supra* note 7.
[12] *Duggan v. Durham Region Non-Profit Housing Corporation* 2020 ONCA 788 at para 38
[13] *Ibid* at para 37.

It was therefore left to counsel to determine that the case was appropriate, and then to try to convince a judge that they were correct.

The difficulty with the Rule as worded was of course that it required the parties' consent. An appropriate case could be stonewalled by a non-consenting party. They may wish to drive up costs for the other party, add to the risk of one part of the case tainting another, or were leery of litigating that way.

The impetus for change was from judges wishing to make use of bifurcation. Without the consent of the parties, they were powerless to do so.

The New Rule

This rule is much more detailed and has implications for other rules. It now reads:

> 6.1.01 (1) The court may order a separate hearing on one or more issues in a proceeding, including separate hearings on the issues of liability and damages,
>
> (a) on a party's motion, with or without the consent of the other parties; or
>
> (b) at a conference under Rule 50, with the consent of the parties.
>
> (2) In determining whether to order a separate hearing, the court shall consider,
>
> (a) whether ordering a separate hearing will dispose of some or all of the issues, shorten or simplify the rest of the proceeding or result in a substantial saving of costs;
>
> (b) whether the issues are clearly severable and can be heard separately without unduly repeating evidence or risking inconsistent findings of fact;
>
> (c) whether ordering a separate hearing would unduly prejudice or advantage a party, including the impact on any counterclaim, crossclaim or third or subsequent party claim or, in cases where a jury notice has been delivered, on a party's election to have the action heard by a jury;
>
> (d) the impact of ordering a separate hearing at the applicable stage in the proceeding; and
>
> (e) any other relevant matter. O. Reg. 175/24, s. 1.

Key features of the new Rule:

The new wording incorporates considerations adopted from prior case law. An oft-cited but unreported decision, *Bourne v Sanby,* set out these considerations for a personal injury action:

1. Are the issues to be tried simple?
2. Are the issues of liability clearly separate from the issues of damages?
3. Is the factual structure upon which the action is based so extraordinary and exceptional that there is good reason to depart from normal practice requiring that liability and damages be tried together?
4. Does the issue of causation touch equally upon the issues of liability and damages?
5. Will the trial judge be better able to deal with the issues of the injuries of the plaintiff and his financial losses by reason of having first assessed the credibility of the plaintiff during the trial of the issue of damages?
6. Can a better appreciation of the nature and extent of injuries and consequential damage to the plaintiff be more easily reached by trying the issues together?
7. Are the issues of liability and damages so inextricably bound together that they ought not to be severed?
8. If the issues of liability and damages are severed, are facilities in place which will permit these two separate issues to be tried expeditiously before one court or before two separate courts, as the case may be?
9. Is there a clear advantage to all parties to have liability tried first?
10. Will there be a substantial saving of costs?
11. Is it certain that the splitting of the case will save time, or will it lead to unnecessary delay?
12. Has there been an agreement by the parties to the action on the quantum of damages?
13. If a split be ordered, will the result of the trial on liability cause other plaintiffs in companion actions, based on the same facts, to withdraw or settle?
14. Is it likely that the trial on liability will put an end to the action?[14]

A judge may not order bifurcation of their own initiative. The recommendation of the Civil Justice Reform Project, Summary and Recommendations completed by the Honourable

[14] *Bourne v. Saunby*, 1993 OJ. No. 2606 at para. 30.

Coulter Osborne, which supported judicial motions, was not supported by any of the members of the Bar who commented on the amendments to the Rule.

Any party may bring the motion at a time they see fit. When to bring it in a particular proceeding will depend on the case, the issues, the evidence, the need for experts, and admissions at discovery to name a few considerations. It does not tie the parties to a particular timeframe in the action.

A judge must now rule on the request, although the fact that the parties consent is a factor. It may be dealt with at a case conference with the consent of the parties.

The result must be that bifurcation *will* dispose of some or all the issues in a case; *will* shorten or simplify the case; or *will* result in a substantial savings in costs.

Duplication of evidence is a negative factor. Consider causation of damage, which arises in most auto cases. In a low-speed collision, with musculoskeletal injuries, whether the collision caused the damages sustained will be in issue. Very likely, that will result in the duplication of evidence and argue against bifurcation.

Tactical considerations are relevant. Where one party is disadvantaged or advantaged, or might lose their jury, bifurcation might not be appropriate.

<u>Other Rules Affected by the Amendment</u>

Leave to bring a motion after set-down

Rule 48.04 mandates obtaining leave to bring a motion after setting the action down for trial. Bifurcation is now exempted from that requirement. Obviously, some cases require the exchange of expert reports before the parties can come to grips with the procedural niceties of the action. The new wording is found at subsection 3:

> (3) Leave of the court is not required for,
>
> > (a) a motion to compel compliance with any obligation imposed by a rule listed in clause (2) (b); or.
> >
> > (b) a motion under rule 6.1.01 for a separate hearing on one or more issues in a proceeding, including separate hearings on the issues of liability and damages.

Pre-trial memos

There is now a requirement to include consideration of bifurcation in the memo:

50.04 5.

If any of the parties intends to seek an order granting separate hearings under rule 6.1.01, the filing party's position on proceeding by way of separate hearings.

The same is required in simplified proceedings.

Interpretation of the Rule

While it came into force as of July 1, 2024, the Rule has already attracted a ruling in the personal injury arena. In *LaPointe v Simcoe Muskoka Catholic District School Board*[15] Justice Healey had occasion to consider a motion to bifurcate liability from damages in a case where a jury notice had been served. The defendant brought the motion, and the plaintiff resisted.

The defendant argued that the matter was ideal for bifurcation under the new rule arguing witnesses needed to testify to the issue of liability could be neatly separated from those required to testify to the issue of damages. The plaintiff argued that there would be witnesses who would need to testify on both issues and, therefore, creating duplication. Another evidentiary overlap that the plaintiff claims is the testimony of their biomechanical expert. He would address how the injuries were caused (standard of care and causation) and how facial protection would have mitigated those damages (foreseeability and causation). The latter point pertains to damages as it attempts to prove that the damage was caused in fact and in law by the defendant's breach.[16] The plaintiff also claimed that the injured claimant's teammates would also be required to testify in respect of both liability and damages. They observed a loss of consciousness and confusion, which was relevant in a trial dealing with an alleged brain injury.[17]

The moving defendant also asserted that the analysis should begin rule 1.04(1), which requires the rules to be liberally construed to secure the just, most expeditious and least expensive determination.[18] Justice Healy noted that the factors that are listed in the new Rule "appear to have been designed to meet these same objectives".

The moving party unsuccessfully argued that the issues would be simplified because a jury would only be required to assess one issue and not the other. Healy J. held that this was not a simplification or a shortening of the issues but rather just a dividing of the issues into individual timeslots.[19]

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[15] 2024 ONSC 4040
[16] *Ibid* at para. 13.
[17] *Ibid* at para. 12.
[18] *Ibid* at. para. 35.
[19] *Ibid* at. Para. 51.

The wording of this part of the test in the amended rule stipulates that the court must be certain that some or all of the issues will be disposed of prior to granting a motion to bifurcate.[20] This means the moving party must present concrete evidence that there will be a benefit of bifurcation.[21] The mere possibility of benefit is not enough. Finally, the court held that a mere division of issues is not sufficient to simplify the issues at trial; there must be material evidence of simplification of the issues at bar.[22]

(a) Whether the issues are severable

The issues must be "clearly severable".[23] In other words, the court must be able to neatly compartmentalize the issues without overlap in witnesses or evidence. The issues cannot be severed in a case where causation touches on both liability and damages.[24]

(b) Whether bifurcation would create an imbalance between the parties

Healy J. held that the power to bifurcate must be exercised in the interests of justice and should only be applied in the clearest cases.[25] The wording of the amended rule implies broad application to all proceedings without differentiating between jury trials and judge-alone trials. However, special attention must be given to the impact of bifurcation where a jury notice has been served.[26]

Though the language of subsection 2(c) "by a jury" is consistent with that of the *Courts of Justice Act*, there seems to be some uncertainty respecting the relationship between the amended Rule 6.1.01 and s.108 of CJA.

Section 108 (1) of the CJA provides:

> In an action in the Superior Court of Justice that is not in the Small Claims Court, a party may require that the issues of fact be tried, or the damage is assessed, or both, by a jury, unless otherwise provided.

She followed the logic of Justice Blair in *Kovach* where he interpreted s. 108(1) to mean that a party could require that the issues be tried by a *single jury.* [27]

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[20] *Ibid* at para 42.
[21] *Ibid* at para 44.
[22] *Ibid* at para. 51.
[23] *Ibid* at para. 54.
[24] *Ibid.*
[25] *Ibid* at para. 62.
[26] *Ibid* at para. 64.
[27] Citing Kovach at para 6

This section states that a jury notice gives rise to the statutory right to have the entire case heard by one jury and the court lacks jurisdiction to order otherwise.[28] As Healy J. points out, there are some practical barriers precluding the same jury from hearing both trials that may be heard as far as a year apart.[29] If by two different juries, a panoply of issues arise, such as (quoting Justice Blair) *multiple appeals in the same action, associated with delays and substantial costs; inconsistent findings between juries; two triers being seized of the same action; and the limited ability of the motions judge to accurately predict whether there will be no overlap in the evidence relating to both liability and damages at trial*.

Furthermore, there is some uncertainty when it comes to paramountcy of the applicability of the two pieces of legislation together. While the CJA empowers the CRC to make rules even if they alter or conform to the substantive law, the CJA as the parent law would likely prevail on the issue of bifurcating in the case of a jury trial where it is not feasible to maintain the same jury throughout the action.[30] Upon considering these difficulties and inconsistencies, Healy J. opted to leave providing clarity on these issues to a higher court.[31]

(c) What is the impact of ordering a separate hearing at the applicable stage?

Healy J. noted that the motion was filed with the anticipated rule change returnable on the first possible date. That being said, it was noted that the plaintiffs had begun trial preparation in earnest. This position was not rebutted by the moving defendant in the trial was set to begin 5.5 months from the date of the hearing of the motion.[32]

(d) Any other relevant factors?

The analysis considered the fact that the incident occurred over six years prior to the date of the hearing of the motion. It was indicated that any additional delay that would be caused by bifurcation must also give rise to consideration of the effect of the passage of time in respect of this, is memories of the events.[33] Citing to *Kovach (Litigation Guardian of) v. Kovach,* Healy J. noted potential issues that might arise if a jury trial was bifurcated including multiple appeals in the same action, associated with delays and substantial costs.[34]

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[28] *Ibid* at para. 65.
[29] *Ibid* at para. 74.
[30] *Ibid* at para. 66-67.
[31] *Ibid* at para 73.
[32] *Ibid* at para. 78.
[33] *Ibid* at para. 79.
[34] *Ibid* at para. 32, citing to *Kovach (Litigation Guardian of) v. Kovach*, 2010 ONCA 126 at para. 41.

Conclusion

Where there is no jury, bifurcation is nonetheless likely to find a rough road to acceptance in any given case. In personal injury, the fact that foreseeability of harm is at the root of the standard of care test, may make it virtually impossible in the average auto one-plaintiff vs one-defendant action. Different considerations may be in play where there are multi-party cases. For example, a pile-up on the highway might be best litigated separately to determine who will pay under which policies of insurance. Smaller, two-defendant, one plaintiff cases may similarly benefit where the issue is who pay or who pays in what amount. Consideration of the limits of policies may come into play.

Looming large for plaintiffs considering bifurcation will the delays of an appeal that they are not involved in.

All of that said, there remains a place for counsel, acting responsibly and in their clients' best interests, to carefully consider bifurcation where there is a severable issue impeding resolution of the action. Our responsibility to the integrity of the judicial system demands that we do so.

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TAB 7

7th Motor Vehicle Litigation Summit

My Life in the Motor Vehicle Litigation Trenches – A Plaintiff and Defence Perspective (PPT)

Heidi Brown, C.S.
Bogoroch & Associates LLP

Jean-Claude (J.-C.) Rioux
Flaherty McCarthy LLP

September 18-19, 2024

cpd

LSO 7th Motor Vehicle Litigation Summit

My Life in the Motor Vehicle Litigation Trenches – A Plaintiff and Defence Perspective

September 18, 2024

Heidi R. Brown
Bogoroch & Associates LLP
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FLAHERTY McCARTHY LLP LITIGATION COUNSEL

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Civility and Professionalism in the Legal Profession

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Obligations under the Rules of Professional Conduct

Rule No.	Rule
2.1-1	A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.
2.1-2	A lawyer has a duty to uphold the standards and reputation of the legal profession and to assist in the advancement of its goals, organizations and institutions.
3.2-1	A lawyer has a duty to provide courteous, thorough and prompt service to clients. The quality of service required of a lawyer is service that is competent, timely, conscientious, diligent, efficient and civil.
5.1-1	When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.

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Rule No.	Rule
5.1-5	A lawyer shall be courteous, civil, and act in good faith to the tribunal and with all persons with whom the lawyer has dealings.
5.6-1	A lawyer shall encourage public respect for and try to improve the administration of justice.
7.2-1	A lawyer shall be courteous, civil, and act in good faith with all persons with whom the lawyer has dealings in the course of their practice.
7.2-1.1	A lawyer shall agree to reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities, and similar matters that do not prejudice the rights of the client.
7.2-2	A lawyer shall avoid sharp practice and shall not take advantage of or act without fair warning upon slips, irregularities, or mistakes on the part of other legal practitioners not going to the merits or involving the sacrifice of a client's rights.
7.2-4	A lawyer shall not in the course of professional practice send correspondence or otherwise communicate to a client, another legal practitioner, or any other person in a manner that is abusive, offensive, or otherwise inconsistent with the proper tone of a professional communication from a lawyer.

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Increased Incivility in the Legal Profession

"Report on Civility and Professionalism in the Legal Profession" –Toronto Lawyers Association

- Survey conducted in 2023 received 332 responses
- 69.88% felt civility and professionalism had declined
- Top 3 frequent behaviours: not receiving responses to correspondence, excessive rigidity during negotiations, and inappropriate interruptions
- Other frequent behaviours: sarcasm/condescending attitude, negotiating in bad faith, and aggressive, inflammatory or rude correspondence
- Perceived reasons for the decline: lack of training or mentorship, impacts of technology, overwork/workload, and raised client expectations

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The Importance of Civility in the Practice

Groia v Law Society of Upper Canada, 2018 SCC 27:

Incivility is damaging to trial fairness and the administration of justice:

1. Incivility can prejudice a client's cause
2. Incivility is distracting
3. Incivility can erode public confidence in the administration of justice

"Civility and resolute advocacy are not incompatible. To the contrary, civility is often the most effective form of advocacy."

- Justice Moldaver for the majority

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The Importance of Civility in the Practice

R v Felderhof, [2003] OJ No 4819:

> "It is important that everyone, including the courts, encourage **civility** both inside and outside the **courtroom**. Professionalism is not inconsistent with vigorous and forceful advocacy on behalf of a client and is as important in the criminal and quasi-criminal context as in the civil context…Counsel are required to conduct themselves professionally as part of their duty to the court, to the administration of justice generally and to their clients."
>
> - Justice Rosenberg

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The Importance of Civility in the Practice

Stepita v Dibble, 2020 ONSC 3041:

> "It is expected that parties to the litigation will disagree about the issues. It is expected that they will make vigorous, fulsome arguments as to the substance of the matters before the court. It is unacceptable, however, for those arguments to rise to the level of inflammatory language which is pervasive throughout the plaintiff's closing submissions."
>
> - Justice Ferguson

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The Importance of Civility in the Practice

Singh et al. v Braich, 2023 ONSC 5053

"It appears to have been an attempt by a senior lawyer to bully a junior lawyer. This is unfortunately a common occurrence in the practice of law. It should not happen. When it does, counsel who decide to conduct themselves that way should understand that their behaviour will be called out. Senior members of the bar should serve as examples to their junior counterparts. They should not use their seniority to try and gain a tactical advantage."

- Justice Rahman

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Playing Nicely in the Litigation Sandbox: A Litigating Nicely Checklist

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1. Cooperate to set discovery dates and other important steps in the litigation.

2. Prioritize getting your opponent the necessary documents well in advance of discovery.

3. At discovery, treat the witnesses with respect. You are there to get admissions and to create a transcript you can use at trial. You don't need to be unpleasant to accomplish that goal.

4. Before you bring a motion, pick up the telephone and see if you can have a chat and resolve whatever it was that the motion was going to be about.

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5. At mediation, don't tell people about their own lives. It's more effective to just tell them what you are going to ask a trier of fact to accept, and why you think the trier o fact might do what you ask.

6. If you and your instructing principal have decided to take a particular case to trial, then pick up the telephone and let the other side know, so they can properly prepare their client.

7. Respond promptly to emails. Explain why it make take some time to respond.

8. Serve expert reports well in advance of the pre-trial.

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9. Before the pre-trial, try to get agreement on jury questions.
10. Before the pre-trial, try to get agreement on the deductions.
11. Before the pre-trial, try to get an agreement on the authenticity of key documents.
12. At trial, show respect for the jury. Particularly, do your best to avoid wasting their time.
13. If you lose, congratulate your opponent.
14. Remember why you became a lawyer and that it is a privilege to do what we do.
15. Share a laugh with your opponent from time to time!

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HELPFUL RESOURCES:

Report on Civility and Professionalism in the Legal Profession, Toronto Lawyers Association

Civility as a Strategy in Litigation by Eugene Meehan QC

https://supremeadvocacy.ca/wp-content/uploads/2020/12/Civility-as-a-Strategy-in-Litigation.pdf

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Thank you!

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TAB 8A

7th Motor Vehicle Litigation Summit

Don't Read This Paper (If You're Content with the Status Quo) - Re-Thinking Personal Injury and Insurance Mediation Process

Mediation Design and Process for Complex Claims

Mediating a Complex Multi-Party Matter

Vance Cooper
Cooper Mediation Inc.

September 18-19, 2024

cpd

Don't Read This Paper [If You're Content with the Status Quo] - Re-Thinking Personal Injury and Insurance Mediation Processes

By Vance Cooper, Cooper Mediation Inc.

I frequently encounter two problems at mediation: first, the content and style of opening remarks in the joint plenary session; second, positional and distributive bargaining process. These problems are the result of our longstanding traditions to mediate in the same way and our acceptance of the status quo. In this paper, I review these common mistakes and offer novel and constructive alternatives and solutions.

Before I ask you to join me on a trip down the rabbit hole, my solutions to these problems are predicated on an assumption that the parties and their lawyers are attending at mediation to make a serious attempt to resolve their dispute. The principles I discuss do not apply to mediations in which one side or both are looking to showcase their position, learn about their weaknesses or simply "kick the tires." Similarly, if the parties are attending the mediation to "tick a box," obtain a report from the mediator and set the action down for trial, what follows will not apply. If the parties and their lawyers are serious about attempting to resolve their matter, please read on.

A story, told to me as true, will illustrate this point. A fellow told me that he watched his wife prepare a brisket of beef before putting it into the oven. She carefully cut off slices at each end of the brisket of beef before putting it in the pan and into the oven. He asked her why she did

this and she told him that she did it this way because her mother always did it this way. The fellow approached his mother-in-law and asked her why she always cut off slices at each end of the brisket before putting it in the pan and into the oven. She told him that she did it this way because her mother always did it this way. He approached his wife's grandmother, who was alive and well, and asked her why she cut off slices at each end of the brisket before putting it in the oven. She explained, matter of factly, "otherwise, it wouldn't fit in the pan."

We have been mediating personal injury and insurance claims for almost 40 years in a very similar and traditional manner. There are alternatives that may offer the parties and counsel a better, less acrimonious and more productive and efficient path to resolution. Mediation of these claims is well established throughout the province and particularly so in Toronto, Windsor and Ottawa where mediation is mandated as a precondition to setting the action down for trial. I suspect we are all reluctant to try something new. This traditional approach may have outlived its utility.

Opening Remarks in the Plenary Session

I have been involved in personal injury and insurance mediations for almost 40 years. Until 2004, this was exclusively in the role of counsel, whether for a plaintiff or defendant, their insurance carrier, or a self-insured risk. Since then, I have spent most of my time at mediation at the head of the table as mediator [exclusively so since 2010]. Mediations have always started with a joint session. I have watched the evolution of opening remarks by counsel. Simply put, we have lost our way and lost an important opportunity for persuasion along the way.

Mediation memoranda have become increasingly lengthy. Counsel on all sides of the matter deliver comprehensive mediation memoranda which frequently review virtually all evidence that exists in the matter. Having written 20 or 30 pages (or sometimes as much as 50 pages), counsel feel the need to repeat the content of written briefs in opening remarks as part of the joint session. This is a missed opportunity.

If you are not going to give opposing counsel and the opposing party credit for reading your memorandum, why would you believe that they will listen to anything that you have to say? There is a natural predisposition on a party to disbelieve or reject anything opposing counsel says to them as they are viewed as the enemy. Logically, anything opposing counsel says must be good for them and bad for the recipient so the listener must reject it. This applies with equal force to anything that might be said by the plaintiff or by the defence or insurance representative.

One of my pet peeves is when counsel on one side of the case says to the client on the other side of the case, “what you need to know” or “what you need to understand.” Please stop and think about that expression for a moment. As a starting place, you are telling someone opposite in interest what to do. Why would anyone take instruction from someone opposite in interest? Moreover, why would they look to you, on the opposing side of the table, to gain knowledge or understanding of an issue in dispute. At minimum, the point should be made as a request; “what I would ask you to do is to consider the following…”

Frequently, opening remarks go on at great length and can be quite inflammatory. The plaintiff lawyer explains why they have mountains of evidence and why they will crush the defence like a bug. The defence lawyer explains why the plaintiff has no claim, no credibility, and no likeability such that the claim is almost worthless. These opening remarks can go on for upwards of an hour, particularly in multi-party cases. If I assume that people are attending mediation with a sincere desire to resolve the dispute, comments of this nature are completely antithetical to the objective. I suppose remarks of this nature are justified on the theory that litigation is not a tea party. I understand that, but I fail to see how or why anyone would want to start a process of seeking a mutually agreeable resolution by effectively adding gasoline to the fire. After this hour of inflammatory comments, I frequently spend the next 30 to 60 minutes talking people in from ledges and calming them down.

In my meetings with the parties and their lawyers in caucus, I work very hard to establish trust and build confidence. In the process, I gain insights as to the dynamics present in each room. I promise all who have read this far in this paper that I will deliver the important information and messages in the memorandum to the opposite party in an understandable format. There is an opportunity for dialogue and discussion in caucus which is not available to counsel making opening remarks. I encourage decision makers to engage in the process. I do my very best to explain the points they have made to the party opposite in interest in a digestible format.

If counsel would like their audience to listen, I suggest that they start with something with which their audience must agree. One of my favorite techniques is for counsel to identify three things for which there is agreement, three things for which there is disagreement and a methodology, pathway, or approach to address the points of disagreement.

I challenge all counsel to do the following with their opening remarks.

1. Counsel cannot repeat anything that is in their brief. They can provide new information that is not in the brief. They could also take information that is presented chronologically in the brief and make opening remarks based on themes of the matter. This should not give counsel license to repeat the content of their brief in a “shuffle and deal” format.

2. Counsel can and should respond to things written in the opposing brief or things said in opening remarks by opposing counsel. You should not repeat anything that is in your brief but you should respond to things said or written that matter. If opposing counsel comments on something peripheral to the resolution of the matter, leave it alone. You can make the point with me in caucus. To the extent that it has any material bearing on the discussions and negotiations, I will make the point on your behalf in the other room.

3. Counsel can and should make remarks that are conciliatory in nature. We are in the bridge-building business. Stop throwing bombs and extend olive branches

instead. Please offer thoughts or comments as a blueprint to help all those involved at mediation build the bridge of resolution.

Negotiations and Bargaining

The second problem arises from traditional opening demands and opening offers. There is a tendency on the part of most plaintiff lawyers to demand the moon and the stars. Sometimes there is evidence to support the demands; sometimes, there is not. To the extent there is evidence, it is typically predicated on assumptions which are very favourable to the plaintiff and improbable to ever be proven at trial. I have remarked to counsel for plaintiffs that even if defence counsel was to sleep through their alarm for the duration of the trial, it is still unlikely that any judge or jury would grant a judgment in the amount of this opening demand. There is a tendency on the part of most defence lawyers to respond to most opening demands with a defence offer that is equal and opposite in form and content. It is typically the “cold water” response. Once again, counsel for the defendant are unlikely to consider how their offer is received or considered in the opposing room.

The plaintiff lawyer, after hearing the defence offer, often immediately responds with something along the lines of how unreasonable the offer is and how the defence is clearly not interested in a reasonable resolution. The plaintiff lawyer forgets the magnitude of their opening demand and fails, refuses or is otherwise unable to appreciate that this is exactly how their first demand was received in the defence room. The plaintiff lawyer then makes a small move in the direction of settlement to test the waters and determine if the defence is really there to settle the case.

The defence lawyer and insurance representative, having now received two offers which are well outside of the realm of any realistic settlement, responds in kind for the second time.

After two rounds of insulting demands and insulting offers, once again consuming the better part of an hour or more, I spend the next 30 minutes or so talking people off of ledges, urging the parties not to give up and encouraging them to stay at mediation long enough to determine if settlement is possible. How does this make sense? How and why is this a good and productive use of our time together?

It's a mistake for counsel not to be sensitive to how settlement demands or offers are received or considered in the opposing room. The parties and their lawyers are involved in something like a partnered dance. Imagine what it would look like if you and your dance partner were listening to different music or one of you was listening to the music and the other wasn't listening at all. Your movement together would be uncoordinated and awkward. The same is true for an opening demand or an opening offer which are not mindful of how they will be received in the other room.

Breaking Free From the Status Quo? A New, Better Way to Mediate

For the last number of months, I have been doing something extraordinary as a mediator. I have been discouraging the parties from making offers at mediation. I am pleased to report that the parties who have accepted my recommendation have enjoyed nearly universal success in my initial trials.

My mediation agreement and my mediation opening both address the extreme confidentiality of caucus. For my approach to be successful, the parties must have faith and trust in my commitment to confidentiality. I explain in my opening remarks that in caucus, the parties will feel me push back on the assumptions and approaches taken by the parties and their counsel. This is not because I necessarily disagree but, rather, because it is part of the process. My job description requires me to challenge the thinking in each room. I promise each side that I will push in an equal and opposite direction in the other room.

In my first caucus visit to each of the rooms, I encourage the lawyer and the client to engage in a realistic discussion as to how they see the case, having regard for the current state of the evidence, anticipated future evidence and the skills and abilities of those on the other side of the case. I do not want the plaintiff's "bottom line" any more than I want the insurance representative's "final authority." I want to gain an understanding as to what a realistic settlement agreement looks like in each room and the reasons and rationale to support such a settlement agreement.

Typically, I start in the defence room(s) before visiting the plaintiff room. There is a rationale for this approach. Bear in mind that there is a fundamental difference between a defence offer and a plaintiff demand. A defence offer can be deposited into the bank and spent; a plaintiff demand, whether realistic or not, requires adjudication to prove to the other side that it is an appropriate basis for resolution.

After I have made one visit to each room, I normally need to make a second visit to each room to fine tune the analysis, views, and assessments in that room. At all times, I maintain complete confidentiality. The net result is that while the plaintiff's claim on paper has a value of 100X, the plaintiff lawyer's private and confidential view is that the case has a realistic settlement value in the range of 50-60X. The defence view on paper is that the case is virtually worthless and has a value of 0-10X. Not surprisingly, their private view is that a realistic settlement range is 40-50X.

If the parties and their lawyers are equally candid and forthcoming with me, the settlement agreement more or less reveals itself. If the gap in positions is modest, there are many things I can do. I can canvas the ways and means that the gap can be addressed. I can canvas the appetite on one side to move to the other side's position. This must be handled confidentially and delicately, but it certainly can be done. I can serve as a negotiation coach in either or both rooms.

The advantages to this approach are many. We avoid positional bargaining and distributive bargaining. We avoid the high - low auction. Real estate transactions serve as an apt example. If you are listing your house for sale and there are comparable homes which have recently sold in your neighborhood for $1 million, listing your home for $2.5 million may be aspirational but you are unlikely to get any serious offers. If you are out of touch with the value of your home, no serious buyer is inclined to look at your home or to make a serious offer. Conversely, when a buyer has walked through your $1,000,000 home during an open house and hires an agent to present an offer, you are unlikely to treat their offer of $250,000 as anything you would seriously entertain. In both cases, the listing price and the offering price are outside of the realm of reasonable.

My approach preserves bargaining positions should a settlement not materialize. The confidential views expressed by the participants to the mediator remain confidential. If one side or the other or both are not prepared to tell me on a confidential basis that they can enter the range of their negotiation partner, the mediation can be terminated or adjourned without engendering bad feelings.

Alternatively, the parties can resort to traditional bargaining to see if that can overcome the impasse. This will provide each side with an opportunity to test the other with a principled demand or offer which gives some insight into the thought process and analysis brought to bear.

How does the mediator create an environment that side steps or overcomes the traditional need for positional bargaining? At minimum, the parties and their lawyers must have sufficient trust and confidence in the mediator. This is not limited to the critical need for the mediator to maintain confidentiality. The parties and their counsel must have confidence that the mediator will not telegraph one negotiation partner’s thoughts, views and analysis to the other. In addition, the mediator needs sufficient subject matter expertise to identify and call bluffing or posturing from either side. An extreme offer or demand tantamount to an invitation to capitulate is inimical to the process. Matters do not resolve because one side or the other gets

their way. Matters are resolved because each side recognizes their risks and takes a reasonable position in relation to those risks. While it probably helps to have a prior relationship with counsel and the insurance claims professional, I have utilized this approach with people I met for the first time at the mediation, the techniques were still effective and the results were the same.

Let me offer a few case studies to demonstrate this technique.

In one matter arising from a rear end motor vehicle accident with dash cam video which demonstrated the violence of the collision, there were senior lawyers on both sides of the case. The injured father and daughter had very significant and relevant pre-accident health histories. The plaintiff lawyer did his best in his mediation memorandum to demonstrate exposure at or above $2,000,000 which happened to be the defendant's insurance limit. The defence lawyer did his best in his mediation memorandum to demonstrate the challenges and obstacles each plaintiff would have presenting a claim for damages. Using my approach of strict confidentiality and discussion without presented offers per se, a settlement figure was reached with two visits to each room. The settlement was confirmed in less than three hours.

A subrogated property damage claim was recently mediated using this technique. The building in question, which was a multi-unit residential structure, required a fire suppression/sprinkler system. There were a host of liability issues arising from the fact that the owner of the building had effectively served as his own general contractor. There were professional liability claims against an architect, resolved before the mediation, and claims against a mechanical engineer and a municipality arising from building inspections. There were five parties in total. One was uninsured. I made two visits to each room and the settlement revealed itself in less than three hours.

The last case involved a violent head-on crash at highway speeds. A mother and her son and daughter sustained serious injuries. The mother's claim was conceded to be catastrophic, and

her accident benefit insurer was present at the mediation. The son had a non-catastrophic accident benefit claim arising from the subject accident and had been involved in a subsequent accident. All of these claims were mediated globally, and the settlement terms revealed themselves after about two hours at mediation (though it did take another 60-90 minutes to "paper" the settlement terms).

The point of these case studies is not to brag about my skills or acumen. Rather, it demonstrates that if the parties and their lawyers can negotiate confidently in the realm of a potential resolution, the terms of a settlement agreement will often reveal themselves. Frequently, I am asked to "work your magic." I do not perform magic tricks. Cases are settled because settlement demands and settlement offers are sufficiently close that the mediator can finesse the relatively small monetary gap or one side or the other can live with the amount being demanded or the amount being offered. The challenge I have experienced for many years is getting one side of the other to move into that realistic realm of what is probable rather than negotiating in the arena of what may be possible.

The Parties Must Attend Mediation With a Realistic Assessment of Their Case

My approach requires the people involved in the mediation to have the skills, abilities, and confidence to realistically evaluate the matter in dispute. For those representing plaintiffs, it requires an ability to realistically evaluate the settlement value of a claim at the time of the mediation, having regard for the state of the evidence, anticipated future evidence and the capabilities and tendencies of the people with whom you are bargaining. It also requires the ability to manage the expectations of their client. If the client needs "the process," which is frequently akin to bargaining over the price of fish at a market, this approach is probably not appropriate. If the plaintiff and/or plaintiff lawyer are fishing for the best defence offer, without regard for the intrinsic value of the claim, this approach is probably not appropriate. Conversely, if the insurance claims professional and defence counsel (or the authority granting body) have materially different views on the value of the claim, this approach may not be appropriate.

That said, the confidential nature of this process can allow the parties and their lawyers to “dip their toes in the water” and gauge the temperature of the water and appetite for settlement without potentially offending their negotiation dance partner.

Plan B – Escape Hatch – Pull the Chute

Let’s assume that I have made at least two visits to each room. Let’s assume that each of the participants at mediation has shared their realistic views with me with an equal level of candour. I have determined that the target figure shared by the plaintiff room will not work in the defence room(s) and that the target figure shared by the defence will not work in the plaintiff room. This process should take no more than 60-90 minutes after opening remarks have concluded. What next?

The parties are still free to negotiate in a traditional manner. Indeed, there is an enhanced opportunity to conduct negotiations as the mediator, while still protecting the confidentiality of discussions in caucus, can become a negotiation coach and encourage each side to present thoughtful, reasoned and substantiated demands and offers. There is no need for the participants to start at extreme positions. If the plaintiff target was 50-60X, the mediator can coach the plaintiff and their lawyer to present an offer in the 65-75X range. The mediator will have a better sense as to what may be well received in the other room. Similarly, if the defence target was 40-50X, the mediator can coach the defence to present an offer in the 25-35x range. The goal posts for settlement have been established without going through multiple rounds of insulting offers.

It is entirely possible that one side or the other or both have not been fully candid with the mediator. This exchange of offers could resuscitate settlement discussions and move one side or the other or both past what they told the mediator was their target during the earlier phase of the mediation. Since this information was shared only with the mediator in complete

confidence, neither side is painted into a corner. If the plaintiff wants to resolve the matter for less than the target of 50-60X, they are free to do so and there is no loss of face. The same is true if the defence wants to pay more than the target of 40-50X.

The offers which have been presented leave room for further negotiations, whether at mediation or as the litigation proceeds forward. Each side leaves with an understanding of what the other is seeking. Moreover, each side leaves with an understanding that their private and confidential end of day expectations do not align with the private and confidential end of day expectations of the other side.

Concluding Thoughts

If mediation is going to be a serious attempt to resolve a dispute, the steps taken in advance of and at mediation should be designed to dovetail with that objective. The approaches and thoughts which I have offered here are designed to put the parties and their lawyers in the best position to probe settlement prospects both confidently and confidentially. As a senior plaintiff lawyer said to me recently, “It is unsettling (pun intended) to share my private views on a realistic end of day outcome with the mediator before 12 noon.” Nevertheless, when the matter was resolved shortly thereafter, despite issues in relation to contributory negligence, a further issue in relation to the application of very substantial collateral benefit offsets and a very significant liability dispute amongst three defence participants, that lawyer became a convert.

To borrow from Winston Churchill, “Those who fail to learn from history are doomed to repeat it.” We are not limited by our prior experiences and approaches. We have an opportunity to craft a more productive, efficient and less acrimonious way to conduct mediations. Let's seize the opportunity and make the most of it.

ABOUT THE AUTHOR

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MEDIATION DESIGN AND PROCESS FOR COMPLEX CLAIMS – Vance Cooper

If two is company, three is a crowd, and four is a party, what is more than a dozen? The answer, as I recently learned when conducting a multi-party mediation for a complex claim, is that more than a dozen is a challenge (and that may be an understatement).

This two-part blog series reviews two particularly challenging, multi-party and multi-day mediations I conducted over the past year. The key difference between these mediations and a standard two party single day mediation was my involvement at an early stage in the design of and process for the mediations.

In this first blog post, I discuss a case where multiple plaintiffs were making claims against finite resources. I believe that advanced preparation and co-ordination among the plaintiffs, with the knowledge of the defendant(s), made a significant difference during the mediation.

WHEN MANY PEOPLE WANT A PIECE OF A SMALL OR FINITE PIE

A tractor trailer caused a multi-vehicle collision with several fatalities and several very serious injuries. There were other claims that were not of similar severity or magnitude. The tractor trailer maintained middling seven-figure insurance limits. Although there was an additional or peripheral defendant with significant financial resources, that defendant had a very strong liability defence.

I was first consulted after the parties had booked a two-day mediation but several months before the date of the mediation proper. Defence counsel for the target defendant indicated that based on his assessment of all claims, it was possible but not probable to resolve all claims within the target defendant's insurance limits. Consequently, defence counsel thought

that the primary exercise in the mediation would likely be prorating the available insurance limits. A secondary exercise would be to determine whether the additional peripheral defendant could be persuaded to part with anything, having regard for their strong liability position.

Extensive written background material from defence counsel for the target defendant provided me with some understanding of the nature and magnitude of the claims which would be under consideration at the mediation.

CONSULTING THE PLAINTIFFS

A series of 15-30 minute telephone appointments with counsel for the various plaintiffs allowed me to get further insight into the nature, magnitude and complexity of their respective clients' claims, to learn about any particular client sensitivities, and to elicit their views as to how to put our collective time together to best use.

During these calls, which took place three to four months in advance of the mediation proper, it became obvious to me that counsel for the plaintiffs, as a group, had no doubt that the target defendant's insurance limits would be exhausted. With one exception, which had more to do with strategy and tactics and situational necessity, all plaintiff lawyers agreed that the additional defendant was unlikely to attract liability but might pay something to avoid the ongoing costs of the litigation.

In the course of these calls, I reviewed the process of prorating and the unnatural and awkward task of not only assessing the realistic value of their own client's claims but also the competing claims of other plaintiffs when there were likely finite insurance resources.

WHAT IS PRORATING?

Let's assume that there are four claims made against a $1 million insurance policy. The claims are valued at $200,000, $300,000, $400,000 and $500,000, amounting to $1.4 million. If one takes $1 million of available insurance and divides this by the total claims figure of $1.4 million, this produces a percentage of 71.43%. Each plaintiff would recover 71.43% of their valuation amount. In my example, the plaintiffs would recover approximately $142,860, $214,290, $341,435 and $401,793, respectively.

The mathematics are relatively straightforward. Persuading counsel for the plaintiffs to provide a candid and realistic view of their client's claim and, moreover, to realistically value the claims of the competing plaintiffs, is another matter altogether.

FACT SHEETS AND TIMELINES

After completing a series of about a dozen teleconferences with lawyers for the plaintiffs and receiving input from all, I developed the idea that each plaintiff lawyer would produce what I described as a fact sheet.

This document would be provided to me and to all lawyers for all plaintiffs. It would provide, in one or two pages, the essential features of a given plaintiff's claim. Essential details like age, a brief description of injuries, nature of employment and financial details [if there was a loss of income claim] and a brief description of the claims for other heads of damages would be set out.

While I I believe there was universal buy in to the process, the effort expended by both the authors and the readers and the level of candour was inconsistent as amongst the lawyers for the various plaintiffs.

Timelines to create and share mediation memoranda and fact sheets were established and compliance was substantial. However, I suspect the effort expended by various plaintiff counsel, when reviewing the mediation memoranda of other plaintiffs, was inconsistent.

Finally, it was imperative that all plaintiff lawyers produce a list of assessable disbursements or, at minimum, an amount for assessable disbursements as early as possible in advance of the mediation to allow the lawyers for the defendants to obtain adequate authority to fund these disbursements at the mediation.

THE MEDIATION

Ultimately, after all this preparation, the mediation unfolded in the following manner:

Day 1

1. At the beginning of the first day of the mediation videoconference, all parties were invited to attend. I had something in the order of 35 Zoom windows open. After briefly reviewing the mediation's structure, I spent time explaining the process of prorating – what I anticipated to be the likely outcome of our time together and the largest challenge. The lawyers for the plaintiffs certainly agreed with my assessment and, "unofficially", it was what the lawyer for the target defendant expected. Counsel for the target defendant had asked me privately for an opportunity to speak first [more about this shortly].

2. In a typical two-party mediation, there would be an opening session where the plaintiff lawyer would make submissions on behalf of their client, followed by a statement by the plaintiff themselves, followed by defence counsel and the defendant representative or insurance representative. In this case, it was recognized by all parties that this was going to be too time consuming and a poor use of our time together. Instead, I explained to all plaintiffs that extensive briefs had been delivered by their respective lawyers and that these briefs had been read not only by defence counsel but by counsel for the other plaintiffs, all of whom were competing for what may be a finite amount of financial resources available to be shared amongst all plaintiffs.

With the benefit of hindsight, I wish we had designed the process to allow for brief opening sessions for each individual plaintiff. All plaintiff counsel

would observe these sessions, but the other plaintiffs would be put in breakout rooms while this was happening to respect privacy. The individual plaintiffs may have had a better experience and perhaps felt better about the outcome if given the opportunity to speak, even if briefly. Nevertheless, the process we designed was driven by the imposed time limitation. The parties had scheduled a two-day mediation without any input from me or discussion amongst themselves in relation to the process or design. While a two day mediation (in comparison to perhaps a three-day mediation) was certainly more efficient for the lawyers, it seemed to be less satisfying for the parties themselves.

3. Counsel for the target defendant spoke next and, to the surprise of no one, advised all concerned that he had been instructed to tender his insurance limit in exchange for the usual terms. Counsel for both defendants spoke politely and respectfully to all of the plaintiffs and made the appropriate sympathetic and empathetic comments.

4. At this point, counsel for the defendants and all individual plaintiffs left the mediation. Each plaintiff lawyer made an opening on behalf of each of their clients for the benefit of other plaintiff lawyers and the mediator. On the first pass, there may have been some comments made in relation to valuations and some questions by way of clarification from the lawyers for the other plaintiffs. During the second pass, more effort was put into critical evaluation and number crunching. The use of an Excel spreadsheet was very helpful as it demonstrated not only the individual valuations but the valuations in the aggregate and prorating.

5. By the end of the first day, there were rough assessments for each of the claims and rough prorating, but nothing was set in stone. Unusually, all or most of these discussions (or early stage negotiations) were conducted with all plaintiff lawyers in the same room at the same time. There were no caucus sessions that I can recall. Each plaintiff lawyer was charged with the responsibility of explaining what had transpired at the mediation to this point in time to their clients. I reported what had transpired to defence counsel without getting into any details, percentages or otherwise. I was also able to gain some insight as to the views of defence counsel, uninfluenced by discussions amongst plaintiff lawyers, in relation to the relative valuations of the claims. This information was going to be very helpful to me in group and caucus sessions on day two.

Day 2

6. On the morning of the second day, the mediation appeared to take a step backward. Many of the lawyers tried to backpedal on valuations and assessments made on the first day and expressed discomfort about assessing the claims of other plaintiffs. While not unexpected, this was exactly what we tried to anticipate and address through early exchange of memoranda and fact sheets. In any event, we made what was essentially a third pass around the “main room” with further thoughts, comments, evaluations and assessments of the individual claims.

7. Caucus sessions were a principal focus of Day Two. I was able to speak privately and confidentially with individual plaintiff lawyers. I obtained their views on the evaluation of their individual client’s claims and gained insight as to whether they agreed or disagreed with the valuation of the other claims. When there was disagreement, I attempted to gain a sense of its extent, detail and magnitude. It was very important to keep track of all of these comments so I could remind myself of the extent to which I could quote individuals when speaking with other plaintiff lawyers. Augmented by insights and guidance I had received from defence counsel, suffice it to say, I made no friends as I relayed messages which were perceived as critical of their valuation as each plaintiff lawyer tried to maintain their share of the “pie.”

8. Toward the end of the second day, a consensus was reached – with one exception. One of the plaintiffs appeared to be a worker in the course of their employment for purposes of the Workplace Safety and Insurance Act (WSIA). This plaintiff elected to opt out of the WSIA to pursue a civil action. Unfortunately, the claim against the target defendant appeared to be barred because the owner and driver of the tractor trailer was similarly covered by WSIA. The peripheral defendant had a very strong liability position, but did not have the benefit of a WSIA defence. Their contribution, motivated more by economics than by principled evaluation of exposure, was divided on a prorated basis as amongst all plaintiffs but for the exceptional plaintiff. In a bold move, the peripheral defendant agreed to allow the claim of the exceptional plaintiff to continue for purposes of establishing damages and the percentage liability, if any, as against this defendant. This required confidence on the part of the peripheral defendant

and their counsel that their offer would be equivalent to the result after an application to the WSIAT which would have the same net result from their perspective.

As I understand matters, the exceptional plaintiff ultimately did re-elect to receive benefits under the WSIA. I do not know whether the exceptional plaintiff has continued the action to establish negligence and damages as against the peripheral defendant.

9. By the end of the second day, there was an agreement in principle to settle the claims of all plaintiffs, but for the exceptional plaintiff, with the lawyers for all plaintiffs prepared to make recommendations to their clients. The plaintiffs returned to the Zoom mediation so that concluding remarks could be made by all concerned. Given the “loose ends” in relation to the claim of the exceptional plaintiff, claims of minor plaintiffs, court approval and the like, it did take several months for the settlement achieved in principle at the end of the mediation to be implemented.

TAKEAWAYS

In a case where the insurance limits are likely insufficient to satisfy the claims of competing plaintiffs, I cannot emphasize enough the importance of plaintiff lawyers sharing information and documentation with the lawyers for competing plaintiffs early and often. As the mediation approaches, it is imperative that each plaintiff lawyer evaluate the claims of competing plaintiffs with almost the same rigour as they apply to evaluating the claims of their own clients.

If I was designing a process for a similar multi-party mediation again, I would try to ensure space and time are reserved to give individual plaintiffs a greater sense of participation and involvement. This might extend the time for the overall mediation, but I believe it would provide the individual plaintiffs a better understanding of and satisfaction with the process and the outcome.

In the next part of this series, I will review another multi-party mediation with very different circumstances and processes. That case involved a

large number of claims arising from an event for which the defendants might not attract any liability. This was certainly the united defence view but, win or lose, there were going to be significant legal expenses defending these claims which would involve months of trial time.

MEDIATING A COMPLEX MULTI-PARTY MATTER – Vance Cooper

Mediating a complex, multi-party case is a lot like baking a cake. It's not enough to have the right ingredients. You need to observe careful direction and patience to blend the ingredients in the right quantities and at the just the right time to produce the best result possible.

In this particular case, which was of high sensitivity and extreme confidentiality, there were a large number of claims arising from an event for which the defendants might not attract any liability. Certainly, this was the official defence position though they appreciated that there was risk to their position. Win or lose, there were going to be significant legal expenses accrued in defending these claims to and through a trial which would last months in total.

There were also a host of factual issues in dispute. Moreover, some very important legal issues in this case could have seen the litigation continue to a provincial appellate court.

THE DEFENDANTS' PREFERENCE

If it was solely up to the defendants, we would have dispensed with the mediation process entirely and they would have authorized me to serve as facilitator and negotiator. In this scenario, I would have obtained settlement demands from each of the many plaintiff lawyers, presented those demands to lawyers for the defendants and then circled back with offers to the many plaintiff lawyers.

The defence interests appeared to be motivated primarily by economics. They projected high six-figure or low seven-figure defence costs, relatively low risk prospects for a sustainable finding of liability and, before any liability considerations, damage assessments as low as five figures to as much as low seven figures.

The defence was initially reluctant to participate in a full-blown mediation process. Given that there were approximately 12 pending actions, participating in a standard mediation process could take two to three weeks to complete.

ESTABLISHING CONSENSUS AMONG THE PLAINTIFFS

It was far more challenging to identify the interests on the part of the plaintiffs. A variety of factors, including the number of different plaintiffs, their separate representation, and widely varying values of claims, made it difficult to establish how they would want to individually and collectively proceed.

I thought it important for the plaintiffs to receive an unfiltered view of the overarching issue of liability. This concept would ultimately drive the settlement discussions and it could stand in the way of settlement if it was not properly understood. Moreover, I wanted each of the plaintiffs to be part of a process and feel that they were being heard, understood and respected.

FASHIONING THE MOST EFFICIENT AND FAIR MEDIATION PROCESS

In a series of pre-mediation caucuses, we were able to design a time-sensitive and cost-efficient process.

The defendants proposed a process whereby one plenary session, involving lawyers for all parties, would address the legal and liability issues and overall mediation processes.

Counsel for the various plaintiffs delivered individual mediation memoranda. These statements addressed the common issue of liability and the unique or personal issues applicable to their individual client's own claim for damages. The liability portions of the mediation memoranda were shared amongst all counsel. The portions of the memoranda dealing with damages were shared with defence counsel only. If there had been an

issue with finite insurance resources, those portions of the briefs dealing with damages would likely have been required to be shared.

Counsel for the defendants delivered omnibus mediation memoranda addressing the liability issues common to all plaintiffs. Separate mediation memoranda were delivered to address the individual plaintiffs' claims for damages. This process respected privacy interests but allowed for a group discussion of the common issue of liability.

SHARING THE COST OF THE MEDIATION

Establishing who would be responsible for the cost of the mediation and to what degree was another critical task in designing the process. The defendants agreed to pay a very substantial portion of the total cost of the mediation, regardless of its outcome. However, they required each plaintiff, through their lawyer, to commit to pay $1,000 plus HST as their individual contribution toward the mediation's total costs. If a plaintiff's individual claim was resolved, the defence would pay that plaintiff's share of the cost of the mediation.

I suspect the defence was interested in each plaintiff having some "skin in the game." No one seemed to object to this approach.

MANAGING SETTLEMENT DISCUSSIONS FOR 12 ACTIONS

Confidential Offers

All plaintiffs, defence representatives and their respective lawyers met for an initial plenary session. This portion of the mediation addressed the mediation process generally and the specifics applicable to the mediation of each of these 12 actions.

Counsel for the defendants made it clear that any offers made in the subsequent individualized mediation sessions were to be absolutely confidential. These offers could not be shared with anyone other than the plaintiff's legal and financial advisors and immediate family. Specifically, the

offers could not be shared or compared as amongst lawyers for other plaintiffs.

Counsel for the defendants also communicated that any potential settlements reached in the individualized mediation sessions would be tentative or provisional, subject to concluding all of the individualized mediation sessions. Counsel for the various plaintiffs were informed that the defendants reserved the right to settle all, some or none of the individualized matters. In other words, the defendants maintained that settling anything was not contingent on settling everything. However, they certainly implied they would need most, if not all, claims to be settled for the tentative or provisional settlements to be confirmed.

Confidential Settlements

Finally, if any settlements were reached in these actions, the defendants would require each plaintiff to sign a full and final release, including a confidentiality clause. Case law seems fairly clear at this point that a confidentiality clause must be bargained for and cannot be assumed as part and parcel of a standard full and final release.

Counsel for the plaintiffs were agreeable to this approach. Certainly, no one voiced any overt objection. I am quite certain that the lawyers for the plaintiffs appreciated the challenges in relation to the liability issue and understood that the defence motivation to resolve the claims would be influenced to a large extent by their ability to wrap up most, if not all, litigation once and for all.

In spite of this very prominent “loose end” surrounding liability and the ability of the defendants to confirm or reject settlement at the end of the individualized mediation sessions, I did not sense any reluctance on the part of any of the parties to hard bargaining as we moved into the individualized mediation sessions.

ABBREVIATED MEDIATIONS BY DESIGN

The individualized mediation sessions were designed to be abbreviated.

Given that all parties had already heard opening remarks in relation to the mediation process and detailed submissions in relation to the liability issues, we were able to “hit the ground running.” There was a discussion of the damages, but it was relatively abbreviated. Each individualized mediation session was designed to be completed in three hours. This time limit required each side to have a firm grasp of the damages so that offers could be prepared and exchanged in a timely fashion.

In some cases, the tentative or provisional agreement for the quantum of damages was reached in three or four rounds of offers. In other cases, there were a greater number of offers. Assessable disbursements were significant as part of the overall settlement process. It was imperative to prepare those lists in advance of the mediation and provide them to defence counsel so that disbursements could be considered for purposes of securing settlement authority. In most cases, the parties were able to reach an agreement in principle in less than three hours. We ran sessions starting at 9:00 AM, 12 noon and 3:00 PM. We purposely put the more contentious or complex claims for damages into the 3:00 PM time slot to allow for the option of “overtime.”

By the middle of the last day, all but one of the plaintiffs’ claims had been settled and the last claim settled by the end of the day. I had queued up several draft emails confirming settlements. Once the last of the plaintiff claims was settled, I was able to hit the “send” button on a dozen e-mails and these matters were put to rest.

MY KEY TAKEAWAYS

Reflecting on this multi-party mediation, I believe it clearly demonstrates that preparation and process are truly interdependent considerations. I was informally retained very early in the mediation process to consult with stakeholders. The idea was for me to try to get a good sense of what these stakeholders would be looking for out of the mediation process.

These communications allowed me, with significant input from the stakeholders, to design a mediation process that efficiently managed time and contained costs from ballooning to exorbitant levels. The process would only work if people were prepared to commit to the timelines and

deadlines to complete their respective tasks. Whether it was preparing and delivering mediation memoranda, drawing up a list of assessable disbursements, planning a series of offers to expedite the negotiation process, or securing settlement authority, getting buy-in to the process was absolutely necessary for it to work as well as it did.

CONCLUSION

When all was said and done, I imagine the parties collectively saved hundreds of thousands of dollars on experts' fees, possibly more than $1,000,000 on legal fees and managed to resolve 12 lawsuits with less than a full week of work. If these actions went to trial, it would take years to set the court date and months more to be tried.

This is not a tale of a mediator with superpowers; rather, it is very much an example of how many people with distinct and potentially differing interests can collectively put their minds toward solving a problem by designing and implementing a process that would facilitate a solution.

Benjamin Franklin famously advised fire-threatened Philadelphians that "an ounce of prevention is worth a pound of cure." Clearly, preventing fires is better than fighting them. The same concept applies to complex multi-party mediations. Preparation, forethought and planning early in the timeline leading to mediation is far more effective and preferable. Waiting until the last few days or hours leading up to the mediation or on the day of the mediation itself is a recipe for failure. Settlements don't magically appear; they are the result of careful planning and forethought.

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TAB 8B

7th Motor Vehicle Litigation Summit

Virtual vs. In person Mediations

Judy Neger
JN Mediations Inc.

September 18-19, 2024

cpd

Virtual vs. In person Mediations

By: Judy Neger, JN Mediations Inc.

An analysis on the pros and cons of mediating in the digital world

All the data collected for this article are specific to personal injury/insurance related mediations in Ontario

The following article is a summary of findings based on a study of mediations conducted from 2016 to 2020, all in person and from 2020 to 2024, virtual mediations. Although most mediations were virtual, there were 10 mediations conducted in person from 2020 to 2024, which are also included in this study. Plaintiff and Defense lawyers as well as insurance adjusters were interviewed by way of survey to gain perspective on the pros and cons of virtual and in-person mediations.

Introduction

Recently I was on a trip to New York City with my sisters. We went to Times Square which is arguably one of the busiest areas in New York with tons of tourists. With three sisters, it was difficult to agree on which stores to shop at so we split up for a while and said we will text each other where we are and where to meet up. I looked at my sisters and said, what did we do before cell phones? As a kid or teenager we went on trips and somehow managed to find each other without the benefit of cell phones! When we are so thoroughly programmed to use our technology, it is hard to imagine what life was like without it.

In the last four years since the Covid-19 pandemic began, mediation has turned almost exclusively onto a virtual experience. Prior to Covid, all mediations were conducted in-person at various venues that were considered neutral spaces. In this article, we will explore the benefits and drawbacks to conducting mediations on Zoom as opposed to in-person.

In this case study, I examined mediations conducted by JN Mediations from 2016 to 2024 and compared the settlement rates of those conducted in person (pre-Covid) and virtually (post Covid). We also asked 85 lawyers and 30 adjusters to complete surveys regarding their experiences with virtual mediations. This article is based on an analysis of 120 in-person mediations between 2016 to 2020, 120 virtual mediations between 2020 and 2024 and 10 in-person mediations from 2020 to 2024. The assumption of this study was that in-person mediations resulted in higher settlement rates. The stats are as follows:

Examined 120 in person mediations (pre covid) conducted between 2016-2020 (80% settlement rate)
Examined 120 virtual mediations (post covid) conducted between 2020-2024 (70% settlement rate)
Examined 10 in person mediations (post covid) conducted between 2020 and 2024 (90% settlement rate)
Of the 250 cases observed, approximately 50% were mandatory mediations and 50% were private.

The Concerns:

One of the concerns raised in the surveys and expressed mostly by defense counsel is the lack of transparency on the virtual platform. Counsel could not be sure exactly who was in the room and/or listening in and affecting settlement discussions. This concept is rooted in the confidential nature of the mediation. If someone on Zoom does not disclose if there are other people in the room, or anyone

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who can hear what is going on, this is potentially a breach of confidentiality and can affect the process.

Another concern was decorum. Since the mediations proceed *"virtually,"* many participants are multi-tasking, distracted by surroundings, driving, unable to focus, or dressed poorly (this applies equally to clients *and* lawyers). Working on a virtual platform while being at home can create some distractions such as the needs of children and / or pets who need to be tended to, and an overall need to juggle and reconfigure work/life balance. Appropriate attire should always be a must regardless of virtual or in person. Remember: mediation arises from a claim made in the Ontario Superior Court of Justice. Parties and their counsel should communicate, dress and act accordingly.

Poor technical or audio issues, spotty wifi or internet connection, lack of computer skills, and poor lighting were all concerns on Zoom. From the survey responses, some lawyers suggested to mitigate the detrimental effects of these issues by having more than one device available for the Zoom meeting. Most lawyers agreed that elderly plaintiff clients in particular should go to their lawyer's office to avoid any technical pitfalls.

Survey respondents also expressed concern with their inability to read body language, maintain eye contact, and a perceived lack of overall professionalism on Zoom. Communicating with clients virtually as opposed to in-person - especially elderly clients – presented as a challenge for many plaintiff lawyers. Many defense lawyers expressed concern with the inability to build rapport with the plaintiff and the other lawyers when conducting mediations on Zoom.

Many lawyers agreed that it is easier to be "uncivil", "aggressive", "unprofessional" and "condescending" to plaintiffs, clients, and other lawyers in a virtual setting as opposed to in-person.

Some lawyers expressed concern over needing to ask the mediator to put them in a room with co-defendants as opposed to the ease with which lawyers can do this in-person on their own initiative. Being in virtual breakout rooms gives the mediator too much control over who can speak to whom and when. In my practice, I am flexible when lawyers want to speak to each other. However, if a mediation is going badly and lawyers are upset with each other, sometimes there are screaming matches when they are re-joined and that is not productive.

The biggest consensus of concerns among lawyers was the failure or refusal of some lawyers to say goodbye at the end of the mediation and how much easier it is on Zoom to "log out". In person, saying goodbye was much more common. As a mediator it is a struggle as we do not want to force people to say goodbye but at the same time, we should not be put in the position of forcing people to act professionally. If a plaintiff would like to log off after a particularly difficult negotiation, I encourage his or her lawyer to go to the main room and say thank you and goodbye to the other side, regardless of the outcome.

Another significant issue raised by respondents to the survey was that, in person, lawyers would have a release and obtain a signature from the plaintiff on the spot. In virtual mediations, your electronic release may not executed right away. In some instances, plaintiffs have changed their minds and naturally this leads to a barrier to settling a file. I have had lawyers email me asking if I would testify

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at a motion to enforce settlement and provide notes from the mediation, which indicates to me they did not read my agreement to mediate!

Some lawyers expressed concern about lack of socializing and camaraderie among lawyers when doing work on Zoom. Some expressed feelings of isolation, loneliness and missing the food at Network!

The Benefits:

Saving costs on travel time and venue fees was overwhelmingly cited as the biggest benefit of Zoom mediations from lawyers and adjusters. Not having to be inside the same physical room with clients, the flexibility that comes with virtual and the convenience of working from home (ie child care duties, schedules, commutes etc) were also mentioned positively. Many younger lawyers with small children discussed the benefits of the work/life balance and flexibility they have doing virtual mediations as opposed to in-person.

Many lawyers shared their experiences that virtual mediations were much more efficient and effective, saving time on travel and attending at the mediation. For example, if a mediation ends at 4pm and they are at home, they do not have to worry about the commute to get home.

Some lawyers expressed that in person mediations are more likely to settle due to the costs involved in getting everyone to attend in person. With mandatory mediations or mediations where there are no monetary offers being made from the defense (example: "*dismissal without costs*"), most lawyers expressed a desire to "rush the mediation" or conduct a "quick mediation". These lawyers agreed that virtual was more effective as there would likely not be a lot of negotiating involved.

In my professional opinion, I prefer in-person mediations because it allows the mediator to build better rapport with the clients, increase concentration and focus on the case at hand and provide for a more professional environment. It also allows me to actually wear heels! Young lawyers get the opportunity to network, meet people and learn more. The results from my study suggest that there is a higher percentage of settlement rates by in person mediations (80%), as opposed to virtual (70%), albeit only by 10%. Of the mediations that *were* conducted in person over the last four years, 90% settled. However, given the small sample size, it is difficult to conclude that these mediations resulted in a settlement *because* they took place in-person.

Although the data suggests that litigants perceive more drawbacks than benefits to virtual mediations, the main benefit was seen as saving on costs and time -- especially for people outside the GTA – which arguably should be given more weight. This, combined with the flexibility in schedules that virtual mediation provides was enough for most people to agree that mediations will almost never go back to being conducted *exclusively* in person and that only unique cases would probably be considered for same. Even though the courts have encouraged a return to in person mediations, virtual mediations have become the norm and it appears the legal profession is reluctant to give up the convenience of virtual mediations. As we continue to become accustomed to technology and comfortable with the new advantages, we will adapt to the new norm, just like texting my sisters where I will be so they can find me in the crowded streets of New York.

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TAB 9

7th Motor Vehicle Litigation Summit

Post-Discovery Evidentiary Issues: Sanctions and Remedies (PPT)

Associate Justice Ronna Brott
Superior Court of Justice

Serena Genova
Desjardins General Insurance Group

Jaclyn Habas
Greg Monforton and Partners

Post Discovery Evidentiary Issues: Sanctions and Remedies

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September 18-19, 2024

cpd

Post-Discovery Evidentiary Issues: Sanctions and Remedies

Associate Justice Ronna Brott of the Superior Court of Ontario

Serena Genova, Desjardins General Insurance Group

Jaclyn Habas, Greg Monforton and Partners

Case Conferences

- 50.13 (1)
  - A judge may at any time, on his or her own initiative or at a party's request, direct that a case conference be held before a judge or associate judge

Case Conferences: Jurisdiction

R. 50.13(5) - Matters to be Dealt With

At the case conference, the judge or associate judge may,

(a) identify the issues and note those that are contested and those that are not;

(b) explore methods to resolve the contested issues;

(c) if possible, secure the parties' agreement on a specific schedule of events in the proceeding;

(d) establish a timetable for the proceeding; and

(e) review and, if necessary, amend an existing timetable. O. Reg. 170/14, s. 16; O. Reg. 383/21, s. 15.

R. 50.13(6) Powers

At the case conference, the judge or associate judge may, if notice has been given and it is appropriate to do so or on consent of the parties,

(a) make a procedural order;

(b) convene a pre-trial conference;

(c) give directions; and

(d) in the case of a judge,

(i) make an order for interlocutory relief, or

(ii) convene a hearing. O. Reg. 170/14, s. 16; O. Reg. 383/21, s. 15.

Case Conferences: View from the Bench

- When to request?

- Advantages?

Substantive Orders at Case Conferences

- *Miller v. Ledra et al*, 2023 ONSC 4656
- *Think Research Corporation v. N&M Medical Enterprises*, 2023 ONSC 6910

Case Conferences: Considerations

- Costs
  i. *Orologio v. Reali*, 2019 ONSC 686
  ii. *Davies v. Cossnell*, 2022 ONSC 654

- Appeals?

What's next? Rules 30.03 and 34.12

What are the proposed changes?

How will this impact us?

Questions?

Thank you!

Post-Discovery Evidentiary Issues: Sanctions and Remedies

By: **Jaclyn Habas,** *Greg Monforton & Partners* and
Serena Genova, *Desjardins General Insurance Group*

Examinations for discovery and documentary disclosure are the most crucial stages of a civil suit. They provide lawyers with the tools to properly evaluate the merits of a personal injury claim.

Documentation that flows from a motor vehicle lawsuit typically includes a motor vehicle collision report, police file (ideally unredacted), as well as the Plaintiff(s)' clinical notes and records, employment files, extended health benefits file, and more. Once relevant documents are exchanged and reviewed, typically Examinations for Discovery are held. Examinations for Discovery allow for both Plaintiff and Defence counsel to meet the named parties and ask them questions to get a better sense of their respective cases, while also allowing each party to assess the other's credibility.

During the Examinations for Discovery, both Plaintiff and Defence counsel request information and documents from one another. While the lawyers mostly agree to answer and produce relevant documents/responses, many times, they refuse to do so for various reasons, including the issue of litigation privilege. The lawyers are then left with the option of disputing the refusals by way of motion in front of a Judge or Master.

Undertakings and refusals motions are one of the most common types of motions brought in personal injury litigation. Refusals, specifically, can often serve as a hindrance to the discovery process. It is well-known that many courthouses are backlogged as a result of parties bringing undertakings and refusals motions throughout Ontario. In jurisdictions like Toronto, it can take well over one year to just hear such a motion. As a result, the bench and bar have long contemplated how to resolve the backlog and resulting access to justice issues.

This paper delves into the conundrum of what to do when faced with improper refusals and unanswered undertakings, and best practices to address (or avoid) same. Can we imagine a world without refusals motions? If not, how do we move our cases along? While there is no singular or perfect answer, we look at the sanctions for refusals and failure to

provide relevant documents in a motor vehicle lawsuit, the function and use of Case Conferences in lieu of motions, and the proposed changes to Rules 30.03 and 34.12 stemming from the Civil Rules Committee, specifically the Refusals Motions Subcommittee, and the Civil Reform Working Group.

I. Sanctions for Failing to Produce Documents Post-Discovery

How documentary discovery is handled in a proceeding is perhaps one of the best indicators of how efficiently and expeditiously a matter will proceed and resolve. As aptly noted by the Ontario Bar Association, "*the prevalence of incomplete, untimely, disorderly and excessive disclosure and production often leads to increased costs, delays and disputes in the discovery process*".[1]

As indicated above, our goal is to hopefully provide some insight as to how to address post-discovery evidentiary issues, without resorting to a motion, or avoid them altogether. In order to further delve into this topic, it is imperative to briefly review the relevant *Rules* on discoveries and the production of relevant documents.

a) *Documentary Production Obligations:*

Rule 1.04 states that the *Rules* are to be construed in a manner which secures the just, most expeditious and least expensive determination of a proceeding, on its merits.[2]

Rule 30.03 mandates that each party produce and swear an Affidavit of Documents, containing all relevant documents in the party's possession, control, or power. Subsection 30.03(2) outlines the various schedules to be included in the Affidavit. Rule 30.08(2) outlines the sanctions for failing to serve an Affidavit of Document or produce a document for inspection in compliance with the *Rules*. In such circumstances, the Court may:

> *(a) revoke or suspend the party's right, if any, to initiate or continue an examination for discovery;*
>
> *(b) dismiss the action, if the party is a plaintiff, or strike out the statement of defence, if the party is a defendant; and*

[1] Ontario Bar Association, "Discovery Best Practices", online: at page 4, <https://www.oba.org/en/pdf_newsletter/DTFGeneralDiscoverybest.pdf>
[2] *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 1.04.

(c) make such other order as is just.[3] [Emphasis added].

Rule 30.02 outlines the scope of a party's obligation to produce documents relevant to a proceeding.[4] The following subsections are of note:

> *30.02 (1) Every document relevant to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in rules 30.03 to 30.10, whether or not privilege is claimed in respect of the document.*
>
> *(2) Every document relevant to any matter in issue in an action that is in the possession, control or power of a party to the action shall be produced for inspection if requested, as provided in rules 30.03 to 30.10, unless privilege is claimed in respect of the document.*

Rule 30.07 makes clear that the obligation to disclose relevant documents persists throughout the course of litigation. It states that where a party comes into possession or obtains power over a document that relates to a matter in issue that is not privileged, or discovers that the Affidavit is inaccurate or incomplete, the party shall forthwith serve a supplementary Affidavit of Documents with the requisite modifications.

Rule 30.08(1) outlines the sanctions for failing to comply with the requirements in Rule 30.02. Pursuant to this Rule, if a party fails to disclose a relevant document in an Affidavit of Documents, or fails to produce said document, the party may not rely on said document at trial if it would be favourable to that party's case, except with the leave of the trial Judge.[5] If the document is unfavourable to the party who failed to produce it in the first place, the Court has the discretion to make an Order as it deems fit.[6]

Rule 48.04(2)(a) states that setting an action down for trial does not relieve a party from complying with undertakings given at an examination for discovery.

The Ontario Court of Appeal's decision in *Falcon Lumber United v. 2840375 Ontario Inc*.,[7] underscores the significant consequences attached to non-compliance with documentary

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[3] *Ibid* at Rule 30.08(2).
[4] *Ibid* at Rule 30.02.
[5] *Ibid* at Rule 30.08(1)(a).
[6] *Ibid* at Rule 30.08(1)(b).
[7] *Falcon Lumber Limited v 2480375 Ontario Inc.*, 2020 ONCA 310, 325 ACWS (3d) 174.

production obligations. In that decision, the Court of Appeal upheld the Motion Judge's decision to strike out a Statement of Defence and a $6,246.00 costs Order against the Defendants' lawyer for breach of documentary production obligations.

The claim arose out of a debt claim for the payment of $131,748.17 for goods sold and delivered. The Court of Appeal expected this type of claim to have a "*reasonably prompt disposition of the dispute on its merits*."[8] The litigation was delayed by the Defendants for over two years due to their failure to comply with documentary production orders.

In the lower Court decision, the motion Judge highlighted the course of the litigation as follows:

- 30 total dates for motions, cross-motions, and case conferences;
- The subject of the majority of court attendances centered on the Defendants' failure to comply with production obligations and orders;
- 6 production orders made against the Defendants;
- As of the date of the motion (which was then appealed), the Defendants still had not completed production of all relevant documents.

The Court of Appeal found that the motion Judge's Order was not disproportionate based on the goal of accessible civil justice from *Hryniak v. Mauldin*.[9] It determined that the Defendants should not be permitted to remain in default of their production obligations, especially in view of Rules 30.06 and 30.08 of the *Rules of Civil Procedure*. The Court cited *Starland Contracting Inc. v. 1581815 Ontario Ltd*.[10] to affirm that the motion Judge was well within his authority as a case management Judge to dismiss proceedings for repeated failure to comply with Court Orders. Brown J.A. concluded that the Motion Judge had been more than fair in the opportunities granted to the Defendants to meet their

[8] *Ibid* at para 6.
[9] *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87.
[10] *Starland Contracting Inc v 1581518 Ontario Ltd*, [2009] OJ No 2480, 178 ACWS (3d) 338.

evidentiary obligations under the *Rules* and the order to strike out their pleadings could have been made much earlier.

The Court of Appeal provided several guiding principles to be considered when deciding whether a pleading ought to be struck due to non-compliance with documentary disclosure, as follows:

> *"The remedy is not restricted to "last resort" situations, in the sense that it must be preceded by a party breaching a series of earlier orders that compelled better disclosure or production. However, courts usually want to ensure that a party has a reasonable opportunity to cure its non-compliance before striking out its pleading;*
>
> *A court should consider a number of common sense factors including: (i) whether the party's failure is deliberate or inadvertent; (ii) whether the failure is clear and unequivocal; (iii) whether the defaulting party can provide a reasonable explanation for its default, coupled with a credible commitment to cure the default quickly; (iv) whether the substance of the default is material or minimal; (v) the extent to which the party remains in default at the time of the request to strike out its pleading; and (vi) the impact of the default on the ability of the court to do justice in the particular case;*
>
> *The merits of a party's claim or defence may play only a limited role where breaches of disclosure and production obligations are alleged as one would reasonably expect a party with a strong claim or defence to comply promptly with its disclosure and production obligations;*
>
> *In considering whether an order to strike out a pleading would constitute a proportional remedy in the circumstances, a court should consider:*
>
> - *the extent to which the defaulting party's conduct has increased the non-defaulting party's costs of litigating the action, including the proportionality of those increased costs to the amount actually in dispute in the proceeding; and*
> - *to what extent the defaulting party's failure to comply with its obligation to make automatic disclosure and production of documents has delayed the final adjudication of the case on its merits, taking into account the simplicity (or complexity) of the claim and the amount of money in dispute."*[11]

[11] *Supra* note 7 at para 57.

b) Refusals:

While an entire paper could be dedicated to the topic of refusals, we will briefly canvass perhaps two of the most common types of refusals that arise in the personal injury context, which can often lead to a motion. That is, statements provided by parties following a motor vehicle accident over which litigation privilege is claimed (i.e., insured statements to the insurer) and the production of social media accounts.

In *Pearson v. Inco Ltd*.,[12] the Court considered whether the Plaintiff was required to disclose notes containing relevant facts obtained from witnesses by Plaintiff's counsel, over which counsel claimed litigation privilege. The Court ruled that the physical notes containing the facts in issue were privileged and not subject to production; however, the factual content of those privileged notes had to be disclosed. In arriving at the decision, Cullity J. referred to the following statement of law by Professor and Justice Robert J. Sharpe in *Claiming Privilege in the Discovery Process*[13]:

> *"It is well established in the case law that where a party on discovery has asked for facts relating either to his own case or to that of his opponent, those facts must be revealed, notwithstanding that the party's source of information is a privileged report or document.* [emphasis added]."[14]

In *Sangaralingam v. Sinnathurai*,[15] the Divisional Court considered whether the Defendant was required to produce the statement he provided to his insurer or to provide the information contained in it. Defence counsel refused to produce both the document and the information on the basis that both were protected by litigation privilege.

The Court found that a party under examination cannot withhold relevant information merely because that information may be included in a privileged document. However, that is not what occurred in this case. Plaintiff's counsel had the opportunity to ask the Defendant questions about matters relevant to the material issues. The Defendant did not withhold information about those issues. There was, therefore, an alternative means available for the Plaintiff to obtain the relevant information, and no need to seek disclosure

[12] *Pearson v Inco Ltd*., [2008] O.J. No. 3589, 169 A.C.W.S. (3d) 524 at para 13.
[13] Robert J. Sharpe, "Claiming Privilege in the Discovery Process", (1984) Special Lectures of the Law Society of Upper Canada, at page 169.
[14] *Ibid.*
[15] *Sangaralingam v Sinnathurai*, 2011 ONSC 1618, [2011] OJ No 1205.

of the contents of the privileged document. The Court further noted that questions which directly seek to compromise the Defendant's credibility may be properly refused.[16]

With respect to production of social media accounts, Justice Boswell in *Mohamud v. Juskey*[17] was asked to consider this often litigated and debated topic. In this case, the Defendants requested digital copies of the Plaintiff's Facebook and Instagram accounts. The Plaintiff refused stating that production offers minimal probative value and will result in substantial prejudice in the form of significant intrusion on her personal privacy.

In his Motion decision, Justice Boswell reviewed Rules 29.2 and 30.02 as they relate to the relevancy of social media accounts. In short, Justice Boswell agreed that "*there is a reasonable inference that the private areas of the Plaintiff's Facebook and Instagram accounts will contain similar to that shared in the public areas of those applications*"[18], however, he was not satisfied that the entire contents of those social media accounts were producible. Instead, he ordered that the Plaintiff produce a particularized Affidavit of Documents listing all of the photographs in her possession, control, or power, including those posted on social media, that are relevant to the live issues in the proceedings.

Counsel should be prepared to discuss the consequences of maintaining social media accounts with their clients. While everything may not be producible, it will be an onerous task to go through accounts and determine – photograph by photograph – if same relates to the parties claim for damages.

In sum, an in-depth knowledge of the *Rules* and case law surrounding a party's production obligations is the best way to avoid evidentiary issues from arising at discovery.

c) <u>Correcting Evidence Post-Discoveries and Sanctions:</u>

Rule 31.09(1) outlines the obligations on a party to correct evidence provided at a discovery that is later discovered to be incorrect or incomplete when made or is no longer correct and complete. The Rule stipulates that a party "shall" correct the evidence in

[16] *Ibid* at paras 30 and 34.
[17] *Mohamud v Juskey*, 2023 ONSC 4414.
[18] *Ibid* at para 86.

writing forthwith.[19] This can be done through a letter or e-mail. When an answer is corrected, the evidence may be treated as if it formed part of the examination and the party receiving the correction is entitled to further examination on that issue.[20]

The sanctions for failing to correct answers are significant. A party who fails comply with Rule 31.09(1) may not introduce the new information at trial, if favourable to the party's case, except with leave of the trial Judge. If the new evidence is not favourable to the party's case, the court may make any such order as it deems just.[21]

Whether the original evidence provided at discovery in addition to the correction are permissible at trial was canvassed in *Capital Distributing Co. v. Blakey*.[22] In that decision, the Plaintiff was permitted to read in both the original answer made on discovery as well as the corrected answer. The Court noted, *"[i]t is therefore, in my view, left to the Judge hearing the Motion how it is to be treated and that the Judge is entitled to examine both the original and the amended answers and weigh them accordingly and in the context of the Motion so brought*."[23]

In *Baron v. Nguyen*,[24] the Plaintiff's lawyers refused to produce the Plaintiff for a further examination for discovery, taking the position that the medical reports were sufficient. The Court found that, pursuant to Rule 31.09(2)(b), the Plaintiff was producible for a further examination for discovery to verify the new information.

d) <u>Practical Considerations on Undertakings and Refusals Motions:</u>

As lawyers, we have obligations to produce relevant documentation in a timely manner. The Rules discussed above clearly outline this onus. A good grasp of the law should avoid most motions, as will being proactive in how you manage a file. These are some simple, practical tips to stave off the need for a motion:

[19] *Supra* note 2, Rule 31.09(1).
[20] *Ibid* at Rule 31,09(2).
[21] *Ibid* at Rule 31.09(3).
[22] *Capital Distributing Co v Blakey*, [1997] OJ No 1913, 70 ACWS (3d) 970, at para 13.
[23] *Ibid* at para 13.
[24] *Baron v Nguyen*, [1991] OJ No 1832, 29 ACWS (3d) 756.

1. Forecast what is really at issue:

    - Do not wait until discoveries to request or produce documents that are key to your case. Do this at the outset of the action. Include these documents in your Affidavit of Documents.

    - For example, in a case where a Plaintiff has been involved in multiple collisions, there are overlapping injuries, and causation is at play, consider the timeframe for which you are requesting productions. Do not wait for Defence counsel to ask for additional records encompassing those other dates of loss at discovery. On the Defence side, especially counsel dealing with coverage issues, request log notes at the outset. Redacting log notes can be a laborious and time-consuming task.

2. Establish a rapport with counsel:

    - Most issues can be resolved by a simple phone call.

    - If you know that settlement discussions will not be possible without a certain step having occurred, or a specific document having been produced, call counsel and advise them of same. Do not wait until Mediation to advise the opposing party that you cannot settle because key productions remain outstanding.

    - Before proceeding to schedule a motion, call counsel and document same. Find out the reason for the delay. Have best efforts been made? Or perhaps an agreement on a timetable is appropriate?

And if these tactics fail, consider requesting a Case Conference before preparing motion materials.

II. Case Conferences: An Alternative to Motions

When a Statement of Claim is issued, the proceeding is not subject to any form of judicial management. Whether and how a case progresses is dependent upon the parties to the action. As litigators, we know that cases often do not proceed as efficiently as we would hope, resulting in added costs, delay, and frustration for both institutional and private clients. So, what are the options? One form of recourse is to bring a motion, a cumbersome, time-consuming, and costly option. As noted in our introduction, in some jurisdictions, it takes over one year to get to a motion. Regardless of jurisdiction, the preparation of motion materials is an onerous task.

Enter Case Conferences. Rule 50.13 prescribes a mechanism under which a party may request that a Case Conference be held before a Judge or Associate Judge.[25] As of August 2024, parties are able to obtain a Case Conference date within 5 to 6 months in Toronto. In Windsor, the wait-time is between 2 to 4 weeks. In Ottawa, Courts will not provide available dates for a Case Conference until a judge is seized of a matter.

You may be asking: *what jurisdiction do Judges and Associate Judges have at a Case Conference?* Rule 50.13 (5) notes that a Judge or Associate Judge may:

a. *identify the issues and note those that are contested and those that are not;*

b. *explore methods to resolve the contested issues;*

c. *if possible, secure the parties' agreement on a specific schedule of events in the proceeding;*

d. *establish a timetable for the proceeding; and*

e. *review and, if necessary, amend an existing timetable.*

If notice has been provided and a judge or associate judge deems it appropriate or if the parties consent, the judge/associate judge may:

a. *make a procedural order;*

b. *convene a pre-trial conference;*

[25] *Supra* note 2, Rule 50.13(1).

c. give directions; and

d. in the case of a judge,

(i) make an order for interlocutory relief, or

(ii) convene a hearing.[26]

Until recently, Case Conferences were utilized to resolve primarily procedural issues, such as timetabling. This has changed, at least arguably, with the advent of two recent decisions (in the commercial litigation context) where substantive Orders were made during Case Conferences. In both decisions, the same Judge concluded that he had jurisdiction to make substantive rulings during a Case Conference without requiring a full hearing. Whether these decisions have opened the possibility of substantive Orders being made in the insurance context, when considering the substantial delays and costs imposed by motions, remains to be seen.

a) <u>Recent Case Law:</u>

In *Miller v. Ledra et al*.,[27] the Applicant, a former director and alleged shareholder of the corporate Respondent, sought the production of the Respondents' annual financial statements, as well as an Order requiring the Respondents to hold a shareholders' meeting. The Respondents opposed the request and requested an adjournment due to the alleged health condition of the personal Respondent.

During a Case Conference, the Court declined the adjournment request and granted the relief sought by the Applicant.[28] In declining the request, Justice Koehnen referenced a new Practice Direction for the Civil List in Toronto, which provides that opposed Motions and Applications of less than two hours should be directed to a Case Conference prior to scheduling an oral hearing (subject to exceptions).[29]

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[26] *Ibid* at Rule 50.13(6).
[27] *Miller v Ledra et al*, 2023 ONSC 4656, 2023 ACWS 4302.
[28] *Ibid* at paras 3-5.
[29] *Ibid* at paras 8 and 11, "Consolidated Practice Direction for Civil Actions, Applications, Motions and Procedural Matters in the Toronto Region," effective September 4, 2023, online: <www.ontariocourts.ca/scj/practice/regional-practice-directions/toronto/consolidated-practice-direction-for-civil-actions-applications-motions-and-procedural-matters-in-the-toronto-region/>.

One point at issue was whether the Applicant was a shareholder of the corporate respondent, Biosa Technologies Limited. The Applicant argued that he owned 20% of the shares, relying on several records, including the corporate share register, to prove same. The Respondent argued that said records were "not authentic", without supporting evidence.[30]

The next available motion date in Toronto was 14 months away from the Case Conference date. Bearing this in mind, the Judge denied the Respondents' motion and granted the substantive relief sought by the Applicant. In granting the relief, the Court considered: the nature of the relief sought, the repeated delay tactics employed by the Respondent, the insufficient reasons for the adjournment request, and the prejudicial effect of granting an adjournment against both the applicant and "*others in the justice system*", referencing the backlog in the Court system.[31]

In spite of the fact that the *Rules* do not expressly grant Judges the authority to make substantive Orders at Case Conferences, Justice Koehnen determined that he had the authority to do so, pursuant to Rules 50.13(6) (cited above) and 1.04(1) – (1.1) which provide:

> *Rule 1.04(1) - These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.*[32]
>
> *Rule 1.04(1.1) - (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.*[33]

In *Think Research v. N&M Medical Enterprises*,[34] the issue was with a share purchase agreement and specifically, how to calculate "net working capital", which would adjust the purchase price of the shares in question. Under the agreement, if the parties were unable to agree on the calculation, Ernst & Young would be appointed to determine same. If Ernst & Young was unable to act, due to conflict or other reasons, KPMG LLP was to be

[30] *Ibid* at para 12.
[31] *Ibid* at paras 12-19.
[32] *Supra* note 2, Rule 1.04(1).
[33] *Ibid* at Rule 1.04(1.1).
[34] *Think Research Corporation v N & M Medical Enterprises*, 2023 ONSC 6910.

appointed. Following several months of discussions, the Applicant delivered a notice to appoint KPMG LLP to make the calculation. The Respondent argued that the Applicant was contractually out of time.

Following the initial Case Conference, Justice Koehnen issued an Endorsement that read:

> *"The object of the [second] case conference will be to make a determination on the merits of the application" and to facilitate this, both sides should deliver a case conference memo of up to 10 double-spaced pages setting out their position and why they should succeed."*[35]

The Respondent argued that the Court did not have the jurisdiction to grant substantive relief at the Case Conference, as evidence was necessary to resolve the Application. The Court rejected these arguments, stating that a party could not make bald assertions that application records, cross examinations, and exchange of facta were required in order to simply avoid the granting of substantive relief at a Case Conference. The Judge proceeded to appoint KPMG LLP and in doing so, noted that in addition to the powers conferred upon him under Rules 50.13(6), 1.01(1) and (1.1), he had provided the parties with notice that a determination on the merits of the Application would be made at the second Case Conference.

It bears noting that neither decision appears to have been appealed.

b) <u>Costs at Case Conferences:</u>

The following decisions make clear that Judges and Associate Judges are able to award costs at Case Conferences.

In *Orologio v. Reali*,[36] Justice Firestone awarded costs in favour of the Plaintiff. Approximately one week prior to the Case Conference, one Defendant brought a motion to adjourn the trial date. The co-Defendant consented to the adjournment and the Plaintiff opposed. Justice Firestone vacated the trial date. At the Case Conference, the Plaintiffs sought their 'costs thrown away' for their preparation of the trial. Justice Firestone

[35] *Ibid* at para 12.
[36] *Orologio v Reali*, 2019 ONSC 686, 301 ACWS (3d) 705.

awarded the Plaintiffs costs thrown away, as well as the costs of trial scheduling court preparation and attendance.

The Endorsement of Regional Senior Justice Richetti in *Davies v. Cossnell*[37] raises some important considerations counsel should turn their minds to before requisitioning a Case Conference. Counsel for one Defendant requested a Case Conference to address various issues, including Plaintiff counsel's failure to address a service issue of the Statement of Claim and failure to answer certain letters and undertakings. RSJ Richetti identified the various motions that would need to be brought and set a timetable for those motions.

Regarding the Plaintiff's outstanding undertakings, Defence counsel sought an Order that the outstanding undertakings be produced within 60 to 90 days. Defence counsel only produced a brief letter identifying which undertakings remained outstanding. RSJ Richetti was critical of this approach, noting there was no evidence before him as to which specific undertakings remained outstanding and whether the proposed timeframe was reasonable. His Honour was critical that the failure to produce key documents constituted a waste of the Court's time.

Of note, RSJ Richetti made clear that parties acting unreasonably should expect that costs may be awarded against them at the conference, if appropriate.[38]

He went on to clarify the purpose of civil Case Conferences, as follows:

- They are not intended to provide substantive remedies (unless on consent) but are meant to resolve procedural matters. If substantive relief is being sought, the matter ought to be scheduled for a hearing, not a Case Conference, to allow the court to decide the issues on evidence and submissions.[39]

- An urgent hearing can be scheduled and timetabled at a civil Case Conference.[40]

[37] *Davies v Cossnell*, 2022 ONSC 654.
[38] *Ibid* at para 5.
[39] *Ibid* at paras 2 and 3.
[40] *Ibid* at para 4.

- A Case Conference is not intended to and should not be used for the Court's intervention to facilitate civility, reasonable, or responsive conduct by opposing counsel, which is already required by the Rules of Professional Conduct.[41]

c) <u>Important Considerations for Case Conferences:</u>

The decisions rendered in *Miller* and *Think Research* make clear that the door is open for Judges to make substantive Orders at Case Conferences. Those decisions were made in the commercial litigation context, and it remains to be seen whether Judges and Associate Judges will opt to render substantive decisions in personal injury matters. As of the date of this paper, it does not appear that either decision was appealed.

Of note, the manner in which one would appeal an Order from a Case Conference Judge or Associate Judge is unclear. Rule 50.13 is silent on the appeal route. This ambiguity is an important consideration to keep in mind, especially if contemplating seeking substantive relief.

While the *Davies* Endorsement is contradictory to *Miller* and *Think Research*, noting that procedural and not substantive matters may be determined at a Case Conference (unless on consent), it bears noting that *Miller* and *Think Research* were decided after *Davies*. Further, as recently as June 2024, Justice Centa referenced the *Miller* decision in *Wilcox v. Abittan*,[42] acknowledging and reenforcing Justice Koehnen's view that Judges and Associate Judges have discretion in rendering substantive decisions at Case Conferences. He noted:

> *"… In the appropriate case the case conference judge may make substantive orders: Miller v. Ledra, 2023 ONSC 4656."*[43]

In view of the discretion afforded to Judges under Rules 50.13(6),1.01(1) and (1.1), and the significant delay associated with motions, counsel should seize the opportunity to dispose of procedural issues at Case Conferences and may wish to try their luck in disposing of substantive ones. Bear in mind, however, the potential risks in doing so. And in cases where the other side is seeking substantive relief, it is important to have regard

[41] *Ibid* at para. 6.
[42] *Wilcox v Abittan*, 2024 ONSC 3180.
[43] *Ibid* at para 2.

for the recent decision in *Think Research*, where the argument that 'more evidence is required' was insufficient in opposing substantive relief.

III. What's Next? Proposed Rule 30 and 34 Changes

The Civil Rules Committee has been working hard to strategize and find ways to alleviate the civil backlog. Similarly, the Civil Reform Working Group has also been tasked by Attorney General Downey and Chief Justice Morawetz to find ways to reduce the delay often caused by refusals motions.

The Civil Rules Committee consists of 29 members including: the Chief Justices and Associate Chief Justice of Ontario and of the Superior Court, other members of the judiciary, the Attorney General or a designate, Ministry of the Attorney General staff and counsel, as well as private sector lawyers. The members are appointed by the Chief Justices, the Attorney General, or the Law Society of Ontario. Their powers are prescribed in section 65 of the *Courts of Justice Act*.

The Civil Reform Working Group ("CRWG") is a group of judges and lawyers selected throughout Ontario with the task of reviewing the *Rules of Civil Procedure* and consider "*whether technological solutions may be leveraged to enhance justice and reduce delay*."[44] This group was struck by Attorney General Downey and Chief Justice Morawetz in early 2024. This review is a two-year project proceeding in three stages. Phase 1 is a scoping phase. Phase 2 will involve an in-depth study of the potential reforms identified in Phase 1 and the development of a policy proposal. Phase 3 involves approval and implementation. As of the date of this paper, the Civil Reform Working Group has completed Phase 1.

Of note, the CRWG is separate from the Civil Rules Committee. The CRWG works independently but keeps the Civil Rules Committee notified of their progress and consults with them when appropriate. A few members of the CRWG sit on both the working group and the Civil Rules Committee.

[44] Civil Rules Review, Phase 1 Consultation Paper, at page 1.

As part of Phase 1, the CRWG sent out a consultation asking for recommendations as to what areas they should consider. The potential areas referenced include Rules 30 and 34 (see the Consultation Paper at pages 6-10). The goal is for the Civil Reform Working Group to have the policy proposals completed by June of 2025.

As it exists at present, Rule 30.03 reads:

> ***Affidavit of Documents***
>
> ***Party to Serve Affidavit***
>
> ***30.03*** *(1) A party to an action shall serve on every other party an affidavit of documents (Form 30A or 30B) disclosing to the full extent of the party's knowledge, information and belief all documents relevant to any matter in issue in the action that are or have been in the party's possession, control or power.*
>
> ***Contents***
>
> *(2) The affidavit shall list and describe, in separate schedules, all documents relevant to any matter in issue in the action,*
>
> *(a) that are in the party's possession, control or power and that the party does not object to producing;*
>
> *(b) that are or were in the party's possession, control or power and for which the party claims privilege, and the grounds for the claim; and*
>
> *(c) that were formerly in the party's possession, control or power, but are no longer in the party's possession, control or power, whether or not privilege is claimed for them, together with a statement of when and how the party lost possession or control of or power over them and their present location.*
>
> *(3) The affidavit shall also contain a statement that the party has never had in the party's possession, control or power any document relevant to any matter in issue in the action other than those listed in the affidavit.*
>
> ***Lawyer's Certificate***
>
> *(4) Where the party is represented by a lawyer, the lawyer shall certify on the affidavit that he or she has explained to the deponent,*
>
> *(a) the necessity of making full disclosure of all documents relevant to any matter in issue in the action; and*

(b) what kinds of documents are likely to be relevant to the allegations made in the pleadings.

Affidavit not to be Filed

(5) An affidavit of documents shall not be filed unless it is relevant to an issue on a pending motion or at trial. R.R.O. 1990, Reg. 194, r. 30.03 (5).[45]

Rule 34.12 reads:

Objections and Rulings

34.12 (1) Where a question is objected to, the objector shall state briefly the reason for the objection, and the question and the brief statement shall be recorded.

(2) A question that is objected to may be answered with the objector's consent, and where the question is answered, a ruling shall be obtained from the court before the evidence is used at a hearing.

(3) A ruling on the propriety of a question that is objected to and not answered may be obtained on motion to the court.[46]

The Civil Rules Committee is continuing in its role of reviewing and amending the *Rules of Civil Procedure* as they have always done. This past winter, the Refusals Motions Subcommittee of the Civil Rules Committee sent out a consultation which included proposed amendments. Some of the proposed changes suggested by the Refusals Motions Subcommittee included reducing the number of inappropriate refusals motions. The proposed amendment from the Rules Committee to Rule 34.12 is as follows:

(4) No motion under subrule (3) may be brought by a party unless that party has produced a sworn affidavit of documents that includes the mandatory productions listed in Rule 30.03 and has fully complied with their undertakings.

(5) Costs of a motion under subrule (3), shall be ordered on a substantial indemnity basis, subject to the overriding discretion of the court in determining costs. In fixing costs, the court may fix costs on a per question basis.

[45] *Supra* note 2, Rule 30.03.
[46] *Ibid* at Rule 34.12.

The Refusals Motions Subcommittee also proposed amendments to Rule 30.03 that includes new subrules 2.1 and 2.2 adding:

> *(2.1) In an action involving a claim for personal injury, the plaintiff shall include the following in a sworn affidavit of documents and produce the documents within six months of issuance of the statement of claim:*
>
> *a) where the party has such coverage, a decoded Ontario Health Insurance Plan summary that covers the time period of three years prior to the incident that gave rise to the claim;*
>
> *b) the clinical notes and records of the plaintiff's family doctor, primary medical care provider, or clinic for the time period of three years prior to the incident that gave rise to the claim;*
>
> *c) the clinical notes and records of all doctors who provided treatment in connection with the injuries being claimed in the statement of claim;*
>
> *d) a copy of any police report related to the incident that gave rise to the claim;*
>
> *e) a copy of any statement given to the police by the party;*
>
> *f) the file from the Statutory Accident benefit provider;*
>
> *g) any disability claims file or other collateral benefit provider file arising from the incident;*
>
> *h) all hospital and ambulance records in relation to the injuries being claimed in the statement of claim;*
>
> *i) if loss of income or loss of earning capacity is being claimed, the as-filed tax returns and/or the notice of assessment from the Canada Revenue Agency for three years prior to the incident giving rise to the claim;*
>
> *j) if loss of income or loss of earning capacity is being claimed, at least three months before the pretrial and three months before the trial, provide any additional as-filed tax returns and/or the notice of assessment from the Canada Revenue Agency; and*
>
> *k) any video evidence in the possession of the plaintiff that depicts the circumstances of the incident that gives rise to the claim.*

(2.2) In an action involving a claim for personal injury, the defendant shall include the following in a sworn affidavit of documents and produce these documents:

a) the insurance policy and declaration page of any policy that affords coverage to the defendants for the incident alleged in the statement of claim;

b) a statement of any party and/or a will-say statement of any witnesses to the incident or any witness having relevant evidence to the issues in the pleadings;

c) a copy of the police report;

d) a copy of any statement given to the police by the party;

e) surveillance evidence of the plaintiff that is being used substantively to defend the plaintiff's claim;

f) any video evidence in the possession of the party that depicts the circumstances of the incident that gave rise to the claim; and

g) cell phone records for the day of the accident, with telephone numbers redacted.

There are understandably concerns with the proposed Rule 30.03 and 34.12 changes. The bar is concerned that the proposed changes may eliminate virtually all refusals motions and force their clients to answer every question asked of them.

The CRWG is considering the concerns raised in the responses it has received but has not yet made any decisions as of the date of this paper. They are now in the midst of Phase 2 and are researching potential changes to the approved areas.

IV. Conclusion

The effects of the COVID-19 pandemic and the increasing caseload of criminal, family, and civil matters throughout the province of Ontario continue to backlog our courthouses.

Civil matters are further backlogged as a result of undertakings and refusals motions that can take months, if not years to bring in front of a Master or Judge. Civility and reasonableness between counsel, as well as the use of Case Conferences, may assist in unclogging this accumulation of motions.

With respect to long-term resolutions, the Civil Rules Committee and the CRWG are working hard to eliminate the backlog by canvassing solutions with the bench and bar to innovate ways to circumvent further delay by making changes to our *Rules of Civil Procedure*.

If the trend of bringing undertakings and refusals motions continues on its current trajectory, especially in jurisdictions like Toronto, Plaintiffs and Defendants alike will only face further access to justice issues, brought on by their own counsel. While it may be difficult to practice law in today's world, it is not difficult to be rational and reasonable with the bench and bar. That may be the best solution for moving cases forward.

Law Society of Ontario | Barreau de l'Ontario

TAB 10A

7th Motor Vehicle Litigation Summit

Submissions and Letters by Canadian Defence Lawyers

Lisa Pool
Evans Philp LLP

September 18-19, 2024

Submissions and Letters by Canadian Defence Lawyers*

Prepared for: LSO's 7th Motor Vehicle Litigation Summit

September 18, 2024

1. April 3, 2023 – Submissions on Presumptive Guidelines
2. April 30, 2023 – Submissions on Bifurcation
3. May 2, 2023 – Commentary on KPIs at the LAT
4. May 29, 2023 – Submissions on the LAT's Draft Common Rules of Practice and Procedure
5. April 30, 2024 – Submissions on Rules 30 and 34
6. July 12, 2024 – Submissions on the Toronto Civil Reform Project

Additional information on CDL's contributions on public policy and governance can be found on CDL's website – www.cdlawyers.org

*This is not intended to be a complete list of submissions prepared by Canadian Defence Lawyers, but rather, examples of submissions made in 2023 and 2024 as they relate to motor vehicle insurance claims in Ontario, directly or indirectly.

Compiled by:
(September 11, 2024)

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TAB 1

CANADIAN DEFENCE LAWYERS

April 3, 2023

VIA EMAIL: rosemarie.juginovic@ontario.ca

Office of the Chief Justice
Ontario Superior Court of Justice

Attn: Rosemarie Juginovic
Senior Criminal Counsel

RE: Ontario Superior Court Guidelines to Determine Mode of Proceeding in Civil Actions
Response to Call for Input – Canadian Defence Lawyers

Canadian Defence Lawyers (CDL) is grateful for the opportunity to respond to the Call for Input issued by the Office of the Chief Justice of the Ontario Superior Court regarding the presumptive method of hearings in civil actions. As our membership base deals exclusively with civil actions, we have restricted our comments to the civil framework.

Founded in 1996, CDL is a national bar association with members from coast to coast. We are the voice of the Canadian civil defence bar, drawing from the experience of trial and appellate counsel appearing on behalf of insurers, insured defendants, corporations, and institutional litigants.

In preparation of this response, CDL canvassed its Ontario members through a province-wide survey. CDL received 99 individual responses to the survey. The survey and follow-up communications obtained provides a summary of our membership's position on the presumptive manner of hearing for civil matters. We have set out in Appendix "A" attached a summary of the responses received.

The data obtained by the CDL through its membership survey identifies significant consensus that the following matters should proceed presumptively **virtually**:

- Case conferences
- Pretrial conferences involving trial management and scheduling issues only
- Trial and motion scheduling court
- Assessment hearings

The data obtained also identifies a clear consensus that the following matters should remain presumptively **in-person**:

- Judge alone trials
- Jury trials

The data obtained identifies the following areas where there is **no clear consensus** on the preferred presumption for the method of hearing:

- Pretrial conferences involving settlement issues (approx. 67%/33% in favour of virtual)
- Contested motions and applications (approx. 57%/43% in favour of virtual)
- Examinations for Discovery (approx. 60%/40% in favour of virtual)
- Mandatory mediation (approx. 65%/35% in favour of virtual)
- Appeals to the Divisional Court and applications for Judicial Review (approx. 70%/30% in favour of in-person)

In favour of virtual hearings, the membership raised the following key points:

- Access to justice – more affordable
- Moves more expeditiously
- Scheduling is far easier
- Virtual keeps everyone on time
- Environmentally it is better due to less travel
- Significant savings of resources for litigants
- Eliminates physical barriers for those who have physical challenges
- Meant to address short procedural matters
- Safety measure for those concerned with covid or have compromised immune systems

In favour of presumption of in-person hearings, the membership raised the following key points:

- More is accomplished in person
- Greater chance of meaningful discussion or settlement
- Trials (both Judge and Jury) must remain in person
- Viva voce evidence is best assessed in person

With respect to discoveries and mediation specifically, a number of our members raised the comment that no presumption is required, and that counsel can determine the appropriate manner of proceeding.

CDL as an organization supports the efforts of the Office of the Chief Justice in its review of the presumptive manner of hearings in Ontario civil actions. CDL is committed to its ongoing role as a key stakeholder in these initiatives and would like to thank the Office of the Chief Justice for the opportunity to provide its input on behalf of its membership.

If you require any further information or clarification on the information contained within this response, please do not hesitate to contact us.

Yours very truly,

Andrea R. Lim

President
Canadian Defence Lawyers

Canadian Defence Lawyer's Subcommittee on Guidelines to Determine Mode of Proceeding in Civil Actions:

John Lea, Aviva Trial Lawyers
Debbie Orth, Bertschi Orth Solicitors and Barristers LLP
Brett Rideout, Rideout Law

APPENDIX "A"

Responses to CDL Questionnaire re Presumptive Manner of Hearing in Civil Actions

1. Should case conferences remain presumptively virtual?

96.97% of the respondents answered "Yes"

3.03% of the respondents answered "No"

2. Should case conferences now be presumptively in-person?

3.03% of the respondents answered "Yes"

96.97% of the respondents answered "No"

3. Should pre-trial conferences involving trial management and scheduling issues only remain presumptively virtual?

94.4% of the respondents answered "Yes"

5.10% of the respondents answered "No"

4. Should pre-trial conferences involving trial management and scheduling issues only now be presumptively in-person?

6.19% of the respondents answered "Yes"

93.81% of respondents answered "No"

5. Should pre-trial conferences involving settlement and trial management issues remain presumptively virtual?

68.69% of the respondents answered "Yes"

31.31% of the respondents answered "No"

6. Should pre-trial conferences involving settlement and trial management issues now be presumptively in-person?

33.67% of the respondents answered "Yes"

66.33% of the respondents answered "No"

7. Should trial and motion scheduling court remain presumptively virtual?

95.92% of the respondents answered "Yes"

4.08% of the respondents answered "No"

8. Should trial and motion scheduling court now be presumptively in-person?

4.08% of the respondents answered "Yes"

95.92% of the respondents answered "No"

9. Should contested motions and applications remain presumptively virtual?

57.14% of the respondents answered “Yes”

42.86% of the respondents answered “No”

10. Should contested motions and applications now be presumptively in-person?

41.84% of the respondents answered “Yes”

58.16% of the respondents answered “No”

11. Should assessment hearings remain presumptively virtual?

86.17% of the respondents answered “Yes”

13.83% of the respondents answered “No”

12. Should assessment hearings now be presumptively in-person?

14.74% of the respondents answered “Yes”

85.26% of the respondents answered “No”

13. Should examinations for discovery remain presumptively in-person?

36.73% of the respondents answered “Yes”

63.27% of the respondents answered “No”

14. Should examinations for discovery now be presumptively virtual?

58.16% of the respondents answered “Yes”

41.84% of the respondents answered “No”

15. Should mandatory mediations remain presumptively in-person?

33.67% of the respondents answered “Yes”

66.33% of the respondents answered “No”

16. Should mandatory mediations now be presumptively virtual?

64.29% of the respondents answered “Yes”

35.71% of the respondents answered “No”

17. Should Judge alone trials remain presumptively in-person?

81.44% of the respondents answered “Yes”

18.56% of the respondents answered “No”

18. Should Judge alone trials now be presumptively virtual?

17.53% of the respondents answered “Yes”

82.47% of the respondents answered “No”

19. Should jury trials remain presumptively in-person?

93.81% of the respondents answered “Yes”

6.19% of the respondents answered “No”

20. Should jury trials now be presumptively virtual?

7.29% of the respondents answered “Yes”

92.17% of the respondents answered “No”

21. Should appeals to the Divisional Court and applications for judicial review remain presumptively in-person?

67.35% of the respondents answered “Yes”

32.65% of the respondents answered “No”

22. Should appeals to the Divisional Court and applications for judicial review now be presumptively virtual?

29.59% of the respondents answered “Yes”

70.41% of the respondents answered “No”

TAB 2

CANADIAN DEFENCE LAWYERS

April 30, 2023

Laura Craig
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Barbara Legate
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Canadian Defence Lawyers (CDL) is grateful for the opportunity to make submissions to the Bifurcation Subcommittee of the Civil Rules Committee.

Founded in 1996, CDL is a national bar association with members from coast to coast. We are the voice of the Canadian civil defence bar, drawing from the experience of trial and appellate counsel appearing on behalf of insurers, insured defendants, corporations, and institutional litigants.

More Easily Accessible Bifurcation Increases Access to Justice

In 2014, the Supreme Court of Canada released its seminal decision in *Hryniak v Mauldin*.[1] The Court recognized a systemic problem with the legal system across our country – the significant difficulties that ordinary Canadians have accessing civil justice. "Ensuring access to justice is the greatest challenge to the rule of law in Canada today. … Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication in civil cases, the development of the common law is stunted."

The Supreme Court directed that a "shift in culture" was required to address this problem. The Supreme Court cautioned that undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes. More easily accessible bifurcation of trials in Ontario is a further step in the direction of this cultural shift and enhances access to justice.

Yet, the current Rules and jurisprudence work against this culture shift by requiring that all parties agree to a bifurcated trial.

One of our members has advised of a recent experience in Ottawa highlighting the current Rule's problem. The case involves a relatively simple liability dispute and a complex claim for damages. The plaintiff and two of three defendants agreed to a bifurcated trial, but the final defendant refused. All parties now face the very problems of which the Supreme Court warned – unnecessary delay and significant expense.

[1] 2014 SCC 7.

A liability trial in that action would require 5 days. It is possible (and even likely) that some or all of the defendants would have been successful and the action would be dismissed as against those parties. A judgment on liability would also remove one of the largest obstacles to a negotiated settlement. Instead, at a time when judicial resources throughout our province are already at a premium, a 20 day trial is scheduled for the latter part of 2025.

Moreover, all parties must now incur the costs of securing expert reports on damages. Given the complexity of the plaintiff's alleged injuries and medical history, multiple experts are required for the trier of fact to assess damages, which comes with significant additional risk to the plaintiff. If any of the defendants succeed, the plaintiff is exposed to a much greater costs award. The plaintiff may even rethink whether to advance this action to trial. This is the antithesis of access to justice.

The Current System Is Inconsistent with Other Trial Procedures

Trials are the culmination of a legal proceeding. Counsel are expected to cooperate with one another to present a case to the court in an organized and efficient manner. If procedural disputes arise, the court can intervene and direct a process that will secure the most just, expeditious and least expensive determination of the proceeding on its merits. So, why does one party have the unilateral power to have all parts of an action tried together?

Comparing the court's powers with respect to directing the mode of trial, even where a jury notice has been delivered, to the court's powers with respect to bifurcation demonstrates an inconsistency in how the principles set out by the Supreme Court are applied in Ontario.

A party's right to have a trial by jury is a long-recognized substantive right; however, it is not absolute. The Court of Appeal for Ontario observed that: "the object of a civil trial is to provide justice between the parties, nothing more. It makes sense that neither party should have an unfettered right to determine the mode of trial. Rather, the court, which plays the role of impartial arbiter, should, when a disagreement arises, have the power to determine whether justice to the parties will be better served by trying a case with or without a jury."[2]

Whereas the current rule on bifurcation precludes the court from bifurcating a trial and directing how a case is to be tried absent consent of all parties; which runs contrary to the Supreme Court's encouragement: "This culture shift requires judges to actively manage the legal process in line with the principle of proportionality."[3]

Bifurcation in Other Provinces

No other province requires the consent of all parties to order bifurcation, thereby making separate trials for liability and damages more readily available elsewhere in Canada than in Ontario. For example, in British Columbia, Rule 12-5(67) allows the court to "order that one or more questions of fact or law arising in an action be tried and determined before the others." Rule 41(18) of the Rules of Court for the Supreme Court of Yukon and Rule 7.1(1)(a) of the Alberta Rules of Court contain similar language.

In New Brunswick, Rule 47.03 of the Rules of Court provides: "Either before or after an action is set down for trial, the court may order that different issues be tried at different times and may give

[2] *Cowles v Balac* (2006), 83 OR (3d) 660 (CA), para 38.
[3] *Hryniuk v Mauldin*, para 32.

directions with respect to the conduct of such trials." Several criteria are to be considered by the court in granting such discretionary relief.[4]

In Québec, Article 211 of the Code of Civil Procedure permits the court, even on its own initiative, to split a proceeding if it thinks it advisable in order to protect the parties' rights. Similarly, Article 158(1) provides the court with authority to split a proceeding when to do so would "simplify or expedite the proceeding and shorten the trial." Such an order may be made at any stage of the proceeding.

Prince Edward Island – which has adopted Rules of Civil Procedure which closely mirror those in Ontario – enacted a rule which expressly permits any party, or the court on its own initiative, to seek an order for separate hearings.[5]

Not every province has enacted a specific procedural rule dealing with severance of trial proceedings. The Court of Kings' Bench Rules in Manitoba do not contain a rule. However, the court nonetheless retains jurisdiction to make such an order without the consent of all parties.[6] Similarly, courts in Saskatchewan rely on inherent jurisdiction and only grant bifurcation "in the most exceptional cases … where the issues to be tried separately are simple and where it appears at least probable that the trial of the separate issues will put an end to the action."[7]

Responses to the Questions Posed

1. *Should jury and non-jury trials be treated differently under the Rule.*

No. Our members in Ontario routinely try cases before juries where the issue of either liability or damages has been settled – essentially a bifurcated trial – without complication. Civil juries are one of two cornerstones of our parliamentary democracy.[8] A party who seeks to have some or all of a case tried by a jury should, subject to the court's discretion on a motion to strike a jury notice, be entitled to that right.

The Supreme Court of Prince Edward Island permits separate hearings on liability and damages in jury cases.[9] Meanwhile, the courts in British Columbia have noted that "severance is most appropriate when the trial is by judge alone" but that it remains within the court's discretion to bifurcate a jury trial.[10]

2. *Should a judge be able to bifurcate an action on their own initiative? Should this be limited to the pre-trial judge? Is it too late to bifurcate at trial?*

No. CDL is of the view that the court should not have the authority to bifurcate an action on its own initiative. Judges, with the exception of those presiding over a pre-trial, have limited insight into the dynamics of an action. The parties to a proceeding and their counsel are in the best position to assess the most appropriate method of resolving a case. An order unilaterally imposing a bifurcated trial on parties would be akin to a mandatory Rule 20 or 21 motion.

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[4] See *Jeux Maritimes Inc. v. Commission des loteries du Nouveau-Brunswick* (1994), 150 NBR (2d) 46.
[5] Rules of Civil Procedure, r 6.03
[6] See *O'Brien v. Tyrone Enterprises Ltd*., 2012 MBCA 3.
[7] *Central Canada Potash Co. v. Saskatchewan (Attorney General)*, 1974 CanLII 976 (SK CA), para 15.
[8] The other being the right to vote.
[9] See for example *Ghiz-Fay v RBC*, 2021 PESC 37; *Jreij v Intact Insurance Company*, 2016 PESC 31.
[10] *Nguyen v Bains*, 2001 BCSC 1130, para 11.

However, the pre-trial judge should canvas the prospect of bifurcation as part of the matters that should be considered at a pre-trial conference.[11] CDL recommends that Rule 50.06 be amended to add: "The possibility of separate hearings on the issues of liability and damages."

3. *At what point in the litigation ought the motion be brought?*
4. *Should the timing be an issue for determination by a judge on a case-by-case basis?*

CDL recommends that the Rules should not prescribe the timing of such a motion. Civil litigation, particularly personal injury actions, are fluid. The dynamics of a case change continually as new information is discovered and as counsel engage in settlement discussions. Counsel are in the best position to determine when a motion to bifurcate a trial should be brought.

As a best practice, once a party is of the view that separate trials could result in a more expedited resolution, that party ought to bring the motion seeking bifurcation. This is likely to occur at or shortly after the action is set down for trial but may be earlier. New Brunswick Rule 47.03 expressly provides that such a motion may be brought "before or after an action is set down for trial."

Consideration could be given to modifying the certificate signed by the lawyer setting the action down to include a declaration of whether that party intends to seek a bifurcated trial.

However, the timing of the motion ought to be a factor in the court's decision. Separate trials on liability and damages allow the parties to obtain a result on the merits in a cost-effective manner. There will be a time in every litigation when bifurcation will no longer provide a cheaper or faster route for the parties. In Nova Scotia, one of the factors considered on such a motion includes whether substantial cost had already been incurred on both issues of liability and damages.

5. *If bifurcation occurs at the pre-trial stage, should the pre-trial judge have the jurisdiction to award costs of damages disbursements where they will have to be updated should that part of the action proceed to trial?*

No. Costs should generally only be awarded by a pre-trial judge to compensate a party for costs "thrown away". Costs incurred obtaining documents relevant to damages are not "thrown away".[12] There are two types of "damages disbursements" regularly encountered in actions defended by our members: (1) the cost of obtaining a plaintiff's medical records and other relevant documents; and (2) expert opinions.

Parties are obliged under the *Rules* to obtain and produce all relevant documents in their power, possession or control and to update their productions throughout the litigation. If a plaintiff succeeds at a preliminary liability trial, then the costs of complying with these continuing discovery obligations are properly included as an assessable disbursement following the ultimate decision. If the plaintiff is unsuccessful, then no additional disbursements will be incurred.

With respect to expert opinions, the point in an action at which a party obtains a medical opinion is a strategic decision. A premature expert opinion can set artificially inflate a party's expectations. Whereas

[11] Rules 50.06(2) [simplification of the issues], (4) [the question of liability] and (11) [any other matter that may assist in the just, most expeditious and least expensive disposition of the proceeding].
[12] If medical practitioners charge fees that are disproportionate to the costs to produce documentation, then this ought to be addressed through a different forum.

a properly timed expert opinion can facilitate settlement discussions, even if an update is required for trial.

Ultimately, the need to update damage expert reports is one that can be addressed through early discussions between counsel about the benefits of bifurcation in a particular case. As Justice Karakatsanis held in *Hryniak*: "counsel must, in accordance with the traditions of their profession, act in a way that facilitates rather than frustrates access to justice."[13]

6. *Would new wording in Rule 6 that adopts that contained in Rule 21.01(1) to permit bifurcation where it may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs, be acceptable?*

Yes. CDL supports language which adopts that set out in Rule 21.01(1). As Lord Denning once held: "The normal practice should still be that liability and damages should be tried together, but the court should be ready to order separate trials whenever it is just and convenient to do so."[14]

CDL is committed to its ongoing role as a key stakeholder in these initiatives and thanks the the Civil Rules Committee for the opportunity to provide its input on behalf of its membership.

If you require any further information or clarification on the information contained within this response, please do not hesitate to contact us.

Yours very truly,

Andrea R. Lim
President
Canadian Defence Lawyers

Canadian Defence Lawyer's Subcommittee on Proposed Amendment to Rule 6.1.01
Stephen Libin, Dutton Brock LLP
Lisa Pool, Evans Philp LLP
Talaal Bond, Matthews Abogado LLP

[13] Para 32.
[14] *Coenen v Payne*, [1974] 2 All ER 1109, p 1112.

TAB 3

CANADIAN DEFENCE LAWYERS

May 2, 2023

VIA EMAIL: LATregistrar@ontario.ca

Harry Gousopoulos, Executive Director
Tribunals Ontario
15 Grosvenor Street, Ground Floor
Toronto, Ontario M7A 2G6

Dear Executive Director Gousopoulos:

RE: Recommendations for New Tribunals Ontario and License Appeal Tribunal – Automobile Accident Benefits Service Key Performance Indicators (KPIs)

Thank you for your invitation of Thursday, April 13, 2023 for feedback from the stakeholder organizations, including the Canadian Defence Lawyers (CDL), regarding Key Performance Indicators (KPIs) for LAT-AABS. CDL is the only national organization representing the interests of civil defence lawyers. As a significant percentage of CDL's membership practices accident benefits litigation in Ontario, CDL appreciates Tribunals Ontario's request for input.

While the LAT adjudicates matters arising under a variety of statutes, the volume of disputes involving the Statutory Accident Benefits Schedule eclipses all others, with a current active file load of 15,507 as of fiscal quarter 3 of 2022-2023. Our submissions are focused on providing commentary with that context in mind.

The following are the proposed KPIs for the LAT-AABS:

Performance Measures	Target
Volume of in-person, electronic and written hearing events held at the LAT-AABS	N/A
Number of eligible accommodation requests granted (in whole or in-part) by the LAT-AABS	N/A
Percentage that the first hearing event (i.e. a case conference) is scheduled within 90 calendar days from the receipt of a completed appeal/application	80%
Decisions issued within 90 calendar days from the conclusion of a hearing	80%
Percentage of cases within the 12-month case lifecycle for LAT-AABS	80%
Percentage of cases resolved through alternative dispute resolution (in whole or in-part) within the LAT-AABS	N/A

(1) Volume of in-person, electronic and written hearing events held at the LAT-AABS

CDL supports allocating Tribunal resources in a manner proportionate to the benefits in dispute. For example, disputes over the Minor Injury Guideline would require less resources versus matters involving a catastrophic impairment dispute. However, clarification of this metric is required as follows:

- Whether there is a specific pending target for each type of hearing, such as written or videoconference hearing, and the rationale.
- The timeframe for this metric should be defined proportionate to the benefits in dispute and designation (Minor Injury Guideline, non-catastrophic or catastrophic).

(2) Number of eligible accommodation requests granted in whole or in part by the LAT-AABS

CDL recommends that "accommodation request" be clarified. It is not a defined term within the Tribunal's current Operation Statistics data. "Accommodation request" may refer to requests for accommodations under the *Ontario Human Rights Code* as referenced in Rule 7 of the *Common Rules*, or possibly to adjournment requests and similar "accommodations" under Rule 16.

(3) Percentage that the first hearing event is scheduled within 90 calendar days from the receipt of a completed appeal/application

CDL supports a target for all case conferences **to occur** within 90 days of a completed application rather than simply being 'scheduled'. A 90-day target for case conference occurrence will facilitate the early identification and resolution of potential procedural concerns that may jeopardize the fair, efficient, and proportional resolution of a dispute.

(4) Decisions issued within 90 calendar days from the conclusion of a hearing

CDL supports this metric. We also suggest that case conference reports and orders be issued within a specified time frame from occurrence.

CDL would also encourage the tracking of the use of Rule 3.4 to determine whether there is an opportunity for the Tribunal to evaluate the efficacy of its current gate-keeping function.

(5) Percentage of cases within the 12-month case lifecycle for LAT-AABS

CDL is concerned that a blanket lifecycle performance indicator does not consider the differences in complexity between, for example, a MIG application versus a catastrophic impairment determination application. The current KPI of 80% would hinder the Tribunal's ability to assess the efficacy of its services relating to the most serious of claims, including those where catastrophic impairment is involved. In its current iteration, this target would be met, regardless of how long the average catastrophic file remains open should files involving a catastrophic impairment consist of less than 15% of all applications filed. If a lifecycle target must be present, it should be differentiated by complexity of matter.

CDL recommends also reporting information about case age and the separate reporting of case age information for adjourned matters.

CDL cautions against the adoption of an overly formulaic or quantitative application of this KPI. Our membership's experience with the Tribunal's restrictive approach on adjournments resulted in

applications withdrawn through tolling agreements causing further delays upon resubmission, and further cost to the parties.

(6) Percentage of cases resolved through ADR within LAT-AABS

This performance indicator requires its terms to be defined. A clear definition is needed for "alternative dispute resolution". The Tribunal closed an average of 3,470 files per quarter over the last 4 quarters. On average, only 3.5% of those closures were due to merits decisions. The remainder were "closed by early resolution". CDL recommends that the specific reasons for closure be differentiated and tracked with a specific emphasis on whether the closure was due to settlement and whether the settlement occurred before, during, or after a Case Conference. CDL suggests closures by "early resolution", or "ADR" be due to settlement, rather than withdrawal or abandonment.

Final Comments:

CDL supports the timely, efficient, and fair resolution of disputes at the Tribunal. We appreciate the ongoing opportunity to provide input and are encouraged that the Tribunal continues to evaluate its performance and metrics. CDL would also again encourage regular Stakeholder input going forward as input from the Tribunal's Stakeholder organizations would only serve to assist with the Tribunal's KPI goals.

CDL welcomes any questions and the opportunity to provide further contributions to the operational success of the Tribunal.

Yours very truly,

Andrea R. Lim
President
Canadian Defence Lawyers

Michelle Friedman
Chair of the Accident Benefits Substantive Committee
Canadian Defence Lawyers

CC: Sean Weir, Executive Chair, License Appeal Tribunal
Sara Mintz, Alternate Executive Chair, License Appeal Tribunal
Mary Ann Hunwicks, Senior Manager, License Appeal Tribunal
Maria Damiano, President, Ontario Trial Lawyers Association
John Karapita, Chief Executive Officer, Ontario Trial Lawyers Association
Randi Glass, Executive Director, Canadian Defence Lawyers
Peter W. Kryworuk, President, The Advocates' Society
Vicki White, Chief Executive Officer, The Advocates' Society

Karen Perron, President, Ontario Bar Association
Elizabeth A. Hall, Executive Director and General Counsel, Ontario Bar Association

The Canadian Defence Lawyer's Subcommittee on New Tribunal Ontario and License Appeal Tribunal – Automobile Accident Benefits Service Key Performance Indicators:

Michelle Friedman, Aviva Trial Lawyers
Andrea Lim, Dutton Brock LLP
Devan Marr, LawPRO
Philippa G. Samworth, Dutton Brock LLP

TAB 4

CANADIAN DEFENCE LAWYERS

May 29, 2023

VIA EMAIL: Sean.Weir@ontario.ca; Sara.Mintz@ontario.ca

Sean Weir, Executive Chair
Tribunals Ontario
15 Grosvenor Street, Ground Floor
Toronto, Ontario M7A 2G6

Sara Mintz, Associate Chair
Licence Appeal Tribunal
15 Grosvenor Street, Ground Floor
Toronto, Ontario M7A 2G6

Dear Executive Chair, Associate Chair:

RE: Response and Feedback to Draft *Common Rules of Practice and Procedure*

Thank you for your correspondence of May 1, 2023 inviting the Canadian Defence Lawyers (CDL) to provide its feedback to the Draft *Common Rules of Practice and Procedure* (*Rules*), and the Tribunal's request for further stakeholder input in respect of the draft. We acknowledge with thanks the extension you provided to the CDL to consider and respond with feedback.

CDL is pleased that the stakeholder recommendations were carefully considered and that many of our recommendations were incorporated into the draft *Rules*. In particular, **CDL supports** the following draft *Rules*:

(1) **Rule 8.1 Summons** – Restricts the issuance of a summons to witnesses and items relevant to the issues in dispute and which are admissible at a hearing. The suggested change addresses the issues of hearing ambush, intimidation of witnesses, disorderly proceedings and presentation of irrelevant evidence.

(2) **Rule 9.2 Production Orders by the Tribunal** – Provides that a party must make reasonable efforts to obtain documents; and, Rule 9.2.1 provides that no order will be issued for documents not relevant to the issues in dispute. This correctly requires parties to produce best efforts letters and to provide rationale for production demands.

(3) **Rule 9.2.2 Orders for Non-Party Productions** – Provides the ability to seek an order from the Tribunal from non-parties, which is equivalent to Rule 30.10 in the *Rules of Civil Procedure*, R.R.O. 1990, O. Reg. 194 and was absent from the *Rules*, effective October 2, 2017.

(4) **Rule 16.3 Factors to Consider** (Adjournments) –While CDL does have some concerns with several enumerated factors, as outlined below, the guidance to parties regarding adjournment requests is welcome.

(5) **Rule 24.4 Representative Withdrawal** – Provides the method and grounds for removal / withdrawal of solicitors of record, which assists in preventing unnecessary adjournments of hearings and holds representatives to account.

CDL does, however, have the **following concerns** in respect of the draft *Rules*:

(1) **Timelines should be simplified and staggered** – The current proposed global deadline for productions and expert reports encourages a "trial by ambush" approach. It denies a responding party the full knowledge of the case it is required to meet and removes the ability to adequately respond to last minute productions and expert reports. In order to allow the parties to effectively prepare to meet the case presented at a hearing, CDL recommends setting a staggered timeline for the production of the applicant's documents (Rule 9.5.2) and expert witness reports (Rule 10.3) and the production of the responding documents and expert witness reports. CDL suggests that the applicant's documents and expert witness reports remain due 45 days prior to the hearing, and the respondent's due 30 days prior to the hearing. This would require further amendments to Rule 9.4.2 and 10.3.

(2) **Rule 9.5.2, 9.5.3 and 9.5.4 Rules Specific to AABS Matters and Rule 10.3 Disclosure and Filing Timelines** - CDL requests that in each of the subrules "on consent of the parties" should be added as an enumerated option related to the extension or variation of the set timelines.

(3) **Rule 14.2 Scope of Case Conferences** – CDL suggests adding "Requests for court reporter" as an enumerated option to consider at a case conference.

(4) **Rule 14.6 Party Attendance and Authority of Representatives at Case Conference** – CDL does not support the amendment to this Rule. If the primary goal of a case conference is to attempt resolution of the application, all parties should be present. This ensures applicants are invested in and have knowledge of the process. It is also the only opportunity the parties, and adjudicator, may have to speak and interact directly and frankly with the opposite party. A party's attendance at the case conference should be the default requirement, absent the consent of the parties.

(5) **Rule 16.3 Factors to Consider** – CDL is concerned that the first enumerated factor is the age of the file. CDL recommends that criteria (m) 'broader institutional and public interests', (n) 'legislative requirements', and (p) 'operational considerations' either be removed as considerations or defined as these terms are ambiguous and likely to lead to significant disputes in interpretation. CDL further recommends that an additional consideration be added related to setting out any objections raised/conflicts that arose when scheduling the event with the Tribunal. CDL submits that the proper adjudication of the dispute on its merits and the procedural fairness to the parties must not be secondary to operational or performance factors of the Tribunal.

(6) **Rule 16.4 Adjournment Requests Following a Denial** – CDL does not support a blanket denial of further adjournment requests for the same event unless the initial denied request was made on consent of both parties and there has been no material change in circumstances. A blanket denial of further adjournment requests does not take into consideration difference in respect of all matters before the LAT and would result in a "one size fits all" approach to each matter.

(7) **18.2 Criteria for Granting Reconsideration** – CDL does not support amendment to this Rule and submits that the original Rule 18.2 stand. The term "material breach" in the "new" 18.2(a) is not defined and is open to broad interpretation. The criterion dealing with false evidence ("old" 18.2 (c)) ought to remain as a criterion to consider. There does not appear to be any rationale provided for its removal, nor did CDL request this amendment.

(8) **18.5 Review On Own Initiative** – CDL strongly objects to empowering the Tribunal to review any decision on its own initiative. The right to seek review of a decision or let a decision stand should rest with the parties alone, as established by the Divisional Court of the Superior Court of Justice in *Shuttleworth v. Licence Appeal Tribunal*, 2018 ONSC 3790 (CanLII).

(9) **20.4 AABS Case Conference Summary** – CDL recommends the current form be updated to reflect the changes to the Rule. CDL suggests adding "A brief description of the parties' positions on the issues in dispute" as an enumerated factor to include on the form.

Final Comments

CDL asks the Tribunal to consider its input, and the input of the Stakeholders, in further amending the draft *Rules*.

In consideration of transparency to the Stakeholders, CDL continues to strongly recommend that any Policies and/or Practice Directions be made available to the public. Further, CDL recommends regular meetings with the Stakeholders take place at least once annually.

CDL is happy to provide any further contributions and input in respect of Policies and/or Practice Directions. We look forward to meeting with you in future alongside our fellow Stakeholders.

Yours very truly,

Andrea R. Lim
President
Canadian Defence Lawyers

Michelle Friedman
Chair of the Accident Benefits Substantive Committee
Canadian Defence Lawyers

CC: Maria Damiano, President, Ontario Trial Lawyers Association
John Karapita, Chief Executive Officer, Ontario Trial Lawyers Association
Randi Glass, Executive Director, Canadian Defence Lawyers
Peter W. Kryworuk, President, The Advocates' Society
Vicki White, Chief Executive Officer, The Advocates' Society
Karen Perron, President, Ontario Bar Association
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The Canadian Defence Lawyer's Subcommittee on Tribunal Ontario's Common Rules of Practice & Procedure:

Michelle Friedman, Aviva Trial Lawyers
Kerry Figliomeni, Shillington McCall LLP
Andrea Lim, Dutton Brock LLP
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TAB 5

CANADIAN DEFENCE LAWYERS

April 30, 2024

Via Email: Laura.Craig@Ontario.ca

Ms. Laura Craig
Counsel, Office of the Chief Justice

RE: Proposed amendments to Rule 34.12 and Rule 30.03 of the Rules of Civil Procedure

Dear Ms. Craig,

Your ref.: COM-CIVRC

Canadian Defence Lawyers (CDL), Canada's national association of civil litigation defence lawyers, appreciates the opportunity to participate in this specific project. We would like to thank you, and Justice D. Wilson, Chair, Refusals Motions Subcommittee of the Civil Rules Committee, for the invitation to participate in the consultation with the civil litigation bar on the issue of our discovery Rules 30 and 34.

CDL's Position on the Two Proposed Amendments

We understand the purpose of the proposed amendment to add subrule 34.12 (3) is to reduce the number of inappropriate refusals motions. We further understand the purpose of the proposed amendment to Rule 30.03 with mandatory documentary disclosure in personal injury actions.

CDL strongly agrees with the proposal to amend Rule 30.03, but have some concerns about the proposal to amend Rule 34.12.

We are pleased to offer our comments, below, and our response to the specific questions posed, in order.

Questions re Rule 34.12(5)

Question 1: Do you agree that the ability to bring a refusals motion should be limited to parties that have met the mandatory document production requirements under the Rules?

Yes. However, in personal injury cases, it is commonly the plaintiff who refuses, in an attempt to restrict the defendant's discovery of facts. Therefore, increasing the responsibilities on a party moving against refusals will not target the main problem in personal injury cases, which is the delayed relevant document production by the plaintiff. The defendant's affidavit of documents in a personal injury case, especially an MVA case, is limited to the police report and the property damage documents, and the undertakings are for items of limited relevance to the main issues in dispute. While the defence should comply with the existing rules, as should the plaintiff, it is frequently the case that the plaintiff does not seek out such documents from the defence. As such, the proposed requirement, particularly in respect of personal injury actions, places the emphasis on the wrong side of the problem.

Question 2: Is it appropriate to discourage inappropriate refusals motions with cost consequences, such as those in subrule (5)?

No. If a refusals motion is dismissed, substantial indemnity costs would be too harsh, because in personal injury cases, refusals motions generally involve truly arguable issues about the scope of discovery, i.e. prior medical history, prior lawsuits for personal injury, etc…

Rule 30.03(2.1) and (2.2)

CDL agrees with the proposed amendment to Rule 30.03(2.1), which requires a personal injury plaintiff to include in their sworn affidavit of documents within 6 months of claim issuance, relevant damages documents:

- decoded OHIP summary and family doctor records for 3 years pre-accident,
- all hospital and ambulance records and records from all doctors who provided treatment for the accident injuries,
- the police report and their own police statement,
- the AB and disability and collateral benefits files from the incident,
- tax returns for 3 years pre-accident, and
- any video evidence of the incident in their possession.

We agree *in principle* with most of the proposed amendment Rule 30.03(2.2) to require a personal injury defendant to include in their sworn affidavit of documents relevant documents:

- the insurance policy and declaration page,
- a statement of any party or witness to the incident or with relevant evidence to the issues in the pleadings, listed in Schedule B if litigation privilege is claimed,
- the police report and the party's own police statement,
- property damage documentation in motor vehicle accident cases,
- surveillance listed in Schedule B if litigation privilege is claimed, unless litigation privilege is waived for surveillance being used substantively and not solely to impeach,

- video evidence of the incident if in their possession, and
- cell phone records for the day of the accident, with telephone numbers redacted.

Question 3: Do you agree with imposing mandatory documentary disclosures in personal injury cases?

Yes, CDL does agree with imposing mandatory documentary disclosures in personal injury cases as it would support and encourage settlement in advance of Pre-Trials and Trials.

Question 4: Do you have any concerns with the proposed mandatory disclosures under new subrules (2.1) and (2.2)?

Yes. However, we have serious concerns that the current document list proposed for the plaintiff is not parallel to the list for the defendant.

<u>Regarding 2.1's Plaintiff's Documents List:</u>

- In car accident cases, the plaintiff is often another driver who bears liability for the accident mechanics. The plaintiff should also be obliged to produce their cell phone records for the day of the accident, with telephone numbers redacted.
- Does this cell phone record requirement apply to non-MVA cases?
- The prevalence of adverse costs insurance, after the event insurance, and other litigation insurance in personal injury cases makes the obligation to disclose the insurance policy and declaration page a critical document for the plaintiff to disclose (even if the policy insures the firm, not the individual plaintiff).

<u>Regarding 2.2's Defendant's Documents List:</u>

- The parties – both – must have equivalent disclosure obligations as to witness statements. It is unfair and potentially prejudicial to require the defendant to disclose their witness statements if there is no parallel requirement on the plaintiff. If there is a requirement to disclose witness statements, it must be bilateral.
- Under no circumstance should either party be obliged to disclose a statement provided by that party. The prior statement of a party is of no relevance to the trial. This requirement is only listed for the defendant in the draft, but should not apply to either party.
- The requirement on any party to provide the statement of "any witness with relevant evidence to the issues in the pleadings" bears separate consideration from statements regarding the incident. It is over-broad. Does it apply to treatment providers? Does it apply to witnesses who might be part of the plaintiff's case, but who might also appear on the defendant's witness list, like an employer, a party from a prior lawsuit, a

surveillance investigator? Rule 30.03 is likely not the best rule to address the exchange of witness statements that do not pertain to the incident giving rise to the claim.

Question 5: Do you have any concerns with the timing of disclosures?

No, CDL does not have concerns with the timing of disclosures because the plaintiff is responsible to move the case as the pace which is appropriate for their recovery. The suggested 6 months after the claim issuance may be optimistic given current practice, but it is appropriate to have a timeline for the plaintiff and not the defendant.

Question 6: Are there additional disclosures that you would recommend? For example, should disclosure of social media be required or an obligation to maintain social media (i.e. not deleting it)?

Yes. The plaintiff in personal injury actions should be required to disclose all social media accounts and their name/handle, and the requirement not to delete any accounts should be mandated.

Question 7: The list of required disclosures is not meant to be an exhaustive list. Rather, at the very least, the listed items must be disclosed in any case involving personal injury. Do you agree with this approach?

Yes, CDL agrees with the approach that the listed items must be disclosed in any case involving personal injury, but subject to best efforts.

Question 8: Additional amendments would also indicate that if there have been redactions to a document, the fact of a redaction must be made clear. As well, a procedure for reviewing redactions would be introduced. Namely, if the opposing party questions the legitimacy of a redaction, the unredacted version of the document would be provided to the Court for determination regarding whether the redacted information is relevant to the case and should be disclosed.

CDL agrees, as this would be similar to a privilege motion, where the document over which privilege is claimed is provided, sealed to the Court for review and adjudication of the privilege claim.

Question 9: The amendments would also provide that only relevant excerpts of the transcript of evidence should be included in the party's compendium (i.e. the full transcript should not be provided). Do you have concerns with this approach?

No, however, the party should have the transcript available should it be necessary.

Question 10: Should the rules specify that, where the plaintiff intends to argue threshold, when setting the matter down for trial the plaintiff must confirm that they have served a threshold report on the defendant?

Yes, CDL agrees that where the plaintiff intends to argue threshold, when setting the matter down for a trial, the plaintiff must confirm that they have served a threshold report on the defendant as this would ensure efficiency of the procedure at trial. Such a report is a requirement under the Regulation under the *Insurance Act* to prove threshold. There is no point setting a motor vehicle action down for trial until it is served.

Question 11: In conjunction with question 10, if the defendant is served with the plaintiff's threshold report and intends to respond, should the rules specify a timeline for the defendant's response (e.g. within six months of receiving the plaintiff's threshold report)?

No. The defendant is limited to one defence medical assessment (per matching specialty to the plaintiff's experts). The time for delivery of this report must be calculated backwards from the pre-trial date as currently is required, otherwise it becomes outdated. The plaintiff has the right to unlimited expert consultations and reports (at least until trial), but the defence is restricted to one assessment.

Conclusion

It is CDL's view that these changes, if implemented, would strive to reduce the duration and cost of personal injury actions, which exhaust an extraordinary amount of time and money in attempting to secure the relevant documents to properly assess, and very likely resolve, a case.

We would be pleased to remain involved in this project as it continues.

Yours very truly,

Heather Sanderson
President, Canadian Defence Lawyers

Susan E. Gunter
Chair of the Public Policy Secretariat (PPS)

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Current Rules

Rule 34.12 of the *Rules of Civil Procedure* provides as follows:

34.12 (1) Where a question is objected to, the objector shall state briefly the reason for the objection, and the question and the brief statement shall be recorded.

(2) A question that is objected to may be answered with the objector's consent, and where the question is answered, a ruling shall be obtained from the court before the evidence is used at a hearing.

(3) A ruling on the propriety of a question that is objected to and not answered may be obtained on motion to the court.

Rule 30.03 provides as follows:

Party to Serve Affidavit

30.03 (1) A party to an action shall serve on every other party an affidavit of documents (Form 30A or 30B) disclosing to the full extent of the party's knowledge, information and belief all documents relevant to any matter in issue in the action that are or have been in the party's possession, control or power.

Contents

(2) The affidavit shall list and describe, in separate schedules, all documents relevant to any matter in issue in the action,

(a) that are in the party's possession, control or power and that the party does not object to producing;
(b) that are or were in the party's possession, control or power and for which the party claims privilege, and the grounds for the claim; and
(c) that were formerly in the party's possession, control or power, but are no longer in the party's possession, control or power, whether or not privilege is claimed for them, together with a statement of when and how the party lost possession or control of or power over them and their present location.

(3) The affidavit shall also contain a statement that the party has never had in the party's possession, control or power any document relevant to any matter in issue in the action other than those listed in the

affidavit.

Lawyer's Certificate

(4) Where the party is represented by a lawyer, the lawyer shall certify on the affidavit that he or she has explained to the deponent,

(a) the necessity of making full disclosure of all documents relevant to any matter in issue in the action; and

(b) what kinds of documents are likely to be relevant to the allegations made in the pleadings.

Affidavit not to be Filed

(5) An affidavit of documents shall not be filed unless it is relevant to an issue on a pending motion or at trial.

TAB 6

CANADIAN DEFENCE LAWYERS

July 12, 2024

VIA EMAIL

Dear Justices Chalmers and Koehnen,

Thank you for giving Canadian Defence Lawyers (CDL) the opportunity to participate in this consultation with the Bar - the Toronto Civil List reform project. CDL is Canada's national association of civil litigation lawyers who predominantly represent defendants. https://www.cdlawyers.org/

The best solution to the delay in civil justice is to replenish the judicial complement for Toronto Region - and expand it due to the region's growth. CDL calls upon both federal and provincial governments to immediately fill the vacant judicial positions at all levels of court in Ontario.

At your request, we are offering our members' input on **other ways** to address delay in the Toronto civil courts.

Civil Trial Scheduling

Trial scheduling has improved on the civil list in Toronto with sittings in Spring and Fall for jury trials under 10 days, long trials booked for fixed dates next year and under 5-day trials booked within months. But - the reason for the success of the scheduling is not merely the assignment of a trial date. Instead, it is because the cases scheduled for trial are *actually ready for trial.* They are ready for trial because they are vetted by the trial scheduling judges and trial scheduling forms process. Matters should not be forced to trial before they are ready. Cases that are ready should be forced to trial. CDL hopes the Court continues to run the list with the same careful consideration and vigilance, balancing the need to provide access to the court with procedural fairness. Accommodation for reasonable adjournment requests must still, in the interests of justice, be granted, especially given the wide availability of trial dates in the near future.

Addressing Action Delays for Earlier Trial Readiness

CDL wishes to focus this Court's attention on assisting the parties to prepare the cases for trial. As is apparent from the current time-outs to Motions and Case Conferences, we have a problem with access to justice at the interlocutory stage. We offer the following suggestions for your consideration – including brainstormed ideas from our Ontario CDL members who

enthusiastically responded to our survey seeking to learn their experience on the Toronto civil list, at this Court's request.

Premature Filing of Trial Records Impacts Trial Lists

"Be careful what you wish for."

Plaintiffs often serve trial records immediately after discovery or mediation, but then fail to produce answers to undertakings, updated productions, expert reports etc. The lack of timely motion dates to address the plaintiff's procedural issues can result in the parties arriving at trial scheduling court before they are ready. Frequently, it is the plaintiff, still not ready for trial, seeking an adjournment when it was the plaintiff who filed the Trial Record and certified readiness for trial in the first place.

- Trial scheduling court should not waste its time managing cases (timetabling, resolving procedural disputes, etc.) that are before it because the plaintiff set the case down before it was ready. Other cases that are ready for trial are waiting for scheduling.

- When cases at trial scheduling are not ready, they should be struck from the list, regardless of whether a timetable has been imposed.

Electronic Scheduling: Calendly

"Calendly is a good concept… when there is date capacity."

- The *Rules* allow Associate Judges to conduct Case Conferences but on Calendly, the only option is to select a Judge. Associate Justice should be added as a booking option on Calendly for Case Conference bookings. It is noted that an express 15-minute motion with an Associate Justice currently books only 2 weeks out.

- A booking party should be able to place (only) one date on hold for a 24-hour period to secure the consent of the other parties.

- Motion confirmations should be filed on Calendly instead of a moving party emailing a motion confirmation form 4 days pre-hearing. This will streamline and centralize the motion process.

Costs Consequences for Late Consent on Motions

"There are no consequences to delaying to respond to a motion when it is booked far into the future."

- Responding parties often consent to relief at the last minute, just prior to the return date.

- There are no cost consequences since there is no court attendance and the court frowns on motions argued only about costs.

- Costs sanctions against a late-consenting party could correct this conduct.

Increased Case Conference Availability

CDL members overwhelmingly support the Case Conference system. Unfortunately, the time out is nearly as long as a long motion. More Case Conference time slots should be added.

Case Conference – Expansion of Use of Jurisdiction to Make Orders

"Case Conference judicial officers have the jurisdiction to make orders even on opposed matters."

Rule 50.13(6) permits a Judge or Associate Justice, to make orders, either on consent or on notice, convene a pre-trial, give directions, or make an order for interlocutory relief or have a hearing:

- *Miller v. Ledra* 2023 https://canlii.ca/t/jzw02;
- *Think Research v. N&M* 2023 https://canlii.ca/t/k1k7w;
- Article about *Think Research* https://canliiconnects.org/en/summaries/93527;
- *Wilcox v. Abbitan* 2024 https://canlii.ca/t/k5332

CDL members support an expanded use of these case conference powers, especially to address the routine motions set out below.

Suitable Motions for Case Conferences with Judge or Associate Justice

"Most motions are brought due to delays in prosecuting the action."

- Insurance defence lawyers typically bring the following eleven (11) motions: undertakings, refusals, further and better affidavit of documents, strike improper pleading, add statutory third party, documents from non-party, attend defence medical, security for costs, enforce timetable, dismissal for delay, enforce settlement. The majority of these derive from the plaintiff's breach of existing *Rules* and failure to move the case expeditiously.

- Conversely, plaintiffs generally bring five (5) types of motions which are either on consent or unopposed: service motions, pleadings amendment, add party, settlement approval, timetabling. Plaintiffs *may* face opposition in motions to set aside dismissal orders or removal of their firm as lawyer of record, but usually those motions proceed unopposed. The unavailability of motion dates makes the defendant's remedy inaccessible and the action slows to a standstill. The time out to motions disproportionately disadvantages defendants.

- The burden of the unavailability of motion dates is born primarily by defendants in civil actions. Case conferences where the Court rules on simple opposed matters would greatly reduce this burden and move cases faster, with fewer involved motions requiring full court hearing on Motion Records with evidence.

Case Conferences, applying the procedure under Rule 50.13(6) and principles in *Miller v. Ledra,* could hear all of these types of interlocutory disputes - even opposed motions.

Case Conference Procedure Modifications and Document Requirements

"Opposed matters can, and should, be dealt with at Case Conferences, with procedural safeguards."

- CDL members uniformly support the requirement to deliver a 2-3 page maximum summary of evidence, argument and law for a Case Conference, as well as Draft Orders.

- Informal materials filing is preferable, including email to the Court. However, the parties must preserve the record since there is no Court filing of Case Conference materials. The implementation of Caselines for materials on opposed Case Conference matters might address that issue, even if the materials do not make their way to the actual Court File.

- A Case Conference Order made on an opposed matter requires notice to the opposing party and the decision must be accompanied by Reasons (matching the complexity of the issue). It is important that the losing party's right to appeal the Court's decision is preserved.

- Counsel must be encouraged to request an adjournment if the party feels materials are required. Such requests should be received favourably since a party has the procedural right to file materials in opposed matters. As soon as it becomes clear that formal materials or a hearing is required, the Case Conference judicial officer should timeline the hearing. If the Court declines a party's request to adjourn for the purpose of filing materials or a hearing, Reasons should be given to preserve the party's right of appeal on the denial of the adjournment request.

New Bifurcation Rule 6.1.01 – No Consent Required

"Bifurcated trials are short trials, whether by judge or jury, are superior to summary judgment motions which require timetabling, affidavits, cross-examinations, transcripts and facta."

Bifurcation orders mark a major step forward in access to affordable justice and should facilitate the earlier resolution of damages claims. CDL members are excited about the opportunity to access quick and final resolution of liability issues especially in personal injury cases. Most CDL members have avoided recommending summary judgment motions for years given the unfavourable case law. No procedural options existed to extract clients who are not

liable from sometimes decades-long litigation. CDL made submissions to the Rules Committee's 2023 subcommittee on bifurcation and are gratified to see their proposed changes adopted.

- Opposed motions for bifurcations can be made as short motions before Judges. They do not require much evidence; they are only seeking a short trial.

- Once the order for bifurcation is made, Case Conferences can manage how to deal with the damages case.

- Rule 48 does not prohibit a bifurcation motion. If the action is set down for trial, a party can still move for bifurcation.

- Bifurcation orders should therefore be discussed at Pre-Trial Conferences.

- CDL members are optimistic that the Court will apply the new bifurcation Rule in the spirit it embodies, finally in accordance with the call for a culture shift in *Hryniak v. Mauldin* 2014 SCC for efficient resolution of disputes.

Pre-Trial Conferences and Memoranda

"Pre-Trial Conferences are extremely important to the trial preparation process and the trial management function."

- CDL members emphasize the importance of a Judge or Associate Justice familiar with the subject matter to ensure the success of the Pre-Trial Conference for several reasons. Whereas a Pre-Trial Conference judge unfamiliar with the subject matter can waste the parties' time and even push the parties further apart, a judge familiar can believably mediate the dispute and provide an accurate assessment and comment on the merits of each party's case, both of which may lead to settlement.

- The Pre-Trial Conference is often the first time the defence learns the plaintiff's theory of the case. This is true even when there has already been a mediation. The delivery of Pre-Trial Memoranda should be staggered – the plaintiff's memo served/filed first, the defence memo second. This would narrow the issues in dispute. Unnecessary arguments, evidence, or even detail in the defence memo could be avoided if the defence knew the case to meet at the Pre-Trial Conference.

- Pre-Trial Conferences should never go longer than the scheduled time, either 1 or 2 hours generally.

Civil Jury Must Be Preserved

"Keep civil juries. Access to fair justice demands it. Abolishment of civil juries is a construct of plaintiff personal injury lawyers… not backed up by the data they purport to peddle. In a jury trial, the jury renders and it's done. In a judge-alone trial, the writing time cannot be overlooked as an additional burden to an already overburdened system."

- CDL earnestly supports and defends Ontarians' long-standing right to trial by a jury of their peers.

- Juries are as well suited to deliver justice as a judge – especially in cases requiring the application of the "reasonable person" standard, i.e. all negligence cases.

- Juries are diverse by definition, in contrast to a single appointed judicial officer. Jurors come from all walks of life and cultural backgrounds. It is only recently that the jury pool has been expanded to include those who do not own property in Ontario – a welcome change which has further increased the diversity of Ontario's juries.

- Damages are intended to reflect community standards. A jury drawn from the community is the best representative of the community, not a single appointed judicial officer.

- Jurors have no medical or scientific training but neither do judges. It is not the job of the trier of fact to rely on their own knowledge.

- There is no evidence of what, if any, costs are burdened on the civil justice system by having juries.

- A jury trial provides faster justice to the parties and closes the court case with the verdict.

- There is no one-year waiting period for Reasons for the parties to learn who won and who lost.

- Appeals from jury trials are less likely, expediting the conclusion of the dispute for the parties and the court system.

- All rules of evidence must be strictly respected without the ability to admit inadmissible evidence with a "consideration of weight" justification.

- The gatekeeping function of restricting expert testimony under Rule 53 is exercised with greater vigilance in a jury trial – increasingly important in the era of junk science and allegedly biased experts.

- Scheduling wrinkles and adjournments are less likely granted when juries are empaneled creating greater certainty in court resource allocation.

- To CDL's knowledge, only two (2) civil personal injury trials have actually proceeded to conclusion under Rule 76 Simplified Procedure despite January 1, 2020 (Ont. Reg. 344/19) when damages were capped at $200,000 and no civil juries were permitted.

This is despite the representations of the plaintiff's bar associations that injured plaintiffs would try their cases before judges, whom they trust more than juries.

- The recent concerted backlash against trials by jury in Ontario is restricted to civil juries, with no mention of whether criminal juries are up to their equally important task. Public calls for abolition of civil juries come from plaintiff personal injury litigation lawyers, exclusively.

- There is no evidence to support any restriction or abolition of juries.

- CDL members value the ability of our citizenry to participate in the justice process, which we view to be a cornerstone of democracy itself. The Government of Canada's position on the "Role of the Public" in the justice system is: *"Even before the advent of modern democracy, trial by a jury of ordinary people reflected a seismic shift from the top-down justice administered by a Crown or state appointee. Today, testifying in court as a witness or sitting as a juror are specifically identified as the role of the citizen."*

Conclusion

CDL is grateful for the opportunity to participate in the Toronto Civil Bench and Bar Committee, and to make submissions for areas of reform to streamline our civil list in Toronto. We will endeavour to provide education opportunities to our members on these and other reforms. We would be pleased to work on this project going forward and to provide any assistance the Court may require.

Yours very truly,

Lisa C. Pool
President
Canadian Defence Lawyers

Canadian Defence Lawyer's Subcommittee on the Toronto Civil Reform Project Submission:
Lisa Pool, Evans Philp LLP, President, Canadian Defence Lawyers
Susan Gunter, Dutton Brock LLP, Chair of the Public Policy Secretariat
Karim N. Hirani, Zuber & Company LLP
Andrea Lim, Dutton Brock LLP
Amelia Leckey, SGI Canada Insurance
Debbie Orth, Bertschi Orth Solicitors & Barristers LLP
Brett Rideout, Rideout Law
Grant Bodnaryk, Travelers Canada
Joshua Henderson, Groia & Company Professional Corporation

…
Enclosures

Law Society of Ontario | Barreau de l'Ontario

TAB 10B

7th Motor Vehicle Litigation Summit

Submissions by the Ontario Trial Lawyers Association

Sandev Purewal, C.S.
Lerners LLP

September 18-19, 2024

OTLA Ontario Trial Lawyers Association

Submissions by the Ontario Trial Lawyers Association

Prepared for: LSO's 7th Motor Vehicle Litigation Summit

September 18, 2024

ONTARIO TRIAL LAWYERS ASSOCIATION
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The Ontario Trial Lawyers Association is pleased to provide a summary of submissions developed in 2023 and 2024 related to auto insurance in Ontario. This is not a complete list of submissions made during this period.

1. April 3, 2023 – Submissions on Presumptive Guidelines
2. April 28, 2023 – Submissions on Bifurcation
3. May 4, 2023 – Commentary on KPIs at the LAT
4. May 29, 2023 – Submissions on the LAT's Draft Common Rules of Practice and Procedure
5. April 30, 2024 – Submissions on Rules 30 and 34
6. July 12, 2024 – Submissions on the Toronto Civil Reform Project (Bench and Bar Committee)

TAB 1

OTLA Submission to the Office of the Chief Justice of the Ontario Superior Court of Justice

Consultation on Mode of Proceedings

April 3, 2023

ONTARIO TRIAL LAWYERS ASSOCIATION
1190 Blair Road - Burlington - Ontario • L7M 1K9
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The Ontario Trial Lawyers Association (OTLA) appreciates the opportunity to make submissions to the Office of the Chief Justice of the Ontario Superior Court of Justice on its review of the Ontario Superior Court of Justice's Guidelines to Determine the Mode of Proceedings in the Superior Court (the "Guidelines").

The Ontario Trial Lawyers Association was formed in 1991 by lawyers acting for plaintiffs. Our purpose is to promote access to justice for all Ontarians, preserve and improve the civil justice system and advocate for the rights of those who have suffered injury and losses as the result of wrongdoing by others, while at the same time advocating aggressively for safety initiatives.

Our mandate is to fearlessly champion, through the pursuit of the highest standards of advocacy, the cause of those who have suffered injury or injustice. Our commitment to the advancement of the civil justice system is unwavering.

OTLA's members are dedicated to the representation of wrongly injured plaintiffs across the province and country. OTLA is comprised of lawyers, law clerks, articling students and law students. OTLA frequently comments on legislative matters and has appeared on numerous occasions as an intervener before the Court of Appeal for Ontario and the Supreme Court of Canada.

Overview

OTLA fully supports the current review on the presumptive modes of hearing as outlined in the Guidelines. When the current Guidelines, and its predecessors, came into effect, it was at a time when the legal profession, and especially the Courts, had undergone significant upheaval and rapid change due to the COVID-19 pandemic. As outlined in the consultation request, and as has been stated many times by Chief Justice Morawetz, "the Guidelines are living documents."

In OTLA's view, this is an important time to revisit the Guidelines, in a post-pandemic environment, which will likely guide the profession's "new normal" in dealing with the Courts for years to come. We have set out below OTLA's position to the Guidelines that impact OTLA members, specifically those areas that affect Civil matters. OTLA does not have any input to add to the Guidelines as it relates to Family or Criminal proceedings.

The recommendations that follow are based on OTLA's strong belief that our Courts must provide greater access to justice and be flexible and efficient. While OTLA appreciates the rationale outlined in the consultation request for an emphasis on in-person hearings, it is OTLA's view that access to justice requires a greater emphasis on virtual and/or hybrid hearings in as many cases as possible. As was said by Chief Justice Morawetz at the Opening of the Courts in October 2022, "…the availability of virtual hearings has been transformational for the Courts. When deployed for the right types of proceedings, virtual hearings open our Court to greater flexibility and accessibility. **There is no going back: virtual hearings have become a permanent fixture for court proceedings** [emphasis added].[1]"

[1] https://www.ontariocourts.ca/scj/news/speeches/oc/

Consent Motions, Without Notice Motions and Unopposed Motions

OTLA agrees with the proposal in the Guidelines that consent motions, without notice motions and unopposed motion be heard presumptively in writing. OTLA however cautions that to the extent these motions are presumptively in writing, there should be a mechanism put in place to:

(1) ensure certain types of motions can be read urgently, or at least within a reasonable amount of time, and, in any event, where all motions are read within a defined and reasonable period of time; and

(2) ensure any clarifications required by the judiciary to filed materials be dealt with in an efficient and timely manner.

In OTLA's view, these mechanisms need to be put in place to ensure that matters affected by these types of motions are addressed in a timely and efficient manner.

Timeframe for Motions to be Dealt With

OTLA is concerned that the requirement that all of these types of motions be dealt with presumptively in writing may result in a significant backlog of in-writing motions. Many of these motions have traditionally been dealt with by way of a brief, few-minute-long, in person attendance at the next scheduled motion sitting. While there is presumably some discretion to the Courts to still allow such motions to be heard orally, it has been our members' experience that these motions are not being allowed to be heard orally, especially in larger judicial centers. Given the manner in which motions are now booked, OTLA is concerned that those scheduling the motion will not exercise any discretion and will require that the motion be mandatorily in-writing as indicated in the Guidelines, resulting in a large influx of these motions.

Motions are often necessary to advance a case. If a mechanism is not set up so that more time-sensitive matters can be dealt with efficiently in writing, great prejudice can occur to a party. For example, our members have expressed concerns that the requirement that Rule 7 motions (motions affecting a party under legal disability) be in writing has resulted in lengthy delays before hearing back from the Court with a judgment. Some of our members have reported upwards of a three- or four-month delay in receiving the final judgment approving the settlement of these motions. Without the judgment, a case that is provisionally settled cannot resolve and no settlement funds can be dispersed to some of the most vulnerable and in-need members of our society.

Another example of a motion of a time-sensitive nature is an *ex parte* motion to extend the time to serve a Statement of Claim or for substituted service. If these motions cannot be read quickly, and an order issued within a reasonable amount of time, then the time to serve the Statement of Claim could expire. This will then result in the lawyer needing to not only bring a further motion, but also to self-report to his or her insurer to assist with remedying the dismissal.

Consideration should be given to some sort of system being put in place where motions in writing under certain Rules are dealt with by the courthouse within a certain number of days (for example

Rule 7.08 motions). Additionally, OTLA recommends that a separate process be set up whereby counsel can notify the Court that certain motions are urgent or time sensitive so that they can accordingly be prioritized in the queue.

OTLA also recommends that the Guidelines provide that all motions in writing, irrespective of the Rule it is brought under, be dealt with within a specified period of time of no longer than two months from the date of filing. Otherwise, OTLA has concerns that motions in writing will end up in a lengthy queue (of uncertain length) before they come before a judge or associate judge. If that happens, the rights of the parties can be significantly affected.

System for Clarification of Questions from the Judiciary

One of the central problems with motions being done in writing is that the judiciary has no efficient manner in which to obtain clarification from counsel regarding any issues or requested relief in the motion. This causes further delay. Traditionally these types of motions covered by the Guidelines would be dealt with by way of a quick in-person attendance where the judge could ask clarification questions of counsel. This will no longer be the case with motions being presumptively in-writing.

OTLA is concerned that the potential delay can be significant, even if only a minor clarification is required. Where a member of the judiciary now has questions about the submitted in-writing motion materials or the relief being requested, he or she then has to issue an endorsement setting out the issues/questions and requesting additional information from counsel, often by way of supplementary affidavit. The endorsement then has to wind its way through the administrative process of being entered by court staff and sent to the lawyer of record. The lawyer of record then has to take the steps requested by the judge/associate judge reviewing the materials and then submit the materials back into Court. By the time this process has taken place, significant time has likely passed since the materials were originally reviewed and often that member of the judiciary has moved onto a trial, long motion, or other Court duties. While the motion is eventually dealt with, it has been our members' experience that any clarification from the judiciary, no matter how small, often leads to several weeks, if not months, delay in ultimately obtaining a final order. All the while, the case is unable to move forward towards either next steps in the matter or towards full and final resolution. These delays are especially concerning with Rule 7 motions or motions dealing with limitation periods.

OTLA recommends that strong consideration be given to putting in place a mechanism to efficiently deal with clarification questions the judiciary may have regarding the motion materials. Consideration should be given to allowing for such matters to be dealt with in a quick chambers attendance/call or an expedited and streamlined in-writing mechanism so that these matters can be prioritized. A clarification which would normally be achieved by way of a few minutes' discussion should not delay a matter for several weeks or months. OTLA notes that, in certain jurisdictions, there is often direct contact (by phone, email, etc.) between a Court reviewing a motion in writing and counsel on more minor issues or questions relating to the motion or its materials. OTLA recognizes that this type of contact may not be possible in all jurisdictions but nonetheless encourages it, where possible and appropriate, as a quick and efficient resolution to

more minor issues with motions in writing. This type of contact can help minimize or even eliminate delay, and thus lead to the timely rendering of judgments.

Examinations for Discovery

OTLA disagrees with the Guidelines requiring examinations to be presumptively conducted in person. The civil justice system in Ontario has made great strides in modernizing since the onset of the COVID pandemic. OTLA is concerned that requiring all discoveries to be presumptively in person is a step back in that modernization. In our members' experience, virtual examinations have in practice become the default since the pandemic. Very few examinations tend to be conducted in person and there are benefits to virtual examinations which include time and cost savings.

In our members' experience, the time required to schedule and conduct examinations for discovery is a significant contributor to delay in civil actions, especially during the early stages of proceedings. Requiring in-person examinations for discovery only adds to that delay. While parties have the right to be examined in their geographic location, they nonetheless often retain counsel that live in different cities, especially if they require a specialized lawyer, are injured in a location not near where they live or they live in an area that is underrepresented by legal counsel. Rather than having to travel to different locations for the purpose of examinations - and stay in hotels where necessary for multi-day examinations, for example - virtual examinations for discovery allow counsel to schedule examinations more efficiently and earlier in the proceedings. In addition, virtual examinations allow counsel to stagger discoveries over several weeks and months, whereas in-person examinations often need to be done over consecutive days to avoid the cost associated with travel. Finding consecutive days in counsel's calendar often proves challenging and cause examinations to often be set over a year into the future as a result, especially where multiple parties with multiple different counsel are involved. Examinations for discovery should not be delayed simply because parties cannot meet in person and virtual examinations prevent one party from using difficulties in scheduling examinations to delay proceedings.

For similar reasons, in-person examinations for discovery add to the costs of litigation because counsel must often travel from their office location to where their client is being examined. An out-of-town lawyer may be less inclined to take a smaller case, if there will be significant travel expenses relating to discoveries, thereby contributing to the access to justice issues already experienced in smaller civil matters. Equally, there is often significant costs associated with having court reporters travel to smaller towns throughout Ontario that do not have local court reporting services. All of these issues and costs are eliminated with virtual examinations. Whether that travel is for one day or for multi-day examinations, the costs are significant and, in OTLA's view, disproportionate to any benefit of in-person examinations for discovery. These costs are added to already costly litigation, thereby impeding access to justice.

One of the underlying over-arching principles for the requirement for in-person attendances in the Guidelines is that the participant's personal circumstances may make remote hearings less suitable. Examples that are given in the Guidelines are a party's disability or caregiver responsibility. Equally, these personal circumstances of the participant may be exactly why a virtual discovery and/or hearing is in the best interests of the participant. A physical disability may

make it easier for the participant to conduct the examination from their home where they have all necessary accommodations they require, rather than necessitating them to travel to a discovery location. Equally, virtual discoveries can often be arranged around school drop off and pick ups as an example, and again, avoids the time and inconvenience of travelling to and from a discovery location.

As Justice Meyers noted in *Arconti v. Smith*, we have the technological capabilities to conduct virtual examinations for discovery and using them is "…more efficient and far less costly than personal attendance. We should not be going back." [2] Presumptively in-person examinations for discovery are a step back with no discernible benefit to civil litigation. Not only is the technology available, but multiple legal organizations, including OTLA, have produced *Best Practices for Remote Examinations for Discovery*, which are readily available and can help counsel who may not be fluent in their use.[3] In 2023, counsel must adapt and be able to conduct virtual proceedings.

OTLA's main concern with the Guidelines mandating that discoveries be presumptively in-person is that it allows one party or counsel to prevent virtual examinations for no reason at all and/or to increase the costs to the other party. As noted above, this leads to increased delay and unnecessary cost. OTLA recommends that this potential power imbalance be reversed so that a party wishing to conduct an in-person examination be required to justify their position to a Court by way of a case conference or other stream-lined process. In that way, litigation can proceed more quickly and efficiently while allowing a party recourse to the Courts should there be a disagreement as to the mode of discovery.

Along this same vein, there are no due process concerns with virtual examinations for discovery. No substantive result is achieved or awarded by conducting the discoveries in person. While actions can be settled after an examination for discovery, no third party adjudicates the quality of evidence at that stage. Rights are therefore not lost with virtual examinations for discovery. All parties have the same opportunity to participate and be heard. Further, the ability to assess credibility and the strength of a witness being examined has already been accepted by the Courts as being just as effective through virtual means versus in-person. The benefits of conducting the discovery virtually far outweigh any concerns from opposing parties about being able to assess a party's credibility as a witness. Other important steps in litigation, including pre-trials under the Guidelines, for example, are presumptively conducted virtually with no notable decrease in their quality. There is no reason why examinations for discovery cannot be similar.

Judge-Alone Trials

OTLA has concerns with the Guidelines mandate that judge-alone trials are presumptively in person unless both parties' consent and the Court approves. It is OTLA's position that strong consideration should be given to having trials be virtual, and at a minimum, mandatorily hybrid, as the default for judge-alone trials. It is worth starting the discussion of OTLA's concerns with this

[2] *Arconti v. Smith*, 2020 ONSC 2782 (CanLII) at para 15.
[3] See Best Practices for Remote Hearings dated May 13, 2020 https://www.advocates.ca/Upload/Files/PDF/Advocacy/BestPracticesPublications/Best_Practices_for_Remote_Hearings_oct30.pdf

aspect of the Guidelines with the oft-quoted opening paragraphs of Justice Karakatsanis' decision in *Hryniak v. Mauldin*:[4]

> Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.
>
> Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case.

To say this statement was prescient in light of the Covid-19 pandemic is to state the obvious. The pandemic, with all of the suffering that it caused around the world, did force the administration of justice into the electronic age at an incredibly rapid pace, for which it is to be commended. The lessons we have learned and the efficiencies we have gained must not, however, be lost as we navigate a post-pandemic world.

It is not just motions, applications, mediations and pre-trials that have benefitted from the new virtual world, for reasons of efficiency, costs and overall access to justice, virtual judge-alone trials have also been an immense success.

Virtual trials bring flexibility. During trials, it is inherently difficult to anticipate the length of witness testimony particularly when the timing depends on the length of time taken by opposing counsel in cross-examination. Forcing witnesses to attend court and sit in the Court hallways for hours or even days for their turn to testify is inefficient. It also wastes the time of the Court when witnesses testify faster than anticipated thereby leaving trial time with no witnesses available to proceed. Virtual court permits flexibility and latitude for witnesses to be placed in a standby position and, in the meantime, live their lives provided they are given some notice prior to the time for testimony. Many people who are being asked to testify are doing so without compensation other than witness attendance fees. Minimizing inconvenience to those assisting in the administration of justice is a huge benefit of virtual trials.

Virtual trials allow professional witnesses to continue to work while waiting for their time to testify. Family doctors and medical specialists can continue to treat patients thereby (a) reducing the burden upon the health care system and (b) reducing the actual costs billed to the litigants for their trial participation. Litigation experts can more easily attend trial for their testimony and cost effectively sit to observe the evidence of others which may be relevant to their testimony.

[4] *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII), [2014] 1 SCR 87 at paras 1 to 2.

Witnesses do not need to be flown in from other cities or countries for their testimony if all witnesses proceed virtually. Avoiding the costs of transportation and accommodation of witnesses would assist in keeping costs of a trial reasonable. Without virtual trials, important witnesses may need to travel great distances, and possibly on multiple occasions if their testimony is not completed as anticipated or other obligations arise that prevent them from staying overnight. These unanticipated costs can be avoided entirely with virtual trials.

Virtual trials increase the ability of a party to attend the trial on a daily basis, something most parties find difficult with in person trials due to work and/or childcare commitments. It allows the party to virtually enter the courtroom at different times of the day as their personal circumstances allow. In addition, if a party is disabled, as an example, attending court day in and day out can be unrealistic due to physical limitations. Being able to watch the trial virtually from home allows that party the benefit of participating in his or her trial, while still having the benefits of their home assistive devices and/or the ability, as an example, to be able to stand and walk as their disabilities require.

Virtual trials make a trial more cost effective, time efficient and more convenient to all parties. The costs of trial would also be more evenly distributed within the province. In some jurisdictions, it may not be possible to find experts that are located within a reasonable distance while other jurisdictions have ready access to far more expert resources. Virtual trials help even the playing field for all litigants no matter what jurisdiction the trial is held.

The benefits of a virtual trial to those who are served by the administration of justice should not be underestimated nor lost in favour of a rush to get back to the courtroom for nostalgic reasons. While it may not be that every case will benefit from a virtual trial, there should not be a presumption in favour of in-person judge-alone trials and a corresponding burden placed on anyone seeking a virtual judge-alone trial for whatever reasons.

OTLA submits that the issue of whether a judge-alone trial will be heard virtually or in person should be left for determination by the parties or, failing agreement, the matter should be addressed at Trial Management Court or on a contested motion well in advance of the trial. Without a presumption in place, it would be for both parties to put forth cogent reasons why one mode of trial is preferable to another based on the particular factors of their case. This would inject flexibility into the system and compel lawyers to seriously consider their positions and articulate why they prefer one mode of trial over the other.

As was stated by Chief Justice Morawetz at the Opening of the Courts in October 2022 when specifically addressing the state of civil proceedings in the Superior Court of Justice, we need technology and modernization with our trials:

> The Court runs the risk of becoming irrelevant in civil proceedings if action is not taken. In the short term, I am looking at ways to put us in a greater state of readiness and flexibility for civil proceedings. One way may be to schedule a team of civil judges ready to deal with trials in any region of the province.
>
> ....

> **I envision a future civil court that has earned the title "modern" with its use of enhanced case management and technology.** One that is responsive, flexible, but adheres to the needs of the justice system without compromise and **includes a nimble group of judges who can hear trials on a regular basis, bringing judges to the litigants.** [emphasis added]
>
> That is the future we can have by creating a "new normal" for civil proceedings emphasis added].[5]

It is very telling that to start to deal with the backlog that has been crippling the civil justice system, two four-week-long trials sittings will be held in November/December 2023 and April 2024. The mode of hearing will be *exclusively* virtual.[6] This is because even the Courts recognize that virtual trials are more flexible and efficient, and allow parties, witnesses, and in this case even the judiciary, to come from all regions of the province.

In the words of Justice Karakatsanis, "[t]h**e balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just**" [emphasis added].[7] The presumption proposed in the Guidelines appear to run contrary to this mode of thinking and relegates the virtual trial to the dustbin of pandemic history instead of embracing it for what it was, a cost effective alternative to in person trials that were both fair and just to the parties.

Mandatory Mediation

The Guidelines currently call for mandatory mediations to be presumptively in person. For many of the same reasons stated above with respect to trials, in OTLA's view, mandatory mediations should be presumptively virtual. There is no principled basis for mandatory mediations to be treated any differently than pre-trial conferences. Like pre-trial conferences, mandatory mediations focus on "settlement issues,"

Rule 24.1.01 states that the purpose of mandatory mediation is "to reduce cost and delay in litigation and facilitate the early and fair resolution of disputes." Presumptively in-person mandatory mediation goes against this very purpose. Such method of hearing lacks flexibility. For example, it can limit the option and availability of mediators to a geographic area, given the Rules application only to the City of Ottawa, City of Toronto and the County of Essex. The availability of virtual mandatory mediation breaks free from such limitations and leverages the inherent flexibility of this method of hearing against delay and costs.

In our members' experience, virtual mediations continue to be a great success. They are cost effective, time efficient and convenient. They promote access to justice. Rule 24.1 is built to achieve timely, cost effective, and early and fair resolution of disputes. The Guidelines should

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[5] https://www.ontariocourts.ca/scj/news/speeches/oc/
[6] Memorandum by Chief Justice Morawetz dated December 14, 2022. See https://www.advocates.ca/Upload/Files/PDF/Advocacy/SuperiorCourt/2022/Memo_CJ_Morawetz_to_Bar_Associations_and_Legal_Organizations_re_Virtual_Trial_Sittings_for_Civil_Non_Jury_Cases_December_14_2022.pdf
[7] *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII), [2014] 1 SCR 87 at para 2.

properly equip litigants to achieve that purpose. In OTLA's view, mandatory in-person mediations do not facilitate those broader goals.

Like virtual trials, not every case may be appropriate for a virtual mandatory mediation. OTLA acknowledges that there will be cases where the in-person interaction and participation of the parties in the proceeding better achieves the purpose of Rule 24.1. Accordingly, OTLA submits that mandatory mediations, like pre-trial conferences, should be presumptively virtual, unless the parties agree to an in-person mediation or the Court orders otherwise.

Regional Variation

OTLA acknowledges the regional variation in the Guidelines with respect to the method of hearing. While regional variation with some practices in our civil justice is inevitable, OTLA encourages consideration of embracing consistent practices and guidelines across the province, as much as possible and where reasonably practicable. To be effective, any guideline of general application must equally consider the practices and input of all regions. However, the benefit of standardized and consistent practices/guidelines allows our civil justice system to effectively maximize its resources across the province, without certain resources being unnecessarily tied within a region.

Conclusion

OTLA thanks the Office of the Chief Justice of Ontario's Superior Court of Justice for inviting OTLA to provide input into the Guidelines. OTLA fully supports the effort to revisit the Guidelines at this stage in time. OTLA would be pleased to discuss these submissions if there be any questions, or if OTLA can be of any further assistance.

TAB 2

OTLA Ontario Trial Lawyers Association

OTLA Submission to the Civil Rules Committee

Proposed Amendment to Rule 6.1.01

April 28, 2023

ONTARIO TRIAL LAWYERS ASSOCIATION
1190 Blair Road - Burlington - Ontario • L7M 1K9
905 639 6852 - www.otla.com

The Ontario Trial Lawyers Association appreciates the opportunity to make submissions to the Civil Rules Committee with respect to its proposed amendments to Rule 6.1.01.

The Ontario Trial Lawyers Association (OTLA) was formed in 1991 by lawyers acting for plaintiffs. Our purpose is to promote access to justice for all Ontarians, preserve and improve the civil justice system, and advocate for the rights of those who have suffered injury and losses as the result of wrongdoing by others, while at the same time advocating aggressively for safety initiatives.

Our mandate is to fearlessly champion, through the pursuit of the highest standards of advocacy, the cause of those who have suffered injury or injustice. Our commitment to the advancement of the civil justice system is unwavering.

OTLA's members are dedicated to the representation of wrongly injured plaintiffs across the province and country. OTLA is comprised of lawyers, law clerks, articling students and law students. OTLA frequently comments on legislative matters, and has appeared on numerous occasions as an intervener before the Court of Appeal for Ontario and the Supreme Court of Canada.

OTLA's Position

1. **Should jury and non-jury trials be treated differently under the Rule.**
    a. **As proposed in the Osborne report, bifurcation could continue to be available to the parties in a jury action if consented to. In all other cases, any party could move for bifurcation; or**
    b. **All cases, jury or non-jury, any party may move for bifurcation.**

OTLA supports option (b), i.e. that any party may move for bifurcation in any case, whether jury or non-jury. Both jury and non-jury trials should be treated the same. Bifurcation is expected to be used in exceptional cases only. The moving party should bear the burden of proving that bifurcation is appropriate in the circumstances of the case such that it is a proportionate approach, more expeditious and less expensive means to achieve a fair and just result. For jury trials, a major consideration should be the practicality of having a jury being able to participate in a bifurcated trial, in the circumstances of the case.

2. **Should a judge be able to bifurcate an action on their own initiative? Should this be limited to the pretrial judge? Is it too late to bifurcate at trial?**

Bifurcation should only be ordered on the initiative of one of the parties. In absence of a motion for same, a judge should not unilaterally decide to bifurcate an action. OTLA also supports that it is too late to bifurcate at trial. Counsel would need to account for bifurcated proceedings in their trial strategy and preparations, and so bifurcation should be ordered as early in the litigation process as possible.

3. **At what point in the litigation ought the motion to be brought?**

A motion for bifurcation should be brought as early in the proceedings as possible. A motion to bifurcate should be treated like any other motion; that is, that it may be brought prior to filing the trial record without leave, and once set down for trial, the motion may only be brought with leave of the court.

4. **Should the timing be an issue for determination by a judge on a case-by-case basis? In other words, leave it to the parties to assess when to bring the motion. Permit a motion judge to adjourn it to the pretrial in an appropriate case.**

The timing for determination should be assessed on a case-by-case basis. The timing of the motion would be one factor in deciding whether to grant the motion or costs of the motion. We disagree that the motion judge should adjourn it to pretrial as a pretrial judge should not have jurisdiction to hear motions. A motion to bifurcate should be dealt with as a typical motion before the court.

5. **If bifurcation occurs at the pretrial stage, should the pretrial judge have the jurisdiction to award costs of damages disbursements where they will have to be updated should that part of the action proceed to trial?**

The judge hearing the motion should retain the discretion to award costs as appropriate in the circumstances.

6. **Would new wording in Rule 6 that adopts that contained in Rule 21.01(1) to permit bifurcation where it may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs, be acceptable?**

The qualifiers in Rule 21.01(1) may be useful in the bifurcation context and should be among the factors used to determine whether bifurcation should be allowed in exceptional cases. The caveat is that there will likely be significant disagreement amongst the parties about whether these intended consequences of bifurcation can be achieved. The potential difficulty with using the language or test of Rule 21 is that bifurcation will almost always dispose of part of the action such that, standing alone, the test could arguably be met in every case rather than being reserved for the exceptional case. The test should also include an analysis of proportionality and require a consideration of whether bifurcation in the exceptional circumstances of the case is the most expeditious and least expensive means to achieve a fair and just result. The list of factors in *Bourne v. Saunby*, while not exhaustive, are a helpful analytical framework and should also be incorporated into the wording of the Rule itself.

Conclusion

OTLA thanks the Civil Rules Committee for inviting us to provide input on this initiative. OTLA would be pleased to discuss our position and recommendations further should the need arise so that we can collectively work to ensure that our justice system is responsive to the needs of all Ontarians.

TAB 3

OTLA Ontario Trial Lawyers Association

Ontario Trial Lawyers Association Submission to the Licence Appeal Tribunal

Automobile Accident Benefits Service Key Performance Indicators

May 4, 2023

The Ontario Trial Lawyers Association (OTLA) appreciates the opportunity to make submissions to the Licence Appeal Tribunal (LAT) on proposed Automobile Accident Benefits Service (AABS) Key Performance Indicators (KPIs).

The Ontario Trial Lawyers Association was formed in 1991 by lawyers acting for plaintiffs. Our purpose is to promote access to justice for all Ontarians, preserve and improve the civil justice system, and advocate for the rights of those who have suffered injury and losses as the result of wrongdoing by others, while also advocating aggressively for safety initiatives.

Our mandate is to fearlessly champion, through the pursuit of the highest standards of advocacy, the cause of those who have suffered injury or injustice. Our commitment to the advancement of the civil justice system is unwavering.

OTLA's members are dedicated to the representation of wrongly injured plaintiffs across the province and country. OTLA is comprised of lawyers, law clerks, articling students and law students. OTLA frequently comments on legislative matters, and has appeared on numerous occasions as an intervener before the Court of Appeal for Ontario and the Supreme Court of Canada.

OVERARCHING CONCERN WITH CURRENT AND PROPOSED KPIs

OTLA applauds the use of performance measures to keep the LAT accountable to the public as stated in its Memorandum to Stakeholders. OTLA also agrees that timelines are helpful to ensure the efficient delivery of decisions. The disputes before the LAT are serious matters and should be approached with the same seriousness and deference given to similar matters in our Courts. Many applicants await decisions that will make a difference in their overall health and financial well being. OTLA is however concerned that the LAT's current and proposed performance measures focus too heavily on the speed at which an application advances through the system, without due consideration for the needs of each case and the parties involved. As noted in the consultation request, the KPIs are designed to assess the LAT's effectiveness in resolving disputes in an accessible, fair, efficient, and timely manner. "Timely" is only one of the KPI deliverables; the KPIs should also assess the accessibility, fairness, and efficiency of the system.

OTLA is concerned the changes the LAT made over the course of the past year with respect to scheduling and denials of consent adjournments have negatively impacted the accessibility, fairness, and efficiency of the system. These negative consequences affect all parties and include:

- increased costs related to motions for adjournments/applications for judicial review;
- increased costs related to the transfer of files to new counsel;
- increased delays and costs as a result of cases being withdrawn and then re-filed because reasonable consent adjournment requests are denied;
- increased difficulties for parties retaining and maintaining counsel of choice; and
- increased stress and anxiety for parties and their counsel in using the LAT system.

These consequences have negatively affected public confidence in the LAT system and resulted in concerns over fairness, access to justice and due process.

Ontarians and Ontario businesses are not well served by a process that prioritizes the speed of the dispute resolution system over the fairness of the process or the cost to the parties. Many of the disputes before the LAT are serious matters, involving entitlement to income replacement benefits or catastrophic level medical and attendant care benefits, often with hundreds of

thousands of dollars or more at stake. These disputes should be approached with the same seriousness and deference given to similar matters in our Courts.

To improve confidence in the LAT system and ensure access to justice for all parties, OTLA strongly recommends the LAT's KPIs allow for greater flexibility when processing applications to ensure that applications are not only being measured by timeliness, but are also being processed in an accessible, fair and efficient manner.

REMOVE CONSENT AGREEMENTS REGARDING SCHEDULING AND ADJOURNMENTS FROM TIME CALCULATIONS

The LAT's current scheduling process and approach to consent adjournment requests continues to be a concern as it does not adequately consider the needs of each case or the availability of the parties or their counsel. Parties are being forced to book hearings for which the matter will either not be ready, or at which their witnesses or counsel cannot attend. Adjournment requests are also being routinely denied even when made on consent of the parties.

To ensure adherence to general performance measures regarding timelines does not outweigh access to justice or procedural fairness, OTLA recommends the LAT remove "consent agreements" regarding scheduling and adjournments when calculating the time from filing the application to hearing. Alternatively, OTLA recommends the LAT create a separate statistic for matters that are adjourned, or scheduled outside the typical timelines, on consent.

The parties are not prejudiced by consent agreements, and consent requests should not be unreasonably denied in order to adhere to general performance measures. Similarly, consent agreements should not reflect negatively on the LAT's performance or ability to meet its performance measures.

By tracking consent agreements regarding scheduling and adjournments separately, the LAT could also generate additional data to better inform the LAT and stakeholders of the lifecycle of applications and how this impacts the LAT process. This information could be used to better craft and modify KPI targets and educate stakeholders and the public on the necessary timelines for particular types of disputes.

AVOID ONE-SIZE-FITS-ALL APPROACH TO CASE LIFECYCLE

One of the proposed KPIs for the AABS system is "percentage of cases within the 12-month case lifecycle… - target of 80%". It is not entirely clear what is meant by this KPI and as such, OTLA recommends it be better clarified.

In the event this KPI indicates a target of resolving 80% of LAT AABS cases within 12 months, OTLA reiterates its concerns noted above regarding disproportionately focusing on timelines, to the detriment of other goals of accessibility, fairness, and efficiency of the system.

OTLA also notes that the KPIs appear to be designed as a one-size-fits-all target. OTLA recommends that the KPIs instead be varied based on the complexity of the dispute. For example, simpler, more straightforward matters (i.e., single medical/rehabilitation treatment disputes) can more easily be resolved within the KPIs proposed 12-month timeline. In contrast, more complex disputes, such as catastrophic designation and entitlement to attendant care or income replacement benefits will often require additional time. As in Superior Court, there should be shorter timelines for simpler matters (i.e. Small Claims or Simplified Rules matters) and longer, more

flexible timelines for more complex matters (i.e. Regular Track matters). Hearings regarding catastrophic designation are million-dollar disputes. They accordingly require more evidence, time, and experts. They also require experienced counsel of each party's choice.

Similarly, matters involving multiple disputes are more complex and may require additional time. For example, it is often in the best interests of the parties to delay an application involving one issue to allow time for another issue to catch up. This is true particularly where there will be overlapping evidence, including expert evidence. It is not in the interests of justice to require parties to incur the expense of litigating these disputes separately or require parties to incur additional delay and costs by withdrawing these disputes and re-filing them later. Access to justice requires that parties be able to combine disputes into one hearing and be afforded time to allow newer disputes to catch up with previously filed disputes. Failure to recognize this may result in inconsistent decisions and added cost to the parties.

Access to justice may also require parties be allowed longer timelines in circumstances where:

- there is a mediation scheduled that may resolve the matter without the need for a hearing;
- more time is needed to gather required evidence for the hearing;
- expert witnesses are not available to testify;
- counsel are scheduled to attend other LAT hearings;
- counsel are scheduled or called to appear in another court or tribunal; and,
- counsel or parties have important competing personal commitments.

These are examples but should not be considered exhaustive. A one-size-fits-all approach where applications are expected to be resolved within a set number of months and the LAT's performance measures are tied to meeting the targeted timeline regardless of the needs of the case, does not serve justice to the parties and draws into question the fairness, effectiveness, and responsiveness of the system.

The LAT's current and proposed KPIs do not allow for flexibility or differing and lengthier timelines when required. They also do not provide insight or useful data into the reasons certain cases may require additional time. OTLA recommends that the AABS KPIs be modified to adapt to the complexity of the dispute in issue and that they provide more flexibility for consent agreements regarding scheduling and adjournments.

TIMELINE FOR RELEASE OF DECISIONS

OTLA supports maintaining clear timelines for the release of orders/reports following Case Conferences and decisions following the conclusion of hearings.

With respect to Case Conference orders/reports, OTLA notes that the current AABS KPIs require Case Conference orders/reports to be issued within 30 days of the conclusion of the Case Conference. This KPI is ***not*** included amongst the proposed KPIs. OTLA recommends it continue to be a KPI. To avoid any incongruence between the order/report and date scheduled for hearing, OTLA also recommends that the Case Conference order/report be released as quickly as possible after the Case Conference and *prior to the scheduling of the hearing date.*

With respect to decisions following hearings, OTLA supports the proposed KPI that decisions be issued within 90 calendar days from the conclusion of hearing and looks forward to the LAT meeting this target. Our members have been reporting significant delays in this respect – with some waiting well over 7 months for decisions. The parties cannot move forward, and applicants cannot access disputed benefits, until decisions are released. In cases where a claimant is limited

to 5 years of medical, rehabilitation and attendant care benefits, these delays significantly impact their ability to access benefits.

CONCLUSION

OTLA appreciates the opportunity to provide the LAT with feedback regarding its proposed KPIs and looks forward to working with the LAT to ensure the KPIs effectively assess the LAT's ability to resolve disputes in an accessible, fair, efficient, and timely manner. OTLA is available and would welcome the opportunity to further discuss the KPIs and OTLA's feedback upon request.

OTLA also looks forward to continuing to work with the LAT to improve the dispute resolution system and ensure access to justice for all parties. OTLA takes the LAT's requests for feedback very seriously and in future, would greatly appreciate a lengthier consultation period. Additional time would enable OTLA and other stakeholders to more fully consult members and provide greater feedback on the LAT's important issues.

TAB 4

OTLA Ontario Trial Lawyers Association

Ontario Trial Lawyers Association Submission to the Licence Appeal Tribunal

Proposed Changes to Rules 8, 9, 10, 14, 16, 18, 20 and Proposed New Rule 24

May 29, 2023

The Ontario Trial Lawyers Association (OTLA) appreciates the opportunity to make submissions to the Licence Appeal Tribunal (LAT) on proposed revisions to the *Common Rules of Practice & Procedure* (the *"Rules"*).

OTLA was formed in 1991 by lawyers acting for plaintiffs. Our purpose is to promote access to justice for all Ontarians, preserve and improve the civil justice system, and advocate for the rights of those who have suffered injury and losses as the result of wrongdoing by others, while also advocating aggressively for safety initiatives.

Our mandate is to fearlessly champion, through the pursuit of the highest standards of advocacy, the cause of those who have suffered injury or injustice. Our commitment to the advancement of the civil justice system is unwavering.

OTLA's members are dedicated to the representation of wrongly injured plaintiffs across the province and country. OTLA is comprised of lawyers, law clerks, articling students and law students. OTLA frequently comments on legislative matters and has appeared on numerous occasions as an intervener before the Court of Appeal for Ontario and the Supreme Court of Canada.

INTRODUCTION

OTLA appreciates the LAT's consideration of the stakeholder input previously provided and is pleased to see that some of the stakeholder recommendations have been incorporated into the draft *Rules*.

OTLA is, however, concerned that the draft *Rules* are too complex and place too heavy a burden on claimants to meet deadlines (and impose significant consequences if claimants fail to do so). OTLA recommends that the *Rules* be simplified to allow for greater flexibility and more closely mirror the rights afforded to parties through the *Rules of Civil Procedure*. For simplicity, OTLA has highlighted its specific concerns and recommendations with respect to the proposed *Rules* below.

RULE 8: SUMMONS

Proposed Rules 8.1 and 8.2 - Issuing a Summons and Filing a Request for Summons

While the proposed changes to Rule 8 clarify the procedure to summons documents which is a welcome change, it also creates additional requirements to obtain a summons to give evidence at a hearing (i.e. summons to witnesses). OTLA is concerned that this change will overcomplicate the summons process and create significant potential for disputes, increasing costs to the parties and further taxing LAT resources.

OTLA recommends that proposed Rules 8.1 and 8.2 be revised to distinguish between the procedure for a summons to give evidence at a hearing versus a summons for production of documents. While the procedure outlined in the proposed *Rules* may be appropriate for a summons to produce documents, it is not in OTLA's view appropriate for a summons to witness. OTLA

respectfully submits that summonses to witnesses should be issued as a matter of course. All parties should have the *prima facie* right to obtain a summons to witness. Should either party feel the summons is an abuse of process, that party has recourse to move to quash the summons. This is in keeping with procedural fairness and the process used by the Superior Court of Justice. It will also relieve the Tribunal from having to determine who may be summonsed in every situation, even when the summons is not opposed.

Our members also noted that as currently worded, the proposed *Rules* do not specify **who** will address disputes regarding summonses (whether they be for summonses to give evidence or summonses to produce a document) and the timing as to when those disputes will be addressed. OTLA recommends that such disputes be determined by an adjudicator, after hearing oral submissions from the parties, rather than by a staff member of the Tribunal, without affording the parties the opportunity to make submissions. Such disputes should also be addressed ***prior to*** the commencement of the hearing to ensure all evidence tendered at hearing is properly tendered and relevant.

With respect to the last paragraph of proposed Rule 8.1, which requires that a request for summons name the specific individual being summonsed, OTLA notes that this is sometimes untenable. When dealing with corporations, such as insurers or employers, there are often times where the name of a specific person is not known, or, unbeknownst to counsel or the parties, the person best positioned to provide evidence at the hearing changes (for example, they leave a company's employ). OTLA strongly recommends that summonses continue to be issued to a "representative of" named organizations or groups, where appropriate.

Lastly, OTLA strongly recommends that the proposed 21-day deadline set out in proposed Rule 8.2 be removed. Summonses should be available at any time prior to and during a hearing. Our members have expressed concern that a deadline of 21 days pre-hearing may unintentionally remove one of the incentives to settlement that exists for both parties, namely, to avoid the costs involved with finalizing the plans for the hearing. Additionally, our members are concerned that the 21-day deadline may unduly restrict the evidence that can be brought before the Tribunal. For example, although counsel will exchange witness lists 45 days prior to the hearing according to proposed Rule 9.5.2 and 10.3, one party may ultimately decide to remove a witness from the list it ultimately files with the Tribunal 21 days prior to the hearing (per proposed *Rules* 9.5.3 and 10.3). When that happens, the other party may want to summons that witness and should be permitted to do so, but, as the rule is currently drafted, they would be prohibited from doing so by virtue of the 21-day deadline.

RULE 9: DISCLOSURE

Rules 9.2 and 9.2.1 – Production Orders & Orders for Production Between the Parties

OTLA appreciates and supports the clarification in the proposed *Rules* that the Tribunal will not make orders to produce documents or things that are not relevant to the issues in dispute in the

proceeding, or that are unduly repetitious. OTLA believes this will be helpful and minimize disputes moving forward.

OTLA also supports the requirement in proposed Rule 9.2 that parties make reasonable efforts to obtain a document or thing without a production order before requesting same from the Tribunal. This too will help minimize disputes and issues moving forward.

OTLA members do, however, have significant concerns with the proposed new requirement that parties "produce a summary of the evidence that each witness will give at the hearing" (proposed Rules 9.2.1 and 9.5.3) rather than simply a "brief description of each witness' anticipated testimony" as contained in Rule 9.2. In many instances, the parties know the evidence each witness is likely to provide, making this summary unnecessary. For example, often reports have been exchanged or examinations-under-oath have been conducted. OTLA submits that the requirement to provide a summary is not in the interest of efficiency or expediency and will further increase the costs of AABS disputes. OTLA recommends that such summaries only be provided/ordered if requested by the parties.

With respect to the production of documents, OTLA continues to be concerned that the proposed *Rules* are too restrictive regarding the documents that can be introduced into evidence. OTLA continues to recommend that the *Rules* explicitly allow for the introduction of additional documents at the hearing if they are required during the course of the hearing. Permission should be granted to file these documents during the hearing where (a) the parties' consent, or (b) the document was previously exchanged and the party seeking to rely upon the document shows the document's importance outweighs any prejudice to the other party as a result of it not being filed at the commencement of the hearing. Such a remedy recognizes the unpredictable nature of hearings, while also encouraging parties to only file what they need. OTLA is concerned that if a remedy like this does not exist, parties will likely file more than is necessary at the commencement of a hearing in order to limit the risk of any required documents being excluded, leading to a less efficient and more costly hearing.

Lastly, OTLA continues to recommend that the process of exchanging documents be simplified by listing in Rule 9 (or alternatively, creating a practice direction that so lists) the standard documents that should be exchanged. In terms of the documents that claimants should typically disclose, OTLA recommends the following:

- The clinical notes of the claimant's family doctor, from 1 year prior to the accident to date. These records typically include the consultation reports and records of specialists and other providers seen.
- Ontario Health Insurance Plan decoded summary, from 1 year prior to the accident to date.
- If entitlement to income replacement benefits is in dispute, the claimant's employment file(s) and Canada Pension Plan file, from 1 year prior to the accident to date.
- If the quantum of income replacement benefits is in dispute, tax returns and financial statements, if applicable, from 1 year prior to the accident to date.

In terms of the documents the insurer should typically disclose, OTLA recommends the following:

- A complete copy of the claimant's accident benefit file, if requested.
- Complete surveillance or investigation files that were relied upon for claims handling or decision making.
- Log notes from the date of the claim to date with appropriate redactions for reserves, solicitor-client privilege, or litigation privilege and with reasons provided for each redaction.
- The complete file from all medical assessors relevant to issues in dispute
- Updated breakdown of benefits paid to date.

Any additional documents to be produced should be decided on a case-by-case basis with regard to the specific issues in dispute and the need for the dispute resolution process to remain efficient and cost-effective.

Proposed Rule 9.3 – Failure to Comply with the Rules

OTLA recommends that proposed Rule 9.3 be amended to put the onus on the parties to object to the admission of late-received evidence. The Tribunal should allow the admission of late-received evidence if the parties agree to its admission on consent. Where parties do not consent, the Tribunal should consider the factors listed in proposed Rule 9.3. To do otherwise may create an unintended disincentive to settlement. For example, counsel often agree to adjust the timelines for service when negotiating settlements to avoid the cost of, for example, expert reports. If the *Rules* do not allow for these consent agreements, it hinders the potential for settlement, unnecessarily increases costs, and creates less certainty for the parties.

RULE 10: EXPERT WITNESSES

Rule 10.4 – Expert Witnesses – Challenges to Qualifications, Reports, Statements

Proposed Rule 10.4 changes the time for a party to give notice that they intend to challenge an expert witness' qualifications or report from 10 days to 21 days. OTLA recommends keeping the deadline at 10 days. Parties may still be attempting to settle the matter 21 days prior to the hearing, and the later deadline can help keep those settlement talks going without the need to incur additional costs.

Additionally, OTLA recommends that challenges to expert witness qualifications be addressed as a preliminary issue at the hearing, and that the hearing adjudicator rule on same before any evidence is heard. This ensures that such an important issue is heard by the hearing adjudicator.

Finally, OTLA recommends that Rule 10 be amended to require any party relying on an expert report to make that expert available for cross-examination if requested by the opposing party. Natural justice demands that an opposing party have the opportunity to test the evidence being

put forward through cross-examination. If one party puts an expert forward in support of their case, they should also bear the cost of producing that expert for cross-examination if the other party so demands.

RULE 14: CASE CONFERENCES

Rule 14.1 Directions and Orders at Case Conferences

In both the existing and proposed *Rules*, Rule 14.1 gives the Tribunal broad discretion to issue procedural directions and other orders as necessary. OTLA members have noticed issues with these orders later being modified by the adjudicator presiding over the hearing without adequate notice to the parties. OTLA members have also noticed that at times, unexpected and significant changes are being made to the case conference orders about the very conduct of the hearing during the hearing itself to the great prejudice of their clients.

Parties need to be confident that the case conference directions and orders about the conduct of the hearing will not be changed unless they are provided with sufficient notice. This will ensure that lawyers, paralegals and self-represented persons can properly prepare for the hearing, file the necessary documents, obtain the needed summonses, and make the proper arrangements with witnesses so that the hearing is run in a timely, cost-effective and efficient manner.

Considering these concerns, OTLA recommends that the following wording be added to the proposed Rule 14.1.

> **14.1.1** The Tribunal's case conference orders and directions about the manner in which the hearing itself will be conducted or heard shall not be varied by the Tribunal unless the parties' consent or are unopposed to the amendments or, alternatively, unless advanced notice is given to the parties at least 21 days before the hearing.

Rule 14.6 Party Attendance and Authority of Representatives at Case Conference to Settle

While OTLA supports proposed Rule 14.6, which gives the Tribunal broader powers where a party or representative does not attend a case conference with the necessary authority or instructions, OTLA does **not** support the change that relieves parties from attending case conferences where a declaration of representative has been filed with the Tribunal. While this may be appropriate in Tribunal matters outside of AABS claims, OTLA is concerned about the impact of this rule on the effectiveness of case conferences for accident benefits disputes.

OTLA strongly recommends that the Tribunal require **all** parties to attend case conferences for AABS claims. There are instances during a case conference where new issues requiring instructions are raised that had not been contemplated prior to the case conference. Further, insurance adjusters have the authority to approve and deny treatment plans and benefits for their insureds. They can reconsider their decisions at any time. They have authority to settle any one or more of the issues in dispute before the Tribunal. They are often very familiar with the claimant and the overall status of a claimant's accident benefits file, and always owe the claimant a duty of good

faith when adjusting the claim. Furthermore, at times resolution of disputes before the Tribunal can only be achieved by considering other aspects of the claimant's accident benefits file. It is therefore important to have both the claimant and the adjuster in attendance at any case conference. This will increase the chances of settlement and make case conferences more efficient and productive.

OTLA is also of the view that the Tribunal can more effectively encourage parties to attend with full authority and settlement instructions by permitting the Tribunal to order costs against any party who attends without such authority.

Accordingly, OTLA recommends the changes proposed at the first paragraph of Rule 14.6 be deleted and that the original Rule remain in place.

> 14.6 Parties are required to attend the case conference. If a party is unable to attend a case conference, the party must at least 7 days before the scheduled case conference: (a) Advise the Tribunal that his or her representative has instructions with respect to the issues and authority to make agreements, including settlement of the case; and (b) Obtain permission from the Tribunal to send that representative on the party's behalf. ~~If a party is self-represented, the party must attend the case conference. If a party has a representative who has filed a declaration of representative with the Tribunal, the party is not required to attend the case conference.~~
>
> ~~If a party does not attend the case conference, their representative must attend with instructions on all matters set out in Rule 14.2 that will be considered at the case conference.~~
>
> If a party does not attend, ~~or if a representative attends on behalf of a party and does not have the necessary instructions,~~ the Tribunal may issue procedural and/or administrative directions as necessary for the conduct of the proceeding and may make such further orders as the Tribunal deems necessary, including ordering costs against any such party.

RULE 16: ADJOURNMENTS

OTLA is pleased to see that the adjournment procedure has been clarified in the proposed *Rules*. OTLA hopes this amendment will be of assistance to the parties in better understanding their obligations and will result in a fair determination of adjournment requests.

OTLA also hopes that this amendment will be coupled with a change in practice that better responds to the needs of the parties and particular issues in each case. More specifically, and as OTLA previously noted, OTLA continues to recommend that the LAT implement an approach to scheduling hearings and dealing with reasonable requests for adjournment that is flexible and recognizes the needs of the parties to each case. The LAT should defer to the parties on the appropriate initial hearing date, and only intervene if the parties cannot agree on the dates on consent. The LAT should also defer to the parties regarding consent adjournment requests, particularly when the request is made more than 30 days before the adjudicative event. There is

no prejudice to the parties in cases where they agree on consent to schedule a hearing on a specific date or agree on consent to adjourn a hearing already scheduled.

The changes the LAT implemented over the past year have negatively impacted the accessibility, fairness and efficiency of the system by, amongst other things, increasing costs related to motions for adjournments/applications for judicial review and the forced transfer of files to new counsel; increasing delays and costs as a result of cases being withdrawn and then re-filed because reasonable scheduling requests and consent adjournment requests are denied; and increasing stress and anxiety for parties and their counsel in using the LAT system. These consequences have negatively impacted public confidence in the LAT system and resulted in significant concerns regarding fairness, access to justice and due process.

For these reasons, OTLA recommends that consent agreements between the parties be the pre-eminent factor in all scheduling and adjournment decisions, particularly when the consent request is made more than 30 days before an adjudicative event. OTLA strongly recommends that the first paragraph of proposed Rule 16.3 be amended as follows:

> Consent requests made by the parties will be upheld by the Tribunal so long as those requests are made more than 30 days prior to the commencement of an adjudicative event.
>
> When considering whether to grant an adjournment when the request is opposed, or is made 30 days or less prior to an adjudicative event, the Tribunal may consider any of the following factors:

The LAT's current practice creates excessive work and costs to the parties and taxes the Tribunal, when much of this work and expense could be minimized if there was an allowance for consent agreements. OTLA understands the need to address last minute adjournment requests but does not understand the need to force parties through the adjournment procedure for every scheduling request made outside the mandated days or for every adjournment request made, particularly when those requests are made on consent well before a scheduled hearing.

Lastly, OTLA objects to the addition of proposed Rule 16.4, which prohibits the LAT from considering any further adjournment requests for the same event made for the same reasons. This proposed rule is unduly harsh and has the potential to prejudice claimants. It is important to remember that the AABS system is meant to enable unrepresented parties to advance disputes without the need for counsel. The system should work for and in tandem with claimants to ensure their concerns and requests are fairly and fully heard. Claimants should not be punished with such a restrictive prohibition where for example, through inadvertence they fail to raise a particular issue or argument. OTLA accordingly recommends that proposed Rule 16.4 be removed in its entirety.

RULE 18: RECONSIDERATION OF A TRIBUNAL DECISION

OTLA continues to recommend that Rule 18.1 be amended to require reconsiderations be heard by an adjudicator other than the adjudicator who made the original decision now being

reconsidered. This is necessary to ensure fairness and transparency. Allowing the initial adjudicator to hear his or her own reconsideration creates an apprehension of bias and erodes confidence in the system.

OTLA further recommends that Rule 18.1 be amended to:

- increase the deadline to apply for reconsideration from 21 to 30 days. This will enable parties greater time to consider the decision, obtain instructions where necessary and prepare the necessary submission for reconsideration. Our members indicate that the 21-day deadline is much too short.
- remove the requirement that the reconsideration request include notification if the party is seeking judicial review or pursuing an appeal as required by Rule 18.1(c)(ii). This requirement essentially puts the cart before the horse. The parties should not have to identify their next plan of appeal before the reconsideration is heard.
- add "an extension of time provision" where transcripts are required. This extension should mirror that which is contained in the *Rules of Civil Procedure* and would enable parties to ensure they have all necessary evidence to complete the request for reconsideration.

To that end, OTLA recommends that Rule 18.1 be revised as follows:

> The Tribunal may reconsider any decision of the Tribunal that finally disposes of an appeal if:
>
> a) The request is made within ~~21~~ 30 days of the date of the decision;
>
> b) The request is served on all parties and filed with the Tribunal using the form for reconsideration requests on the Tribunal's website; and
>
> c) The reconsideration request includes the following:
>
> i. All submissions in support of the request, which must specify the applicable criteria under Rule 18.2. The submissions must not exceed 10 double-spaced pages in length, exclusive of evidence and case law;
>
> ii. ~~Notification if the party is seeking judicial review or pursuing an appeal in relation to the decision~~; and
>
> iii. The remedy or relief sought.
>
> The request for reconsideration will be heard by written submissions. It ~~may~~ will be heard by ~~the same member whose decision is the subject of the request, or by~~ another member who did not make the decisions being reconsidered.
>
> Where the party making the Request for Reconsideration requires transcript evidence, that party shall file a certificate of request for transcripts within 30 days of the date of the decision that is under reconsideration along with the form outlined in 18.1(b). That party shall provide submissions in accordance with 18.1 (c) within 60 days of the date of the decision or as otherwise ordered by the Tribunal.

With respect to proposed Rule 18.5, OTLA is concerned that the rule, as written, is open-ended. OTLA recommends that the rule require any such review to be conducted within 60 days after the decision is released and that the parties be notified and afforded opportunity to make submissions before any such review is conducted. OTLA accordingly proposes, the rule be revised as follows:

> The Tribunal may, on its own initiative, review any decision of the Tribunal. The Tribunal's review shall take place within 60 days ~~a reasonable time~~ after the decision or order is made. The parties shall be notified of any review and be afforded an opportunity to make written submissions.
>
> When conducting a review on its own initiative, the Tribunal shall not make an order under Rule 18.4(b) unless it is satisfied that one or more of the criteria in Rule 18.2 are met.

RULE 20: AUTOMOBILE ACCIDENT BENEFIT SERVICE (AABS) CLAIMS

OTLA has no concerns with the proposed changes to Rule 20 provided previously numbered Rule 20.5, which allows for AABS applications to be combined by the Tribunal, remain in place without change. This is an important rule that saves parties significant time and expense.

RULE 24: REPRESENTATION

The proposed Rule 24 is an entirely new rule directed at the authorized representatives.

While OTLA is not the regulator of lawyers in Ontario, OTLA supports any rule requiring lawyers to meet their ethical obligations in accordance with the *Law Society Act* and *the Rules of Professional Conduct*. In fact, lawyers are required to meet these obligations regardless of any rule imposed by the Tribunal.

The *Rules of Professional Conduct* require all lawyers in Ontario, among other things, to be competent, provide quality services to their clients, represent their clients resolutely and honorably, encourage respect for the administration of justice and act in good faith. Lawyers may not be able to meet any one of these essential and important obligations if they are legitimately unable to attend an adjudicative event before the LAT to represent the very clients they have agreed to assist. In fact, they may be forced to withdraw from representing their clients to meet the high ethical standards of their profession. Further, if parties are not provided with sufficient dates to ensure their lawyer of choice is able to attend an adjudicative event, then the parties too are prejudiced and perhaps significantly so and in a manner that cannot be remedied or compensated.

Because of these professional rules, and having regard to the rules of natural justice, and recognizing the great importance of parties having their lawyers of choice representing their interests, OTLA implores the Tribunal to:

a. schedule hearings and other adjudicative events with reasonable flexibility based on the needs of each case and the availability of the parties and their representatives;

b. ensure that lawyers are not forced to accept dates for adjudicative events for which they are already scheduled to attend other tribunal or court related matters;

c. grant the reasonable adjournment requests of lawyers who are legitimately unable to attend hearing dates or other adjudicative events; and

d. ensure adjournment requests can be heard and addressed expediently to meet the ends of justice. Lawyers cannot continue to act on files for which there has been a breakdown in their solicitor client relationship or for which they are unable to obtain instructions.

CONCLUSION

OTLA appreciates the opportunity to provide the LAT with feedback regarding its proposed revisions to the *Rules* and is pleased to see that some of its prior feedback has been incorporated in the *Rules*. OTLA is, however, concerned that the proposed *Rules* place too heavy a burden on claimants, particularly with the new deadlines and requirements imposed. OTLA hopes the LAT will consider its additional recommendations set out above to rectify these issues and concerns.

OTLA also hopes the LAT will consider its prior recommendations in its submission dated February 17, 2023, available here, wherein OTLA recommended practice directions regarding the procedure for filing documents at hearings, requesting and serving summons, and the conduct of hearings be created. This would better enable lay persons to manage the dispute resolution process independently.

OTLA looks forward to continuing to work with the LAT to improve the dispute resolution system and ensure access to justice for all parties. OTLA is available and would welcome the opportunity to further discuss its recommendations and the proposed changes to the *Rules*.

TAB 5

OTLA Ontario Trial Lawyers Association

OTLA Submission to the Refusals Motions Subcommittee of the Civil Rules Committee

Proposed Amendments to Rule 34.12 and Rule 30.03 of the Rules of Civil Procedure

April 30, 2024

ONTARIO TRIAL LAWYERS ASSOCIATION
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The Ontario Trial Lawyers Association (OTLA) is pleased to provide input to the Refusals Motions Subcommittee of the Civil Rules Committee. We thank you for the invitation to participate in your review of Rule 34.12 and Rule 30.03 of the *Rules of Civil Procedure* (*Rules*), and to comment on your proposed amendments to these *Rules* in order to address the issues of costs and delay in relation to Refusals Motions.

OTLA was formed in 1991 by lawyers acting for plaintiffs. Our purpose is to promote access to justice for all Ontarians, preserve and improve the civil justice system, and advocate for the rights of those who have suffered injury and losses as the result of wrongdoing by others while, at the same time, advocating aggressively for safety initiatives.

OTLA frequently comments on legislative matters and has appeared on numerous occasions as an intervener before the Court of Appeal for Ontario and the Supreme Court of Canada.

OTLA members possess expertise in the resolution of claims for personal injury and medical negligence. We act primarily for individuals and not for corporations and insurance companies. It is from the perspective of the ordinary citizen of Ontario, and the lawyers who represent those citizens, that we submit our comments.

INTRODUCTION

OTLA is pleased to see the acknowledgement that refusals motions are an appropriate interlocutory remedy that must be retained in the *Rules*. The goal of trying to reduce the number of inappropriate refusals motions is appropriate and well intentioned. The issues of costs and delay in relation to refusals motions are of particular concern to OTLA and its members.

However, in the collective experience of OTLA members, it is only a small percentage of problematic cases that generate inappropriate refusal issues on discovery. There is no rule amendment, no matter how well intended, that can eliminate discovery disputes. As plaintiff lawyers, we are obligated to manage time and expense. We have to do so because our clients cannot afford to employ scorched earth tactics, including inappropriate refusal motions. It is rare for a plaintiff's lawyer to engage in disruptive discovery tactics, thereby resulting in a refusals motion that then creates a roadblock to settlement or trial. Our clients simply cannot afford the delay or costs generated by such tactics. As such, in our members' experience, when a plaintiff brings a refusals motion it is genuinely because it is felt that the answers or documents are required to advance the case or prove liability.

On the other hand, delay may benefit insurer defendants who may be incentivized to delay resolution of claims as a way of putting financial pressure on plaintiffs.

For the majority of our members' cases, discovery abuse is not a pervasive problem and counsel co-operate in providing timely disclosure and by answering relevant questions. There are occasions where counsel cannot agree on the relevancy of a document or a question to be answered. At these times, counsel may seek out the court's guidance by way of a motion. Many regions have a collegial bar who work toward resolving these disputes independently and this should be encouraged.

In the experience of OTLA members, we have not seen refusals motions occupy a very significant amount of judicial time across the entire province. If a backlog of refusal motions exists in Toronto,

it is likely due to number of cases filed in Toronto and the failure of the provincial government to appoint the needed compliment of Associate Justices to hear such motions. The explosive growth in population of the GTA is a significant reason for any backlog.

Decisions on refusals motions are important and can change the course of litigation depending on what is ordered to be produced or answered. These decisions can impact the evidence that will be available to prove damages and liability. When refusals disputes occur, what is needed is the ability to bring the dispute to the court for a quick determination with a strong judicial hand that dissuades inappropriate motions, keeping in mind fairness, relevancy, and cost concerns.

PROPOSED AMENDMENTS

Question 1: Do you agree that the ability to bring a refusals motion should be limited to parties that have met the mandatory document production requirements under the Rules?

OTLA has no objection to adding an obligation on parties to serve a sworn affidavit of documents as a pre-condition to bringing a refusals motion. Service of a sworn affidavit of documents is already a pre-condition under Rule 31.04(1) to the right of parties to conduct an examination for discovery.

However, OTLA does oppose adding an obligation on parties to "*fully comply with their undertakings*" as a pre-condition to bringing a refusals motion. Refusals and undertakings should not be conflated. An undertaking is treated differently by the existing *Rules*. It is an unequivocal promise to perform a certain act. Undertakings, in particular those given in personal injury litigation, are often ongoing obligations to produce documents and new information leading right up to the date of trial. It would be impossible to fully comply with undertakings before seeking, by way of motion, answers to refusals by the other party. Refusals motions may need to be brought promptly following examinations for discovery, in order to ensure that all relevant evidence is available for mediation, pre-trial and independent medical examinations. Undertakings also often require requests to third parties who control medical and various other records. Their response time is not within a party's control. A delay by a doctor, government agency or any other third party, in providing medical records would result in a delay in the ability to move the entire action forward. It would be inherently unfair to prevent a party, who has diligently requested records in order to answer an undertaking, from bringing a refusals motion due to a third party's delay.

Further, the proposed amendment invites the opposing party to raise a defence to the motion before the refusals motion can even be heard. Within the refusals motion, the opposing party is likely to raise the issue of whether undertakings have been fulfilled and whether the moving party is even permitted to bring the refusal motion. What will result is a motion within a motion and likely further cost and delay to the parties. The opposing party already has the ability to bring a motion regarding undertakings under the *Rules* at any time.

Another significant concern is that refusals motions can only be dealt with prior to setting the matter down for trial. The proposed amendment shifts the timeline for fulfilling undertakings (that may be ongoing and out of the plaintiff's control) and will result in further delay as matters cannot be set down without the completion of a refusals motion. A further implication is the current Court backlog as an existing roadblock in booking a timely motion date. As a result, an action could potentially be delayed by a year or longer in many jurisdictions.

Question 2: Is it appropriate to discourage inappropriate refusals motions with cost consequences, such as those in subrule (5)?

OTLA opposes adding a mandatory costs sanction of substantial indemnity costs to Rule 34.12.

Costs sanctions that would discourage parties from proceeding with legitimate disputes should not be rigidly applied. Where *bona fide* disputes arise in the context of discovery, counsel must be permitted to seek a ruling without the loser being exposed to something tantamount to a penal sanction. The imposition of mandatory or presumptive costs sanctions is not a panacea for discovery difficulties that result in refusals motions.

A court has inherent jurisdiction to award or not to award costs having regard to the traditional considerations, including the principle that *prima facie*, costs follow the event. The current *Rules* have a wide range of sanctions with which to address costs.

It is important to not lose sight of the fact that there is disparity in the ability of plaintiffs and defendants in personal injury actions to pay costs. A plaintiff in a personal injury case often lacks the financial resources to fund the costs of litigation. On the other hand, most defendants are insured with access to a vast pool of money to fund their defence, without impact on their personal income and assets. Harsh cost sanctions may create access to justice issues.

Rather than penal sanctions, discovery obligations must be enforced by providing direction to counsel where needed to ensure consistency and predictability. Rather than imposing penal costs to reduce or shorten refusal motions, OTLA proposes that the parties be encouraged to resolve or alternatively, narrow, the contested issues in a collegial manner, prior to attending a hearing for a refusals motion.

OTLA's Proposed Rule addition to Rule 37.10(10)

To promote efficiency in the use of judicial time, OTLA proposes the addition of a positive duty on the parties or counsel to consult and collaborate for purposes of resolving or narrowing the contested issues, after the exchange of the Refusals Chart - Form 37C. The proposed addition is as follows:

> Rule 37.10(10)(c)
>
> At least two (2) days before the hearing, the moving party and responding party, or counsel with authority to deal with the matters in issue, shall in a settlement meeting or by telephone call, consult and collaborate for the purpose of resolving or narrowing the contested issues and in particular shall,
>
> (i) consider whether any refusal has been satisfied;
>
> (ii) consider whether any request for an answer can be withdrawn;
>
> (iii) consider a compromise or settlement of any or all issues; and
>
> (iv) consider the terms of an Order on Consent.

The Court already has discretion on costs and could inquire with the parties after the motion, or through the cost outline, whether the parties genuinely participated in the required settlement meeting and take that into account in any cost award.

Question 3: Do you agree with imposing mandatory documentary disclosures in personal injury cases?

OTLA opposes adding the proposed new subrules 2.1 and 2.2 to Rule 30.03. At the outset, OTLA is concerned about the singling out of personal injury claims in the proposed amendments.

First, imposing a six-month time period to serve a sworn affidavit of documents after issuance of a statement of claim conflicts with the existing time for service of a claim. Rule 14.08 provides a statement of claim shall be served within six months after it is issued. Counsel often issues claims to protect limitation periods and/or do not wish to serve a claim until in possession of expert support; it is unworkable and illogical that a sworn affidavit of documents be delivered on the same day a statement of claim is served. The time period does not take into account service of statements of defence.

Furthermore, there is no corresponding time period for delivery of the sworn affidavit of documents of the defendant. Although OTLA does not agree with the imposition of a time period, should one be inserted into the *Rules*, there must be reciprocity.

Second, the insertion into the Rule of a list of mandatory documents and files to be produced by the plaintiff in motor vehicle litigation is unworkable and will conflict with and duplicate existing obligations under the *Insurance Act*. Pursuant to section 258.3[1] and Regulation 461/96,[2] there already exists statutory obligations on plaintiffs in motor vehicle litigation not to commence an action without first producing documentation and information to the defendant and his/her insurer within 30 days of giving notice of the accident. Regulation 461/96 requires production of evidence of all income sources, copies of all accident benefit applications with supporting material, every medical report respecting the plaintiff's injuries, and all clinical notes and records.

Third, the proposed list includes obligations to produce files *en masse* when the *Rules* provide that only relevant documents are to be produced. Relevancy is determined by the facts and issues in an individual claim. Even in a motor vehicle collision action, entire files may not be relevant. In non motor vehicle personal injury claims, some of the documents listed would not be relevant at all. In a slip and fall matter, a defendant's cell phone records would likely be irrelevant. In a wrongful death claim arising from a motor vehicle collision, a family member's medical records for three years prior, their decoded OHIP summary, disability claims or collateral benefit records, and income loss records could be completely irrelevant and intrusive to produce, depending on the scope of their claims.

Fourth, the proposed list includes many records that are in the hands of third parties and the plaintiff does not have the power or authority to compel production. As an example, many government agencies determine how far back they will go with records, what they will produce and when they will produce. OHIP summaries, at times, can take six months to obtain. There is no consistency between government agencies regarding the production of police reports and statements. They may or may not be redacted and sometimes motions are required to obtain statements. At times, entire police files will be held pending the resolution of criminal charges. Plaintiffs have little to no control over the timing of receipt of documents and to impose an

[1] Section 258.3, *Insurance Act*, https://www.ontario.ca/laws/statute/90i08#BK264
[2] Regulation 461/96, *Insurance Act*, https://www.ontario.ca/laws/regulation/960461

obligation on them to obtain these documents and serve them within a specified time frame is likely untenable.

Last, it conflicts with spirit of collaboration provided for under Rule 29.1 - the Discovery Planning Rule - where counsel discuss and co-operate by addressing discovery of documents, timelines for delivery, examination dates, and other related matters. A further practice direction regarding the use of discovery plans and enforcement of this existing Rule may provide the same desired outcome.

Question 4: Do you have any concerns with the proposed mandatory disclosures under new subrules (2.1) and (2.2)?

As listed in the response to Question 3, OTLA opposes adding the proposed new subrules 2.1 and 2.2 to Rule 30.03.

In addition to the concerns listed in OTLA's response to Question 3, there is a further concern that setting out a list of required disclosures to be produced within six months of the issuance of a claim would result in even more motions brought before the Court. The mandatory nature and the short window for production risks delay tactics by defendants even on files where the plaintiff has been actively taking steps to satisfy its obligations. The proposed amendments do not address whether and how compliance with these mandatory productions on a "*best efforts*" basis would be analyzed in relation to the list of mandatory disclosures.

Another concern is that litigants already have the tools to ensure that relevant documents are produced in a timely manner – the requirement for a discovery plan and the availability of timetables on consent or by Court order encourage cooperation and communication between counsel.

OTLA would also like to point out that case law has already clearly established which productions are routine and reasonable. For example, in *Trumble v. Soomal*[3], Justice Sloan described the documents in issue which included the records of all doctors, treatment providers and hospitals, and decoded OHIP summary, and a copy of the accident benefits file as *"the somewhat normally requested documentation in a personal injury case"*. Justice Sloan went on further to describe such documents as routine and reasonable productions in a *"run-of-the-mill"* personal injury action. This approach was subsequently followed in *Rheume v. Foster*[4] and *Endale v. Parker*[5] and, even without the caselaw, has always been the standard approach within the personal injury bar. The issue of relevancy in relation to these documents would only be disputed by unreasonable litigants or counsel. OTLA believes that amending Rule 30.03 would not be an effective tool for disciplining or steering away unreasonable counsel or self-represented litigants who ignore the well-established case law and would instead, lead to more unnecessary motions before the court.

[3] *Trumble v. Soomal*, 2020 ONSC 8097, https://www.canlii.org/en/on/onsc/doc/2020/2020onsc8097/2020onsc8097.html
[4] *Rheaume v. Foster*, 2021 ONSC 5804 , https://www.canlii.org/en/on/onsc/doc/2021/2021onsc5804/2021onsc5804.html
[5] *Endale v. Parker*, 2022 ONSC 2008, https://www.canlii.org/en/on/onsc/doc/2022/2022onsc2008/2022onsc2008.html

Question 5: Do you have any concerns with the timing of disclosures?

Please refer to the response to Question #3 above.

Question 6: Are there additional disclosures that you would recommend? For example, should disclosure of social media be required or an obligation to maintain social media (i.e. not deleting it)?

OTLA opposes adding the proposed new subrules 2.1 and 2.2 to *Rule* 30.03.

The example of social media disclosure illustrates another reason why a list of mandatory disclosures in Rule 30.03 is not necessary and moreover, would be prejudicial due to its "blanket" approach, ignoring other paramount principles which must always be applied on a case-by-case basis. The Ontario Superior Court of Justice has ruled on the request to disclose the contents of the plaintiff's social media accounts and most recently in *Mohamud v. Juskey*[6], Justice Boswell emphasized the importance of a case-by-case analysis to determine relevance and minimize undue intrusions into personal privacy. Earlier cases have also established that there is a wide judicial discretion to conduct a balancing of probative value and prejudice in assessing whether the contents of social media accounts should be disclosed.[7] Most notably, Justice Boswell highlighted the "judge's gatekeeping" role at para 80 - *"balancing probity and prejudice – a function trial judges are well-acquainted with as part of their "gatekeeping function" – will serve to ensure that the truth-seeking function of the adversarial process is respected and promoted, while at the same time ensuring that litigants' privacy interests are not intruded upon save as necessary for the proper disposition of the litigation"*.

OTLA agrees with Justice Boswell's view that where a party to a civil action resists disclosure on privacy grounds, the court must, under *Rule* 29.2.03(c), engage in a balancing of the probative value of the records sought against the prejudice that will inure to the party resisting disclosure, or to the litigation process, should the production be compelled.

Requiring the disclosure of social media accounts would entirely ignore the importance of a case-by-case analysis and would diminish the judicial "gatekeeping" role which can only result in unjust prejudice to injured plaintiffs. In turn, such blanket requirements would take away the right to protect litigants' privacy interests in cases where social media accounts do not hold any probative value (e.g. *FLA* claims) or where *some* contents hold probative value but not the accounts in their *entirety*.

Question 7: The list of required disclosures is not meant to be an exhaustive list. Rather, at the very least, the listed items must be disclosed in any case involving personal injury. Do you agree with this approach?

As discussed in OTLA's responses above, prudent and reasonable counsel already request and produce the proposed "required disclosure" list, while counsel or self-represented litigants who

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[6] *Mohamud v. Juskey*, 2023 ONSC 4414, https://www.canlii.org/en/on/onsc/doc/2023/2023onsc4414/2023onsc4414.html

[7] *Isacov v. Schwartzberg*, 2018 ONSC 5933, https://www.canlii.org/en/on/onsc/doc/2018/2018onsc5933/2018onsc5933.html; *Jones v. I.F. Propco*, 2018 ONSC 23, https://www.canlii.org/en/on/onsc/doc/2018/2018onsc23/2018onsc23.html; *Stewart v. Kempster*, 2012 ONSC 7236, https://www.canlii.org/en/on/onsc/doc/2012/2012onsc7236/2012onsc7236.html

are not cooperative would not be discouraged simply because of the amendments. Such an approach would simply increase the number of motions that would be brought which is inconsistent with the current comprehensive review and overhaul of the *Rules* to simplify and streamline civil procedure. OTLA proposes that instead, there is a call for cooperation and meaningful communication when disputes inevitably arise.

Question 8: Additional amendments would also indicate that if there have been redactions to a document, the fact of a redaction must be made clear. As well, a procedure for reviewing redactions would be introduced. Namely, if the opposing party questions the legitimacy of a redaction, the unredacted version of the document would be provided to the Court for determination regarding whether the redacted information is relevant to the case and should be disclosed.

OTLA does not see a need to provide a Rule which requires parties to indicate that a document has been redacted. This obligation already exists. It would be unethical and improper to try to hide a redaction. Redactions within a document are obvious with whiting out or blacking out sections, particularly on electronic documents. If the opposing party questions the legitimacy of a redaction, they can bring a motion to address this issue under the discovery, production of documents, and undertaking and refusals *Rules*, as they already exist. In such a motion, it would be impossible for a court to decide whether the redaction is relevant without viewing the redacted section. This has recently been commented on in *H.C. v. SSQ Life Insurance Company Inc.*, 2024 ONSC 53,[8] where the Court considered relevancy and prejudice as the overall principles when considering whether redactions should be disclosed. While OTLA is not opposed to having a Rule that explains the steps to deal with redactions, it is of the view that the current *Rules* already provide an avenue to resolve such disputes and no further Rule is required. Relevancy and prejudice should remain the key guiding principles in determining whether the redaction should be disclosed.

Question 9: The amendments would also provide that only relevant excerpts of the transcript of evidence should be included in the party's compendium (i.e. the full transcript should not be provided). Do you have concerns with this approach?

OTLA is concerned with limiting the use of the transcript from the examination for discovery in refusals motions. Context is particularly important in these motions and, at times, numerous references are required to establish the relevancy of documents requested or questions asked. A proper factum should include links to the relevant section of the transcript. The compendium could include only the relevant excerpts from the transcript, however, requiring that only those excerpts be included could limit argument. The court often raises questions that may require reference to other sections of the transcript. The parties could find themselves without the necessary material to address the court's concern or question raised. With the use of Caselines links to documents, and the ease of moving through electronic documents quickly and easily, OTLA does not see the need to limit the transcript in the compendium in a modern digital courtroom.

[8] *H.C. v. SSQ Life Insurance Company Inc.*, 2024 ONSC 53, https://www.canlii.org/en/on/onsc/doc/2024/2024onsc53/2024onsc53.html

Question 10: Should the rules specify that, where the plaintiff intends to argue threshold, when setting the matter down for trial the plaintiff must confirm that they have served a threshold report on the defendant?

First, OTLA wishes to clarify that it is not the plaintiff who brings a threshold motion under the *Insurance Act*. The defendant in a motor vehicle action decides whether they will bring a threshold motion, or seek a threshold ruling. Further, such motions are not brought pursuant to the *Rules*. Threshold motions arise out of the *Insurance Act*, *ss. 267.5 (3), (5), (12) and (15)* and O. Reg 461/96 ss. 4.1, 4.2 and 4.3.

Threshold motions do not apply to all personal injury cases. The threshold only applies in a motor vehicle collision action where the defendant is an owner of a vehicle, driver, or a person at the scene. Defendants in a motor vehicle action against a municipality or road authority would not be entitled to bring a threshold motion. Thus, such a motion does not apply in all personal injury claims.

The threshold test itself, as set out in the *Insurance Act* and its Regulations, requires medical support to establish the permanency element of the threshold. O. Reg 461/96 s 4.3 sets out the evidence required to establish threshold and sets out the requirement for medical evidence. In a motor vehicle action, the plaintiff has the burden to establish their case, including proving they meet the threshold test. The plaintiff will always proceed on the basis that they meet the threshold. The expert reports obtained from doctors for the plaintiff will address the threshold test. OTLA sees no need to create a Rule under the *Rules of Civil Procedure* to add requirements to expert reports or to require confirmation of a report that addresses one defence available under the *Insurance Act*. Such a *Rules* is not necessary, it imports a duty regarding a motion that may or may not be brought by the defence and addresses an *Insurance Act* provision that already addresses the requirements for a medical opinion. Rules already exist regarding the timing of service of expert reports and a medical report that addresses the threshold is just one type of expert report under *Rule* 53. Including a Rule for service of one specific type of expert report would lengthen the number of *Rules*, open the door to conflicting provisions and make compliance more difficult.

Question 11: In conjunction with question 10, if the defendant is served with the plaintiff's threshold report and intends to respond, should the rules specify a timeline for the defendant's response (e.g. within six months of receiving the plaintiff's threshold report)?

As set out above, it is OTLA's position that there should not be a *Rule* specific to the threshold. The timing for service of reports that address the threshold should be no different than the timing already set out in the *Rules* for expert reports. To create *Rules* that are specific to specific types of cases is unnecessary and is likely to create confusion.

CONCLUSION

OTLA thanks the Civil Rules Committee for inviting us to provide input in this important area. OTLA would be pleased to discuss our position and recommendations further should the need arise.

TAB 6

OTLA Ontario Trial Lawyers Association

OTLA Submissions to the Toronto Civil Bench and Bar Committee

Backlogs and Court Efficiency

July 12, 2024

ONTARIO TRIAL LAWYERS ASSOCIATION
1190 Blair Road - Burlington - Ontario • L7M 1K9
905 639 6852 - www.otla.com

The Ontario Trial Lawyers Association (OTLA) is pleased to provide input to the Toronto Civil Bench and Bar regarding the consultation on Backlogs and Court Efficiency.

The Ontario Trial Lawyers Association (OTLA) was formed in 1991 by lawyers acting for plaintiffs. Our purpose is to promote access to justice for all Ontarians, preserve and improve the civil justice system, and advocate for the rights of those who have suffered injury and losses as the result of wrongdoing by others, while at the same time advocating aggressively for safety initiatives.

OTLA frequently comments on legislative matters and has appeared on numerous occasions as an intervener before the Court of Appeal for Ontario and the Supreme Court of Canada.

Our comments are as follows:

General Court Efficiency

1. Increased number of Judges and Court staff.

It is imperative that judicial vacancies are filled and regional complements of judges are increased to keep up with increases in population. In addition, OTLA believes that efficiencies would be gained through additional court staff, including judicial assistants, clerks, registrars and court reporters.

2. Use of non-judicial officers of the Court to oversee functions currently conducted by Judges in the Toronto Region.

To make best use of current judicial resources, OTLA also suggests the following measures be implemented either provisionally or permanently:

- As in other regions (e.g. Brampton) Trial Scheduling Court should be presided over by non-judges (Registrars for example) allowing judges to attend to other matters;
- Other officials or appointed persons, such as senior counsel, retired judges, or senior mediators should be appointed via a *Judge Pro Tem* Program to conduct pre-trial conferences. Further information on this proposed initiative can be found in the joint letter from OTLA and the Canadian Defence Lawyers to the Honourable Justice Chief Morawetz, dated March 25, 2024, which is linked to this submission here; and
- Where counsel can consent to pre-trial and trial dates, and where they meet certain eligibility requirements (e.g. certification that expert reports are complete or there is a reasonable agreed upon timetable in place), counsel should have the option to submit dates on consent and without an appearance in court, further reducing the complexity and length of the Trial Scheduling Court list.

3. Sharing of province-wide court hours and judicial resources

The backlogs in Ontario vary from jurisdiction to jurisdiction. Backlogs also vary depending on court procedure which also varies by jurisdiction. In some jurisdictions, counsel can get a motion date very quickly but trials are delayed by years and, in others, the opposite is true. Access to justice should be equal across the province. The ability to review materials on Case Center (formerly *CaseLines*) and hear matters virtually makes shared use of resources possible across

jurisdictions. Consideration should be given to sharing such resources, particularly during blitz periods or periods of acute backlog or delay.

4. Increased Court hours

Until backlogs are addressed, consideration should be given to increased hours of court operations. For example, additional staff could be hired on a temporary or permanent basis, there could be optional additional hours for staff who are interested in overtime and supernumerary judges could be engaged to hear motions and deal with written matters. Marshalling current resources to relieve backlogs is necessary to ensure timely access to justice. The current court day generally runs for only 5 to 6 hours of actual court time. If this capacity were increased, more motions could be heard, trials would be shorter in terms of number of weeks and backlogs could be reduced.

5. Eliminate Unnecessary Court hearings or appearances

The Court of Appeal of Newfoundland and Labrador adopted Rules allowing parties to make a written request for directions or an order in various circumstances. Requests can be filed electronically using a standardized form. This practice has improved court efficiencies both before and during the pandemic. OTLA recommends that consideration be given to a similar procedural change in the Ontario Superior Court.

Trial Backlogs

1. Civil Juries should be restricted to cases that attract a public interest or engage community values

OTLA has long argued that jury trials in many civil matters are a barrier to swift and meaningful access to justice for Ontarians. Their continued use in many personal injury matters in Toronto (and Ontario) contributes to the length of time it takes to conduct a trial. In particular, civil jury trials often take much longer to conduct than judge-alone trials as they require:

- additional time to empanel and select the jury;
- additional time to excuse the jury for *voir dires*, evidentiary objections, legal arguments, arguments respecting the charge to the jury and objections to opening or closing arguments;
- additional time and expense where mistrials occur (more likely with a jury than judge alone);
- additional time for judges to prepare and deliver the charge, often taking days to write, deliver and hear counsel argument; and
- requirement for in-person trials.

Judge-alone trials do not have the same requirements and they result in increased outcome predictability and stability. Judges understand the threshold and deductible in motor vehicle litigation. They know about experts for hire and inappropriate tactics by counsel. They are equipped with the skills to quickly reach a result. When results are more predictable, cases are more likely to settle, and settle earlier in the process, and backlogs are therefore reduced.

OTLA's position, which has been provided to the Ontario government multiple times over the past several years, is that civil juries should be restricted to cases which attract a public interest or engage community values, such as defamation, institutional sexual abuse, professional and

institutional negligence in healthcare, intentional torts, and the assessment and award of punitive damages. Further details of OTLA's position on this issue are set out in our most recent pre-budget submission to the Ontario government, which is linked to this submission here.

2. Structured Overbooking of Hearing Lists

The Court of King's Bench of Alberta has implemented a two-part overbooking initiative called "Have Gavel, Will Travel." Under part one, long and short criminal and civil trials are regularly triple-booked while jury trials are double-booked, to prevent court resources from being underutilized due to last minute adjournments or resolutions of cases. Under part two, a volunteer roster identifies supernumerary judges deployable on short notice to conduct a trial in any judicial centre in the province where overbooked trials have not been resolved. These judges undertake not to schedule other matters during their availability period and to avoid any scheduling conflicts if they are required to deploy on short notice.

3. A "Ready-to-Go-to-Trial" Pilot list should be created

Any region with a backlog may benefit from initiating a pilot project where parties are able to join a list after certifying, on consent, that they are "Ready-to-Go-to-Trial" whenever they may be called on by the Court. Such a pilot project would allow those regions to continue with their set-date trial process, while also permitting willing parties to benefit from gaps that may occur in the Court's schedule on short notice.

4. Encourage meaningful pre-trial conferences, and operate them distinct from trial management conferences

Litigants and the Court would benefit from more meaningful pre-trial conferences, including with more focus on trying to settle cases. Judges or other officials conducting pre-trial conferences should be actively encouraged to provide their views on the merits of a case, as well on any difficult evidentiary matters or legal issues that might affect the outcome of a case, and sufficient time should be scheduled to allow discussion of the issues specific to each case. Longer pretrials, where required and to the extent schedules permit, should also be encouraged.

Although the Rules prescribe that clients are required to attend civil pre-trial conferences, a practice has developed amongst may institutional litigants where decision makers request leave of the Court (by way of letter to the Court) to be excused from attending the pre-trial conference. In OTLA's view, the granting of such requests reduces the efficacy of the pre-trial conference, and prevents the parties or decision makers in question from hearing the frank views of the official presiding during the pre-trial conference. This, in turn, reduces the likelihood of resolution before trial.

5. Expansion of early case conference availability, early trial dates, and timetables

Early case conferences and the setting of early timetables may be helpful in more complex cases. Timetables are currently required at the time of trial scheduling. Parties should be encouraged, however, to develop timetables earlier in the process. Examples of incentives that could be used may include:

- Enhanced access to case conferences where the parties have agreed to a timetable; and/or
- Enhanced access to timely motions where parties have agreed to a timetable

6. Compulsory Trial Management conferences with the trial judge to streamline document management, *voir dires*, witness scheduling and in-trial motions

Trial management issues are best dealt with by the trial judge, especially in complex matters where various evidentiary issues are likely to arise at trial. Conducting trial management conferences in advance of lengthy trials would allow the trial judge to become familiar with the case and potential issues, resolve minor disagreements respecting document authenticity or admissibility, and coordinate timelines for in-trial motions or contested *voir dires* so they do not derail the scheduled trial and put additional strain on judicial resources. Parties should be expected to outline witness schedules and trial judges should be encouraged to hold parties to those schedules, as best as possible.

7. Improving coordination with other regions to ensure consistency of Practice Directions, forms and methods for booking trials, pre-trial conferences, and motions

Streamlining processes across the province, where possible, will greatly reduce delay. In particular, it would improve court accessibility to litigants and reduce errors and delays if there were a consistent model of trial and pre-trial administration across trial regions that could be relied on by all litigants.

Motion List Backlogs

The inability of litigants to obtain timely motion dates impacts all areas of practice and impedes matters from moving toward resolution. Many counsel have reported delays of one year or more to have a motion heard. Having a system that allows for the availability of motions in a timely manner promotes the overall goal of resolution of a file.

1. Undertakings and Refusals Motions

It is understood that the Civil Rules Committee undertook a review and revision of undertakings and refusals motions. OTLA made a submission in that regard, which can be found here.

2. WAGG Motions

It is understood that The Ministry of the Attorney General has a backlog of WAGG motion requests and typically has 2,000 WAGG motions to process at any given time. The Ministry of the Attorney General takes the position that they require 28 weeks to obtain and screen documents before providing a position on these *Rule* 30.10 motions. This results in a delay of more than 6 months before the Ministry will even respond to the motion with its position. Ultimately, a consent order is often submitted, excluding a standard list of documents and allowing some edits after the review. Each of these motions needs to be heard by a judge. The vast majority of these motions are unopposed and result in a consent Order. Options to reduce the impact these matters have on motion delays include:

- working with the Ministry of the Attorney General to reduce the screening time required for these records;
- no longer requiring an order in cases where witnesses or third parties have not objected to the release of information contained in the Crown file;
- a centralized system for WAGG motions only; and
- a requirement that all WAGG motions be in writing, unless contested.

3. *Rule* 30.10 Motions

Rule 30.10 motions for the production of documents from non-parties are often unopposed or not responded to by the non-party. Counsel nonetheless have to book an in-person appearance because the third party has not responded to the notice of motion or prior requests for records. OTLA recommends that these motions proceed in writing provided the third party does not wish to oppose and proof of notice to the records holder is provided.

4. Motion Blitz List

In an effort to deal with the backlog of motions, a motions blitz list could be very helpful even if it requires use of judicial resources from other jurisdictions. This could assist in the clearing of backlogs and allow appropriate measures to be put in place on a go-forward basis so that future backlogs can be avoided.

Given the delay it takes currently to obtain a motion date in some jurisdictions, a motion blitz would allow the courts to effectively clear the list of motions that have been previously booked.

5. Regularized Motions Lists & Online Booking

Many jurisdictions have access to motions lists either weekly or bi-weekly, without prior scheduling confirmations with the court. Currently, matters in Toronto must wait for the court registrar to approve a date which is several months, if not a year, away. The process is not simple or efficient. The request must be sent through email. Several days later, the registrar will offer dates. Counsel must then confer, and by the time the parties provide their availability, the dates are often gone and the process must start over. This puts considerable strain on the resources of the court as well as the litigants.

An option to increase efficiency is to have specific days for motions without limit. It can be divided by types of motions, such as removal of solicitor motions on a specific day, undertakings motions on a specific day, and contested motions on a specific day. Counsel may confer with one another about the scheduling and then file the motion with the court. The use of Calendly to schedule short motions, as Ottawa does, should also be considered.

Having a system of this nature will also assist with the number of motions scheduled as some motions will resolve. When a motion date approaches, as with a trial, counsel must focus on narrowing the issues or resolving the matter among themselves, or else face potential cost consequences. When motion dates are far into the future, there is no pressure on counsel to resolve issues.

6. Eliminate automatic *Rule* 48 dismissals

OTLA recommends the elimination of automatic administrative case dismissals pursuant to *Rule* 48; instead, OTLA recommends that parties be permitted to advance their cases as they deem appropriate. If an inordinate delay takes place without a reasonable explanation, defence counsel should be permitted to bring a motion for dismissal for delay after the five year anniversary of a proceeding. There are many legitimate reasons why some cases must extend beyond the five-year deadline.

Conclusion

OTLA appreciates the opportunity to provide feedback with respect to the Toronto Bench and Bar consultations on Backlogs and Court Efficiency. OTLA looks forward to continuing to work together to seek ways to improve efficiency and address the ongoing backlog. OTLA would be pleased to discuss these submissions if there be any questions, or if OTLA can be of any further assistance.

Law Society of Ontario | Barreau de l'Ontario

TAB 11

7th Motor Vehicle Litigation Summit

Auto Insurance Coverage Complexities What You Need to Know (PPT)

Relief from Forfeiture: The Keeper of the King's Conscience

Dennis Ong
Aviva Trial Lawyers

September 18-19, 2024

cpd

AVIVA TRIAL LAWYERS

Auto Insurance Coverage Complexities
What You Need to Know

Vancouver – Edmonton – Calgary – London – Oakville – Toronto – Ottawa – Halifax – St. John's

Date: September 19, 2024 – 7th MVA Summit – DAY 2
Presented by: Dennis Ong

OVERVIEW OF TOPICS

- Basic Principles of Insurance Coverage (MVA perspective)
- The Automobile Policy (OAP1)
- Third Party Liability denials
  - The Basics
  - Situational analysis – practical litigation-focus on denial of coverage
- *"Relief from Forfeiture – Keeper of the King's Conscience"* (paper)
  - Review of Relief from Forfeiture
  - Caselaw Review

INSURANCE COVERAGE FUNDAMENTALS

An Insurance Policy is a commercial contract.

There is a customer. (Insured)

There is a indemnifer. (Insurer)

Terms and Conditions of the Policy govern the relationship.

INSURANCE COVERAGE FUNDAMENTALS

- **Coverage Provisions are interpreted broadly, and exclusion clauses narrowly.**
  - *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada,* 2010 SCC 33, [2010] 2 S.C.R.245 at para. 24.

- **The Duty to Defend is broader than the Duty to Indemnify.**
  - *Nichols v. American Home Assurance Co.*, [1990] 1 S.C.R. 801

- ***Contra Proferentem***
  - "against the offeror" – ambiguity construed against the draftor of the contract.

INSURANCE COVERAGE FUNDAMENTALS

- **An insurance contract is one of utmost good faith.**
  - *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 (CanLII), [2002] 1 SCR 595, at para. 83.

- **Insured: driver, participant, witness, party to litigation, present.**

- **Insurer: indemnifier, resources, investigator/assessor, determiner of coverage.**

THE DUTY OF GOOD FAITH

702535 Ontario Inc. v. Non-Marine Underwriters Members of Lloyd's London, 2000 CanLII 5684 (ON CA)

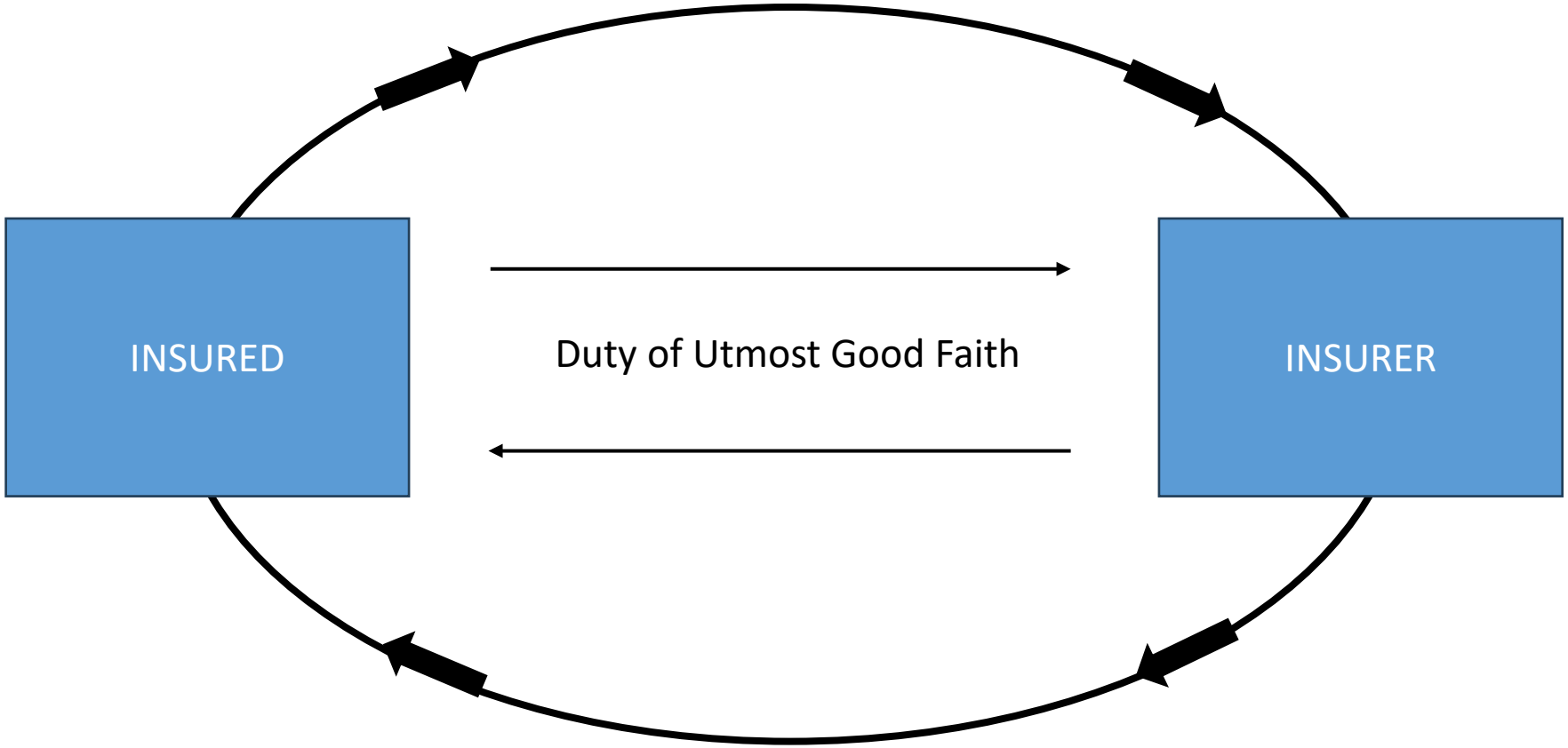
Fidler v. Sun Life Assurance Co. of Canada, 2006 SCC 30 (CanLII), [2006] 2 SCR 3

- **Insured:**
  - **report the claim accurately and honestly**
  - **Cooperate with the insurer's efforts to investigate and assess**
  - **Cooperate and attend as a witness, provide documents, give statements**
  - **Attend at trial – assist with defence of action, if any**
  - **Do not misrepresent the incident, claim details, etc.**

- **Insurer:**
  - **Treat the insured's interests as paramount.**
  - **Investigate, assess and decide a claim in a manner consistent with good faith.**
  - **Do not deny claims without reason or justification.**
  - **Do not misrepresent terms.**

INSURANCE COVERAGE FUNDAMENTALS

Report claim honesty, cooperate, provide details, give statements, attend at discovery, trial, etc.



Treat insured's interests as paramount, do not misrepresent policy, investigate and assess claims in good faith, etc.

AVIVA TRIAL LAWYERS

Why do I need to know anything about Insurance Coverage?

- **Tort Counsel**
  - Skilled at arguing liability
  - Skilled at arguing damages

- **Plaintiff's Counsel** – Access to OPCF44R's – argue 1% Rule
- To Defence Counsel: "Are you aware of any coverage issues?"

- **Defence Counsel** to Plaintiff's counsel
  - "I am not aware of any coverage issues, at this time."
  - "I am not coverage counsel".

- **Proposition:** Having a healthy knowledge of coverage litigation principles makes us all better tort lawyers, makes us more knowledgeable and able to serve our clients better.

THE AUTOMOBILE POLICY (OAP 1)

Motor Vehicle Policies vs. Commercial/Homeowners' Policies

- The OAP1 is a standardized contract.
- Applies to all MVA policies in Ontario.
- Regulated by Financial Services Commission (FSCO)
  - All insureds must abide by the Statutory Conditions – Ontario Regulation 777/93 (material change of risk, notice provisions, etc).
- MVA policy is standardized. Commercial/Homeowners' policies vary from contract to contract.
- POLICY INTERPRETATION GOVERNED BY THE SAME GENERALIZED PRINCIPLES OF COVERAGE.

THE AUTOMOBILE POLICY (OAP 1)

Motor Vehicle Policies vs. Commercial/Homeowners' Policies

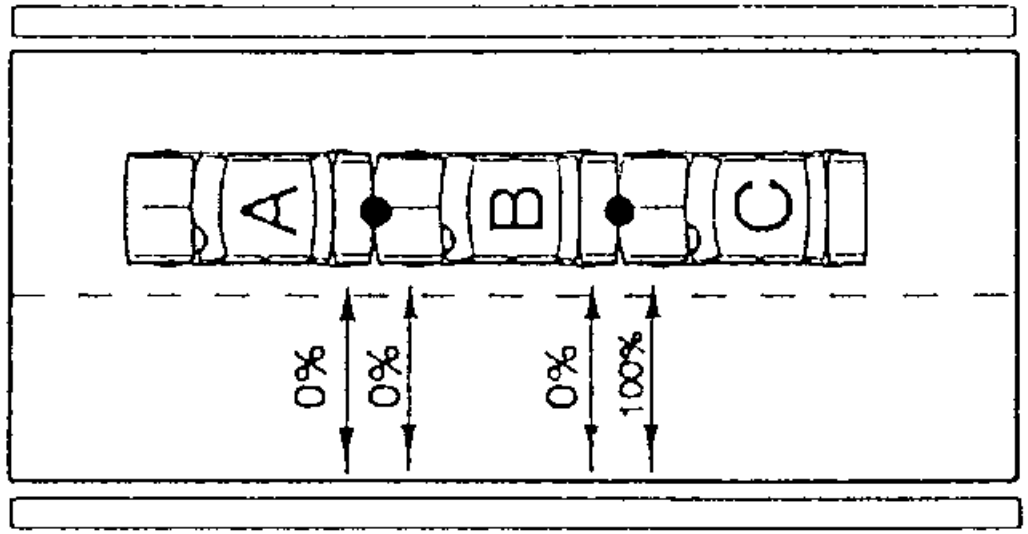
- **POLICY INTERPRETATION GOVERNED BY THE SAME GENERALIZED PRINCIPLES OF COVERAGE.**

- **Coverage Provisions are interpreted broadly, and exclusion clauses narrowly.**
- **The Duty to Defend is broader than the Duty to Indemnify.**
- ***Contra Proferentem***
- **An insurance contract is one of utmost good faith.**

THE MOST COMMON DENIAL SITUATION

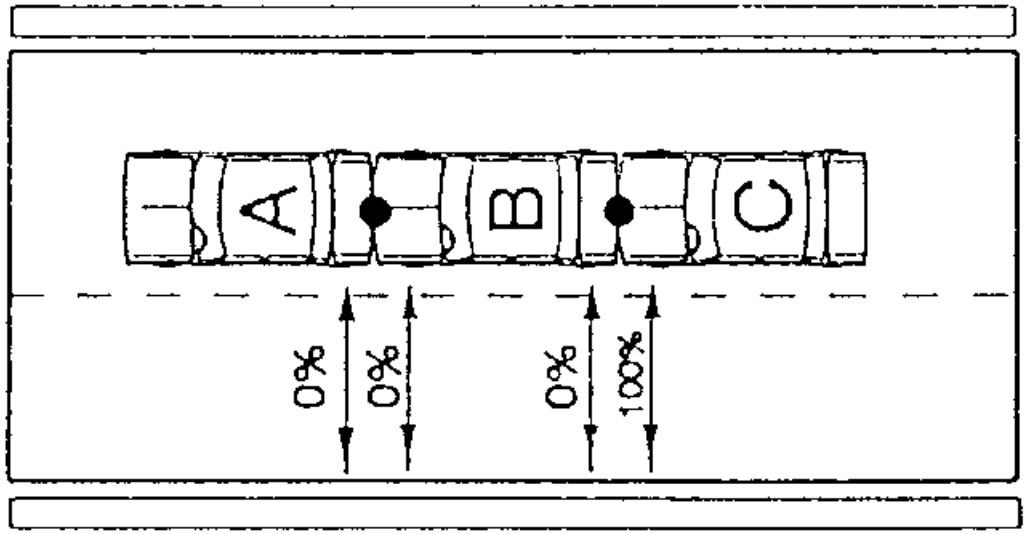
Denial of Coverage

- Consider this situation: (3 car chain collision)
  - Plaintiff driving a vehicle (lead vehicle A)
  - Middle Vehicle Defendant (vehicle B) – stopped in time (?)
  - Rear Vehicle Defendant (vehicle C) – rear-ended B.



- Plaintiff evidence: One Collision – Two Collisions?

THE MOST COMMON DENIAL SITUATION



- Driver (Vehicle C) unable to be located.
- Denial of Coverage for a Co-Defendant (vehicle C)
- Reduction of limits for that Co-Defendant to $200,000 (s. 258(14))
  - The insurer “shall be made a statutory third party”.
- Plaintiff now left with $200,000 vs. tortfeasor.
- Plaintiff adds the OPCF44R carrier.
- 1% Rule – *Negligence Act.* (Plaintiff looking for another tortfeasor – Vehicle B)

DISPUTES BETWEEN INSURERS

Co-Defendant Insurer vis-à-vis Covering-denying Insurer

- **"(Insert X insurer name here) does this all the time…"**

- **Is there any recourse for an insurer (OPCF44R carrier) vs. the Statutory Third Party re the denial of coverage?**
  - **What is the *lis* between the parties?**
  - **Solicitor-client privilege – Insured vs. Insurer?**
  - **Productions of the Statutory Third Party?**
  - **Timing of action for coverage (*Longo v. Maciorowski* 2000 Canlii 16897 (ONCA) "The need for flexibility" (para. 32)**
  - ***Badesha v. Haider* 2017 ONSC 1745 – Justice Trimble**

Paper: Relief from Forfeiture

Relief from Forfeiture: Keeper of the King's Conscience

- History of Relief from Forfeiture
  - Why it is important
- Statutory powers
- The Law of Relief from Forfeiture
- Notable Applications (Case Law)
- **SUMMARY / PRACTICE POINTS**

Relief from Forfeiture – History & Origins

Relief from Forfeiture: Keeper of the King's Conscience

- Courts of Chancery

Paper: Relief from Forfeiture

The Statutes

Insurance Act, s. 129:

Relief from forfeiture

Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss and a consequent forfeiture or avoidance of the insurance in whole or in part and the court considers it inequitable that the insurance should be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as it considers just. R.S.O. 1990, c. I.8, s. 129.

THE LAW ON RELIEF FROM FORFEITURE

The Three-Part Test

The three-part test articulated in *Saskatchewan River Bungalows Ltd. v Maritime Life Assurance Co.*, which requires the Court to consider:

(a) The conduct of the applicant;

(b) The gravity of the breach; and

(c) The disparity between the property forfeited and the damage caused by the breach.

AVIVA TRIAL LAWYERS

Paper: Relief from Forfeiture

Three principles

1. IMPERFECT COMPLIANCE VS. NON-COMPLIANCE
2. INCIDENTAL VS. FUNDAMENTAL BREACH
3. PREJUDICE TO THE INSURER

Paper: Relief from Forfeiture

FRAUD

S. 233 OF THE INSURANCE ACT

Misrepresentation or violation of conditions renders claim invalid

"Once fraud is established, no matter how slight the amount, the entire claim under the proof of loss is forfeited"

Fotinos v. Pitts Insurance Co., 1981 CanLII 1687 (ON SC), [1981] I.L.R. 1-1377 at p. 264 (Ont. S.C.).

AVIVA TRIAL LAWYERS

Paper: Relief from Forfeiture

Please SEE PAPER for CASE SUMMARIES:

- *Kozel v. The Personal Insurance Company,* 2014 ONCA 130
- *Tut v. RBC General Insurance Company*, 2011 ONCA 644
- *Williams v. York Fire & Casualty Insurance Company*, 2007 ONCA 479 (CanLII)
- *Clark v. Co-Operators General Insurance Co., 1997* CanLII 16242 (ON SC)
- *Pridmore v. Drenth*, 2023 ONCA 606
- *Monico v. State Farm Mutual Automobile Insurance*, 2015 ONSC 2697

AVIVA TRIAL LAWYERS

Paper: Relief from Forfeiture

Please SEE PAPER for CASE SUMMARIES:

- *Barkey v. Aviva*, 2024 ONSC 2249 *Tut v. RBC General Insurance Company*, 2011 ONCA 644
- *Yaromich and Botbyl v. Heartland*, 2021 ONSC 3759 *Clark v. Co-Operators General Insurance Co., 1997* CanLII 16242 (ON SC)
  - *Botbyl v Heartland Farm Mutual Inc.,* 2023 CanLII 72662 (ON LAT)
  - *Botbyl v Heartland Farm Mutual Inc.*, 2024 CanLII 28838 (ON LAT)
- Jurisdictional Problem LAT vs ONSC for SABS.
- Small Claims Courts can grant relief from forfeiture.

AVIVA TRIAL LAWYERS

Paper: Relief from Forfeiture

Please SEE PAPER for CASE SUMMARIES:

- *Svia Homes Limited v. Northbridge General Insurance Corporation*, 2020 ONCA 684
- *Monk v. Farmers' Mutual Insurance Company (Lindsay)*, 2019 ONCA 616
- *Searles v. Economical Insurance*, 2022 ONSC 7217

AVIVA TRIAL LAWYERS

Paper: Relief from Forfeiture

Please SEE PAPER for CASE SUMMARIES:

- *Mother and Daughter case:*
- *Wong v. Aviva Insurance Company of Canada*, 2024 ONSC 1111
- *Tieu v. Aviva Insurance Company of Canada*, 2024 ONSC 1110

AVIVA TRIAL LAWYERS

SUMMARY: Relief from Forfeiture

PRACTICE TIPS

1. Mind the Evidence
2. Respect the Trial/Application/Motions Judge
3. Relief from Forfeiture = Discretionary
4. Reasonableness, reasonableness, reasonableness.
5. **KEEPER OF THE KING'S CONSCIENCE**

AVIVA TRIAL LAWYERS

Questions?

Dennis Ong, Aviva Trial Lawyers – Toronto:
dennis.ong@aviva.com

Thank you for your attention!

Relief from Forfeiture: The Keeper of the King's Conscience

By Dennis Ong[1]

INTRODUCTION[2]

Generally

When coverage disputes between insured policyholder and the insurer arise, one potential result could be the determination of a denial of coverage to its own insured by the insurance company. In the context of tort motor vehicle litigation, coverage disputes are generally invoked by the insurer denying liability under the policy of insurance, pursuant to the insurer's rights under s. 258(14) of the *Insurance Act*, R.S.O. 1990, c. I. 8, which gives the insurer the right to be added as a statutory third party to the action.

In the context of tort litigation, injured Plaintiffs will most often have substantial relief from this denial of coverage in the sense that they may add their own OPCF-44R Carrier for underinsured coverage on account for this reduction of the tortfeasor's insurer's liability limits by operation of law. For the denied insured, coverage being denied under the automobile policy can be disastrous, resulting in a lack of a legal defence being offered, and a loss of indemnity coverage available to pay for findings of liability and damages against the insured.

The insured, however, is not without legal remedy since they can, as a last act, seek benefit from the doctrine of relief from forfeiture. This paper provides a review of the law, history and purpose of relief from forfeiture in the insurance context in Ontario.

Relief from Forfeiture – History & Origins

Relief from forfeiture is an equitable remedy, which has its origins in the English Courts of Chancery, which traditionally had a wide range of remedies outside of the common-law courts. The Court of Chancery had jurisdiction to overrule the common-law courts for much its existence. By 1881, with passing of the *Ontario Judicature Act, 1881*, S.O. 1881, c. 5, s. 16 of this *Act* indicated where equitable relief was claimed, the Ontario Courts were empowered to grant the same relief as per the Courts of Chancery.[3] Fast-forward, the *Courts of Justice Act*, as per section 98, is now emboldened with the following generalized powers that the Court, "…may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just". This section resides in the empowering statute's section entitled, "Relief against penalties" under the larger heading of "Common Law and Equity".

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[1] The author is a senior litigation counsel at the Toronto office of Aviva Trial Lawyers. His practice specializes in trial and appellate litigation, and includes but is not limited to, motor vehicle tort claims, Occupiers' Liability, Commercial General Liability, and insurance coverage matters.

[2] This paper was presented at the LSO: 7th Motor Vehicle Litigation Summit on September 18-19, 2024.

[3] Van Rensburg J.A., writing for the Court of Appeal describing the history of relief from forfeiture, generally, in *Poplar Point First Nation Development Corporation v. Thunder Bay (City)*, 2016 ONCA 934 (CanLII) paras. 36-43.

The Insurance Act

Only two statutes in Ontario have specifically listed sections on "Relief from Forfeiture" as being an available remedy. One is the *Insurance Act*, s. 129, which states:

> **Relief from forfeiture**
>
> 129 Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss and a consequent forfeiture or avoidance of the insurance in whole or in part and the court considers it inequitable that the insurance should be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as it considers just. R.S.O. 1990, c. I.8, s. 129.

The other statute in Ontario that contains an explicit relief from forfeiture provision in statute is the *Commercial Tenancies Act*, R.S.O. 1990, c. L.7, which allows the Court to exercise relief from forfeiture in situations of the landlord seeking re-entry upon breach of contract by the tenant, but it is nowhere near as expansive as the development of the insurance-related law on relief from forfeiture.

It should be noted that notwithstanding the Court's generalized power under s. 98 of the *Courts of Justice Act* to invoke relief from forfeiture, the addition of this specified power of equity into the *Insurance Act* is significant. The *Insurance Act* is the statute which governs motor vehicle policies often held by members of the public. Considering the history of relief from forfeiture originating from the Courts of Chancery, this addition of explicit judicial power into statute has meaning. After all, turning back to its historical origins, the lead delegate of the Courts of Chancery was a position known as the "Keeper of the King's Conscience", or Lord Chancellor.[4]

The Courts of Chancery existed to balance the judiciary from becoming a slave to its own common-law precedents, and to prevent the imposition of a draconian system inflexible to any result contrary to strict adherence to its own technical rules. It can therefore be said then that relief from forfeiture is the last bastion or the final frontier of argument that can be made before the imposition of the requisite penalty upon the breaching insured. It is the Court's conscience before granting the imposed statutory penalty for breach.

The Automobile Insurance Policy

Automobile insurance policies in Ontario are mandatory for each and every automobile. Each insurer also must also sell the standardized automobile policy known as the OAP 1 (Ontario Automobile Policy) approved for use by the Financial Services Regulatory Authority of Ontario (FSCO).

[4] https://www.judiciary.uk/about-the-judiciary/history-of-the-judiciary-in-england-and-wales/history-of-the-judiciary/

An insurance contract is one of the utmost good faith. The Supreme Court has noted that it is a two-way street founded upon the principle of utmost good faith arising from the very nature of the contract.[5] In automobile cases, the insurer relies upon the insured to accurately and timely report the incident so that it may properly investigate, defend, and indemnify the situation being claimed. The insurer relies upon the insured's representations regarding the accident, and their ongoing cooperation in order to properly reserve and assess exposure on the matter. The insured is in a superior position with respect to the incident itself because only they were present at the accident. They are the witness and the participant, and the legal party.

This duty of good faith is reciprocal. The insurer must not act in bad faith when dealing with a claim, which is typically made by someone in a vulnerable situation, and the insured must act in good faith by disclosing facts material to the insurance policy.[6]

When such relationship has broken down and the insurer alleges a breach of the statutory conditions, the insurer may deny coverage to the insured pursuant to s. 258(14) of the Insurance Act, thus reducing their liability to the minimum liability limits of $200,000.

THE LAW ON RELIEF FROM FORFEITURE

In *Falk Bros Industries Ltd. v. Elance Steel Fabricating*, the Supreme Court indicated that relief from forfeiture is an equitable doctrine intended to prevent hardship to beneficiaries where there has been a failure to comply with a condition for receipt of insurance proceeds and where leniency in respect of strict compliance with the condition will not result in prejudice to the insurer.[7]

Relief from forfeiture under either s. 129 of the *Insurance Act* or s. 98 of the *Courts of Justice Act*, RSO 1990 c C.43 is only available if the breaching party's conduct amounts to imperfect compliance with a policy term rather than non-compliance with a condition precedent.[8] To determine whether conduct amounts to imperfect compliance versus non-compliance in relief from forfeiture disputes, the Court of Appeal in *Kozel v. Personal Insurance Company* has provided guidance:

> [T]he distinction between imperfect compliance and non-compliance "is akin to the distinction between breach of a term of the contract and breach of a condition precedent". However, in the context of relief from forfeiture, the imperfect compliance/non-compliance analysis does not engage with the contracts jurisprudence on conditions precedent. Rather, the focus is on whether the breach of the term is serious or substantial. Where the term is incidental, its breach is deemed to be imperfect compliance; where the provision

[5] *Whiten v. Pilot Insurance Co.,* 2002 SCC 18 (CanLII), [2002] 1 SCR 595, at para. 83.
[6] The Supreme Court writing in *Bhasin v. Hrynew*, 2014 SCC 71 at para. 55. See also *Coronation Insurance Co v Taku Air Transport Ltd.,* [1991] SCJ No 96 (QL), [1991] 3 SCR 622 at para 23.
[7] *Falk Bros Industries Ltd. v Elance Steel Fabricating Co.,* [1989] 2 SCR 778, 18 MVR (2d) 288 at para 12.
[8] *Kozel v Personal Insurance Company,* 2014 ONCA 130 at para 33.

is fundamental or integral, its breach is cast as non-compliance with a condition precedent.[9]

The Three-Part Test

The Supreme Court has indicated that in order to be successful in obtaining relief from forfeiture, the Court must examine, the three-part test articulated in *Saskatchewan River Bungalows Ltd. v Maritime Life Assurance Co.*, which requires the Court to consider:

(a) The conduct of the applicant;

(b) The gravity of the breach; and

(c) The disparity between the property forfeited and the damage caused by the breach.[10]

An applicant need not prove each of the above three-elements to obtain relief from forfeiture.[11] However, the reasonableness of the applicant's conduct remains at the heart of the analysis.[12] An applicant who has behaved unreasonably will face great difficulty obtaining relief from forfeiture.[13]

In engaging in the three-part test, the Court's mind will be on an analysis of the breaching conduct itself. Specifically, was the breach **imperfect compliance vs. non-compliance**[14] of the insurance policy? Further, was the breach of such nature that it is **incidental vs. fundamental** or integral to the contract itself? Finally, the court also reviews whether there is **prejudice** to the insurer as a result of the breaching conduct.

Insurance Fraud and Relief from Forfeiture

It should be specifically noted that relief from forfeiture under s. 129 of the *Insurance Act* is not available where the insurer proves fraud. In *RBC v. Field*, Justice Emery cited Justice Cummings in *Ghaffari v. Cooperators General Insurance Co*., 1996 CanLII 8031 (ON SC), [1996] O.J. 2630 (Gen. Div.), affirmed 1998 CanLII 17715 (ON CA), [1998] O.J. 4399 (Ont. C.A.)[15]:

> As a consequence of any fraud or wilfully false statement in respect of a claim under the insurance contract, s. 233(1)(c) of the *Insurance Act* provides that the claim of the insured is invalid and the right of the

[9] *Kozel v Personal Insurance Company,* 2014 ONCA 130 at para 41.
[10] *Saskatchewan River Bungalows Ltd. v Maritime Life Assurance Co.,* [1994] 2 SCR 490, [1994] SCJ No 59 (QL) at para 33.
[11] *Monk v Farmers' Mutual Insurance Company*, 2019 ONCA 616 at paras 88-93.
[12] Ibid. at para. 93.
[13] Ibid.
[14] *Falk Bros Industries Ltd. v Elance Steel Fabricating Co.,* [1989] 2 SCR 778, 18 MVR (2d) 288 at page 784.
[15] *RBC v. Field*, 2016 ONSC 5584 (CanLII) at para. 133.

> insured to recover indemnity is forfeited: see *Royal Insurance Co. of Canada v. Dimario* (1987), 26 O.A.C. 370, [1988] I.L.R. 1-2260 (Div. Ct.).
>
> Once fraud is established, no matter how slight the amount, the entire claim under the proof of loss is forfeited: *Fotinos v. Pitts Insurance Co.*, 1981 CanLII 1687 (ON SC), [1981] I.L.R. 1-1377 at p. 264 (Ont. S.C.). This statutory provision appears to be predicated upon a public policy objective of seeking to deter fraudulent claims thereby ensuring premium costs are in line with true losses and risks. An insured is in control of the information submitted in a proof of a loss and, in many cases, the insurer cannot easily verify its accuracy. A contract of insurance is one of utmost good faith.

This is codified into the *Insurance Act* at s. 233(1) which discusses misrepresentations or violations of conditions that render the claim invalid.

Section 233(1) of the *Insurance Act* reads:

> **Misrepresentation or violation of conditions renders claim invalid**
>
> 233 (1) Where,
>
> (a) an applicant for a contract,
>
> (i) gives false particulars of the described automobile to be insured to the prejudice of the insurer, or
>
> (ii) knowingly misrepresents or fails to disclose in the application any fact required to be stated therein;
>
> (b) the insured contravenes a term of the contract or commits a fraud; or
>
> (c) the insured wilfully makes a false statement in respect of a claim under the contract,
>
> a claim by the insured is invalid and the right of the insured to recover indemnity is forfeited. R.S.O. 1990, c. I.8, s. 233 (1).

What can be seen from the wording of the statute is that the words of the Legislature make it patent that in order for the insurer to defend an application for relief from forfeiture by way of fraud, they must successfully prove the elements of fraud, which includes that the insured knowingly misrepresented their claim to the insurer.

Going back to the overall analysis of relief from forfeiture, it is clear that the approach of the Courts when deciding whether to exercise such equitable remedy, the approach is one that is holistic. In *Williams Estate v. Paul Revere Life Insurance*, [1997] OJ No 2773, 1010 OAC 280, the Ontario Court of Appeal noted that the reasonableness inquiry of the insured's breach allows

the Court to examine, "the nature of the breach, what caused it and what, if anything, the insured attempted to do about it. All of the circumstances, including those that go to explain the act or omission that caused the lapse (forfeiture) of the policy, should be taken into account."[16]

Relief from forfeiture is granted sparingly, and the onus rests upon the insured to make their case for it. The power is purely discretionary.[17]

Notable Applications of Relief from Forfeiture (MVA Context)

In *Kozel v. The Personal Insurance Company,* 2014 ONCA 130, an elderly (77-year old) driver received her driver's license renewal documents from the Ontario Ministry of Transportation but set it aside without opening it. Her license had been expired when she was involved in a collision with a motorcyclist who became severely injured. The insurer denied coverage on the basis that she had breached the statutory conditions 4(1) that she was not authorized to drive at the time. The underlying court granted relief from forfeiture, and the Court of Appeal dismissed the insurer's appeal. The Court found that the respondent had always paid her premiums in a timely manner and acted in good faith on all occasions.

In *Tut v. RBC General Insurance Company*, 2011 ONCA 644, a son had drank at a birthday party the night prior, and on the morning of a car accident, asked his mother to use her vehicle. The mother believed that her son showed no signs of intoxication on the morning of the accident (and as supported by other witnesses) and consented to his usage of the vehicle. Notwithstanding, on the morning of the accident, the son's blood alcohol concentration was in excess of 0 percent. The insurer denied coverage on the basis of a violation of statutory condition 4(1) that provides the insured shall not operate a vehicle unless authorized by law. The application judge made a fact finding that the mother had a reasonable belief based on the evidence of her son's zero blood alcohol content. The Court of Appeal dismissed the insurer's appeal indicating that the application judge did not misapprehend the evidence presented by the mother. Much of the focus was based upon the mother's reasonable belief of her son's ability to drive on the morning of the accident and the trial judge's acceptance of the same.

In *Williams v. York Fire & Casualty Insurance Company*, 2007 ONCA 479 (CanLII), an underlying trial judge granted relief from forfeiture to a driver whose license was suspended at the time of the accident. It was the allegation of the driver that he was unaware of his suspension because he had failed to attend a demerit point interview. It turns out that the driver had four speeding tickets incurred in the year prior to the accident that he did not pay, notwithstanding his lack of knowledge of his license suspension. The Court of Appeal exercised its jurisdiction to reverse the trial judge's determination that the insured did not know of his suspension and left this as a

[16] *Williams Estate v Paul Revere Life Insurance,* [1997] OJ No 2772, 1010 OAC 280 at para 49.
[17] *Kozel v. The Personal Insurance Company,* 2014 ONCA 130 (CanLII), at para. 29, citing Doherty J.A. in *Ontario (Attorney General) v. 8477 Darlington Crescent*, [2011] O.J. No. 2122, 2011 ONCA 363, 333 D.L.R. (4th) 326, at paras. 86-87:

triable issue. *Williams*, along with *Kozel*, are important cases that touch upon the fact that the Court's discretion under s. 129 of the *Insurance Act* is narrow, that relate to proof of loss (i.e. circumstances after the loss) and not necessarily policy conditions that pre-date the loss. How this relates to the generalized powers of the Court under s. 98 of the *Courts of Justice Act* as potentially restricting the Court's generalized powers of relief from forfeiture, remains dubious.

In *Clark v. Co-Operators General Insurance Co., 1997* CanLII 16242 (ON SC), the Divisional Court had noted that an expired license constituted imperfect compliance with the insurance policy. The Plaintiff was entitled to relief from forfeiture. This was a matter where a Small Claims Deputy Judge granted relief from forfeiture and the decision was upheld at the Divisional Court. The insured's driver's license expired 14 days before the accident and she discovered this when the police officer advised her of same when investigating the accident. She immediately went to the MTO to renew her license after she was made aware.

In *Pridmore v. Drenth*, 2023 ONCA 606, this involved an ATV accident wherein the Plaintiff Pridmore was thrown from an ATV driven by Tyler Drenth (son of the named insured, Theodore Drenth). The father had given consent to his son Tyler to drive the ATV. The son was a G1 licensed driver at the time. With the father's consent, the son would routinely drive the ATV from their home across a roadway (which they mistakenly thought was a private laneway or alley). While driving the ATV (and on a separate roadway), the son, with Ms. Pridmore as passenger, hit a culvert, throwing the Plaintiff from the ATV, causing her complete paraplegia. Tyler had consumed alcohol at the time in contravention of his G1 license. Tyler, the son, was denied coverage, and the question was whether or not the father was entitled to coverage. Both were denied coverage by the insurer pursuant to statutory condition 4(1).

At the Application, the judge found that the father's consent to the son was for usage of the ATV on the "alley" to access the open fields. The father did not know the son would drive the ATV on highways other than the "alley" in question. Notwithstanding the fact that it was actually a highway, the motion judge found that the father's instructions to the son were clear, that he was to drive across the alley, perform the intended task of extricating a snowed-in vehicle, and then return. There was no reasonable reason why he was to expect that that would not happen. Therefore, coverage was provided to the father, by way of relief from forfeiture being granted.

In *Monico v. State Farm Mutual Automobile Insurance*, 2015 ONSC 2697 (CanLII), the unidentified motorist insurer brought a summary judgment motion claiming that its insured failed to advise the insurer of the accident itself. The Plaintiff here had suffered two other motor vehicle accidents which were in active litigation. The insured gave no notice of the 3rd unidentified accident until approximately 2 years after the accident (7 days before expiry of limitation period). The insurer had no knowledge of the incident until then. The insured first applied for Accident Benefits 3 years after the accident. On Summary Judgment motion, the judge reviewed the factual narrative and denied granting relief from forfeiture, citing that this was not the Plaintiff's first motor vehicle accident and that she must have been familiar with the

procedural aspects and generalized reporting requirements when asserting an insurance claim. Her conduct was not reasonable. Relief from forfeiture was denied.

In *Barkey v. Aviva*, 2024 ONSC 2249, a Plaintiff driver was in a Starbucks drive-through when she was rear-ended by an unidentified driver. The driver fled from the scene without exchanging information. The accident was not reported to the police (or at all) and there was no report to the insurer within 30 days of the accident pursuant to the OAP1. Insurer brought a summary judgment motion to dismiss the claim, citing that the insured had failed to comply with the UIM portions of the policy to report the claim. The insured was 18 years old at the time. She alleged she was in shock after the accident and had sustained other concussion events related to sports in the past. She did not lose consciousness but did indicate confusion or lack of clarity in her thought immediately after the accident. She left the scene without exchanging any information. The Court stated that there was a genuine issue for trial as to whether or not relief from forfeiture could be granted. The nature and extent of the head injury was a triable issue. The judge determined that her excuse for lack of diligence in obtaining the other drivers' identity was partly a matter of medical evidence and credibility. The insurer's Summary Judgment motion was dismissed.

Relief from Forfeiture in the Accident Benefits Sphere

In *Yaromich and Botbyl v. Heartland*, 2021 ONSC 3759, a most interesting case of jurisdiction with respect to Statutory Accident Benefits and relief from forfeiture has arisen. Here, the claimants sought to have access to enhanced SABS benefits. There was a disputed record with respect to whether the insurer was aware of the insureds' desire to seek enhanced benefits. At the Superior Court, Justice Turnbull refused to grant relief from forfeiture, citing that he did not have jurisdiction to grant same in the context of an Accident Benefits Claim. The Applicants then took their matter to the License Appeal Tribunal. The procedural history in this matter shows some confusion with respect to whether or not the LAT has jurisdiction to exercise the power of relief from forfeiture. In *Botbyl v Heartland Farm Mutual Inc.,* 2023 CanLII 72662 (ON LAT), the Applicants in seeking their access to enhanced SABS benefits advanced the argument of relief from forfeiture. The adjudicator determined that since the tribunal is the Applicants' only avenue for dispute resolution, he did have authority to grant equitable jurisdiction.

Shortly after the decision was released, in *Esayas v. Pafco Insurance Company,* 2023 ONLAT 22-014027/AABS-PI, a separate LAT adjudicator specifically noted that s. 129 of the *Courts of Justice Act* confers the power of equitable jurisdiction to a "court" only, and that the tribunal is not a court and declined the exercise jurisdiction (in opposition to the earlier *Botbyl* LAT decision).

The underlying decision granting relief from forfeiture in the LAT was appealed in the Reconsideration decision in *Botbyl v Heartland Farm Mutual Inc.*, 2024 CanLII 28838 (ON LAT). A separate adjudicator agreed that the underlying LAT adjudicator erred when he granted relief from forfeiture. The LAT Reconsideration decision delineated that tribunals are creatures of statute without the inherent power of the Superior Court to exercise powers of equity. The

previous decision to award relief from forfeiture was rescinded. Contrast this tribunal decision with the upheld Small Claims Court decision in *Clark v. Co-Operators General Insurance Co.*, 1997 CanLII 16242 (ON SC). A point that is worth making here: The Small Claims Court is a branch of the Superior Court of Justice. It is clearly a "court" as per the *Courts of Justice Act*. The Divisional Court in *936464 Ontario Ltd. v. Mungo Bear Ltd*., 2003 CanLII 72356 (ON SCDC) and the Court of Appeal in *Grover v. Hodgins*, 2011 ONCA 72 (CanLII) have clearly affirmed that the Small Claims Court can exercise the powers of equitable relief (so long as it is within their monetary jurisdiction). Therefore, expect that Deputy Judges can certainly grant relief from forfeiture as per both the *Insurance Act* and the *Courts of Justice Act* in the Small Claims Court.

However, for the *Botbyl* matter, the above procedural narrative raises serious questions of appropriate jurisdiction. Two legal bodies (Superior Court and the License Appeal Tribunal) have now both stated that they do not have jurisdiction to apply relief from forfeiture in SABS cases. Whether this is an unintentional or intentional gap in Legislation is also a question. For the Applicant, they would cry foul since their sought-remedy of enhanced benefits is caught in limbo with no appropriate adjudicative body to hear the matter. For the Respondent insurer, it would seem to make sense that a Legislative gap in language (and no specific language under the SABS schedule allowing relief from forfeiture) cannot confer jurisdiction to a Court or Tribunal, absent a legislative amendment. Further, whether any of these decisions result in an appeal of the Superior Court Decision or of the LAT Decision, both matters would end up being appealed to the Divisional Court. This matter is presently being appealed to the Divisional Court and is expected to be heard in January 2025.

Comment on Commercial & Homeowner Insurance Disputes and Relief from Forfeiture

It is important to understand that the scope of this paper deals with relief from forfeiture from the motor vehicle context, and the third-party liability tort context, primarily. However, in the world of commercial & homeowner insurance disputes, the relief from forfeiture analysis relies upon the same caselaw, the same test in *Saskatchewan River Bungalows Ltd. v Maritime Life Assurance Co*. and the same generalized tenements of law. However, in application, commercial and homeowners' relief from forfeiture disputes rely heavily on their specific facts and policy wordings.

Svia Homes Limited v. Northbridge General Insurance Corporation, 2020 ONCA 684 dealt with a commercial claim for coverage to repair a sewer system that had failed but lack of timely notice was given to the insurer. *Monk v. Farmers' Mutual Insurance Company (Lindsay)*, 2019 ONCA 616 was a homeowners' property dispute over the refinishing of a log house in Bracebridge where again, late notice was a significant issue. *Searles v. Economical Insurance*, 2022 ONSC 7217 dealt with a late tender for legal defence costs to be paid by the commercial insurer. In all three cases, the Court did not grant relief from forfeiture to the parties seeking equitable relief. Take note, in commercial insurance and homeowners' cases, the individual policies and terms and conditions will vary from policy-to-policy, insurer-to-insurer, as opposed to the standardized terms and conditions of the OAP1 used in all MVA cases.

Ultimately, commercial and homeowner's insurance relief from forfeiture cases can have distinguished facts (and obviously, individualized policies and terms and conditions), so it is a point of caution that these matters should not always be looked to as being binding on MVA relief from forfeiture arguments.

Recent Development re Relief from Forfeiture and Fraud (MVA)

Finally, most recently in *Wong v. Aviva Insurance Company of Canada*, 2024 ONSC 1111 and *Tieu v. Aviva Insurance Company of Canada*, 2024 ONSC 1110, a very interesting case of a mother and daughter duo arose wherein the pair conspired to misrepresent to the insurer who was the true driver of a motor vehicle on the day of the accident. The daughter mistakenly believed that her license was expired, so she conspired with her mother to report that her mother was driving and not her. This version of the accident was reported to the insurer, and to the police at the Self-Collision Reporting Centre. At Examinations for Discovery, the Plaintiff at her discovery gave a description of the driver of the other vehicle which did not fit the physical description or age of the daughter. This was reported back to the insurer and it was the first time the insurer had any idea that someone else other than the mother had been driving. The insurer had always believed the mother's reporting that she was the true driver. The insurer began to investigate the incident and the identity of the driver, notwithstanding their mother insured's representations.

Shortly afterwards, the daughter and the mother admitted that they had conspired in reporting the accident with the mother as the driver and admitted the daughter was the true driver. The insurer denied coverage on a basis of misrepresentations and breaches of the insurance policy. The mother and daughter brought separate Applications in the Superior Court seeking to have the insurer defend and indemnify them in the lawsuit brought by the Plaintiff. It was alleged that no prejudice flowed to the insurer. The daughter was remorseful over the misrepresentations, but explained that she had concocted the mistruth on a mistaken belief that her license was suspended and that she feared the consequences of same. The Applicants relied greatly on their subsequent and apparent full-spoken truth in light of the Examination for Discovery events and the insurer's subsequent investigation, stating that there was no prejudice flowing to the insurer arising from their now accurate reporting.

At the Applications, the judge denied the request for relief from forfeiture stating that the deceit was intentional and prolonged. The judge also made a finding of fraud as against both mother and daughter, citing that they both knew what they were stating to the insurer was false. It is to be noted that the mother also attended at an Examination for Discovery by Zoom in the litigation while her daughter was off-camera instructing her mother live as to the answers during discovery questioning. The Applications judge upheld the insurer's denial of coverage. However, this matter is being appealed to the Court of Appeal of Ontario and will be heard in November 2024. It will likely be an important case on determining the outside extent of when the Courts are willing to grant relief from forfeiture, particularly in the face of a corresponding allegation of fraud from the insurer.

Final Commentary

As can be seen from the history of caselaw on relief from forfeiture, despite the court's own decisions recognizing that relief from forfeiture is to be granted "sparingly", there are a fair number of situations in which the Courts have allowed relief from forfeiture to insureds who have clearly breached the statutory conditions of the standard automobile policy. That being said, Courts have also been relatively true with respect to conducting the analysis contained in *Saskatchewan River Bungalows Ltd. v Maritime Life Assurance Co*. Cases in which requests for relief from forfeiture are denied seem to side on the part of relatively notable and poor conduct on behalf of the insured, which takes into account the totality of their actions and their conduct. Singular breaches of minor importance, or those that are of a technical nature stand a higher likelihood at surpassing the threshold test for relief from forfeiture.

In the context of this analysis, practitioners in this area should be extremely attuned to paying close attention to the facts of breach and the contexts in which any potential breach of the policy may occur. Further, the insurer's conduct with respect to how they handle the insured's claim shall also be under scrutiny.

The following **practice tips** are recommended with respect to approaching cases where relief from forfeiture is concerned:

1) **MIND THE EVIDENCE** – There is no guidance from the *Insurance Act* or the *Courts of Justice Act* as to how the evidence is led, whether it be on summary judgment motion, trial or otherwise. However, the cases above clearly show that the onus is on the Applicant seeking the relief (generally the insured) to prove that relief should be granted. Mind the difference between evidence that can satisfy the relief from forfeiture test vs. an evidentiary-barren argument.

2) **RESPECT THE POWER OF THE TRIAL OR APPLICATION/MOTIONS JUDGE** – The trial judge is the gatekeeper with respect to this equitable power. The trial judge's inherent ability to review evidence, assess the same, weigh evidence for its reliability and make credibility determinations is critical to the analysis. Few appellate decisions have overturned trial decisions on relief from forfeiture and this is not surprising considering the appellate standard of review for discretionary matters as being high.

3) **RELIEF FROM FORFEITURE IS DISCRETIONARY** – Subject to the test in *Saskatchewan River Bungalows Ltd. v Maritime Life Assurance Co*., the trial judge's findings will be given deference.

4) **REASONABLENESSS OF THE CONDUCT** – Step back from your client's case (on both sides) of this analysis and ask yourself these difficult questions: How reasonable is the insured's conduct? How reasonable was the insurers' conduct? How material is the breach? Asking yourself these difficult questions will assist the practitioner in

understanding the strength of the defence or prosecution of a relief from forfeiture argument.

5) **KEEPER OF THE KING'S CONSCIENCE** – Relief from forfeiture is equitable relief. It is not a surprise that circumstances that have amounted to innocuous errors that are not fundamental to the policy, amounting to imperfect compliance, have been successful. On the other hand, repeated acts of disregard, gross time periods of non-reporting, fraudulent and other such unreasonable conduct amounting to unfairness and prejudice against an insurer will likely be unsuccessful at being granted relief from forfeiture. The trial judge's conscience and analysis of the facts in light of the appropriate test is what should guide the analysis. Credibility and reliability of the evidence matters.

CONCLUSION

In conclusion, practitioners in insurance and personal injury law should feel proud that the Legislature specifically called for historical equitable relief to be included in the *Insurance Act.* No other statute contains such an expansive doctrine of available equitable relief in light of statutory or contractual breaches. Appreciating that the Legislature's words have meaning and are intentional follows an important and longstanding legal tradition that automobile insurance coverage in Ontario is drafted in such a manner so-as to provide as much lawfully available coverage to both insured Defendants and insured claimants. Where there are technical breaches of the insurance policy terms, the Courts continue to be the final gatekeeper with respect to the exercise of equitable relief, in the same tradition of the Courts of Chancery were, hundreds of years ago.

Because automobile insurance is such an important part of the fabric of our society, it is not surprising that relief from forfeiture continues to see frequent argument and development in our Courts. A modernizing court system and advancements in public driving and insurance habits, electronic communications, and paperless dissemination of financial and personal documents are anticipated to keep this doctrine well-litigated and relevant for years to come.

Dennis Ong
September 19, 2024

Law Society of Ontario | Barreau de l'Ontario

TAB 12

7th Motor Vehicle Litigation Summit

Insurance Issues Arising From Stolen Vehicles (PPT)

Insurance Issues Arising From Stolen Vehicles

Katherine Di Tomaso
Stieber Berlach LLP

Thomas Russell
Stieber Berlach LLP

September 18-19, 2024

cpd

STIEBER BERLACH

INSURANCE ISSUES ARISING FROM STOLEN VEHICLES

Presented by:

Katherine T. Di Tomaso

Stieber Berlach LLP

Topics

1) Policing, Investigations, and Prevalence of Stolen Vehicles in Canada
2) Examinations Under Oath
3) Nature of Vicarious Liability Under the *Highway Traffic Act*
4) Consent: Explicit and Implied
5) Uninsured Automobile Coverage
6) *Skunk v. Keshar,* ONCA
7) General Coverage Issues
8) Coverage Issues from the Plaintiff's Perspective
9) Statutory Accident Benefits Consequences

STIEBER BERLACH

Policing, Investigations, and Prevalence

Introduction

- Insurance Bureau of Canada ("IBC") estimates that in 2022, $1.2 billion in auto theft claims were paid out[1]
- IBC estimates that 105,000 vehicles were stolen across Canada[2]
- IBC estimates this represented $700 million in losses in just Ontario, and $500 million worth of vehicles stolen in just the Greater Toronto Area[3]
- In 2022, 10 most stolen vehicles in Canada: (1) 2020 Honda CR-V, (2) 2022 Dodge Ram 1500 Series, (3) 2020 Ford F150 Series, (4) 2020 Lexus RX Series, (5) 2021 Toyota Highlander, (6) 2019 Honda Civic, (7) 2021 Jeep Grand Cherokee, (8) 2020 Land Rover Range Rover, (9) 2006 Chevrolet/GMC Silverado/ Sierra 1500 Series, (10) 2021 Jeep Wrangler[4]

1. https://www.canada.ca/en/public-safety-canada/news/2024/05/national-action-plan-on-combatting-auto-theft.html
2. https://www.ibc.ca/issues-and-advocacy/auto-insurance/end-auto-theft.
3. https://www.ibc.ca/issues-and-advocacy/auto-insurance/end-auto-theft.
4. https://www.equiteassociation.com/top-10-most-stolen-vehicles

STIEBER BERLACH

Policing, Investigations, and Prevalence

Efforts from the Federal Government

- *National Action Plan on Combatting Auto Theft*, May 20, 2024[1]
  - $28 million to Canadian Border Services Agency to combat exportation of stolen vehicles
  - $15 million to law enforcement agencies to combat auto theft
  - $51 million annually into community-based presentation initiatives
  - $121 million to the province, to be paid between 2023 – 2028, to combat gun and gang violence, including auto theft

Efforts from the Ontario Government

- *Ontario Introducing Stiff Penalties to Combat Auto Theft*, May 14, 2024[2]
  - Convictions under auto theft resulting in 10-year licence suspension for first offence, 15-year suspension for second offence, and lifetime suspension for third offence

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1. https://www.canada.ca/en/public-safety-canada/news/2024/05/national-action-plan-on-combatting-auto-theft.html
2. https://news.ontario.ca/en/release/1004590/ontario-introducing-stiff-penalties-to-combat-auto-theft

Examinations Under Oath

What is it and When Does it Happen?

- An Examination Under Oath is an opportunity for the insurer to question the insured under oath to obtain further information with respect to a property claim[1]
- The Insured is always permitted to request an examination under oath of the insured for a property claim, as well as request extracts and copies of all relevant documents[2]
- Courts have rejected arguments that the right to examination under oath was extinguished by initiating alternative appraisal processes or even when litigation is commenced between insured and insurer[3]

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1. Daniel Strigberger, *Auto Insurance Coverage Law in Ontario*, 2nd Edition (Toronto: Lexis Nexis, 2021) at p. 207
2. Statutory Conditions – Automobile Insurance, O. Reg. 777.93, s. 6(4).
3. Lauzon v. AXA Insurance (Canada), ONCA 664 at paras 5, 11; Baig v. The Guarantee Company of North America, 2007 ONCA 847 at para 21.

Examinations Under Oath

Scope of Questions Allowed Under Examination Under Oath

- *Baig v. The Guarantee Company of North America*, 2007[1]
  - The scope of an examination under oath covers all questions material to the insurer's liability and the extent thereof, even if not directly related to the claim[2]
  - For example, where there was an objective and reasonable basis for suspecting fraud in the initial appraisal, such questions on the matter were within scope[3]
- *Aviva Insurance Company of Canada v. Ebhodaghe*, 2021[4]
  - Court rejected insurer request for insured to produce documents related to claimed residential address[5]
  - Request was found irrelevant, abusive, and an unnecessary invasion of privacy[6]

1. Baig v. The Guarantee Company of North America, 2007 ONCA 847
2. Baig v. The Guarantee Company of North America, 2007 ONCA 847 at paras 25, 27
3. Baig v. The Guarantee Company of North America, 2007 ONCA 847 at paras 27 – 28.
4. Aviva Insurance Company of Canada v. Ebhodaghe, 2021 ONSC 7343
5. Aviva Insurance Company of Canada v. Ebhodaghe, 2021 ONSC 7343 at para 39.
6. Aviva Insurance Company of Canada v. Ebhodaghe, 2021 ONSC 7343 at paras 29 – 34.

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Nature of Vicarious Liability Under the *Highway Traffic Act*

Meaning of Vicarious Liability

- Put plainly, if you consent to let someone else possess your motor vehicle, you may be liable for their negligence in using that vehicle, even though you were personally not at fault[1]

Exception for Stolen Vehicles

- The *Highway Traffic Act* does not impose vicarious liability for any damages or losses, where the motor vehicle was without the owner's consent in the possession of another party (aside from the owner's chauffeur)[2]

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1. Highway Traffic Act, R.S.O. 1990, c. H.8, s. 192(1).
2. Highway Traffic Act, R.S.O. 1990, c. H.8, s. 192(2).

Nature of Vicarious Liability Under the *Highway Traffic Act*

Importance of Possession

- The question is whether consent was given to possess the motor vehicle, ***not*** whether consent was given to operate the motor vehicle[1]
- Owner bears the onus of establishing no consent to possess[2]

- *Finlayson et al. v. GMAC Leaseco Ltd., 2007*[3]
  - Defendant leased a truck to two individuals, one the condition that one of the individuals, Mr. S, was prohibited from driving the truck[4]
  - Defendant was still held liable for damages caused by negligence of Mr. S in operating the truck, because he had consented to Mr. S possessing the truck[5]

1. McLay v. Dee, 2011 CarswellOnt 4971 at para 4.
2. McLay v. Dee, 2011 CarswellOnt 4971 at para 4.
3. Finlayson v. GMAC Leaseco Limited, 2007 ONCA 557.
4. Finlayson v. GMAC Leaseco Limited, 2007 ONCA 557 at para 6
5. Finlayson v. GMAC Leaseco Limited, 2007 ONCA 557 at para 32

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Consent: Explicit and Implied

Consent under the *Highway Traffic Act*

- Under the *Highway Traffic Act*, consent to posses a motor vehicle, for the purpose of determining vicarious liability, may be either explicit or implied[1]
- While explicit consent is easy to determine, implied consent is more difficult to identify

The Test for Implied Consent

- The question is whether all the circumstances were such that they showed the person who was driving had the implied consent of the owner to posses the vehicle[2]
- The proper focus of the test for implied consent is on the conduct of the driver, and requires, but can also consider the subjective thoughts of the driver[3]

1. Palsky et al. v. Humphrey et al./ Sillito et al. v. Humphrey et al., 1964 CanLII 96 (SCC), [1964] SCR 580; Myers-Gordon v. Martin, 2013 ONSC 5441 at paras 8 – 14, affirmed in Myers-Gordon v. Martin, 2014 ONCA 767
2. Palsky et al. v. Humphrey et al./ Sillito et al. v. Humphrey et al., 1964 CanLII 96 (SCC), [1964] SCR 580 at p. 583.
3. Fernandes v. Araujo, 2015 ONCA 571 at paras 25 – 28.

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Consent: Explicit and Implied

Indicia of Implied Consent

- *Cameron v. Halverson*, 2004[1]
  - Daughter gave implied consent to unlicensed father to drive her vehicle by leaving in parents' driveway
  - Court noted that daughter had only given gentle admonishment when father drove vehicle in the past
- *Korencik v. Hartwell*, 2007[2]
  - Parents gave implied consent to their son to possess the parents' vehicle after leaving it with the son to conduct repairs
  - Son had been given complete possession of vehicle and keys for indeterminate time; son subjectively believed he did not need specific permission to drive the car; evidence did not support the parents impliedly requiring specific consent to drive the car
- ***Counter Example:*** *Myers-Gordon v. Martin*, 2013[3]
  - Mother left keys to her vehicle at home while her son was home alone
  - Court accepted testimony from both mother and son that the understanding was the son did not have consent to drive the vehicle without specific permission, so did not find implied consent

1. Cameron v. Halverson, [2004] A.J. No. 1786, 2004 CarswellAlta 2004 (Q.B.) at paras 2 - 6.
2. Korencik v. Hartwell, 2007 ABQB 459 at paras 6, 33 – 35.
3. Myers-Gordon v. Martin, 2013 ONSC 5441 at paras 2 – 7, 26 - 35, affirmed in Myers-Gordon v. Martin, 2014 ONCA 767

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Uninsured Automobile Coverage

What is Uninsured Automobile Coverage?

- A mandatory provision in every insurance policy in Ontario to help "spread the risk" of insured (or unidentified) automobiles who get involved in accidents[1]
- Allows an insured to make a claim against their own insurer when the vehicle responsible is uninsured or cannot be identified
- Specifically, the insurer agrees to pay its insured any amounts that someone *covered under the policy* would be *legally entitled to recover* as damages for bodily injury or death as a result of an accident involving the uninsured or unidentified vehicle[2]

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1. Insurance Act, R.S.O. 1990, c. 18, s. 265; Ontario Reg. 676, Uninsured Automobile Coverage; Ontario Automobile Policy (OAP 1), s. 5
2. *Auto Insurance Coverage*, page 151.

Uninsured Automobile Coverage

Who is Covered Under Uninsured Automobile Coverage?

- (1) the person with the insurance policy, (2) someone with a *derivative* claim through the person with the insurance policy, and (3) *a person insured under the contract*[1]
- *Person insured under the contract*, subject to many caveats, includes the owner of contents within the insured vehicle, the insured's spouse and dependents (including while in other vehicles), and anyone who is an occupant of the insured vehicle[2]
- Therefore, it is a wide net

1. Insurance Act, R.S.O. 1990, c. 18, s. 265(2)
2. Insurance Act, R.S.O. 1990, c. 18, s. 265(2)

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Uninsured Automobile Coverage

Lack of Consent as an Exclusion to Uninsured Automobile Coverage

- Uninsured Automobile Coverage is excluded for damages under uninsured automobile coverage where the operator of a motor vehicle was in possession of that vehicle without the owner's consent[1]
- This prohibition on claiming for damages under Uninsured Automobile Coverage is extended to passengers of that "stolen" motor vehicle, and even to third parties who suffer damages or loss as a result of the operation of that "stolen" motor vehicle[2]

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1. Shipman v. Dominion of Canada General Insurance Co., 2004 CanLII 33350 (ON CA) at paras 1, 10 – 12; Simison v. Catlyn, 2004 CanLII 22313 (ON CA); OAP 1: *Ontario Automobile Policy Owner's Policy*, s. 1.8.2.
2. Shipman v. Dominion of Canada General Insurance Co., 2004 CanLII 33350 (ON CA) at paras 1, 10 – 12; Conners v. D'Angelo, 2019 ONCA 905.

Skunk v. Keshar, ONCA[1]

Facts[2]

- Motor vehicle was owned by an individual named Maureen Skunk
- Maureen Skunk was married to Christopher Skunk
- Christopher was injured while riding as a passenger in Maureen's motor vehicle
- **Important:** Maureen's motor vehicle was being driven by someone named Laurel Katesh, who did not have the consent of Maureen to possess Maureen's motor vehicle
- Laurel had no applicable and collectible bodily injury liability insurance
- Christopher, therefore, attempted to claim uninsured automobile coverage from Maureen's policy on Maureen's motor vehicle, under uninsured automobile coverage

1. Skunk v. Ketash, 2018 ONCA 450.
2. Skunk v. Ketash, 2018 ONCA 450 at paras 1 - 6.

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Skunk v. Keshar, ONCA[1]

The Law

- An "Uninsured Automobile" is defined as follows under s. 265(2) of the *Insurance Act:*[2]
  - **"uninsured automobile"** means an automobile with respect to which neither the owner nor driver thereof has applicable and collectible bodily injury liability and property damage liability insurance for its ownership, use or operation, but does not include an automobile owned by or registered in the name of the insured or his or her spouse. [emphasis added]
- Both the lower court and Court of Appeal held that, although it is a harsh result, if a person is injured by an uninsured driver driving a car they own, or a car belonging to their spouse, they do not get the benefit of the uninsured automobile provisions, including Uninsured Automobile Coverage[3]

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1. Skunk v. Ketash, 2018 ONCA 450.
2. Insurance Act, R.S.O. 1990, c. I.8, s. 265(2). Note, similar language appears in OAP 1: Ontario Automobile Policy Owner's Policy, s . 5.1.2.
3. Skunk v. Ketash et al., 2017 ONSC 4457 at para 21; Skunk v. Ketash, 2018 ONCA 450 at paras 11 – 12.

General Coverage Issues

Proving Auto Theft for the Purpose of Coverage

- In the context of claims for stolen property, the evidentiary onus is on the claimant to establish that, on a balance of probability, the theft actually occurred[1]
- *Gauthier v. Scottish & York Insurance Co. Ltd.*, 2003[2]
  - Insured brought an action to redeem compensation from his insurer for a stolen vehicle
  - Insurer rejected coverage on the basis that it suspected that the insured was directly or indirectly responsible for the theft
  - The Court accepted expert evidence that the vehicle must have been stolen from someone with a key, and other evidence that the insured must have been in control of the only keys in existence
  - The court found, on a balance of probabilities, the vehicle was not actually stolen, as the insured was somehow involved

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1. Shakur v. Pilot Insurance Co. (C.A.), 1990 CanLII 6671 (ON CA), 74 O.R. (2d) 673 (C.A.) at p. 681.
2. Gauthier v. Scottish & York insurance Co. Ltd., 2003 CanLII 46126 (ON SC) at paras. 1-2, 46 – 49, 58, 64 - 65

General Coverage Issues

Insurable Interests in Stolen Vehicles

- An insurable interest is a necessary condition for a valid policy of insurance[1]
- Courts have stated that an insurable interest means that the individual has, in relation to the thing to be insured, "a moral certainty of advantage or benefit, but for those risks or dangers"[2]
- *Assaad v. Economical Insurance Group*, 2002[3]
  - Insured purchased suspicious vehicle from someone indebted to the insured, well below market price, without documentation, and without mileage
  - Vehicle turned out to be stolen
  - Court of Appeal held that Insured could not claim an insurable interest in the vehicle, after the vehicle was stolen again, because they were not a "good faith purchaser"
  - It was obvious that the insured was wilfully blind to the fact the vehicle was stolen

1. Insurance Act, R.S.O. 1990, c. I.8 at s. 178.
2. Kosmopoulos v. Constitution Insurance Co., 1987 CanLII 75 (SCC), [1987] 1 SCR 2 at para 42.
3. Assaad v. Economical Insurance Group, 2002 CarswellOnt 1980, [2002] I.L.R. I-4116, [2002] O.J. No. 2356 at paras 14 - 21

General Coverage Issues

Confiscation of a Stolen Vehicle as a Peril Under a Policy

- *B. McCurdy Trucking v. Southwestern Equipment Inc.*, 2006[1]
  - Insured was a trucking company who, as a good faith purchaser, purchased two dump trailers
  - Dump trailers were determined to be stolen vehicles as the result of a police investigation, and confiscated
  - Insured attempted to collect on their "all perils" insurance policy
  - Ontario Court of Appeal held that "confiscation" by police was not a listed peril under the policy, and that Insured could not claim for theft because theft had occurred prior to the policy
  - Therefore, seems that current rule is that a specific peril in a policy is required to cover this

1. B. McCurdy Trucking Inc. v. Southwestern Equipment Inc., 2006 CanLII 5137 (ON CA) at para 3; B. McCurdy Trucking v. Southwestern Equipment Inc., 2005 CanLII 34596 (ON SC) at paras 3 – 6, 9 – 12, 17

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Coverage Issues From the Plaintiff's Perspective

- Dealing with Issue of Consent to Possess
- Uninsured Automobile Coverage and the Defendant's Coverage
- Conflict between OPCF 44 Insurers and Tort Defendants
- The Plaintiff is the injured Passenger of a Stolen Vehicle

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Statutory Accident Benefits Consequences

What is Statutory Accident Benefits?

- S. 268 of the *Insurance Act* requires every motor vehicle liability policy to include statutory accident benefits[1]
- Provide basic benefits, subject to certain limits, to almost all individuals involved in a motor vehicle accident[2]
  - Ex. income replacement benefits, non-earner benefits, caregiver benefits, medical/ rehabilitation benefits, attendant care benefits, death and funeral benefits, housekeeping benefits, lost education expenses, cost of medical examinations, and more

1. Insurance Act, R.S.O. 1990, c. I.8, s. 268.
2. Statutory Accident Benefits Schedule, O. Reg. 34/10.

Statutory Accident Benefits Consequences

s. 31 Exclusions and Drivers Without Consent

- Under s. 31 of the *Statutory Accident Benefits Schedule*, there are listed individuals who are not entitled to the benefits of income replacement and non-earner benefits[1]
- It is important to understand, however, that the other statutory accident benefits are still available
- Under s. 31(1)(a)(iv), the exclusion applies to the driver of an automobile at the time of the accident if the driver knew, or ought reasonably to have known, that he or she was operating the automobile without the owner's consent[2]

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1. Statutory Accident Benefits Schedule, O. Reg. 34/10, s. 31.
2. Statutory Accident Benefits Schedule, O. Reg. 34/10, s. 31(1)(a)(iv)

Statutory Accident Benefits Consequences

s. 31 Exclusions and Passengers in Stolen Vehicles

- S. 31(1)(d) states that the exclusion applies to anyone who, at the time of the accident, was engaged in an act for which the *person is convicted of a criminal offence*, or was the occupant of an automobile that was being used in connection with an act for which the *person is convicted of a criminal offence*[1]
- Until someone has been convicted of a crime, the passenger in a stolen vehicle may still be entitled to all statutory accident benefits[2]
- If a criminal charge has been commenced, the insurer will hold the money for income replacement and non-earner benefits in trust until a verdict is reached, at which point the release of the money is dependent upon a non-guilty verdict[3]

1. Statutory Accident Benefits Schedule, O. Reg. 34/10, s. 31(1)(d)
2. For example, See Primmum Insurance Co. v. Aviva Insurance Co. of Canada, 2005 CanLII 11975 (ON SC)
3. Statutory Accident Benefits Schedule, O. Reg. 34/10, s. 31(3),(4).

STIEBER BERLACH

Thank you

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STIEBER BERLACH

Insurance Issues Arising from Stolen Vehicles

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September 3, 2024

TABLE OF CONTENTS

PAGE

PART I - Policing, investigations, and prevalence of stolen vehicles in Canada.....3
A. Efforts by the Canadian Government 4

B. Efforts by the Ontario Government 6

PART II - Examinations Under Oath 6
A. Where an Examination Under Oath is Available 6

B. The Scope of Questions in an Examination Under Oath 7

PART III - Nature of *Highway Traffic Act* vicarious liability 9

PART IV - Consent: Explicit Consent and Implied Consent 11

PART V - Uninsured Automobile Coverage 14
A. What is Uninsured Automobile Coverage? 15

B. Who is Covered under Uninsured Automobile Coverage? 17

C. Lack of Consent as an Exclusion to Uninsured Automobile Coverage.....19

PART VI - *Skunk v. Keshar ,* ONCA – Uninsured Vehicles taken WITHOUT consent and Spousal Exclusions 21

PART VII - Coverage Issues 22
A. Proving Auto Theft for the Purpose of Coverage 23

B. Insurable Interests in Stolen Vehicles.....24

C. Confiscation of a Stolen Vehicle as a Peril Under a Policy 28

PART VIII - Coverage Issues from the Plaintiff's Perspective.....29
A. Dealing with Issue of Consent to Possess.....29

B. Uninsured Automobile Coverage and the Defendant's Coverage.....30

C. Insurers and Tort Defendants.....31

D. The Plaintiff is the Injured Passenger of a Stolen Vehicle 31

PART IX - Statutory Accident Benefits consequences 31
A. The Broad Coverage Under *SABS* 32

B. S. 31 Exclusions.....33

PART X - Conclusion.....36

PART I - POLICING, INVESTIGATIONS, AND PREVALENCE OF STOLEN VEHICLES IN CANADA

Auto theft is a crime that impacts thousands of individuals across Canada every year.[1] It is a crime that causes incredible stress and potential out-of-pocket expenses to its victims, and significant costly insurance consequences.[2] The Insurance Bureau of Canada (the "IBC") estimated that in 2022, $1.2 billion in auto theft claims were paid out.[3] For the first time, insurers lost over one billion dollars in stolen vehicles, which directly impacts Canadians at a time when inflation and affordability are putting strain on consumers. In the same year, the IBC estimated that more than 105,000 vehicles were stolen across Canada, with $700 million in losses in Ontario, and over $500 million worth of vehicles stolen in just the Greater Toronto Area alone.[4] Canadians witnessed double-digit increases in vehicle theft in 2022, with the provincial breakdowns as follows:

- Ontario up 48.3% year over year
- Quebec up 50% year over year
- Alberta up 18.3% year over year (after several years of decline)
- Atlantic Canada up 34.5% year over year.[5]

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[1] https://www.canada.ca/en/public-safety-canada/news/2024/05/national-action-plan-on-combatting-auto-theft.html

[2] https://www.canada.ca/en/public-safety-canada/news/2024/05/national-action-plan-on-combatting-auto-theft.html

[3] https://www.canada.ca/en/public-safety-canada/news/2024/05/national-action-plan-on-combatting-auto-theft.html

[4] https://www.ibc.ca/issues-and-advocacy/auto-insurance/end-auto-theft. In 2022, the ten most commonly stolen vehicles in Canada were reported by the Equite Association as follows: (1) 2020 Honda CR-V, (2) 2022 Dodge Ram 1500 Series, (3) 2020 Ford F150 Series, (4) 2020 Lexus RX Series, (5) 2021 Toyota Highlander, (6) 2019 Honda Civic, (7) 2021 Jeep Grand Cherokee, (8) 2020 Land Rover Range Rover, (9) 2006 Chevrolet/GMC Silverado/ Sierra 1500 Series, (10) 2021 Jeep Wrangler. For more information, See https://www.equiteassociation.com/top-10-most-stolen-vehicles. In 2022, the ten least commonly stolen vehicles in Canada were reported by the Equite Association as follows: (1) Chevrolet Volt, (2) Kia Niro 5DR, (3) Cadillac XT5, (4) Buick Envision, (5) Mini Cooper Countryman, (6) Volvo XC90, (7) Volkswagen Beetle, (8) Chevrolet Corvette, (9) Hyundai Ioniq, (10) Mazda Mazda2. For more information, See https://www.equiteassociation.com/top-10-least-stolen-vehicles/number-of-thefts.

[5] https://www.equiteassociation.com/press/vehicle-theft-reaches-a-crisis-level-as-canada-becomes-a-source-nation-for-illegal-trade

Auto theft is a significant problem affecting many Canadian towns and cities. The prevalence of the problem has prompted government action at multiple levels. Not only is the problem of auto theft expensive and stressful for Canadians and insurers, it poses serious and important legal problems for those that have the unfortunate circumstances of their motor vehicle being involved in a collision and being the victim of a motor vehicle collision involving a stolen vehicle. This paper serves as a primer for lawyers who are charged with acting for clients who experience insurance issues arising from stolen motor vehicles. This paper raises an insurer's statutory right to conduct an Examination under Oath when confronted with an auto theft claim and explains the scope for same. It further explains the root of owner's liability through the *Highway Traffic Act* with a particular highlight upon the statutory language to possess. It provides a comprehensive discussion on the law of consent illustrating different scenarios for explicit and implied consent. It also provides a thorough discussion of uninsured coverage, what it is, the scope of coverage and implications arising from lack of consent or contested consent. This paper discusses insurance coverage issues that arise from stolen vehicles generally and from the plaintiff's perspective. Last, it concludes with a discussion of the impact of stolen vehicles on *Statutory Accident Benefits* entitlements. Overall, the purpose is to introduce readers to these issues and provide guidance and education for those tasked with a file involving an accident with a stolen vehicle. Having touched upon the severity of the issue in Canada, the reader may benefit from the added context of current governmental efforts to combat auto theft.

A. Efforts by the Canadian Government

Concerning actions taken at the national level, the Federal government recently released its new National Action Plan on Combatting Auto Theft on May 20, 2024.[6] The efforts described in this plan, some of which are summarized below, showcase how seriously this issue is being taken.

In 2024, the Government of Canada pledged to invest $28 million into the Canadian Border Services Agency ("CBSA") to help combat the exportation of stolen vehicles out

[6] *National Action Plan, Supra* Note 1.

of the country.[7] The aim is to increase capabilities of the CBSA to detect, identify, and search containers leaving the country with stolen vehicles.[8] In 2024, the CBSA has intercepted 1,205 stolen vehicles being moved out of railyards and ports across Canada.[9]

Furthermore, the Government of Canada has pledged to invest $15 million into the capacity of provincial, territorial, and municipal law enforcement agencies to combat auto theft.[10] The Federal government has pledged to establish a "National Intergovernmental Working Group on Auto Theft", to enhance information sharing across federal, provincial, and territorial governments, and better coordinate a multi-faceted approach to combatting auto theft.[11]

The Federal government invests $51 million annually into community-based prevention initiatives for youth-at-risk, and has pledged to initialize further similar projects, for the purpose of diverting Canadian youth away from gangs and organized crime, including auto theft.[12]

Concerning specifically Ontario, the Federal government has pledged $121 million to the province, to be paid between 2023 – 2028, to combat gun and gang violence in the province, including auto theft.[13]

Finally, the Federal government has put forth legislation to amend the *Criminal Code*, which would create new offences targeting auto theft, possession and distribution of devices used to commit auto theft, and laundering the proceeds of crime, all of which include maximum prison sentences of 10 – 14 years.[14] This legislation will also introduce additional investigative tools by making wiretap warrants and DNA orders available for auto theft.[15]

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[7] *National Action Plan, Supra* Note 1, at "Canada Border Services Agency".
[8] *Ibid.*
[9] *Ibid.*
[10] *Ibid,* at "Public Safety Canada".
[11] *Ibid.*
[12] *Ibid.*
[13] *Ibid.*
[14] *Ibid,* at "Justice Canada".
[15] *National Action Plan, Supra* Note 1, at Justice Canada

B. Efforts by the Ontario Government

In addition to efforts at the national level, the Provincial government in Ontario has also recently released a new action plan. On May 14, 2024, the Ontario government introduced stiff penalties with the aim of combatting auto theft.[16] Under the proposed provincial legislation, thieves convicted of motor vehicle theft under the *Criminal Code* would face a 10-year licence suspension for a first offence, a 15-year licence suspension for a second offence, and a lifetime suspension for a third offence.[17]

Overall, the issue of auto theft affecting Canadians has been a significant one involving government leadership and action at every level. Collaborations between various levels of government, insurers, and law enforcement agencies to address the problem of auto theft at its source can make a more secure, stable, and safe society.

PART II - EXAMINATIONS UNDER OATH

Turning now to the insurance implications of having a vehicle stolen. First and foremost, an insured who finds themselves subject to this offensive crime must understand that, before they are paid out, their insurer has the right to what is a called an Examination Under Oath.[18]An Examination Under Oath of an insured is an opportunity for the insurer to obtain further information with respect to the property claim; in this case a stolen vehicle.[19]

A. Where an Examination Under Oath is Available

Under Statutory Condition 6(4) of Ontario Regulation 777/93, an insured is required to submit to the Examination Under Oath by the insurer, must produce all documents in their

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[16] Government of Ontario, "Ontario Introducing Stiff Penalties to Combat Auto Theft: Thieves will face licence suspensions including lifetime ban for repat offenders" (May 14, 2024), online (webpage): https://news.ontario.ca/en/release/1004590/ontario-introducing-stiff-penalties-to-combat-auto-theft

[17] *Ibid.*

[18] *Statutory Conditions – Automobile Insurance,* O. Reg. 777.93, <https://www.ontario.ca/laws/regulation/930777/v4>, s. 6 [*"Statutory Conditions*"]. See also, Daniel Strigberger, *Auto Insurance Coverage Law in Ontario,* 2nd Edition (**Toronto:** LexisNexis Canada, 2021) at page 207 ["*Auto Insurance Coverage Law in Ontario"*].

[19] *Auto Insurance Coverage Law in Ontario, Supra* Note 17 at page 207.

possession relevant to the matter, and must permit the production of a transcript of the examination, as well as extracts and copies of all relevant documents produced.[20] Historically, courts have staunchly defended the application of this statutory condition, and have been not receptive to arguments to displace its application. For instance, in *Lauzon v. AXA Insurance (Canada),* 2013, the Ontario Court of Appeal rejected the argument that the insurer's right to examination under oath was extinguished by the insurer initiating an alternative appraisal process under s. 128 of the *Insurance Act.*[21] As another example, in *Baig v. The Guarantee Company of North America,* 2007 ("*Baig"*), the Ontario Court of Appeal held that even when litigation is commenced between an insured and insurer, and the parties therefore have the right to an examination for discovery as part of proceedings, the insured still maintains their right to a *statutory* examination under oath.[22]

B. The Scope of Questions in an Examination Under Oath

The scope of the subject matter that an insurer is allowed to examine an insured on has been the subject of extensive commentary from the court. A good starting point for understanding how the scope of permissible questions under an examination under oath is determined is *Baig v. The Guarantee Company of North America,* 2007 ("*Baig"*).[23]

In *Baig,* the Court of Appeal ruled on whether the insurer could ask questions about the valuation of the insured's vehicle, which had occurred when the policy was originally issued and long before any claim had been made on the policy.[24]

The insured in *Baig* argued that allowing a broad scope of the s. 6(4) examination could provide insurers with the opportunity to conduct baseless reviews of the underwriting of

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[20] *Statutory Conditions, Supra* Note 17, s. 6(4).
[21] *Lauzon v. AXA Insurance (Canada),* 2013 ONCA 664 (CanLII), <https://canlii.ca/t/g1pfj> at paras 5, 11. Where provided for in an insurance contract, s. 128(1) of the *Insurance Act, RSO 1990, c I.8,* < https://www.ontario.ca/laws/statute/90i08%23BK448&a=Insurance+Act> provides a mechanism for the insured and insurer to each retain appraisers to determine specified matters in the event of a disagreement.
[22] *Baig v. The Guarantee Company of North America*, 2007 ONCA 847 (CanLII), <https://canlii.ca/t/1v1fv> at para 21 ["*Baig*"].
[23] *Ibid.*
[24] *Ibid* at paras 22 – 28.

the insurance policy, in the hopes of finding a basis to reject the claim.[25] The Court of Appeal did recognize this concern, but ultimately ruled that the scope of the s. 6(4) examination covers all questions material to the insurer's liability and the extent thereof.[26] In this particular case, the Court of Appeal found that where the insurer has an objective and reasonable basis for suspecting fraud in the initial appraisal, then such questions about the matter are relevant and within the scope of the s. 6(4) examination.[27]

In a recent case considering the proper scope of questions under an examination under oath in the context of a claim for a stolen vehicle, the Ontario Superior Court provided firm limits on the rule from *Baig.*[28] In *Aviva Insurance Company of Canada v. Ebhodaghe,* 2021**,** the insurer sought a court order to compel the insured to attend an examination under oath and provide certain documents related to her claimed residential address; namely, her banking and cell phone records.[29] The basis for the production of such documents was that the insurer believed the insured had lied about their home address when originally applying for insurance.[30]

The Court rejected the insurer's request for an order to produce documents related to the insured's residential address.[31] First, the Court found that no evidence had been provided by the insurer as to why such documents would be material to the assessment of the claim for the stolen vehicle.[32] Second, the Court was unconvinced that the insurer had an "objective and reasonable" basis for suspecting fraud in the initial application by the insured.[33] Finally, the Court held that an order for the production of such materials would be an abusive and unnecessarily invasion of the insured's privacy rights.[34]

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[25] *Baig Supra* Note 21 at para 27.
[26] *Ibid* at paras 25, 27.
[27] *Ibid* at paras 27 - 28.
[28] *Aviva Insurance Company of Canada v. Ebhodaghe*, 2021 ONSC 7343 (CanLII), <https://canlii.ca/t/jk5f1> [*"Ebhodaghe"*].
[29] *Ibid* at paras 1, 39.
[30] *Ibid* at para 31.
[31] *Ibid* at para 39.
[32] *Ibid* at para 31.
[33] *Ebhodaghe*, *Supra* Note 27 at para 31.
[34] *Ibid* at para 34.

The Court stressed that *Baig* set the scope of permissible questioning to questions material to the insurer's liability and the extent thereof, and does not permit a fishing expedition on the part of the insurer.[35]

Therefore, the scope of questioning in an examination under oath in response to a claim for a stolen vehicle may extend to details outside the actual event forming the basis of the claim. However, an insurer must always be able to demonstrate that they have an objective and reasonable basis for believing that such questions are material to the insurer's liability for coverage and extent thereof.

PART III - NATURE OF *HIGHWAY TRAFFIC ACT* VICARIOUS LIABILITY

The next concern that a victim of auto theft should be aware of is the nature of their liability for any damages or losses that result from the operation of their stolen vehicle.

In Ontario, vicarious liability is typically imposed on the owner of a motor vehicle for damages or losses sustained by other persons due to the negligent use of the vehicle by another driver. Vicarious liability in this situation means that if you consent to allow someone else drive your motor vehicle, you may be liable for their negligence in using that vehicle, even though you were personally not at fault.

The basis for this comes from s. 192(1) of the *Highway Traffic Act,* which states as follows:[36]

> *Liability for loss or damage*
>
> **192 (1)** The driver of a motor vehicle or street car is liable for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle or street car on a highway.

[35] *Ibid* at paras 29, 32.
[36] *Highway Traffic Act*, R.S.O. 1990, c. H.8 <https://www.ontario.ca/laws/statute/90h08>, s. 192(1) ["*HTA*"].

However, s. 192(2) provides an exception to this broad allotment of liability, which provides protection to motor vehicle owners in the case of stolen vehicles:[37]

> *Same*
>
> **(2)** The owner of a motor vehicle or street car is liable for loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle or street car on a highway, unless the motor vehicle or street car was without the owner's consent in the possession of some person other than the owner or the owner's chauffeur. [emphasis added]

There has been substantial case law on the scope of vicarious liability under s. 192(2), and what exactly consent means in this context. From the caselaw, the principle has arisen that the purpose of s. 192(2) is to protect the public and accomplishes this purpose by imposing a requirement on the owner of a motor vehicle to exercise careful management over its use.[38] Therefore, the scope of vicarious liability for an owner of a motor vehicle should be given a broad interpretation under s. 192(2).[39]

When it comes to what is meant by consent under s. 192(2), the question is whether the owner consented to the possession of the motor vehicle, not the operation of the motor vehicle.[40] As an example to illustrate this point, in *Finlayson et al. v. GMAC Leasco Ltd.*, 2007, the defendant had leased a truck to two individuals, one of which was named Mr. Simon.[41] The defendant had prohibited Mr. Simon from driving the vehicle under the lease, and even had a written acknowledgement and an excluded driver endorsement.[42] However, the defendant was still held vicariously liable for the negligence of Mr. Simon

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[37] *HTA, Supra* Note 35, s. 192(2).
[38] *McLay v. Dee,* 2011 CarswellOnt 4971 at para 4 ["*McLay*"].
[39] *Ibid*. See also, *Cumming v. Budget Car Rentals Toronto Ltd.,* [1966] O.J. No. 2179 (C.A.); *Thompson v. Bourchier,* [1933] O.R. 525 (C.A.).
[40] *Ibid, Supra* Note 37 at para 4.
[41] *Finlayson v. GMAC Leasco Limited, 2007 ONCA 557 (CanLII),* <https://canlii.ca/t/1sdnj> at para 5 ["*Finlayson*"].
[42] *Finlayson, Supra* Note 40 at para 6.

in operation of the motor vehicle, because the defendant had consented to Mr. Simon possessing the motor vehicle as one of the lessees.[43]

The main point to take into consideration is that where an owner of a motor vehicle has consented to hand over possession of a motor vehicle to another person, it is irrelevant for the purpose of vicarious liability under s. 192(2) whether the owner consented to the party actually driving the motor vehicle. This is due to the statutory language of the *HTA*.

A last important point to note is the Owner of a motor vehicle should be aware that they bear the onus of establishing that the motor vehicle was in the possession of another party without consent.[44] In a case of negligent operation of a motor vehicle causing losses or damages to another person, once it has been established that an individual was the owner of that vehicle, they will be liable under s. 192(2) for the loss or damages unless they can establish that the vehicle was in the possession of someone else without the owner's consent.[45]

PART IV - CONSENT: EXPLICIT CONSENT AND IMPLIED CONSENT

Adding further complexity to s. 192(2) of the *Highway Traffic Act* is the fact that consent to possess may be both explicit or implied.[46] As the reader may realize, this creates the necessity of a legal test to determine when an owner of a motor vehicle has given implied consent to operate that vehicle.

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[43] *Ibid* at para 32. For other examples of the same principle, See, *Lajeunesse v. Janssens et al.,* 1983 CanLII 1714 (ON SC), <https://canlii.ca/t/g1ffh>; *Berge v. Langlois*, 1982 CanLII 3151 (ON SC), <https://canlii.ca/t/gdbk2>, affirmed in *Berge v. Langlois*, 1984 CanLII 3080 (ON CA), <https://canlii.ca/t/g924v>; *McKay v. McEwan*, 1999 CanLII 14777 (ON SC), <https://canlii.ca/t/1vvlr>. For more information on the origin of this principle, See the leading case, *Thompson v. Bourchier*, 1933 CanLII 106 (ON CA), <https://canlii.ca/t/g1h9w>.

[44] *McLay, Supra* Note 37 at para 4.

[45] *Ibid* at para 4. For the purpose of establishing possession in this context, it is noteworthy that courts have held that possession contemplates power, control or dominion over property, See, *Finlayson, Supra* Note 40 at paras 23 – 26; *Seegmiller v. Langer*, 2008 CanLII 53138 (ON SC), <https://canlii.ca/t/217g0> at para 34.

[46] *Palsky et al. v. Humphrey et al./ Sillito et al. v. Humphrey et al*., 1964 CanLII 96 (SCC), [1964] SCR 580, <https://canlii.ca/t/22xwz> ["*Palsky*"] ; *Myers-Gordon v. Martin*, 2013 ONSC 5441 (CanLII), <https://canlii.ca/t/g0bc2> at paras 8 – 14 ["*Myers-Gordon - ONSC*"], affirmed in *Myers-Gordon v. Martin*, 2014 ONCA 767 (CanLII), <https://canlii.ca/t/gf5pb> ["*Myers-Gordon - ONCA*"].

The legal test to determine the conferral of implied consent originally derives from the Supreme Court of Canada case, *Palsky (Next friend of) v. Humphrey,* 1964.[47] In *Palsky*, the Supreme Court stated that in determining whether there was implied consent, the question for the Court is whether all the circumstances were such that they showed that the person who was driving had the implied consent of the owner to possess the vehicle and that they showed that the driver was justified in thinking they had consent.[48]

The current version of this test comes from the Ontario Court of Appeal decision in *Fernandes v. Araujo,* 2015.[49] In *Fernandes,* the Court of Appeal held that while the subjective thoughts of the driver are relevant to the issue of implied consent, they are not determinative of whether or not the driver had the implied consent of the owner to possession.[50] The Court went on to state that, considering the language and purpose of s. 192(2), the focus of this test is instead on the conduct of the driver, and requires giving proper consideration of all the evidence, including actions and omissions.[51]

There has been extensive case law to provide guidance on the indicia of implied consent.[52] For instance, in *Cameron v. Halverson,* 2004, a daughter was found to have given implied consent to her unlicensed father to drive her vehicle by leaving it in her parents' driveway when she went away.[53] The Court found that she knew her father had driven her vehicle in the past and had only given him a gentle admonishment.[54] Therefore, by giving him access to the vehicle and the keys, she had given her implied consent to its use.[55]

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[47] *Palsky, Supra* Note 45.
[48] *Ibid* at p. 583.
[49] *Fernandes v. Araujo, 2015 ONCA 571 (CanLII),* <https://canlii.ca/t/gkjsf> ["*Fernandes*"].
[50] *Ibid* at para 28.
[51] *Ibid* at paras 25 - 28. This iteration of the test may leave the reader feeling that the issue is doomed to be simply decided on a case-by-case basis, and, unfortunately for the reader, they are mostly correct. See, *Thorne v. Prets*, 2003 CanLII 22084 (ON CA), <https://canlii.ca/t/1g3wv> at para 18, "*…the question of whether a motor vehicle was in the possession of some other person without the owner's consent is a question of fact to be decided by the evidence in each particular case."*. For further endorsement of this point, See, *Henwood v. Coburn,* 2007 ONCA 882 (CanLII), <https://canlii.ca/t/1v77b> at para 25.
[52] For a useful summary of the case law highlighting the indicia of implied consent, See *Myers-Gordon-ONSC, Supra* Note 45, affirmed in *Myers-Gordon-ONCA, Supra* Note 45 at paras 15 - 25.
[53] *Cameron v. Halverson*, [2004] A.J. No. 1786, 2004 CarswellAlta 2004 (Q.B.) ["*Cameron*"]. This case is considered an example of indicia of implied consent applicable to Ontario in *Myers-Gordon-ONSC, Supra* Note 45, affirmed in *Myers-Gordon-ONCA, Supra* Note 45 at para. 17.
[54] *Cameron, Supra* Note 52 at paras. 2 - 6.
[55] *Ibid*.

As another example, in *Korencik v. Hartwell*, 2007, the parents were found to have given implied consent to their son to possess their vehicle after leaving it with the son to conduct repairs.[56] Although the parents argued that they felt there was an understanding that their son did not have free rein to use the vehicle without permission, the court found that consent was implied.[57] The Court based this on the fact that: (1) the son had been given complete possession of the vehicle and its keys for an indeterminate period of time with express consent to move it if needed and conduct repairs; (2) the son did not subjectively believe he needed specific permission to drive the vehicle; and (3) the evidence did not support that the parents impliedly required such specific consent when leaving the vehicle with the son.[58]

As a final example, *Myers-Gordon v. Martin*, 2013, provides an example where the Court rejected finding implied consent, despite similar facts to the previous cases considered.[59] In this case, a mother left her unlicensed teenage son at home alone, with the keys to her vehicle inside the house, resulting in the son taking the vehicle and causing a tragic accident while intoxicated.[60]

On the one hand, the court considered that: (1) the son had previously been allowed to drive the vehicle with the mother's permission; (2) the mother herself was not legally authorized to drive, but did so in front of her son; (3) the keys were left at the house and were accessible; (4) the mother had not reported to the police that the vehicle had been taken without her consent; and (5) the issue of the son taking the vehicle without the mother's permission was not discussed between them for a significant period of time after the accident.[61]

However, on the other hand, the court considered that the son was not a delinquent who could not be trusted, and that both the mother and son testified that they believed the son

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[56] *Korencik v. Hartwell,* 2007 ABQB 459 (CanLII), <https://canlii.ca/t/1s1bl> [*"Korencik"*]. This case is considered an example of indicia of implied consent applicable to Ontario in *Myers-Gordon-ONSC, Supra* Note 45, affirmed in *Myers-Gordon-ONCA, Supra* Note 45 at para. 17.
[57] *Korencik*, *Supra* Note 55 at para 6, 35.
[58] *Ibid* at para 33.
[59] *Myers-Gordon-ONSC, Supra* Note 45, affirmed in *Myers-Gordon-ONCA, Supra* Note 45.
[60] *Myers-Gordon-ONSC, Supra* Note 45 at paras. 2 – 7.
[61] *Myers-Gordon-ONSC, Supra* Note 45 at para. 26.

did not have the mother's consent to drive the vehicle while she was away.[62] On this basis, and finding no evidence to detract from the credibility of the mother or son, the court found that there was no implied consent on the part of the mother for the son to posses the motor vehicle.[63]

What the case law demonstrates is that the issue of whether implied consent existed for any particular case will need to be determined by the particular facts of that case. While there is a subjective element, it is not determinative, and the history of the relationship between the driver and the owner is typically a point of focus.

An owner of a motor vehicle who finds that their vehicle was involved in an accident while in the possession of another individual will need to keep this in mind for the sake of their own liability. Obviously, in the most clear cut cases of auto theft, there will be no issue of whether consent can be mustered from the facts. However, where the perpetrator is someone known to the owner of the vehicle, critical examination of the relationship between the owner and the perpetrator is necessary to determine if there remains any chance of liability for damages or losses caused by the operation of that vehicle under s. 192(2) of the *Highway Traffic Act.*

PART V - UNINSURED AUTOMOBILE COVERAGE

Insurance implications arising from auto theft present in numerous ways, for instance, as an owner of a stolen vehicle, a perpetrator of auto theft, an accomplice of auto theft, or as an unfortunate third party. We will turn first to understand the implications for uninsured automobile coverage.

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[62] *Ibid* at paras. 28 - 35. On appeal from this decision in *Myers-Gordon-ONCA, Supra* Note 45 at paras. 11 – 13, the Ontario Court of Appeal rejected the argument by the appellant that the motion judge had erroneously determined this issue on a subjective interpretation of the test for implied consent. At para 12, the Court of Appeal held that the motion judge's reasons demonstrate that they considered of all the evidence in front of them, and ultimately decided that in the particular facts of the case, where both the driver and owner believed there was no consent to drive the vehicle, the issue of the driver's credibility was more the issue. In *Fernandes*, *Supra* Note 48 at paras 26 - 28, the Court of Appeal re-affirmed this decision, rejecting the argument that the Court of Appeal in *Myers-Godon v. Martin* had endorsed a test for implied consent that is subjective in nature.

[63] *Myers-Gordon-ONSC, Supra* Note 45 at paras 27 – 35.

A. What is Uninsured Automobile Coverage?

Ideally, everyone in Ontario would follow the law that drivers on public roads must be operating a vehicle insured under a valid automobile insurance policy.[64] Unfortunately, many accidents do still occur in Ontario involving uninsured (or unidentified) automobiles.[65] The issue of how people should be duly compensated in such an unfortunate situation is dealt with by "uninsured automobile coverage".

Under section 265 of the *Insurance Act,* every motor vehicle liability policy is required to include uninsured automobile coverage.[66] The outline of the terms, conditions, provision, exclusions, and limits for uninsured automobile coverage are included in a schedule under Ontario Regulation 676, *Uninsured Automobile Coverage*.[67] Finally, the actual provision of uninsured automobile coverage is through s. 5 of *Ontario Automobile Policy* (OAP 1), which is approved by the Superintendent of Financial Services and acts as the mandatory standard automobile policy for use by automobile owners in Ontario.[68]

The relationship between these three documents can be thought of as analogous to the relationship between the backend and frontend infrastructure of an application. Section 265 of the *Insurance Act* and the schedule under Ontario Regulation 676 provide the legal "backend" infrastructure that sets out the legal requirements for uninsured automobile coverage. The OAP 1 provides the "frontend" infrastructure; a standard insurance policy which can be easily marketed and explained to the end-users. However, as we will see later on in the sub-section on exclusions to uninsured automobile coverage, this analogy is not perfect, as the interpretation of OAP 1 can, in turn, impact our interpretation of the scope of protection offered by section 265.

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[64] *Compulsory Automobile Insurance Act,* R.S.O. 1990, c. C. 25, s. 2.
[65] *Auto Insurance Coverage Law in Ontario, Supra* Note 17 at p. 151.
[66] *Insurance Act,* R.S.O. 1990, c. 18, s. 265 ["*Insurance Act"*].
[67] *Uninsured Automobile Coverage*, Ontario Reg. 676, <https://www.ontario.ca/laws/regulation/900676> ["*UAC"*].
[68] *Ontario Automobile Policy* (OAP 1), s. 5, <https://www.fsrao.ca/oap-1-ontario-automobile-policy-owners-policy> ["*OAP 1"*].

The intent of section 265 is to spread the risk of uninsured drivers among drivers generally, through their insurance policies.[69] As we will see below, this scheme offers protection to more people than it may appear at first blush. However, since it is tied to individuals with an automobile insurance policy, it does not cover everyone. Individuals who find themselves outside the ambit of uninsured automobile coverage must resort to making a claim against the Motor Vehicle Accident Claims Fund (the "MVACF").[70] The MVACF is funded by tax dollars, and regulated by the *Motor Vehicle Accident Claims Act.*[71]

Uninsured automobile coverage means that the insurer will cover any losses arising from an accident involving an uninsured or unidentified automobile.[72] To be more specific, the insurer agrees to pay its insured any amounts that *someone covered under the insurance policy* would be *legally entitled to recover* as damages for bodily injury or death as a result as a result of an accident involving the uninsured or unidentified vehicle.[73] In order to obtain this coverage from the insurer, the claimant has the onus of establishing that they were involved in an accident involving an unidentified or uninsured automobile.[74]

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[69] *Bruinsma v. Cresswell,* 2013 ONCA 111 (CanLII), <https://canlii.ca/t/fw81c> at para 24; *Auto Insurance Coverage Law in Ontario, Supra* Note 17 at p. 151.

[70] Government of Ontario, "Motor Vehicle Accident Claims Fund", Online (Webpage): https://www.ontario.ca/page/motor-vehicle-accident-claims-fund

[71] Motor Vehicle Accident Claims Act, R.S.O. 1990, c. M.41, <https://www.ontario.ca/laws/statute/90m41>.

[72] *Auto Insurance Coverage Law in Ontario, Supra* Note 17 at page 151.

[73] *Ibid*. See, *Auto Insurance Coverage Law in Ontario, Supra* Note 17 at page 151, under the Uninsured Automobile Coverage scheme, there is also some property coverage available for losses caused by uninsured automobiles only (not unidentified). Note, uninsured automobile coverage is only provided if the accident occurs in Canada or the United States, See, *Auto Insurance Coverage Law in Ontario, Supra* Note 17 at page 152; *Ortiz v. Dominion of Canada General Insurance Company*, 2001 CanLII 24093 (ON CA), <https://canlii.ca/t/1fbl4> at para 14; *Pilot Insurance Company v. Sutherland,* 2007 ONCA 492 (CanLII), <https://canlii.ca/t/1rwz3> at paras. 39 – 41. Furthermore, the amount claimable under uninsured automobile coverage is affected by any limitations on what the injured party would otherwise be able to recover from the operator of the uninsured or unidentified vehicle in the jurisdiction where the accident actually happened, See, *Auto Insurance Coverage Law in Ontario, Supra* Note 17 at page 152. See also, *Tolofson v. Jensen, Lucas (Litigation Guardian of) v. Gagnon*, 1994 CanLII 44 (SCC), [1994] 3 SCR 1022, <https://canlii.ca/t/1frp2>. If, for example, the accident happened in Quebec, which prohibits tort actions against at-fault motorists, then the insured party would not be legally entitled to otherwise recover any damages from the operator of the uninsured or unidentified vehicle, and they would be unable to claim uninsured automobile coverage. See, *Auto Insurance Coverage Law in Ontario, Supra* Note 17 at page 152; *Soriano v. Palacios*, 2005 CanLII 18840 (ON CA), <https://canlii.ca/t/1kwvk> at paras. 5 - 6.

[74] *Vescio v. Peterman*, 1999 CanLII 2299 (ON CA), <https://canlii.ca/t/1f9sd> at para 3; *Chmielewski v Pishchak*, 2014 CanLII 7592 (ON SC), <https://canlii.ca/t/g4n39>. Note, the for a claim regarding an unidentified automobile, the claimant must establish, through corroborating materials evidence, that there actually was another automobile involved, and that the identity of the owner or driver cannot be ascertained,

B. Who is Covered under Uninsured Automobile Coverage?

Unfortunately for the reader, the issue of who can or cannot claim coverage under an uninsured automobile coverage policy is not straight forward. To begin explaining why, we must first turn to s. 265(1), which sets out who is covered for uninsured automobile coverage:[75]

> **s. 265(1)** Every contract evidenced by a motor vehicle liability policy shall provide for payment of all sums that,
>
> (a) a person insured under the contract is legally entitled to recover from the owner or driver of an uninsured automobile or unidentified automobile as damages for bodily injuries resulting from an accident involving an automobile;
>
> (b) any person is legally entitled to recover from the owner or driver of an uninsured automobile or unidentified automobile as damages for bodily injury to or the death of *a person insured under the contract* resulting from an accident involving an automobile; and
>
> (c) *a person insured under the contract is legally entitled to recover* from the identified owner or driver of an uninsured automobile as damages for accidental damage to the insured automobile or its contents, or to both the insured automobile and its contents, resulting from an accident involving an automobile.
>
> subject to the terms, conditions, provisions, exclusions and limits as are prescribed by the regulations. [emphasis added]

Subsections (a) and (b) are, arguably, simple enough to understand: (a) means that the person with the insurance is able to claim uninsured automobile coverage, and (b) means

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See, *Auto Insurance Coverage Law in Ontario, Supra* Note 17 at pages 152 - 153**.** In *Hooper v. John Doe,* [2015] O.J. No. 2139, 49 C.C.L.I. (5th) 314 (Ont. S.C.J.) ["*Hooper"*], the claimant was struck by an unidentified taxi driver employed in the city of Mississauga. The Court found that sine there were 227 drivers who fit the description driving 139 vehicles, all of whom were listed under Mississauga's' by-law, it was conceivable that the identity of the driver could be ascertained, and the claim against the insurer was dismissed, See, *Hooper* at paras. 45 – 49. Note, for a claim regarding an uninsured automobile, there is far less drama in establishing that a specific vehicle was uninsured. Under s. 265 (2) of the *Insurance Act,* an uninsured automobile is defined as… "*an automobile with respect to which neither the owner nor driver thereof has applicable and collectible bodily injury liability and property damage liability insurance for its ownership, use or operation, but does not include automobile owned by or registered in the name of the insured or his or her spouse."*, See, *Insurance Act, Supra* Note 65.

[75] *Insurance Act, Supra* Note 65, s. 265 (1).

that someone else with a derivative claim through the person with insurance is also able to claim uninsured automobile coverage. However, subsection (c) is more complex because it does not explain who exactly is *"a person insured under the contract"*.

The definition of "a person insured under the contract" is found under s. 265(2) of the *Insurance Act*, and, subject to many caveats, includes the insured owner of the automobile; the owner of contents within an insured automobile; the insured's spouse and dependants; and, where the insured is a corporation, any director, officer, employee or partner of the insured corporation for whose regular use of the insured automobile is furnished, as well as their spouses and dependents.[76]

Therefore, subsection (c) casts a wide net of individuals who can claim uninsured automobile coverage under any one particular policy.[77] However, the list is not endless, and there are exceptions.

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[76] *Insurance Act, Supra* Note 65, s. 265 (2). For the sake of the reader who wishes to know the caveats alluded to, the definition of "person insured under the contract" under s. 265(2) reads as follows:

Definitions
(2) for the purpose of this section…
"person insured under the contract" means,
(a) in respect of a claim for damage to the insured automobile, the owner of the automobile,
(b) in respect of a claim for damage to the contents of the insured automobile, the owner of the contents,
(c) in respect of a claim for bodily injuries or death,
(i) any person while an occupant of the insured automobile,
(ii) the insured and his or her spouse and any dependent relative of either,
(A) while an occupant of an uninsured automobile, or
(B) while not the occupant of an automobile or of railway rolling stock that runs on rails, who is struck by an uninsured or unidentified automobile,
(iii) if the insured is a corporation, unincorporated association or partnership, any director, officer, employee or partner of the insured for whose regular use the insured automobile is furnished, and his or her spouse and any dependent relative of the person or the spouse,
(A) while an occupant of an uninsured automobile, or
(B) while not the occupant of an automobile or of railway rolling stock that runs on rails, who is struck by an uninsured or unidentified automobile,
where such director, officer, employee or partner or his or her spouse is not the owner of an automobile insured under a contract

[77] In addition to the already lengthy list provided by the legislation where an individual can claim uninsured automobile coverage under a particular automobile insurance policy, courts in Ontario have added further complexity. The Ontario Divisional Court has previously held that the insured under the policy can claim uninsured automobile coverage against their insurer when the insured is injured while a passenger in their friend's vehicle, even though they were neither an occupant of their own insured vehicle nor struck by an uninsured vehicle. See, *Talbot v. GAN General Insurance Co*., 1999 CanLII 14796 (ON SC),

C. Lack of Consent as an Exclusion to Uninsured Automobile Coverage

A lack of consent to possess a motor vehicle is an exception to an individual's entitlement to uninsured automobile coverage. Under s. 265(1), the list of individuals eligible to claim uninsured automobile coverage is subject to the terms, conditions, provisions, exclusions and limits as prescribed the regulations.[78] This takes us to the Regulation, R.R.O. 1990, Reg. 676, *"Uninsured Automobile Coverage",* which states that the general provisions, definitions, exclusions and statutory conditions as contained in a motor vehicle liability policy also apply to payments under the contract under s. 265(1) of the *Insurance Act.*[79]

Therefore, we then have to turn to the mandatory automobile insurance policy in Ontario which actually provides uninsured automobile coverage to Ontarians, Ontario Automobile Policy 1 (**"OAP1"**).[80]

s. 1.8.2 of the OAP 1 provides:[81]

> **1.8.2 Excluded Drivers and Driving Without Permission**
>
> Except for certain **Accident Benefits** coverage, there is no coverage (including coverage for occupants) under this policy if the automobile is used or operated by a person in possession of the automobile without the owner's consent or is driven by a person named as an excluded driver of the automobile policy or a person who, at the time he or she willingly becomes an occupant of an automobile, knows or ought reasonably to know that the automobile is being used or operated by a person in possession of the automobile without the owner's consent.

In *Shipman et al. v. The Dominion of Canada General Insurance Company,* 2004, the Ontario Court of Appeal considered the impact of s. 1.8.2 on entitlement to uninsured

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<https://canlii.ca/t/1vvmd>. Furthermore, the Ontario Court of Appeal has previously held that the dependent of the insured was *also* an insured under the policy and while an occupant of an uninsured vehicle. See, *Taggart (Litigation guardian of) v. Simmons*, 2001 CanLII 24003 (ON CA), <https://canlii.ca/t/1fbnr> at paras 18 – 19 ["*Taggart"*]. Note, the Ontario Court of Appeal subsequently considered whether to overturn *Taggart* in *McArdle v. Bugler*, 2007 ONCA 659 (CanLII), <https://canlii.ca/t/1t0t7>, and refused to do so. If the reader is left confused by these decisions, then the reader is in good company.

[78] *Insurance Act, Supra* Note 65, s. 265 (1) .

[79] *UAC, Supra* Note 66, s. 10.

[80] *OAP 1, Supra* Note 67.

[81] *OAP 1, Supra* Note 67, s. 1.8.2.

automobile coverage under s. 265 of the *Insurance Act.*[82] The Court of Appeal held that the effect of s. 1.8.2 is to exclude coverage for damages or personal injuries under uninsured automobile coverage where the operator of a motor vehicle was in possession of that vehicle without the owner's consent.[83] The Court of Appeal further found that this extends not only to passengers of that motor vehicle, but also to third parties who suffer damages or loss as a result of the operation of the motor vehicle.[84]

More recently, *Shipman* was followed by the Ontario Court of Appeal in *Conners v. D'Angelo,* 2019.[85] In this case, the appellant was a passenger in a motor vehicle driven by an unlicensed driver without the permission of the owner, who sustained injuries in a motor vehicle accident.[86] The motion judge had dismissed appellant's claim against the insurer for uninsured automobile coverage, holding that s. 1.8.2 of OAP 1 meant the appellant was excluded because the motor vehicle was operated without the owner's consent.[87] The appellant appealed this decision, arguing that he qualified as an "insured" and "a person insured under the contract" under s. 265(1).[88]

The Court of Appeal in *Conners* dismissed these arguments.[89] The Court affirmed that s. 1.8.2 of OAP 1 excludes coverage under s. 265(1), even if the appellant could be considered an "insured" for some purposes.[90]

Therefore, as the law stands, the fact that the operator of a motor vehicle was in possession of that vehicle without the consent of the owner excludes the operator, passengers, and third parties from coverage under Uninsured Automobile Coverage.

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[82] *Shipman v. Dominion of Canada General Insurance Co.,* 2004 CanLII 33350 (ON CA), <https://canlii.ca/t/1hzzg> ["*Shipman"*]. See also, *Simison v. Catlyn*, 2004 CanLII 22313 (ON CA), <https://canlii.ca/t/1hqrf>.
[83] *Shipman, Supra* Note 81.
[84] *Ibid* at paras 1, 10 – 12.
[85] *Conners v. D'Angelo*, 2019 ONCA 905 (CanLII), <https://canlii.ca/t/j3c2n> ["*Conners"*].
[86] *Ibid* at para 1.
[87] *Ibid* at para 2.
[88] *Ibid* at paras 5 - 6.
[89] *Conners*, *Supra* Note 84 at paras 19 - 20.
[90] *Ibid* at paras 14.

PART VI - *SKUNK V. KESHAR* , ONCA – UNINSURED VEHICLES TAKEN WITHOUT CONSENT AND SPOUSAL EXCLUSIONS

The reader should be aware of an unfortunate consequence of the exclusion for vehicles taken without consent for uninsured automobile coverage, which manifested in *Skunk v. Keshar,* 2018.[91] In the underlying facts of this case, the motor vehicle at issue was owned by Maureen Skunk ("Maureen").[92] Maureen was married to Christopher Skunk ("Christopher"), who was injured in a motor vehicle accident while riding as a passenger in Maureen's motor vehicle.[93] The issue is that, at the time of the motor vehicle accident, Maureen's vehicle was being operated by Laurel Katesh ("Laurel"), who did not have the consent of Maureen to possess Marueen's vehicle.[94]

Laurel had no applicable and collectible bodily injury liability insurance.[95] Maureen was insured by Jevco Insurance Company ("Jevco"), and Christopher attempted, as the spouse of the insured, to claim uninsured automobile coverage.[96] At the level of the Superior Court of Justice, Fitzpatrick J. ruled that Maureen's vehicle was precluded from being found "an uninsured vehicle" because the situation was excluded by the language of OAP 1 and s. 265(2) of the *Insurance Act*.[97]

Under s. 265 (2) of the *Insurance Act,* an "uninsured automobile" is defined as follows:[98]

> "uninsured automobile" means an automobile with respect to which neither the owner nor driver thereof has applicable and collectible bodily injury liability and property damage liability insurance for its ownership, use or operation, but does not include an automobile owned by or registered in the name of the insured or his or her spouse. [emphasis added]

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[91] *Skunk v. Ketash*, 2018 ONCA 450 (CanLII), <https://canlii.ca/t/hsb9k> ["*Skunk - ONCA"*].
[92] *Skunk v. Ketash et al*., 2017 ONSC 4457 (CanLII), <https://canlii.ca/t/h695q> at para 1 ["*Skunk – ONSC"*].
[93] *Ibid.*
[94] *Ibid.*
[95] *Ibid* at para 6.
[96] *Ibid.*
[97] *Skunk – ONSC, Supra* Note 91 at paras 17 - 22. Note, Justice Fitzpatrick also found that such a finding was also consistent with the language of OPCF 44R, which is an additional opt-in policy to provide further coverage for such a scenario. However, nothing more will be said on this as it is not relevant for our discussion.
[98] *Insurance Act*, *Supra* Note 65, s. 265(2).

Similarly, under s. 5.1.2 of the OAP 1, an "uninsured automobile" is defined as follows:[99]

> An uninsured automobile is one for which neither the owner nor driver has liability insurance to cover bodily injury or property damage arising out of the ownership, use or operation, or the insurance is not collectible. However, this does not include an automobile owned by or registered in the name of the insured person or their spouse. [emphasis added]

The Court accepted that the language is clear and concise, and means that if a person is injured by an uninsured driver driving a car they own, or a car owned belonging to their spouse, they do not get the benefit of the uninsured automobile provisions.[100] The Court lamented that this may not be a fair result, and even an absurd result, but that there is no other result on a plain reading of these definitions.[101]

The matter was then appealed to the Ontario Court of Appeal, where the trial court decision was upheld.[102] The appellants argued that this interpretation leads to an absurd result, namely that a person injured while in their spouse's properly insured motor vehicle is denied coverage only because the vehicle had been taken without the consent of the spouse.[103] The Court of Appeal held that, while it may be a harsh result, it is not absurd, and it is in accordance with the language of s. 265 (2) of the *Insurance Act,* and OAP 1.[104]

Therefore, until there is legislative intervention, the reader should be aware that in certain circumstances a claim for uninsured automobile coverage can be precluded even where the individual is injured via a vehicle belonging to themselves or their spouse.

PART VII - COVERAGE ISSUES

Complications for coverage for damages and losses from a motor vehicle accident is not the only manner in which that auto theft has insurance consequences. This section will

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[99] *OAP 1, Supra* Note 67, s. 5.1.2.
[100] *Skunk, Supra* Note 91 at para 21.
[101] *Ibid.*
[102] *Skunk – ONCA , Supra* Note 90 at paras 13 - 14.
[103] *Skunk – ONCA , Supra* Note 90 at para 6.
[104] *Ibid* at paras 11 - 12.

touch upon some of the other insurance coverage issues that the unfortunate victim of auto theft should be aware of.

A. Proving Auto Theft for the Purpose of Coverage

The primary concern for a victim of auto theft is how they will be compensated for the loss of their vehicle. There are many insurance policies available that will offer coverage in the event of auto theft. However, the individual seeking to claim under such a policy should be aware of their obligations, in case problems arise.

The Ontario Court of Appeal decision in *Shakur v. Pilot Insurance Co.,* 1990, stands for the fundamental principle that, at least in the context of claims for theft, the evidentiary onus is on the claimant to establish that, on a balance of probability, the theft actually occurred.[105]

A good example of where this was relevant is *Gauthier v. Scottish & York Insurance Co. Ltd.,* 2003.[106] In this case, the plaintiff brought an action on the basis that his motor vehicle was stolen, and he was thus owed compensation from the defendant insurer.[107] In turn, the defendant insurer alleged that the plaintiff was directly or indirectly responsible for the vehicle being removed and destroyed in order to obtain the insurance proceeds, and counterclaimed for its investigative costs.[108] The Court endorsed that the claimant would

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[105] *Shakur v. Pilot Insurance Co. (C.A.),* 1990 CanLII 6671 (ON CA), 74 O.R. (2d) 673 (C.A.) <https://canlii.ca/t/g1h27> at p. 681 ["*Shakur*"]. See, *Sooriyaperuman v Certas Home and Auto Insurance Company*, 2024 CanLII 77426 (ON LAT), <https://canlii.ca/t/k6ch7> at para 13; *Hesch et al v. Langford et al*, 2024 ONSC 614 (CanLII), <https://canlii.ca/t/k2sqb> at para 19, for examples of tribunals and courts following this decision to present day. Note, however, that this approach has not been met with open arms across the Country. In *Rahim v. Manitoba Public Insurance Corp.,* 2009 MBQB at paras 22 – 24 ["*Rahim"*], the Manitoba Court of Queen's Bench gave a summary of the dichotomy of cases from Ontario and British Columbia. In *Rahim* at para 24, the Queen's Bench commented that the case law in Ontario appears to place the onus of proof on the claimant for a theft to establish they were not involved in the loss, whereas in British Columbia, the courts have held that a simple statement by the insured that they experienced damage as a result of an insured peril is sufficient to shift the legal burden of proof to the insurer. In *Rahim* at para 25, the Queen's Bench refused to decide the issue for Manitoba.

[106] *Gauthier v. Scottish & York insurance Co. Ltd*., 2003 CanLII 46126 (ON SC), <https://canlii.ca/t/1fwcx> ["*Gauthier"*].

[107] *Ibid* at para 1.

[108] *Ibid* at para 2.

need to prove on a balance of probability that the theft occurred in order to receive compensation from the insurer.[109]

The Court accepted expert evidence that the vehicle in question had to have been operated by an individual with a key when it was taken.[110] Further, the Court found as a matter of fact that, at the time in question, the only sets of keys that existed were in possession, or under control of, the plaintiff.[111] Mainly based on this hard evidence, the Court concluded that, on a balance of probabilities, the plaintiff was party to and complicit in the theft and destruction of the vehicle, and that the plaintiff had committed a criminal offence for the insurance proceeds.[112] On this basis, the Court dismissed the plaintiff's claim, and allowed the defendant insurers counterclaim for the investigative costs.[113]

Therefore, an insured in Ontario claiming for a stolen vehicle bears the onus of establishing that the vehicle was stolen. This will likely be most relevant where there is suspicion of fraudulent activities on the part of the insured.

B. Insurable Interests in Stolen Vehicles

Another issue an insured should be aware of is their ability to claim an insurable interest in a motor vehicle after it is determined that the vehicle was previously stolen. To make this topic clearer with a simple example, imagine you bought a used car from a shady car lot, which was subsequently vandalized and destroyed. Imagine you then turned to your insurance company for compensation, only to discover that the (now thoroughly destroyed) car you purchased from that shady car lot had previously been stolen by the employees of that car lot. Although you may feel that you are entitled to compensation

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[109] *Ibid* at para 46, citing Shakur, *Supra* Note 104 at p. 681. Note, in turn the Court held that, in order for the insurer's counterclaim to succeed, it must "prove its claim on a balance of probabilities to a degree appropriate to an allegation of the commission of a criminal offence."[109] See, *Gauthier, Supra* Note 105 at para 47, citing *El-Ash* v. *Traders General Insurance Co.,* [2001] O.J. No. 3335 (S.C.J.)(QL) at para 80. However, up until the time of writing this article, this principle has seemingly not been endorsed since by any court, and it is unclear what this standard of proof means.
[110] *Gauthier, Supra* Note 105 at para 49.
[111] *Ibid* at para 58.
[112] *Ibid* at para 64.
[113] *Ibid* at para 65.

because you have suffered a loss, there is a big question of whether or not that insurance contract was ever valid.

To begin, it is important to understand what is meant by an "insurable interest". Under the *Insurance Act,* an insured must have an "insurable interest" in the *thing* to be insured in order for the insurance policy for the *thing* to be a valid contract.[114] Historically, there was a rule that an individual needed a "legally enforceable right" to a *thing* in order to have an insurable interest in the *thing.*[115]

However, this idea was relaxed in the Supreme Court Case, *Kosmopoulos v. Constitution Insurance Co.*, 1987.[116] The Supreme Court held that the "Factual Expectancy Test" should be the determination of whether or not there is an insurable interest, which holds that what is required is to "have a moral certainty of advantage or benefit, but for those risk or dangers".[117]

This leads us to the question of whether an individual can meet the "Factual Expectancy Test" for, and be found to have an insurable interest in, a stolen vehicle. In *Assaad v. Economical Insurance Group,* 2000, this issue arose where an insured attempted to file a claim after his vehicle was stolen.[118] Upon investigation by the police, it was determined that, not only had the vehicle been stolen from the insured, but also that the insured had bought it as a stolen vehicle, taken from the actual rightful owner.[119]

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[114] *Insurance Act, Supra* Note 65, s. 178.
[115] See, *Macaura* v. *Northern Assurance Co.,* [1925] A.C. 619 (H.L.); *Hadwick v. Gibraltar General Insurance Co.* (1981), 1981 CanLII 1665 (ON SC), 34 O.R. (2d) 488 (Co. Ct.); *Thompson* v. *Madill* (1985), 13 C.C.L.I. 242 (B.C.S.C.).
[116] *Kosmopoulos v. Constitution Insurance Co.,* 1987 CanLII 75 (SCC), [1987] 1 SCR 2, <https://canlii.ca/t/1ftpw> ["*Kosmopoulos"*].
[117] *Ibid* at para 42. Note, the Supreme Court endorsed multiple ways of expressing this same idea. If the reader is confused by the short description of the Factual Expectancy Test given above, it may be helpful to actually have the quote from para 42 of *Kosmopoulos*: " *...if an insured can demonstrate, in Lawrence J.'s words, "some relation to, or concern in the subject of the insurance, which relation or concern by the happening of the perils insured against may be so affected as to produce a damage, detriment, or prejudice to the person insuring", that insured should be held to have a sufficient interest. To "have a moral certainty of advantage or benefit, but for those risks or dangers", or "to be so circumstanced with respect to [the subject matter of the insurance] as to have benefit from its existence, prejudice from its destruction" is to have an insurable interest in it*."
[118] *Assaad v. Economical Insurance Group*, 2000 CanLII 30192 (ON SCDC), <https://canlii.ca/t/gck1t> at paras 2 – 7 [*"Assaad – ONSCDC"*].
[119] *Ibid* at paras 4 – 7.

At the level of the Divisional Court, it was accepted that an innocent purchaser of a stolen vehicle has an insurable interest in the stolen vehicle by virtue of a right to possession unless and until the rightful owner should come forward.[120]

There was some suspicion in the Divisional Court as to whether the insured was somewhat complicit or wilfully blind to the fact that the vehicle was originally stolen, but reluctantly accepted the finding of the lower trial court decision that the insured was an innocent purchaser.[121] On this basis, the Divisional Court accepted that the insured had an insurable interest.[122] However, the matter was subsequently appealed to the Ontario Court of Appeal.[123]

The Court of Appeal accepted that an innocent purchaser who unknowingly purchases a stolen vehicle could have an insurable interest, but took a hard line with respect to thieves and those who knowingly purchase goods from thieves.[124] The Court of Appeal accepted the principle from American case law that a thief is denied an insurable interest, as well as anyone who knowingly purchases stolen goods, on the basis of public policy.[125]

The Court of Appeal held that that the proper question to determine if an individual should be found an innocent party with an insurable interest in stolen goods is to ask whether they are a "good faith purchaser".[126]

A "good faith purchaser" is a long recognized legal term in the common law, which holds that an individual remains innocent in their purchase of stolen goods if done so unknowingly, despite the fact they may have been negligent or unreasonable.[127] However, if it is found that the individual was wilfully blind to the fact the item was stolen, to the

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[120] *Ibid* at paras 10 - 13.
[121] *Ibid* at paras 15 – 19.
[122] *Ibid* at para 19.
[123] *Assaad v. Economical Insurance Group***,** 2002 CarswellOnt 1980, [2002] I.L.R. I-4116, [2002] O.J. No. 2356 ["*Assaad – ONCA"*].
[124] Ibid at paras 14 – 16.
[125] *Ibid* at para 15.
[126] *Assaad – ONCA, Supra* Note 122 at para 19.
[127] *Ibid*.

point of dishonesty, and refused to ask obvious questions, then the Court may find that they lose their status as a "good faith purchaser".[128]

In the case in *Assaad,* the insured bought the vehicle off another individual who was indebted to the insured.[129] The insured was aware that this individual was leaving the country due to significant debts, and did not ask any questions when this individual suddenly had a new vehicle worth $30,000.00 which they were willing to sell for $16,000.00 plus the forgiveness of their debts to the insured.[130] Furthermore, the insured did not ask questions about the lack of documentation and the anomalous mileage on the vehicle.[131]

On these facts, and despite the findings of the lower courts, the Court of Appeal held that the insured could not possibly be found a good faith purchaser.[132] It was found that, at the very least the insured was wilfully blind, and that any other finding would encourage persons, such as car dealers or pawn brokers, to ignore any suspicions or be wilfully blind to the origin of their goods in anticipation of converting the tainted goods to cash through insurance policies.[133]

Therefore, an individual who finds themselves in possession of a vehicle by suspicious means should consider their obligations to investigate the origins of the vehicle. Where it is clear that certain questions should have been asked, or suspicions investigated, an individual may be found wilfully blind and lose their insurable interest to the vehicle. The reader should also be aware that courts have previously held that an individual loses their insurable interest as soon as they are made aware that the purchased vehicle is stolen, although this idea has been strongly criticized in more recent judgements.[134]

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[128] *Ibid.*
[129] *Ibid* at para 18.
[130] *Ibid.*
[131] *Ibid.*
[132] *Ibid* at para 20.
[133] *Ibid* at para 21.
[134] *Chadwick et al. v. Gibraltar General Insurance Co.,* 1981 CanLII 1665 (ON SC), <https://canlii.ca/t/g1hbg>. In *B. McCurdy Trucking v. Southwestern Equipment Inc.*, 2005 CanLII 34596 (ON SC), <https://canlii.ca/t/1lp47> at paras 13 – 14 ["*McCurdy - ONSC"*], the Ontario Superior Court refused to follow this case, and advised against relying on any caselaw that predates *Kosmopoulos, Supra* Note 115.

C. Confiscation of a Stolen Vehicle as a Peril Under a Policy

The reader may be interested to know what would happen if they were sufficiently diligent in their purchase of a vehicle, such that they were a good faith purchaser, but lost the vehicle due to confiscation by the police when it was revealed to be stolen. Unfortunately for the reader, the law is not in their favour.

In *B. McCurdy Trucking v. Southwestern Equipment Inc.*, 2005, the plaintiff insured was a trucking company who had purchased two dump trailers.[135] Roughly a year after the purchase, the plaintiff was advised that, as a result of a police investigation, it was discovered that the two trailers were stolen vehicles, and they were subsequently seized by the police to be returned to the rightful owners.[136]

The Plaintiff insured attempted to collect on their "all perils" insurance policy for the two dump trailers, but was denied, in part, on the basis that such loss was not covered.[137] It should be noted that the insurer also tried to argue that the plaintiff had no insurable interest, but this was rejected by the Court, on the basis that it was unassailable that the insured had honestly believed they had acquired good legal title to the vehicles.[138]

The Ontario Superior Court rejected the argument from the insurer, holding that an "all perils" policy means exactly that; in this case, the "peril" was loss caused by seizure by the police.[139] On that basis, the Court found that there was coverage for the loss of the vehicles by confiscation.[140]

Although this is arguably a fair solution to the question, this decision was subsequently reversed by the Ontario Court of Appeal in a strikingly brief decision.[141] The Court of Appeal held that, in their view, none of the perils listed provided coverage for this kind of

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[135] *McCurdy - ONSC, Supra* Note 133 at paras 3 – 6.
[136] *Ibid* at para 6.
[137] *Ibid* at para 4.
[138] *Ibid* at paras 4, 9 - 12.
[139] *McCurdy – ONSC* at para 17.
[140] *Ibid.*
[141] B. McCurdy Trucking Inc. v. Southwestern Equipment Inc., 2006 CanLII 5137 (ON CA), <https://canlii.ca/t/1mmkj> [*"McCurdy – ONCA"*]

loss, and even if the loss could be described as due to theft, there would be no coverage because the theft occurred before the insured obtained insurance for the vehicles.[142]

Therefore, for the time being, it seems to be that an "all perils" will likely not cover losses resulting from the confiscation of a vehicle by the police.[143] If an individual was concerned about this sort of occurrence, it may be prudent to acquire specific coverage.

PART VIII - COVERAGE ISSUES FROM THE PLAINTIFF'S PERSPECTIVE

It is worth mentioning some practical points about how the topics covered thus far will affect the approach to litigation that plaintiff's counsel might adopt when they suspect there may be an issue of the vehicle being stolen or otherwise driven without the consent of the owner.

A. Dealing with Issue of Consent to Possess

When dealing with the problem of a personal injury claim arising from a stolen vehicle, the most common situation for plaintiff's counsel is dealing with the issue of consent (as addressed in greater detail in Parts III and IV of this paper). It is very easy for an owner to state, after the accident, that neither explicit nor implicit consent was provided. But how does a plaintiff's counsel challenge these bald statements?

In order to establish liability on the part of the owner of the vehicle, the lawyer will likely at least need to satisfy the test from *Fernandes v. Araujo,* 2015, to establish implied consent.[144]

The plaintiff's counsel has to undertake a critical examination of all of the circumstances to determine whether the totality of the evidence, including actions and omissions, can show that the person driving had the implied consent of the owner to possess the vehicle,

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[142] *Ibid* at para 3.
[143] An application for an extension of time was granted to appeal this matter to the Supreme Court of Canada in 2006, in *B. McCurdy Trucking Inc. v. Zurich Insurance Company*, 2006 CanLII 29074 (SCC), <https://canlii.ca/t/1p5tg>, with no further developments published.
[144] *Fernandes, Supra* Note 48. See Section IV for more information.

keeping in mind that the focus of the test is on the conduct of the driver.[145] Examples from the case law include consideration of whether keys to the motor vehicle were made accessible, the reaction of the owner to the driver taking possession the vehicle in the past, the relationship between the parties and others involved, to name a few.[146]

It will have to be a detailed and holistic approach in order to get the evidence required to refute the consent defence. The corollary is that defence counsel will have to equally obtain evidence with the same meticulous approach and consideration of all of the circumstances to mount a reasonable and successful consent defence.

Finally, and importantly, the lawyers on both sides should always remember that the question is not whether there was consent to *operate* the vehicle, but rather, to *possess* the vehicle.[147]

B. Uninsured Automobile Coverage and the Defendant's Coverage

Plaintiff's counsel may very well wonder whether it matters to ensure the defendant in an action has coverage if the plaintiff has Uninsured Automobile Coverage. The answer is that it depends on the degree of damages sustained by the plaintiff.

There are limitations on the coverage that a plaintiff can claim from their insurer under uninsured automobile coverage. Under section 5.7.1 of the OAP 1, the payment limit for uninsured automobile coverage is capped at the minimum liability limit required in the jurisdiction where the accident occurs.[148] In Ontario, the minimum liability limit is $200,000.00. Under the same section, the plaintiff cannot claim any amount over $25,000.00 in any one accident for damage to the automobile and its contents.[149]

Further, as discussed in greater detail in Parts V and VI, there are exclusions outside of the plaintiff's control, which would prevent them from claiming uninsured automobile

[145] Fernandes, *Supra* Note 48 at paras 25 – 28.
[146] *Cameron, Supra* Note 52; *Korencik, Supra* Note 55; *Myers-Gordon-ONSC, Supra* Note 45, affirmed in *Myers-Gordon-ONCA, Supra* Note 45.
[147] *Finlayson, Supra* Note 40. See Section III for more information.
[148] *OAP 1*, *Supra* Note 67, s. 5.7.1(1).
[149] *Ibid,* s. 5.7.1(2).

coverage. If the plaintiff's counsel suspects there may be issues with the uninsured defendant falling under one of the exclusions to uninsured automobile coverage, they might consider adding the Motor Vehicle Accident Claims Fund as a defendant.

C. Insurers and Tort Defendants

For claimants, another common issue that can arise in this context is when there conflict between an OPCF 44 insurer and tort defendants as to who will respond to the loss. When two defendants are quarrelling as to who will respond, it is important for claimant's counsel to continue to push forward and encourage the defendants to try to resolve that issue prior to mediation in order to focus on the plaintiff's claim.

D. The Plaintiff is the Injured Passenger of a Stolen Vehicle

Where a plaintiff is a passenger of a stolen vehicle who was injured in a motor vehicle accident, they may be concerned about what their options are. First, they should consider whether it is possible and/or helpful to sue the Driver. Second, they should consider whether it would be possible to demonstrate implied consent to posses the motor vehicle (although this may only be relevant where there is some relationship between the thief and the owner).[150] Finally, the passenger should consider their entitlement to statutory accident benefits, which will be discussed in the next part (Part IX). Finally, it is worth noting that the passenger's OPCF 44R: Family Protection Coverage insurer could respond to the driver of the stolen vehicle.[151]

PART IX - STATUTORY ACCIDENT BENEFITS CONSEQUENCES

Section 268 of the *Insurance Act* requires every motor vehicle liability policy to include what are called "statutory accident benefits".[152] The statutory accident benefits required are set out in the *Statutory Accident Benefits schedule*, also known as *"the Schedule"* or

[150] See Part VI for a discussion of the difficulty of a passenger in a stolen vehicle to obtain coverage under uninsured automobile coverage in *Skunk – ONCA, Supra* Note 90.
[151] OPCF 44R: Family Protection Coverage, <https://www.fsrao.ca/opcf-44r-family-protection-coverage> ["*OPCF 44R"*].
[152] *Insurance Act, Supra* Note 65, s. 268.

"the *SABS*".[153] The provision of statutory accident benefits, just like for uninsured automobile coverage, is done through section 4 of the OAP 1.[154]

The benefits available depend on the extent of injury the individual experienced, but can include such things as income replacement benefits, non-earner benefits, caregiver benefits, medical/rehabilitation benefits, attendant care benefits, death and funeral benefits, housekeeping benefits, lost education expenses, cost of medical examinations, and more.[155]

As we will see, the scope of coverage under the *SABS* is extensive, and is provided on a *no fault* basis. The trade-off is that the various benefits under the *SABS* come with different limits, with most benefit limits depending on the seriousness of the injuries.[156]

A. The Broad Coverage Under *SABS*

The Ontario Court of Appeal has held that the definition of "insured" person that governs an individual's entitlement to statutory accident benefits is found in s 2 (now s. 3) of the *SABS*.[157] The definition of insured person found in s. 3 of the *SABS* is very broad, including almost everyone involved in a motor vehicle accident.[158]

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[153] *Statutory Accident Benefits Schedule,* O. Reg. 34/10 ["*SABS*"].
[154] *OAP 1*, *Supra* Note 67, s. 4.
[155] *Auto Insurance Coverage Law in Ontario, Supra* Note 17 at p. 11; *SABS, Supra* Note 152, Parts II – IV.
[156] *Auto Insurance Coverage Law in Ontario, Supra* Note 17 at p. 11.
[157] *Auto Insurance Coverage Law in Ontario*, *Supra* Note 17 at p. 54; *Warwick v. Gore Mutual Insurance Co.,* 1997 CanLII 1732 (ON CA), <https://canlii.ca/t/1g2m4> at para 19; *SABS, Supra* Note 152, s. 3.
[158] *Auto Insurance Coverage Law in Ontario, Supra* Note 17 at p. 53**;** Specifically, the definition of "insured person" under *SABS, Supra* Note 152, s. 3 reads as follows:

"insured person" means, in respect of a particular motor vehicle liability policy,

(a) the named insured, any person specified in the policy as a driver of the insured automobile and, if the named insured is an individual, the spouse of the named insured and a dependant of the named insured or of his or her spouse,

(i) if the named insured, specified driver, spouse or dependant is involved in an accident in or outside Ontario that involves the insured automobile or another automobile, or

(ii) if the named insured, specified driver, spouse or dependant is not involved in an accident but suffers psychological or mental injury as a result of an accident in or outside Ontario that results in a physical injury to his or her spouse, child, grandchild, parent, grandparent, brother, sister, dependant or spouse's dependant,

(b) a person who is involved in an accident involving the insured automobile, if the accident occurs in Ontario, or

The reader should note that this broad definition will even cover what are termed "excluded drivers".[159] An excluded drivers are individuals that would otherwise be explicitly excluded from coverage under the insurance contract through an endorsement signed by the insured, for the purpose of potentially lowering premiums.[160] Under the *SABS,* the excluded driver will receive benefits, but the benefits are limited by s. 31 to exclude certain benefits such as income replacement and non-earner benefits.[161]

B. S. 31 Exclusions

Although coverage is incredibly broad under the *SABS,* and that is mainly the point, it is not without some limitations. S. 31 of the *SABS* provides specific exclusion that apply to the accident benefits context.[162] It should be noted, however, that s. 31 does not provide a blanket exclusion to all benefits, only certain accident benefits such as income replacement and non-earner benefits.[163]

S. 31(1)(a)(iv) states that this exclusion will apply to the driver of an automobile at the time of the accident if the driver knew, or ought reasonably to have known, that he or she was operating the automobile without the owner's consent.[164] Furthermore, s. 31(1)(d)

(c) a person who is an occupant of the insured automobile and who is a resident of Ontario or was a resident of Ontario at any time during the 60 days before the accident, if the accident occurs outside Ontario.

[159] *Auto Insurance Coverage Law in Ontario, Supra* Note 17 at pp. 57 – 58; *Insurance Act, Supra* Note 65, s. 240.
[160] *Auto Insurance Coverage Law in Ontario*, *Supra* Note 17 at p. 56. The *Insurance Act, Supra* Note 65, s. 224 (1) provides the definition: *"excluded driver" means a person named as an excluded driver in an endorsement under section 249".* In turn, s. 249 states: "*A named insured may stipulate by endorsement to a contract evidenced by a motor vehicle liability policy that any person named in the endorsement is an excluded driver under the contract".* The actual endorsement to exclude a driver in the manner described at s. 249 is OPCF 28A: *Excluded Driver*, *https://www.fsrao.ca/opcf-28a-excluded-driver*.
[161] *Auto Insurance Coverage Law in Ontario*, *Supra* Note 17 at p. 58; *SABS, Supra* Note 152, s. 31.
[162] *SABS, Supra* Note 152, s. 31. Note, "non-earner benefits" refers to a benefit that an individual can claim even if they did not qualify for income replacement benefits (for example, students, the unemployed, and retired individuals), where they have suffered a complete inability to carry on a normal life, subject to certain conditions. See, *SABS, Supra* Note 152, s. 12.
[163] *Auto Insurance Coverage Law in Ontario*, *Supra* Note 17 at p. 109; *SABS, Supra* Note 152, s. 31.
[164] *SABS, Supra* Note 152, s. 31(1)(a)(iv). Note, for the reader interested in the exact wording of the exclusion under s. 31(1), it reads as follows:
Circumstances in which certain benefits not payable
31. (1) The insurer is not required to pay an income replacement benefit, a non-earner benefit or a benefit under section 21, 22 or 23,
(a) in respect of a person who was the driver of an automobile at the time of the accident,

states that the exclusion will apply to anyone who, at the time of the accident, was engaged in an act for which the *person is convicted of a criminal offence*, or was an occupant of an automobile that was being used in connected with an act for which the *person is convicted of a criminal offence*.[165]

The reader should take note that the s. 31(1)(d) exclusions only take effect if someone is *convicted* of a criminal offence.[166] Under sections 31(3) and (4), there is a procedure to be followed where a criminal charge has been laid, with possible conviction pending, which would impact an individual's entitlement to statutory accident benefits.[167] Under s. 31(3),

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(i) if the driver knew or ought reasonably to have known that he or she was operating the automobile while it was not insured under a motor vehicle liability policy,
(ii) if the driver was driving the automobile without a valid driver's licence,
(iii) if the driver is an excluded driver under the contract of automobile insurance, or
(iv) if the driver knew or ought reasonably to have known that he or she was operating the automobile without the owner's consent;

(b) in respect of any person who has made, or who knows of, a material misrepresentation that induced the insurer to enter into the contract of automobile insurance or who intentionally failed to notify the insurer of a change in a risk material to the contract;

(c) in respect of an occupant of an automobile at the time of the accident who knew or ought reasonably to have known that the driver was operating the automobile without the owner's consent;

(d) in respect of a person who, at the time of the accident,
(i) was engaged in an act for which the person is convicted of a criminal offence, or
(ii) was an occupant of an automobile that was being used in connection with an act for which the person is convicted of a criminal offence;

(e) in respect of a person who is convicted of an offence under section 320.15 of the *Criminal Code* (Canada) of failing to comply with a lawful demand to provide a breath sample or a sample of a bodily substance, perform physical coordination tests or submit to an evaluation in connection with the accident; or

(f) in respect of a person who was convicted of an offence under section 254 of the *Criminal Code* (Canada), as it read before December 18, 2018, of failing to comply with a lawful demand to provide a breath sample or a sample of a bodily substance, perform physical coordination tests or submit to an evaluation in connection with the accident.

[165] *SABS, Supra* Note 152, ss. 31(1)(d)(i),(ii).

[166] *Auto Insurance Coverage Law in Ontario*, *Supra* Note 17 at p. 110; *SABS, Supra* Note 152, ss. 31(1)(d)(i),(ii).

[167] *SABS, Supra* Note 152, ss. 31(3), (4). If the reader is interested, the exact wording of s. 31(3) and (4) is as follows:

s. 31(3) The insurer shall hold in trust any amounts payable as an income replacement benefit, a non-earner benefit or a benefit under section 21, 22 or 23 to a person who sustains an impairment as a result of an accident if,

(a) at the time of the accident, the person was engaged in, or was an occupant of an automobile that was being used in connection with, an act for which the person is charged with a criminal offence;

(b) the person is charged with an offence under section 320.15 of the *Criminal Code* (Canada) of failing to comply with a lawful demand to provide a breath sample or a sample of a bodily

any amount which may or may not be owed to an individual pending the outcome of the subject criminal charge will be held in trust by the insurer.[168] Upon the verdict in relation to the criminal charge, under s. 31(4), the money shall be returned to the insurer upon a guilty verdict or paid to the entitled individual upon a not-guilty verdict.[169]

Therefore, what is important to understand is that statutory accident benefits under an insurance policy for a motor vehicle will extend to an individual injured in a motor vehicle accident in that vehicle, even if they stole it. This also applies to an individual who was a passenger in that stolen motor vehicle.[170]

However, s. 31 will limit the benefits they can claim, denying the driver of the stolen vehicle any entitlement to income replacement and non-earner benefits, where it is found that they knew, or ought to have known, that they did not have the consent of the owner to operate the vehicle.[171] S. 31 will apply the same limitations on the passenger of the stolen motor vehicle, where it is found that they were an occupant of an automobile that was being used in connection with an act for which the person is convicted of a criminal offence.[172] As explained above, if charges were laid related to the stolen vehicle, then the

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substance, perform physical coordination tests or submit to an evaluation in connection with the accident; or

(c) the person is charged with an offence under section 254 of the *Criminal Code* (Canada), as it read before December 18, 2018, of failing to comply with a lawful demand to provide a breath sample or a sample of a bodily substance, perform physical coordination tests or submit to an evaluation in connection with the accident.

(4) On the final disposition of all charges described in clause (3) (a) or (b), the amounts and any income on the amounts described in subsection (3),

(a) shall be returned to the insurer, if the person is found guilty of the offence or an included offence; or

(b) shall be paid to the person entitled to the payment, if the person is not found guilty of the offence and an included offence.

[168] *SABS, Supra* Note 152, s. 31(3).

[169] *Ibid*, s. 31(4). Note, For the purposes of s. 31, a criminal offence is defined to capture all criminal offences, and offences related to operating an automobile while impaired or failing to provide certain samples or engage in tests to determine if the individual is operating an automobile while impaired. A criminal offence does not apply to provincial offences, such as under the *HTA, Supra* Note 35. See *Auto Insurance Coverage Law in Ontario*, *Supra* Note 17 at p. 111.

[170] For example, see *Primmum Insurance Co. v. Aviva Insurance Co. of Canada*, 2005 CanLII 11975 (ON SC), <https://canlii.ca/t/1k5wk>.

[171] *SABS, Supra* Note 152, s. 31(1)(a)(iv).

[172] *Ibid*, ss. 31(1)(d)(ii).

passenger would have to wait for the verdict before receiving any funds related to income replacement and non-earner benefits from the insurer.

PART X - CONCLUSION

The concerning trend of auto thefts are on the rise. Action is being taken at all levels of government but this devastating crime continues to have a negative impact on all those involved. Stolen vehicles pose unique insurance issues that range from property damage to first party benefits entitlements to impact on tort actions. This paper aimed to serve as a primer to introduce readers to some of the key insurance issues pertaining to auto theft and provide a discussion of and reference point for these key and common issues.

Law Society of Ontario | Barreau de l'Ontario

TAB 13A

7th Motor Vehicle Litigation Summit

LAT: Latest Trends (PPT)

Eric Grossman, C.S.
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Statutory Accident Benefit Caselaw Update

Materials Prepared by:
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September 18-19, 2024

cpd

LAT: Latest Trends

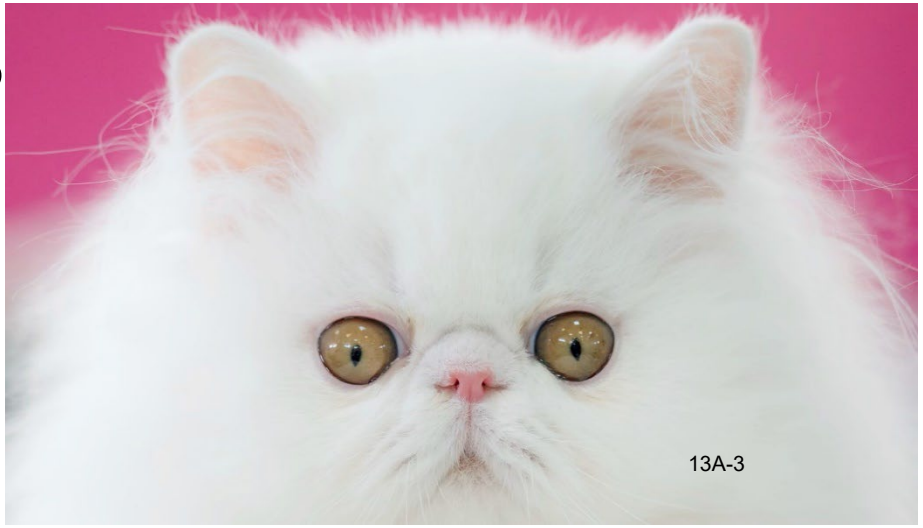
Eric Grossman and Anandi Naipaul

Key Issues

1. CAT Decisions
2. What is an Accident?
3. *Yatar v. TD* – Judicial Reviews for All! But Not Really…
4. Equitable Relief at the LAT
5. Optional AB Coverage in 2025

Major CAT Decisions

1. *Lanzon v. Economical*, 2023 CanLII 119806
2. *Jackson v. Wawanesa*, 2024 CanLII 4259
3. *Dyer v. Economical*, 2024 CanLII 33186
4. *Larose v. Intact*, 2024 CanLII 41019
5. *Raman v. Certas*, 2024 CanLII 43450
6. *Ganopolsky v. Security National*, 2024 CanLII 67346
7. *Harbin v. Echelon*, 2024 CanLII 28818
8. *M.Z. v. Security National*, 2024 CanLII 35847



What is An Accident?

What is An Accident? Travis v. Aviva

- Fire fighter responded to scene of Yonge street tragedy on April 23, 2018.
- Claimed ABs as a result of psychological injuries and impairments.
- LAT (2021 CanLII 120883): neither seeing “carnage” left by the rental van nor use and operation of fire truck constitute accident.
- Reconsideration (2022 CanLII 49959): upheld LAT decision.
- Appeal to Divisional Court (2024 ONSC 1683 (CanLII)): upheld LAT decision → found analogous to facts in *Porter v. Aviva* (2021 ONSC 3107 (CanLII)).

What is An Accident? Porter v. Aviva

- Claimant walking towards stationary rideshare Lyft car when slipped and fell on ice in the driveway of her parents' home.
- LAT (2021 CanLII 43545): facts meet definition of an accident.
- Reconsideration (2021 CanLII 88004): Vice Chair upheld her earlier decision.
- Appeal to Divisional Court: allowed appeal, set aside Reconsideration Decision, ordered claimant not involved in an accident:
  - Vice Chair conflated "but for" test with "direct causation test" → error of law.
  - "More is required than establishing that the car brought the applicant to the location of the incident, and more is required than the car being the reason why Ms. Porter was at the location where the incident occurred."
  - Court held that the dominant factor that physically caused claimant's injuries were icy, snow covered driveway – use or operation of Lyft car was "at best ancillary".

What is An Accident? Porter v. Aviva versus Davis v. Aviva

- *Davis v. Aviva* has similar facts to *Porter v. Aviva* → claimant was walking to her vehicle when she slipped and fell on black ice.
- Opposite chronology to *Porter v. Aviva*:
  - LAT (2022 CanLII 45273): not an accident
  - Reconsideration (2022 CanLII 70502): upheld original decision
  - Divisional Court (2024 ONSC 3054): allowed appeal and held this <u>was</u> an "accident": black ice was <u>not</u> an intervening event where claimant was carrying an electronic key fob for the purpose of entering her vehicle. Court held that this supported vehicle was the direct cause of her fall.

What is An Accident? Madore v. Intact

- Claimant's camper trailer hitched to his pickup truck.
- Claimant inspecting and cleaning the roof of the camper trailer (i.e., he was standing on the roof) and fell off.
- Sustained serious injuries: fractured skull with frontal hematoma and contusion, broken ankle, double wrist fracture, hearing loss, retinal damage to eye.
- LAT (2021 CanLII 53164): not an accident as no evidence "trailer itself caused the fall".
- Reconsideration (2021 CanLII 2763): upheld LAT decision.
- Appeal to Divisional Court (2023 ONSC 11 (CanLII)): allowed appeal, ordered claimant was involved in an accident:
  - Slipping and falling off a trailer "normal incident".
  - Claimant did not need to prove a direct physical connection between the cause of the injury and an automobile.

What is An Accident?

- Twenty (20) decisions released on topic by LAT in 2023 – only four (4) found that the claimant was involved in an "accident".
- Same adjudicators appear to be deciding these disputes for the LAT (i.e., Pahuta, Lundy, Kaur).
- Applicant's onus to prove that they were in an "accident" → where evidence not led to discharge onus, Applicant not involved in an "accident".
- While many slip and falls were previously determined to meet definition of an "accident", no longer a "sure thing":
  - *Sobulo v. Echelon* (2024 CanLII 38465)
  - *David v. Wawanesa* (2023 CanLII 67890), upheld on Reconsideration (2023 CanLII 107252)
  - *Kosiner v. Economical* (2023 CanLII 65800)
- Divisional Court in *Davis v. Aviva* appears to be an outlier in finding that a slip and fall met the definition of an "accident".

Yatar v. TD – Judicial Reviews for All! But Not Really…

- Supreme Court's decision in *Yatar v. TD*(2024 SCC 8):
  - Mere fact that one can appeal under *LAT Act* does not preclude judicial review.
  - Where an application for judicial review has been brought in parallel with an appeal, the Court has a duty to *consider* the judicial review application.
- At minimum, *Yatar* secures an Applicant's right to be heard by way of judicial review – it does not mean the Court must grant the relief sought by Judicial Review.
- *Hamad v. Dominion* (2024 ONSC 332):
  - Late request for judicial review based on *Yatar* requires a motion to extend the time for filing → Court will look at specific factors when determining whether to grant leave to file, high bar to meet.
- Where there is an existing appeal, must file a motion to join Judicial Review Application with existing Appeal.
- T*raders v. Rumball*
  - Motion decision of Justice Matheson released Sept 16/24
  - Unique circumstances justified granting leave for JR four years after the fact

Equitable Relief at the LAT– Davis v. Aviva

- The claimant argued on appeal to the Divisional Court (2024 ONSC 3054) that the LAT has equitable powers.
- The Court held that the LAT does in fact have equitable powers, and an adjudicator has discretion to exercise such powers “where it is just to do so”.
- Powers are available to “ensure procedural fairness”.
- Relied on LAT decision in *Botbyl v. Heartland* (2023 CanLII 72662).

Equitable Relief at the LAT – Botbyl v. Heartland

- Adjudicator asked to decide whether the LAT could, and should, grant relief from forfeiture to "re-elect" which insurer he claimed accident benefits from (specifically, he wished to re-elect to the insurer he had purchased optional benefits from).
- Adjudicator held LAT could and should grant relief from forfeiture in this situation.
- Held that *SABS* does not prohibit or preclude the LAT from exercising equitable powers, and granting of equitable relief is consistent with consumer protection objective as per SCC decision in *Smith v. Co-op.*
- Reconsideration granted by Vice Chair Johal on the basis that s. 129 of the *Courts of Justice Act* (which gives Courts equitable powers) does not apply to the LAT.
- This decision is currently being appealed to the Divisional Court.

Equitable Relief at the LAT – Botbyl v. Heartland

- The use of equitable relief/relief from forfeiture to allow an insured to "re-elect" which insurer to pursue benefits from will have unintended consequences if upheld.
- Example – priority disputes:
  - There is no overlap between the jurisdictions of an abitrator in a priority dispute and the jurisdiction of an adjudicator at the LAT.
  - However, if the LAT allows insureds to "re-elect" via relief from forfeiture, it will effectively be acting outside of its jurisdiction/be encroaching on a priority arbitrator's jurisdiction to make a decision as to where coverage lies and with which insurer.

Equitable Relief and optional benefits

- *Jevco v. Chieftain*, priority dispute before Arbitrator Samworth (March 11, 2016)
- The insured had optional benefits through an automobile policy with Chieftain, and a second policy with Jevco on a motorcycle that did not have optional benefits.
- The insured was involved in an accident while riding his motorcycle and applied to Jevco for accident benefits.
- Jevco commenced a priority dispute against Chieftain, arguing while both policies were on the same “rung” of the priority ladder, the OPCF-47 provides for mandatory optional coverage/makes the priority regulation inapplicable.
- At the same time, the insured attempted to “elect” to receive accident benefits from Chieftain.

Equitable Relief and optional benefits

- Arbitrator Samworth held that the purpose of the OPCF-47 is that if the optional benefit insurer receives the OCF-1, they give up the right to pursue priority against another insurer that would have otherwise existed.
- The OPCF-47 presumes that an individual who has purchased optional benefits will apply to their optional benefit insurer.
- There is no right to “re-elect” to another insurer under the *SABS*.
- This had the harsh result in this case of depriving the insured of access to the optional benefits that he had paid for; however, there was no alternative where this was the effect of the wording of the legislation and regulations.

Optional AB Coverages in 2025

- 2024 Ontario Budget – government committed to auto insurance reforms to provide more affordable options through:
  - 1) Increasing consumer choice by making all benefits outside of med/rehab/attendant care optional to purchase
  - 2) Requiring auto insurers to pay for med/rehab expenses before such expenses are paid under EHC plans
- Potential implications of broader optional coverages:
  - More disputes at the LAT over med/rehab/attendant care benefits
  - Increased exposure on tort side
  - Which insurer a Plaintiff chooses to apply for ABs from will have that much more import in a world with greater optionals
  - Push by Plaintiff bar to purchase optional benefits
- Proposed amendments to the Insurance Act, and to Ontario Regulation 34/10 (Statutory Accident Benefits Schedule) (SABS) under the Insurance Act regarding optional benefits, priority of payment for SABS medical and rehabilitation benefits, and correct an error in the French-language version of the SABS. (ontariocanada.com)

Questions?

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R&M

The COA weighs in on the definition of "incurred" for pre-September 1, 2010 accidents

By Adam Imtiaz

Writing for a unanimous Court of Appeal panel which included Justices Lauwers and Thorburn, Justice Kathryn van Rensburg's decision in *Morrissey v. Wawanesa Insurance Company*, decision the Ontario Court of Appeal has provided clarity as to how the definition of "incurred" is to be applied for accidents that occurred before September 1, 2010. The need for such clarification arises from the two versions of the *Statutory Accident Benefit Schedule*. The *1996 version* was replaced by a new version in 2010 that was intended to govern all claims arising from accidents on or after September 1st of that year. At the same time however, the 1996 *Schedule* would continue to apply to benefit entitlements arising from accidents that occurred before September 1, 2010. To help moderate this change, both *Schedules* contain transitional provisions that apply to accidents that occurred on or after November 1, 1996, but before September 1, 2010, and for accidents that occur on or after September 1, 2010. The Court of Appeal found that these provisions held the answer to the interpretation of the term "incurred" in relation to Mr. Morrissey's entitlement to attendant care benefits.

The procedural history of this matter can be traced back to a LAT application made in 2018 by Mr. Morrissey. He had been receiving benefits from the insurer since shortly after his motor vehicle accident in 2000 which had left him catastrophically impaired. Mr. Morrissey's 2018 application for retroactive attendant care benefits was for increased benefits from October 2015 onwards to cover additional attendant care expenses. The LAT adjudicator granted this claim in part but held that he was not entitled to the retroactive attendant care benefits. Both reconsideration and a judicial review to the Divisional Court yielded similar results, determining that Mr. Morrissey was entitled to some benefits but not to increased attendant care benefits from October 2015 to April 2018.

On appeal, Mr. Morrissey argued that both the Adjudicator and the Divisional Court had erred in their interpretation of the word "incurred" in the 2010 *Schedule* and their conclusion that he was required to substantiate his attendant care expenses.

The Issues:

The Court first considered the issue of Mr. Morrissey's claim for retroactive benefits, which was denied by both the LAT and Divisional Court. The relevant section of the *2010 Schedule*, s.42(5), states that "[a]n insurer may, but is not required to, pay an expense incurred before an

assessment of attendant needs that complies with this section is submitted to the insurer". Both the Adjudicator and Divisional Court interpreted this section in the same way, concluding that insurers were permitted to refuse a retroactive claim for attendant care benefits when there was no evidence of urgency or impossibility of submitting an assessment before the expense had occurred.

The Court of Appeal disagreed with this interpretation, finding nothing in s.42 nor in its 1996 *Schedule* counterpart, s.16 , that prescribes a time period in which an assessment of attendant care needs (also known as a "Form 1") must be submitted. In the LAT and Divisional Court decisions, the Adjudicator and Judge had relied heavily upon a line of cases originating from *T.K. v. Unica Insurance Inc. ("T.K")*, which suggested that allowing retroactive claims would render s.42(5) meaningless. The Court found this interpretation to be an error as the decision in T.K. is itself inconsistent with other authoritative cases such as *Kelly v. Guarantee Company of North America* and *T.N. v. Personal Insurance Company of Canada.*

The interpretation of s.42(5) in these cases differed from that in T.K. and was instead consistent with a plain reading of s.42(5) in the context of the SABs scheme. As such the Court determined that the Adjudicator and Divisional Court had erred , and that there was no basis for requiring "urgency, impossibility or impracticability" as a precondition to payment of attendant care benefits. Instead, the Court found that once a Form 1 is submitted, the insurer is obligated to determine whether the expense claimed for that period is reasonable or necessary. The second issue addressed by the Court was the definition of the term "incurred.

The second issue addressed by the Court was the definition of the term "incurred". In defining the term "incurred", section 3(7)(e) of the 2010 *Schedule* limits the insured's attendant care benefits to goods or services provided by a qualified provider or a person who has incurred economic loss by providing such benefits, goods or services to the insured person.

However, the 1996 *Schedule* does not define the term incurred. Nonetheless, case law interpreted the term to allow for attendant care benefits to be paid when goods or services were provided by an unqualified person without evidence of economic loss. Both the LAT and Divisional Court had reached their decisions, in part, by applying the 2010 definition (which version did require proof of economic loss), which Mr. Morrissey asserted was an error.

Wawanesa relied on ss. 3(1.3) and 3(1.4) of the 1996 *Schedule*, which provides through transitional provisions as to how accident benefit entitlements arising from accidents before September 1, 2010 are to be paid under the 2010 Schedule. However, Wawanesa also maintained that the amount to be paid is still determined under the 1996 *Schedule*.

Wawanesa's position was that while Mr. Morrissey's substantive rights were still governed by the 1996 *Schedule*, the procedure that he must follow to receive his benefits was laid out in the 2010 *Schedule*.

Wawanesa maintained that the requirement for attendant care benefits to meet the definition of incurred in the 2010 *Schedule*is a procedural requirement, and that Mr. Morrissey does not have a vested right to benefits determined in accordance with procedure under the 1996 *Schedule.* Under the 1996 *Schedule*, an expense is incurred if the services or items were reasonable and necessary, and the amount of the expenditure could be determined. It is not necessary that the insured person had to have received or paid for the services for the expense to have been incurred. The 2010 *Schedule* takes a different approach, stating that, among other things, an expense is not incurred until the goods or services have been received, and the expense have been paid (or promised to be paid).

After a review of the transitional provisions of the 2010 *Schedule*, the Court of Appeal found that the definition of incurred is not included in the list of parts that apply to the pre-2010 accident claims. In fact, the transitional provisions state that the 1996 *Schedule* continues to apply to claims arising from accidents before September 1, 2010. As such, the Court found that both the LAT Adjudicator and the Divisional Court had erred because Mr. Morrissey's claim is governed by existing case law that has interpreted the word "incurred" as it appears in the 1996 *Schedule*.

Take Away:

Through this decision, the Court of Appeal has provided not only a definitive answer as to the application and meaning of the crucial term "incurred" in the context of claims for retroactive attendant care benefits arising from accidents that occurred before September 1, 2010, but also a broader guideline for the interpretation of the transitional provisions of the two *Statutory Accident Benefits Schedules*. By their nature, accident benefit claims can have tremendous longevity, and many existing claims still fall under the transitional provisions of the two *Schedules*. It is important for insurers to note that the determination of which *Schedule* is applicable and the interpretation of key terms within those *Schedules* can have a significant impact on what benefits may be owed to the insured. Further, this decision removes a filter that may otherwise have barred attendant care benefit claims submitted retroactively. The reasoning found in T.K. and its successor cases has been overturned and a Form 1 submitted retroactively cannot be denied on the basis of its "late" submission. Insurers will instead need to consider if the claim being presented is reasonable and necessary, even in respect of goods and services

already provided to the insured. The treatment of both issues has highlighted the importance of understanding the nuances of the changing *Schedule*. Where more regulatory changes were announced by the government in the last budget, this case could also be helpful in interpreting the transition to be taken from the existing benefit regime to whatever changes may be introduced in the coming months as well.

Proposed SABS and Insurance Act Amendments Could Change How Auto Insurance Policies are Made and Paid Out

By Sawarn Benning

Overview:

In an attempt to meet commitments made during the 2024 Ontario budget, the government has proposed amendments to the *Insurance Act* and to the Ontario Regulation 34/10, more commonly referred to as the *Statutory Accident Benefits Schedule* or *SABS*.

There are three major categories of amendments proposed. The first two amendments aim to provide more options for auto insurance consumers and modify the payment priority of medical and rehabilitation benefits. The third amendment rectifies a technical error in the French language *SABS*.

Proposed Amendments:

Optional Benefits

The first proposed amendment would require that, for every contract evidenced by a motor vehicle liability policy, insurance companies must offer benefits under Parts II, IV, V and VI of the *SABS* as optional benefits. The benefits captured under the scope of these optional benefits would include income replacement, non-earner, caregiver, death and funeral and other benefits. However, Part III, pertaining to medical, rehabilitation and attendant care benefits, remains unchanged as mandatory auto insurance coverage.

This amendment would apply prospectively and retroactively, provided the latter changes are accompanied by written agreement between the insured person and the insurer.

The proposed amendments would also impact payment of weekly benefits. Currently, the *SABS* provides for fixed weekly payments for income replacement (section 7(1) in defining 'B'), non-earner (section 12(2)), caregiver (section 13(2)(a)-(b)), and housekeeping and home maintenance benefits (section 23). Each of these prescribed monetary values would be substituted by the amount fixed by the optional benefit, should the insured person be entitled to the corresponding benefit.

Payment Priority

The second proposed amendment would modify the *Insurance Act* and *SABS* to reverse the priority levels for payment of medical and rehabilitation benefits (excluding medication expenses).

Currently, under section 46.3(2) of the *SABS*, supplementary health insurance plans must be exhausted before auto insurance can be claimed. Under the amendment, auto insurance would take payment priority for portions of the expense reasonably available to the insured person, under the supplementary health insurance plan.

French Language Discrepancy

The third amendment consolidates a discrepancy within the French version of the *SABS*. Section 3.1(1)(8) of the English *SABS*, as it pertains to catastrophic impairment, requires class 5 impairment in one or more areas of function. On the other hand, the French version requires class 5 impairment in two or more areas of function. The proposed amendment reconciles the discrepancy by making the French version consistent with the English version.

Impact of Proposed Amendments:

These amendments aim to provide greater flexibility and options to insured persons such that part of the auto insurance policy can be catered to an insured's needs. It is important for insurers to note that these amendments would change the liability owed to the insured person depending on their chosen benefit plan.

Further, insurers should note that expense claims may increase, given the reversal of priority for payments of medical and rehabilitation expenses.

Pursuing CAT determination when only MIG limits have been exhausted

By Tiziana Serpa

In the recent decision of *Johnson v Co-operators General Insurance Company*, 2024 CanLII 49023 (ON LAT) Adjudicator Jarda was tasked with determining whether the applicant was entitled to $19,097.00 for a catastrophic impairment assessment in a Treatment and Assessment Plan (OCF-18) that had been submitted to the insurer on March 21, 2020.

After being involved in a September 7, 2012 motor vehicle accident, the applicant was initially treated within the Minor Injury Guidelines ("MIG"). On April 13, 2015, and as a result of a pre-existing psychiatric impairment, he was removed from the MIG. Despite this, by April 13, 2020 (over 7.5 years post-accident), the applicant had only consumed $3,500.00 maximum in medical and rehabilitation benefits under the MIG. Adjudicator Jarda noted that the medical evidence supported that the applicant suffered soft tissue injuries as a result of the accident. The only issue in dispute to be decided was the cost of a catastrophic determination assessment, submitted seven and a half years post-accident.

In an attempt to prove that the OCF-18 in dispute was reasonable and necessary, the applicant relied solely on the "opinion of Dr. Lisa Becker, physician as set out in the additional comments section in the treatment plan". He alleged continued physical, emotional and psychological injuries as a result of the September 2012 accident. There was no reference to any clinical notes and records, including those of a treating family doctor or physician. The applicant also tried to seek entitlement by alleging a deficient denial notice, claiming that the respondent had failed to give medical and other reasons for the decision to deny the OCF-18.

The respondent, on the other hand, relied on the minor soft tissue injuries and post-traumatic headaches sustained by the applicant as a result of the accident, and the fact that despite having access to $50,000 in non-catastrophic limits, the applicant had only consumed $3,500.00 (after 7.5 years). It was noted that the applicant had failed to adduce any medical evidence to meet the onus of proving that the OCF-18 was reasonable and necessary. Furthermore, it was argued that the applicant was trying to circumvent the legislation as the assessments in dispute far exceeded the $2,000 maximum under s. 25 of the *Statutory Accident Benefits Schedule* ("SABS"). Lastly, the respondent denied that its notice was deficient as it had indicated the lack of physical and psychological impairment and causation related to the accident as well as the insufficient evidence of a catastrophic impairment. The respondent also relied on its insurer examinations conducted in 2013 and 2015 .

In his reply, the applicant merely maintained the deficiency of the denial notice and stated that there was a "substantive explanation as to why the multidisciplinary assessments" were reasonable and necessary.

Adjudicator Jarda addressed the relevant provisions of the SABS, specifically ss 15, 16, 45(1), 25(1)5 and 25(5)a, and concluded that the applicant had failed to meet his burden to demonstrate that the proposed assessment plan was reasonable and necessary. It was found that although Dr. Lisa Becker indicated that she had performed a file review, "it was unclear what medical records, if any, were reviewed" in her determination that a catastrophic impairment assessment was reasonable and necessary. Furthermore, Adjudicator Jarda addressed the absence of supporting medical evidence, concluding that the applicant had failed to disclose corroborating medical evidence , and to refer the Tribunal to relevant evidence to demonstrate that the proposed assessment plan was reasonable and necessary. It was held that there was no evidence to support the contention that the applicant had suffered a catastrophic impairment as a result of the September 2012 accident. Similarly, the applicant had failed to establish why the proposed assessments should exceed the $2,000 legislated maximum , or why he had only consumed the MIG monetary limits up to the date of his submissions. With respect to the alleged deficient denial notice, Adjudicator Jarda found that the respondent did not contravene sections 25 and 45 of the SABS. For all these reasons, the assessment plan was not payable and the application was dismissed.

Takeaway

An applicant's decision to seek a catastrophic designation, or threatening to pursue same, is one that should not be considered lightly. As held by Adjudicator Jarda, it is medical evidence that would support an applicant's burden. As previously held by the Tribunal, a treatment plan and OCF-18, on its own, is insufficient to demonstrate that an assessment is reasonable and necessary. Furthermore, it is not up the Tribunal to "connect the dots". The burden of proof, on a balance of probabilities, rests with the applicant and this burden requires that an applicant submit corroborating and relevant medical evidence to the Tribunal, not just bald assertions or submissions that lack an evidentiary foundation.

Applicants cannot bring premature applications for entitlement to catastrophic benefits that are not (yet) available to them

By Juny Kim

In *Alkhatlan v. Aviva Insurance Company of Canada*, 2024 ONLAT 23-010231/AABS-PI, the applicant was involved in an accident on January 31, 2023 and sought payment of accident benefits from her insurer pursuant to the Statutory Accident Benefits Schedule ("SABS").

On November 7, 2023 the applicant submitted an OCF-6 to her insurer seeking reimbursement for $455,530.06 in medical costs. By letter dated November 9, 2023, the insurer approved payment of the remaining $48,607.24 non-catastrophic policy limits for medical and rehabilitation benefits. The balance ($407,022.82) was denied on the basis that she was not catastrophically impaired, and she had exhausted the non-catastrophic policy limits to which she is entitled.

A preliminary issue hearing was heard on the issue of whether the applicant is barred from appealing the denial of the balance of the OCF-6 in this application because she had reached the limit of non-catastrophic injury category of payment, and no catastrophic injury application (OCF-19) was filed.

Adjudicator Grieves agreed with the insurer and found that the applicant was barred from proceeding with the appeal of denied benefits.

The Tribunal followed its decision in *Tlapale v. Wawanesa Insurance*, 2023 CanLII 72625 (ON LAT), relied on by the respondent in its submissions. In *Tlapale,* Adjudicator Bonnie Oakes Charron concluded that the applicant was not entitled to disputed treatment plans because she had consumed the funds available to her within the policy limits and had not been deemed catastrophically impaired. Adjudicator Charron noted that the fact that "the applicant's policy limit had been reached prefaces any other consideration in this matter".

In the case at hand, the applicant had consumed the funds available to her within the non-catastrophic policy limits for accident benefits, and she could not apply for a catastrophic determination until two years post-accident pursuant to s. 3(1) of the SABS. She was not subject to the Minor Injury Guideline ("MIG"), and she had not been determined to be catastrophically impaired. Accordingly, a hearing was not necessary to make any findings about her entitlement to the disputed benefits, nor interest. Adjudicator Grieves noted that if the applicant's approach were to be followed, an absurdity could result whereby applicants confined to the MIG who do not dispute the applicability of the MIG, could bring applications regarding entitlement to

hypothetical post-MIG benefits. However, the adjudicator did permit the applicant to proceed with a standalone claim for an award under O. Reg. 644.

This decision from the LAT reaffirms that applicants cannot bring premature applications for entitlement to catastrophic benefits that are not (yet) available to them if they have not yet submitted an OCF-19 and other documentation supporting an application for a catastrophic determination. Before the Tribunal can find that an applicant is entitled to the disputed benefits above non-catastrophic policy limits, the applicant must be deemed or determined to be catastrophically impaired because of an accident.

WSIB and SABs, The LAT Weighs in on Section 61 to Prevent "Forum Shopping"

By Selina Ferenac

In *Roble v. Chubb Insurance* 2023 ONLAT 23-002811/AABS-PI, Adjudicator Pahuta barred the Applicant's claim pursuant to section 61 of the *Statutory Accident Benefits Schedule* ("*the Schedule*").

In accordance with section 61 of the *Schedule*, when an insured elects to bring an action, thereby opting out of receipt of WSIB benefits, they are entitled to Statutory Accident Benefits (SABS) provided that their election "is not made primarily for the purpose of claiming benefits under SABS." This is to avoid a situation where an individual elects to commence an action for the sole purpose of circumventing the workers' compensation scheme and accessing SABs.

In this case, the applicant was involved in a motor vehicle accident during the course of her employment, and she submitted an Application for Accident Benefits to the respondent. As such, she was required pursuant to s. 61 to make an election between SABS and WSIB benefits. The respondent noted that such election could not be made for the sole purpose of obtaining statutory accident benefits and asked for proof that the tort action had been commenced as well as a copy of the executed WSIB assignment.

The applicant forwarded her executed WSIB assignment to the respondent , and the applicant's representative provided the respondent with a copy of the letter providing notice to the tortfeasor of her intent to sue pursuant to s. 258 .3 of the Insurance Act.

A year later, the limitation period for the applicant to issue a Statement of Claim to pursue recovery of tort damages expired. Despite the respondent's multiple written requests to the applicant requesting a copy of the Statement of Claim, it was filed outside of the two-year limitation period, and the applicant was barred from proceeding against the other party.

In coming to the decision to similarly bar the applicant's SABs claim, Adjudicator Pahuta followed the "primary purpose test" set out in *16-002364 v The Personal Insurance Company*, which considers the following factors that are persuasive in determining the "primary purpose" of an election under s. 61(2):

(i) It is the applicant's onus to prove that their election falls within the exception and this determination is fact driven;

(ii) The relevant point of time when determining the applicant's "primary purpose" is at the time of the election;

(iii) The test in determining the "primary purpose" is subjective, considering if the choice was made in good faith;

(iv) "Objective" factors must also be considered in evaluating the applicant's motives including: strength of the court action, steps taken to pursue the claim, advantages that might have led the applicant to choose accident benefits over WSIB benefits; and

(v) The election must be a "real choice" as opposed to forum shopping.

In addition to this test, Adjudicator Pahuta considered *Mahjourian v TD*, where the applicant filed their claim late and only in response to an insurer's inquiry. This was a key factor suggesting that a proper election was not made. In the matter at hand, the applicant argued that her delay in pursuing her tort claim was due to her difficulty obtaining legal representation and navigating the claims process during Covid restrictions. She cited *Thiyagarajah v. Economical Insurance,* argued that litigation is "complicated and risky" and the fact that a claimant later decided not to pursue a tort claim, does not diminish the possibility of litigation as a valid goal immediately following the accident.

However, it was noted that the applicant had legal representation for more than a year and a half before her Statement of Claim was filed, and such representation had been retained well before the expiration of the limitation period. Further, *Thiyagarajah* was distinguishable on the facts. In the matter at hand, the applicant did not send her notice of intention to sue in tort prior to, or contemporaneously with , her election to pursue payment of SABs by the respondent, and she only did so after the issue was raised by the respondent. In terms of the delay in filing a Statement of Claim, the applicant did not give evidence of any hurdle to the tort claim, as was identified in *Thiyagarajah.* Further, the claimant in *Thiyagarajah* was noted not to have been at fault in the accident. In the present case, the applicant did not make any submissions as to the strength of her tort claim.

Further, Adjudicator Pahuta noted that the decision in *16-002364 v The Personal Insurance*, as raised by the applicant, was also distinguishable. In that case, the applicant provided affidavits indicating their intention to pursue the tort action, and they also filed the statement of claim in a timely manner. This did not happen in the matter at hand , and the "discoverability rule" did not apply to her late filing, as the evidence established that the applicant was aware of her injuries as of the date of loss.

The applicant also raised the additional argument that she did "not have access to WSIB benefits." However, no evidence was provided in support of this claim.

After considering all of these factors, Adjudicator Pahuta determined that in fact, the applicant did not have a *bona fide* intention to issue a tort claim due to her lack of efforts to pursue such claim before the expiry of the limitation period and held that the fact that no tort claim was pursued proved that her election was made primarily for the purpose of pursuing payment of statutory accident benefits. As such, her SABs application was statute barred.

LAT Orders Case to be Reheard due to Original Decision Maker's Failure to Identify Causation as a Key Issue

By Daniel Hinds

Please note: this article discusses abuse

When a car accident happens leading to an insurance benefits dispute between a claimant and their insurance provider, the claimant must prove that the accident caused their injuries to succeed. Without establishing causation, a claimant will not be entitled to payment of benefits. Thus, causation is a crucial step in determining whether a claimant is entitled to payment of statutory accident benefits.

This key point was the focus of the recent case *Buma v TD Insurance Meloche Monnex*, 2024 ONLAT, where the Ontario Licence Appeal Tribunal's failure to adequately address the issue of causation was placed under strict scrutiny, ultimately resulting in an order for a rehearing of the case.

The facts are simple. The applicant, Ms. Buma, was involved in a car accident and consequently sought payment of accident benefits from her insurer pursuant to the *Statutory Accident Benefits Schedule* (SABS). A bystander to the accident provided dashcam footage capturing the crash. Upon viewing this footage, Ms. Buma recognized a house in the background at the scene of the accident in which she previously resided and was the victim of abuse. Ms. Buma argued that her viewing of this video triggered a resurfacing of psychological trauma that exacerbated her pre-existing psychological issues. Ms. Buma further submitted that but for the accident, she would not have experienced the trauma and therefore, the accident is the cause of her current impairments. In other words, Ms. Buma argued that the car accident caused her psychological injury and therefore, the insurance policy should cover this injury.

In the original decision, the Tribunal held that Ms. Buma's viewing of the dashcam footage and noticing the house in which she once resided was not an "accident" as defined under s.3(1) of the SABS because it was not related to the operation or use of an automobile. Thus, Ms. Buma was not entitled to benefits beyond the Minor Injury Guideline, or MIG, because her psychological injuries sustained were not due to an "accident".

However, upon reconsideration, Vice-Chair Louise Logan of the Tribunal held that this decision was in error. As the Tribunal explained, the issue was not whether there was an "accident" as defined under SABS. Instead, the question before the Tribunal that needed to be addressed was whether there was a sufficient causal connection between the car accident captured by the

dashcam footage and Ms. Buma's psychological injuries. By failing to identify and properly address the correct legal issue, it was held that the Tribunal committed an error of law. Whether there was an "accident" was not in dispute between the parties. In fact, it was agreed that there was an accident involving a motor vehicle as defined by s.3(1) of the SABS. Thus, by misidentifying the issue and focusing on whether there was an accident, the Tribunal erred in applying the Ontario Court of Appeal's two-part test for what constitutes an "accident" from *Greenhalgh*. The Tribunal should have instead applied the test for causation to determine whether the car accident, the occurrence of which was undisputed, caused the psychological injuries claimed by Ms. Buma.

Applying the test for reconsideration under Rule 18.2 of the *Licence Appeal Tribunal Rules, 2023*, the Tribunal held that the outcome of the decision would likely have been different had the correct issue been identified. In the original decision, the Tribunal held that Ms. Buma was subject to the MIG and not entitled to payment of treatment plans, an income replacement benefit, interest, or an award. However, this was based on a finding that there was no accident for which benefits could be paid out. This error of law was sufficient to support the remedy of a rehearing of the issues in dispute by a new adjudicator.

To be clear, the tribunal did not provide a legal determination as to whether the car accident caused Ms. Buma's psychological injury and, as of now, this question has still not been answered. However, this case reminds us of the importance of identifying the right issues and applying the correct legal tests to resolve a dispute. Otherwise, clients and lawyers alike might accumulate unnecessary expenses where they could have been avoided.

LAT application a Nullity – Avoidable?

By Selina Ferenac

Facts

D.C. (the applicant) was involved in an automobile accident on August 24, 2019, and sought benefits pursuant to the *Statutory Accident Benefits Schedule (*the *SABS).* Eventually, certain medical benefit claims were denied by Economical Insurance (the respondent).

On June 3, 2020, the applicant passed away due to causes unrelated to the accident. On February 25, 2022, applicant's counsel applied to the Licence Appeal Tribunal (the Tribunal) for resolution of the dispute. The Tribunal was also unaware the applicant was deceased. At the case conference held on December 20, 2022, applicant's counsel informed the respondent and the Tribunal that the applicant was deceased, and that the applicant's spouse would be in attendance on the applicant's behalf. However, neither applicant's counsel nor the respondent had documentation in their possession regarding the applicant's will, estate, or named beneficiary. Because of this, the applicant's request to adjourn the case conference to allow time to gather the necessary documentation was denied. The Tribunal's reasoned that the applicant passed away on June 3, 2020, and the application was submitted on February 25, 2022, thus applicant's counsel had more than nine months to request the documentation from the applicant's family. Although no estate trustee was appointed to act on behalf of the deceased applicant, the application proceeded to a written hearing on September 8, 2023. Applicant's counsel filed written submissions, and the respondent filed responding submissions and evidence.

Procedural issue

The respondent raised a procedural issue, submitting that since the applicant was deceased and no estate trustee was appointed, the application was not legally viable, and the application was not properly commenced. In response, applicant's counsel submitted that the issue raised by the respondent could not be considered as it was not addressed at the case conference, and that raising this issue at this stage was indicative that the respondent was acting in bad faith. Applicant's counsel further submitted that dismissing the application would be highly prejudicial and denied that the application was not properly commenced.

Issue

Was the application properly commenced?

Outcome

The application was dismissed, and the Adjudicator Jarda held that it was unnecessary to consider the deceased applicant's entitlement to the disputed treatment plans, interest, and an award.

Reasoning

Adjudicator Jarda found that the application brought before the Tribunal in the name of a deceased applicant was not properly constituted, that it was "an irremediable nullity", and that to continue the proceeding in the circumstances would be "an abuse of process."

To support her reasoning,Adjudicator Jarda relied on *Toma*, where an application for arbitration was commenced by a deceased insured's counsel. While the insured's widow attended the pre-hearing discussion, it was agreed that the process could not continue until an administrator or representative of the insured's estate was appointed. Further, in *Wentzel*, an application was commenced by theinsured's representative after the insured passed away, with no estate trustee having been appointed. Because there was no evidence that anyone had undertaken to administer the insured's estate, the arbitrator concluded that the legal proceeding had not properly been constituted and dismissed the application.

While applicant's counsel argued that the application to the Tribunal had been commenced to protect the limitation period, no explanation was provided as to why no Estate Trustee was appointed between June 3, 2020 (date of death) and February 25, 2022 (date of application). Further, there was no evidence to support that anyone had been appointed to be an Estate Trustee to represent the applicant during this 262-day period.

The applicant's surviving spouse had 1192 days to take steps to seek appointment as an estate trustee. As he had taken no steps to do so , Adjudicator Jarda found that he had opted not to pursue appointment as an estate trustee. There was also no evidence to support that the applicant's counsel had standing to file written hearing submissions and evidence on the applicant's behalf.

Takeaways

A deceased person has no standing to bring or pursue a claim for payment of accident benefits before the Tribunal, and in the absence of a lawfully authorized person to represent the deceased person's estate (such as an Estate Trustee), there is no legally viable way to pursue an arbitral proceeding before the Tribunal. Simply put, in the absence of an Estate Trustee (or other

similar representative having been appointed), counsel would not be able to demonstrate that they were authorized to commence an application to the Tribunal.

More than Appealing – The Supreme Court of Canada approves the exercise of judicial review in addition to statutory rights of appeal

By Jennifer Griffiths

With its recent decision in *Yatar v. TD Insurance Meloche Monnex*, 2024 SCC 8, the Supreme Court of Canada has underscored the importance of judicial review to administrative law, and provided guidance for judges and litigants in circumstances where judicial review is sought even where there is also a statutory right of appeal from an administrative decision.

Overturning the Ontario Court of Appeal in a unanimous and lengthy decision, the Supreme Court emphasized the critical role of judicial review in upholding the rule of law, as separate and distinct from any statutory right of appeal. Where the two lower courts had held that judicial review was not an appropriate remedy in the absence of "exceptional" or "rare" circumstances respectively, the Supreme Court disagreed, signaling a course correction for appellate courts in this regard.

By way of procedural history, Ms. Yatar applied for and received statutory accident benefits from TD Insurance. Following the termination of certain benefits, she applied for dispute resolution before the Licence Appeal Tribunal ("LAT"), at which point TD asserted a limitation defence, claiming that Ms. Yatar had applied for dispute resolution outside the applicable two-year limitation period to do so. The LAT adjudicator agreed with TD that the claim was statute-barred and upheld his determination on reconsideration.

Central to the LAT adjudicator's decision was his finding that a particular letter sent by TD Insurance to Ms. Yatar in January of 2011 constituted a clear and unequivocal denial of benefits sufficient to trigger the running of the limitation period for her to dispute TD's decision. This finding was made notwithstanding TD's subsequent reinstatement and later denial of the same benefits, undertaken without providing Ms. Yatar with proper notice of her right to dispute at that time, contrary to the requirement set out by the Supreme Court in *Smith v. Co-operators General Insurance Co., 2002*.

Ms. Yatar sought to challenge the LAT's decision both by exercising her statutory right of appeal on a question of law (pursuant to s. 11(6) of the *Licence Appeal Tribunal Act, 1999*), and by seeking judicial review pursuant to s. 280(3) of the *Insurance Act*, and s. 2(1) of the *Judicial Review Procedure Act*. Where an appeal on a question of law is subject to a correctness standard, Ms. Yatar also alleged that there had been errors of fact or mixed fact and law that she sought to have the court review on a standard of reasonableness.

The Divisional Court declined to even undertake judicial review, informed in part by what it viewed to be the legislative intent to limit judicial oversight of the LAT relative to accident benefits matters, and held that there were no "exceptional" circumstances that the Court believed would be necessary to justify its intervention. The Court instead reviewed the matter as an appeal and found that where the right of appeal was limited to questions of law, there was no basis to interfere with the LAT's decision.

Ms. Yatar sought and was granted leave to the Ontario Court of Appeal on the question of whether "the Divisional Court err[ed] in limiting judicial review, in cases where there has been a statutory appeal… to 'exceptional circumstances'" and further on the question of whether the LAT's reconsideration decision was reasonable.

The Court of Appeal took issue with the Divisional Court's language in setting out a threshold of "exceptional circumstances" that would have to be established before judicial review would be available, but did agree that the legislated scheme for resolving disputes concerning statutory accident benefits reflected a "legislative intent to limit access to the courts regarding these disputes", meaning that it would be a "rare" case in which the remedy of judicial review would be appropriate. In such cases, the Court of Appeal set out that the proper approach would be to advance the statutory appeal and the application for judicial review concurrently, as Ms. Yatar had done, in order to preserve judicial resources.

On further appeal to the Supreme Court, Ms. Yatar asserted that the Court of Appeal had "erred when it concluded that the legislature's decision to limit the right of appeal from LAT decisions to "pure" questions of law restricted the availability of judicial review of LAT decisions for errors of fact or mixed fact and law to "rare" or "unusual" cases." She further alleged that the court had erred in finding that the LAT adjudicator's decision was reasonable, which finding was made even though the Court of Appeal had agreed with the Divisional Court that judicial review should not even have been considered in this case.

Informed by its prior decisions in the cases of *Vavilov* and *Strickland*, the Supreme Court's analysis was diametrically opposed to that of the courts below, in essence finding that a statutory right of appeal and access to judicial review are complementary remedies and not mutually exclusive.

In Ms. Yatar's case, she sought to have the LAT's decision judicially reviewed on a reasonableness standard with respect to the adjudicator's findings of fact and mixed findings of fact and law. The Supreme Court observed that this is precisely the situation that was

contemplated in *Vavilov* where separate standards of review were established for questions of law versus questions of fact or mixed fact and law.

Contrary to the rulings of the courts below, the Supreme Court was unambiguous in upholding the right of a person to seek judicial review of an administrative decision, stating at paragraph 49 that "[w]hile there is discretion to hear the application on the merits and deny relief, this discretion does not extend to decline to consider the application for judicial review…".

Further, the Supreme Court did not agree that there was any legislative intent to limit judicial oversight of the LAT to issues of law that would arise on a statutory appeal, finding instead that "[t]he legislature could have decided to encompass all types of errors in the right to appeal, but it did not."

That the statutory right of appeal on questions of law is subject to a standard of correctness, while judicial review on questions of fact or mixed fact and law is subject to a reasonableness standard, speaks to the different roles of each type of judicial oversight, but does not mean that the latter is unavailable. Further, because the remedies are not the same (and in this case, questions of fact or mixed fact and law were central to Ms. Yatar's request for the court's intervention), a statutory right of appeal does not constitute an "adequate alternative remedy".

Having concluded that the components of LAT's reconsideration decision that were not subject to the right of appeal should be judicially reviewed, the Supreme Court then turned its attention to the decision itself, concluding that it was not reasonable, and that the adjudicator had failed to give consideration to key facts and earlier tribunal decisions dealing with similar fact cases.

The question of whether there had been a valid denial sufficient to start the running of a limitation period against Ms. Yatar was ultimately remitted back to the LAT to decide again at first instance.

As suggested by the diverse and numerous parties who obtained intervenor status before the Supreme Court in this matter, the guidance provided by this decision has application far beyond the LAT and the world of statutory accident benefits and speaks to the important place of judicial review in the administration of justice generally. This decision would seem to encourage a more robust role for the court, whether by way of review of the substance of a decision not covered by a statutory right of appeal in this instance, or in reviewing the procedural fairness or legality of an administrative decision more broadly. While judicial review is a discretionary remedy, when *Yatar* is read together with the prior decisions of the Court

in *Vavilov* and *Strickland*, the Supreme Court has now provided guidance as to the circumstances in which the exercise of that discretion is warranted.

Although the Supreme Court left the question of how this ruling would apply in the presence of a privative clause for "another day", elements of this decision would suggest that the court's oversight of administrative tribunals can only be limited by statute where there is an appropriate alternative means to ensure that the administrative body discharges its statutory function in accordance with the rule of law.

Ultimately, and as it relates to accident benefits cases decided by the LAT, the Supreme Court of Canada's decision in *Yatar* would appear to be a game changing decision for those who practice in this area (and likely for those who practice before many other administrative tribunals, including WSIAT, which does not provide for a statutory right of appeal). Whereas prior to its release, it was thought that court oversight of decisions coming out of the LAT was effectively limited to appeals on questions of law on the correctness standard, the Supreme Court appears to have endorsed a more liberal approach to judicial intervention, opening the door to more frequent challenges regarding the reasonableness of findings of fact or mixed fact and law – or in relation to any other applicable grounds for judicial review.

Injuries from physical assaults inside and outside a vehicle are not an 'accident' attracting SABS coverage

By Jordan Hochman

In *Ntege-Lule v Pafco Insurance Company*, 2024 CanLII 2655 (ON LAT), Adjudicator Pahuta found that an Applicant's injuries from an incident arose directly from assaults that she suffered while she was an occupant of an automobile, and after her occupancy ended, rather than being caused by an "accident".

The Applicant was involved in an incident within a vehicle during which she was struck by the driver in the left arm and the face. The Applicant claimed that the driver then pushed her out of the vehicle, and she suffered injuries to the right side of her body upon hitting the ground. She further alleged that she suffered psychological injuries as a result of being pushed out of the vehicle. The Applicant had gotten back into the vehicle after being pushed out, and the driver later assaulted the Applicant again in her apartment, pushing the Applicant into her coffee table. After the incident, the Applicant attempted to claim benefits from the Respondent under the *Statutory Accident Benefits Schedule* (the "*Schedule*"). The Respondent denied the Applicant's claim for benefits. The Applicant applied to the Licence Appeal Tribunal (LAT).

The principal issue before the LAT was whether the incident through which the Applicant sustained injuries was an "accident", as the term is defined in the *Schedule*. Section 3(1) of the *Schedule* defines an accident as an "incident in which the use or operation of an automobile directly causes an impairment." The Adjudicator noted that the burden of proof rested with the Applicant to establish, on a balance of probabilities, that the use or operation of an automobile directly caused the Applicant's injuries.

To determine whether an incident falls under the definition of an accident under the *Schedule*, the Adjudicator applied the test from *Economical Mutual Insurance Company v Caughy*, 2016 ONCA 226. The test has two parts: the purpose test, and the causation test which itself has three parts.

Purpose Test

As Adjudicator Pahuta noted, per *Greenhalgh v ING Halifax Insurance Company*, 243 DLR (4th) 635, 72 OR (3d) 338, the purpose test requires a determination of "whether the incident resulted from 'the ordinary and well-known activities to which automobiles are put'". Essentially, the test is an analysis of the purpose for which the vehicle was being used at the time of the incident. The Respondent conceded that the Applicant had satisfied the purpose

test because the vehicle involved in the incident was being used to transport people from one place to another at the time of the incident.

Causation Test

The causation test requires the adjudicator to determine whether the aforementioned ordinary and well-known activities directly caused the Applicant's injuries. There are three relevant considerations to the causation test which must be satisfied sequentially in order for the Applicant to be successful. First, the Applicant must satisfy the "but for" consideration, meaning they must prove that but for their presence in the vehicle, they would not have sustained the injuries. Second, the Applicant must satisfy the "intervening act" consideration, and prove that the use or operation of the vehicle directly caused the injuries with no intervening event breaking the chain of causation. Finally, if there are multiple possible causes of the injuries, the "dominant feature" consideration requires the Applicant to prove that the ordinary and well-known activities related to the use and operation of the involved vehicle are the most direct causes of the injuries.

The Adjudicator found that the Applicant had satisfied the "but for" test by showing that, on a balance of probabilities, she would not have been injured but for her presence in the vehicle. However, regarding the second step of the analysis, the Adjudicator found that the Applicant had not sufficiently proven her claim. The Adjudicator found that the Applicant's injuries were caused by an intervening act, specifically, the many assaults committed by the driver. The Applicant claimed that she was assaulted by the driver and then pushed out of the vehicle while it was still moving. However, this assertion contradicted the Applicant's own statement to police just nine days after the incident, wherein the Applicant stated that the driver stopped the vehicle before pushing the Applicant out, and the police report indicated that the vehicle was not moving at the time of the incident. Further, the Applicant did not report any injuries to police from being pushed out of the vehicle. To the contrary, the Applicant reported to the police that she suffered injuries as a result of being pushed into the coffee table in her apartment, which occurred long after she had been pushed out of the vehicle.

The Adjudicator similarly found that the Applicant did not sufficiently prove that the ordinary course of use or operation of the vehicle was the dominant cause of the Applicant's injuries. The Applicant attempted to claim that the injuries to her left arm and face were distinct from the injuries to her right side that she claimed to have suffered upon being pushed out of the vehicle. However, the Adjudicator noted that the Applicant did not submit sufficient medical evidence to establish that the Applicant was pushed out of a moving vehicle. Further, the Applicant did not

submit any evidence to support her claim that she suffered psychological injuries from being pushed out of the vehicle. The Adjudicator took note of the fact that the police report stated that the vehicle was not moving at the time of the incident, and that the injuries which the Applicant did report to the police were sustained when the Applicant was assaulted in her apartment after the incident involving the vehicle. On that basis, the Adjudicator held that the Applicant did not prove that her status as a passenger in the vehicle was more dominant than the assaults in causing the Applicant's injuries.

Since the Applicant failed to prove, on a balance of probabilities, that her injuries were the result of the incident involving the use and operation of the vehicle, the Adjudicator held that the Applicant was not involved in an "accident" as defined under s. 3(1) of the *Schedule*. Accordingly, the application was dismissed.

The LAT Cannot Decline to Consider Submissions at First Instance and Brand Them As Fresh Evidence In Reconsideration

By Karina Dziuba

In *Adams v. Aviva Insurance Company* (2024), the Divisional Court remitted the issues back to the LAT for a new hearing after they had been overlooked by the Adjudicator at the first hearing, and the reconsideration hearing.

The Applicant was involved in a motor vehicle accident on August 28, 2018. She reported the accident to Aviva on June 13, 2019, nearly a year after it took place. The Respondent provided Ms. Adams with benefits package the same day, which was completed and returned to Aviva on October 20, 2021, over two years after the fact. On February 1, 2022, Aviva notified the Applicant that it was denying her claim due to her non-compliance with s. 32(1) of the *Schedule*. Ms. Adams applied to the License Appeal Tribunal (the "Tribunal") for a resolution of the dispute. The Tribunal dismissed her application in a decision dated January 27, 2023.

Section 32(1) of the *SABS* states that a person who intends to apply for accident benefits shall notify the insurer of their intention to do so "no later than the seventh day after the circumstances arose that give rise to the entitlement to the benefit, or as soon as practicable after that day." Section 34 clarifies that a person's failure to comply with this time limit does not disentitle them to a benefit if the person provides a "reasonable explanation" for the non-compliance.

In dismissing the application, the Adjudicator concluded that Ms. Adams did not have a "reasonable explanation" for the significant delay and barred her from applying to the Tribunal due to her failure to adhere to *SABS* timelines. In her submissions, Ms. Adams advanced other arguments with respect to the interplay of various *SABS* sections and Adjudicator discretion, but the Tribunal did not find it necessary to conduct an analysis of her submissions made in relation to ss. 32(5), 32(10) or 55(2) of the *Schedule*.

Ms. Adams subsequently submitted a request for reconsideration which was also dismissed on May 31, 2023. The Tribunal held that the Applicant was attempting to raise new arguments in her reconsideration request, which she did not raise in her initial submissions. The Adjudicator found that the "Applicant did not argue that section 34 of the *Schedule* does not apply to section 32(1) and that it does not provide the insurer the recourse applied in denying the payment of benefits to the applicant [nor] argue that section 34 does not provide the Tribunal with the statutory authority to bar her ability to apply to the Tribunal for dispute resolution."

Furthermore, the Adjudicator commented on the Applicant's submissions with reference to ss. 32(10), and stated that she did not make "clear and cogent submissions and nor did she provide any case law supporting her argument." In finding that Ms. Adams failed in her opportunity to submit case law to advance her arguments, and that the Tribunal is "not obligated to address every single argument that a party advanced", the Adjudicator dismissed the request for reconsideration.

Ms. Adams further appealed to the Divisional Court, stating that the Tribunal made errors of law in both the initial and reconsideration decisions. The Court held that the Tribunal's finding that Ms. Adams did not have a reasonable explanation for the delay is a finding of fact from which there is no right of appeal. Therefore, s. 34 of the SABS does not assist the Appellant. The Court did note, however, that s. 34 "does not bar entitlement, but rather, appears to act as a path for forgiveness for a missed time limit."

In its analysis of the other issues raised at the LAT, the Court reviewed the Applicant's initial submissions regarding the interplay of ss. 32(1), 32(10) and s.34, and was satisfied that Ms. Adams did in fact advance an argument that s. 34 is inapplicable to s.32(1) as it is displaced by the specific wording in s.32(1). Interestingly, the Adjudicator at the reconsideration hearing seemed to both accept and reject the Applicant's interpretation of the interplay of these two *SABS* sections, but nevertheless concluded that the Appellant was raising a new argument and denied the request for reconsideration.

The Divisional Court found that "the Tribunal erred in the Preliminary Decision when it failed to consider this issue, and in the Reconsideration Decision, when it concluded that it was a fresh issue on appeal." The Court set aside both decisions and remitted the matter back to the LAT for a new hearing at first instance before a different Adjudicator. The Court also held that depending on the new Tribunal's finding on s. 34(10), consideration might also need to be given to the issues of whether the Appellant failed to comply with ss. 32(5); whether by virtue of s. 55 the Appellant was precluded from appealing to the Tribunal; and whether in these circumstances the Tribunal could exercise the discretion set forth in ss. 55(2) to permit the application to go forward.

The overarching message from the Divisional Court is that the Tribunal cannot decline to consider submissions of the parties at first instance, and then decline to consider the same submissions at the reconsideration stage, branding them as "new argument" or an attempt by a party to re-argue its initial position. It therefore appears that reintroducing submissions from the initial hearing may not amount to an impermissible "second kick at the can" if the Tribunal

erroneously declined to consider them in the first place. As well, the Court's decision points to the possibility that adjudicators may find that they have jurisdiction to permit applicants to proceed with their benefit claims pursuant to ss. 55(2) even in circumstances where a breach of s. 32(1) is not saved by s. 34 on the one hand, but not to permit applicants to proceed pursuant to ss. 55(1)1 on the other hand if there is a breach of ss. 32(5) that is not saved under s. 34 because an applicant fails to provide a reasonable explanation for delay in submitting their completed application for a benefit more than 30 days after receipt of the form.

Confirmation of employment does not automatically eliminate the need for an OCF-10 where IRB and NEB tests are met on an OCF-3

By Lauren Kolarek

In *Lubin v. Allstate Insurance Company of Canada*, 2023 CanLII 116488 (ON LAT), Adjudicator Ulana Pahuta addressed the issue of when an Election of Benefits form ("OCF-10") is required to be submitted by an applicant pursuant to s.35(1) of the *Schedule*.

The applicant was involved in a motor vehicle accident on December 16, 2022. She applied to the LAT disputing her alleged entitlement to income replacement benefits ("IRBs"), and she also claimed a special award due to the insurer's allegedly unjustified request for an OCF-10 among other things.

Allstate raised a preliminary issue, taking the position that the applicant should be barred from proceeding with her claim for IRBs, interest and an award, due to her failure to submit an OCF-10.

The applicant had submitted an Employer's Confirmation of Income ("OCF-2") which confirmed that she had been employed at the time of the accident. Despite this, she had also submitted an Application for Accident Benefits ("OCF-1") and a Disability Certificate ("OCF-3") which indicated that she met the tests to be eligible for ***both*** NEBs and IRBs. As such, Allstate delivered notice to the applicant requesting that she complete and submit an OCF-10 within 30 days, pursuant to s. 35 of the *Schedule*.

In her submissions, the applicant argued that she was not required to submit an OCF-10 as section 35(1) of the *Schedule* had not been engaged. She argued that it was clear from the documents provided to Allstate (OCF-1, OCF-2 and OCF-3) that she did not qualify for a non-earner benefit ("NEB") as she was working at the time of the accident. Accordingly, the applicant argued that there was no ambiguity as to which specified benefit she qualified for.

Allstate submitted that an OCF-10 was requested because there was ambiguity in the applicant's OCF-1 and OCF-3, where the applicant had indicated that she met the tests for both NEBs and IRBs.

Ultimately, Adjudicator Pahuta agreed with Allstate that the applicant was required to submit an OCF-10, and given her refusal to do so, she was barred from proceeding with her claim for IRBs on the basis that the language of section 35(1), which requires an applicant to elect a benefit within 30 days of receiving notice from the insurer, is "mandatory and unambiguous". A failure

on the part of an insured to complete this step renders the application incomplete. Adjudicator Pahuta therefore disagreed with the applicant that there was no ambiguity in her application, and disagreed that her OCF-1, OCF-2 and OCF-3 cumulatively unequivocally indicated to the insurer that she only would qualify for payment of an IRB, not NEBs.

Adjudicator Pahuta noted (and the Tribunal has previously accepted) that an insurer is within its rights to make a determination of eligibility for a specified benefit without requiring an OCF-10, even where an OCF-3 may indicate that both tests are met. However, where the insurer has decided that there is sufficient ambiguity to warrant a request for an OCF-10, the insured must comply with same.

The big takeaway from this decision is that providing employment details in an OCF-1, and even completing an OCF-2 confirming employment , does not automatically eliminate ambiguity. Where the OCF-3 specifies that both specified benefits tests are met, the insurer may request an election, and compliance with such a request then becomes mandatory for insured to return the OCF-10 with their election to receive either IRB, NEB, or caregiver benefits.

Adjudicator Grieves Finds a Stand-Alone Award Claim Permissible and Awards $5,550 for a Delayed NEB Payment

By Duha Sikander

In *Ross v Aviva General Insurance*, 2023 ONLAT 22-002558/AABS, the insurer stopped payment of the claimant's NEB following an IE that concluded that the claimant did not suffer from a complete inability to carry on a normal life. Following the stoppage, the claimant provided updates on his health status via assessments, treatment plans, reports, and clinical notes and records. He also disputed the stoppage of NEBs through three separate applications to the Tribunal. Four years after the NEB stoppage, the claimant was found to be catastrophically impaired, and a year after the CAT finding, the insurer agreed to reinstate the claimant's NEB. However, the insurer did not resume its payment of the claimant's NEB until six months after agreeing to do so.

Adjudicator Grieves found that when the insurer received its own CAT assessment report, it should have reassessed the claimant's entitlement to NEB. The insurer argued that the claimant's class 4 impairment did not impact his eligibility for NEB. While the Adjudicator agreed that the test for catastrophic impairment and the test for NEB are not the same, she found that the conclusions of the CAT assessment report, taken together with the other medical evidence regarding the claimant's deteriorating condition, should have triggered a review of his eligibility for NEB, which did not happen until a year later. The insurer's delay in this regard was deemed to be "stubborn, unyielding and inflexible".

The insurer conceded to the unreasonable delay in resuming NEB payments while concurrently arguing that this case precludes an award under section 10 of *Regulation 664* as it would require a stand-alone award for unreasonably withheld or delayed payments. Adjudicator Grieves found that the Tribunal can grant a stand-alone s. 10 award even in situations where the parties resolved all the substantive issues in dispute before a hearing. She went on to hold that a dispute may also encompass a disagreement regarding unreasonably withheld or delayed payments. In doing so, she considered the consumer protection objective of the *Insurance Act* , and concluded that allowing insurers to sidestep the enforcement of the s. 10 provisions by delaying the settlement of claims until the eve of a hearing would "undermine the legislature's intent of a timely provision of accident benefits and consumer protection".

Adjudicator Grieves held that the insurer did not relieve itself of liability for an unreasonable withholding or delay of payment of NEBs even if the benefit was reinstated prior to the hearing. As a result, under s. 10 of *Regulation 664*, she held that the claimant was entitled to a 40%

award on the benefits that were unreasonably withheld beginning from when the claimant was designated as catastrophically impaired. The insurer was ordered to pay $5,550.00, plus interest under the *Schedule*, plus compound interest calculated as per s. 10 of *Regulation 664*.

This outcome is similar to prior decisions from FSCO, in which a Special Award was levied against an insurer under former section 282 of the Insurance Act. That provision was held to permit the making of such awards by FSCO arbitrators even where substantive issues were resolved before the hearing, sometimes by way of benefit reinstatement. Thus, *Ross v Aviva General Insurance* suggests that LAT adjudicators are interpreting s. 10 of *Regulation 664* in much the same way as FSCO arbitrators used to interpret former s. 282 of the Insurance Act, one requirement of which was that the Special Award amount could not exceed 50% of the withheld benefits.

Catastrophic Assessment Report is Section 45(2)1 Compliant But Claimant Still Not CAT

By Kari-Anne Layng

In the recent decision, *Lanzon v Economical Insurance Company, 2023 ONLAT 20-005424/AABS*, Vice Chair Logan found that the claimant was not catastrophically impaired under criterion 8 of the *Schedule.*

In order to meet the test for catastrophic designation under criterion 8 under the version of the Schedule in force at the time of the Applicant's October 4, 2012 accident, an injured person must show that they have sustained either a Class 4 Marked Impairment or a Class 5 Extreme Impairment in at least one of the four spheres of Activities of Daily Living, Social Functioning, Concentration Pace Persistence, or Adaptation in Chapter 14 of the AMA Guides due to an accident-related mental or behavioral disorders. In this case, the parties disagreed about whether the claimant had sustained a Class 4 impairment in the area of Adaptation.

In finding that the claimant had not sustained a catastrophic impairment, Vice Chair Logan preferred the evidence of the respondent's assessors, psychiatrist, Dr. Joel Eisen and neuropsychologist Dr. Douglas Chute, to the claimant's assessor, neuropsychologist Dr. Lara Davidson. Ultimately, she found that Dr. Davidson relied too heavily on the claimant's self-reporting when the claimant was not a reliable historian. Dr. Eisen more fully considered the claimant's pre-accident psychological condition, work history, and long-term relationship. The claimant's life did change after the accident, but his psychological function was not impeded so as to constitute a Class 4 impairment.

Prior to Vice Chair Logan hearing this case, the Tribunal had previously decided that the claimant was not catastrophically impaired because his multidisciplinary catastrophic assessment was not done in compliance with section 45(2)1 of the *Schedule.* Following this decision, the Tribunal granted the claimant's reconsideration request and ordered a rehearing on the issue of whether the claimant had sustained a catastrophic impairment. Despite reaching the same conclusion as the Tribunal at the initial hearing with respect to the claim of catastrophic impairment, Vice Chair Logan reached a different conclusion in deciding that the claimant's report *was* section 45(2)1 compliant.

Section 45(2)1 of the *Schedule* requires that an assessment or examination in connection with determining a catastrophic impairment must be conducted only by a physician; however, the physician may be assisted by such other regulated health professionals as they may reasonably require.

In this case, the claimant argued that the 2019 Omega Medical Associates Multidisciplinary Catastrophic Impairment Evaluation Report, which was authored by Dr. Lisa Becker and Dr. Harold Becker, complied with section 45(2)1 of the *Schedule*. Dr. Becker reviewed the medical brief, determined if a CAT evaluation was warranted, identified the most appropriate team to complete the comprehensive assessment based on the identified impairments and injuries, selected the experts, prepared an executive summary which included a case synopsis and review of each individual assessors' findings; and determined whether the claimant met the CAT requirements. The claimant argued that this role played by Dr. Becker was consistent with the Black's Law Dictionary definition of the term "conduct" which is "to manage; direct; lead."

Vice Chair Logan agreed with the claimant that the roles that Dr. Lisa Becker and Dr. Harold Becker played in the assessment process were consistent with the definition of "conduct" found in Black's Law Dictionary. Moreover, the *Schedule* does not require a physician to carry out every element of an assessment; rather, it specifically contemplates the assistance of other regulated health professionals. Therefore, a conducting physician is not required to provide an analysis that is independent of other experts who have relevant expertise, and the fact that another involved assessor provides relevant expertise does not negate the conducting physician's role. For these reasons, Vice Chair Logan found that the roles of the claimant's experts went beyond "quarterbacking" the assessments of others, and were compliant with section 45(2)1 of the Schedule.

Medical Evidence Matters

By Jordan Hochman

In *Hamid v. Intact Insurance*, 2023 CanLII 103792 (ON LAT), the Adjudicator made it abundantly clear that evidence from qualified medical professionals is necessary for the Tribunal to rule on issues that involve medical determinations.

In *Hamid*, the Applicant's husband was involved in an accident in 2015 when he lost control of his vehicle on the Gardiner Expressway and collided with a guardrail. Police noted that the man likely lost control of the vehicle due to a medical incident that occurred while he was driving. At the hospital, doctors concluded that the man suffered from a stroke. Some days later, the man went into cardiac arrest and fell into a coma, and remained in a coma until he passed away in 2019. The Applicant applied for benefits from the Respondent but the application was denied.

The issue before the License Appeal Tribunal (LAT) was narrowly framed: whether the Applicant – the man's wife – could be properly considered an "insured person" as that term is defined in Section 3(1) of the *Statutory Accident Benefits Schedule* (*SABS*). Subsection 3(1)(a)(ii) of the *SABS* sets out that, as it pertains to a policy of motor vehicle insurance, 'insured person' includes, *inter alia*, the named insured and the named insured's spouse. It provides for benefits coverage "if the named insured, specified driver, spouse or dependant is not involved in an accident but suffers psychological or mental injury as a result of an accident in or outside Ontario that results in a physical injury to his or her spouse."

The insurer argued that the Applicant was not an insured person because there was no evidence that her husband sustained a physical injury as a result of the motor vehicle accident. The Applicant argued that she was an insured person and entitled to benefits because she claimed that she had suffered a psychological injury as a result of her husband being involved in the accident. However, the Applicant did not lead any medical evidence to prove her alleged psychological injuries, and she did not produce evidence to substantiate that her husband sustained a physical injury as a result of the accident. The Adjudicator held that even if the LAT were to have accepted the Applicant's contentions regarding her alleged psychological injuries, the greater issue was whether the Applicant 's had proven that her husband sustained any physical injuries in the accident that would then create the opportunity for the Applicant to claim benefits based on consequent psychological injury. The medical evidence that was filed detailed that the Applicant's husband had a mild right sided facial droop, right sided neglect and paralysis, and that he was soft and non-tender in all quadrants. The police field notes listed the injuries as stroke. The Adjudicator noted that the Applicant submitted medical literature and

referenced the medical documents from the hospital during her husband's treatment to argue that her husband suffered the stroke and soft-tissue musculoligamentous injuries a result of the accident. However, the Applicant did not provide any evidence from a qualified medical practitioner that could properly opine on the cause of her husband's medical condition. Further, the Applicant did not provide evidence that she even attempted to acquire such evidence. Accordingly, the Adjudicator found no basis to hold that the Applicant's husband suffered physical injuries as a result of the accident, and, for that reason, the Applicant could not be an insured person under Subsection 3(1)(a)(ii) of the *SABS*.S

This decision underlines the requirement for expert medical evidence to prove both the nature of the psychological or mental injury that is being claimed, and the link between underlying physical injury to the insured person involved in the accident and the consequent psychological or mental injury that is being claimed. In *Hamid*, the absence of such evidence resulted in the dismissal of the claim based on the Adjudicator's finding that the claimant was not an insured person under the SABS.

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TAB 13B

7th Motor Vehicle Litigation Summit

Ontario Statutory Accident Benefits Chart

Anandi Naipaul
Ross & McBride LLP

September 18-19, 2024

cpd

Ontario Statutory Accident Benefits

Last updated: August 2024

Accident Benefit	Standard Auto Insurance Policy	Optional Benefits	Proposed Changes
Medical, Rehabilitation and Attendant Care benefits: for non-catastrophic injuries	• $65,000 for medical and rehabilitation benefits, including assessment costs and attendant care benefits for non-catastrophic injuries.	Instead of the standard coverage, you can choose: • Option A: A $130,000 coverage for medical and rehabilitation benefits including assessment costs and attendant care benefits in case of non-catastrophic impairment OR • Option B: $1,000,000 coverage for medical and rehabilitation benefits including assessment costs and attendant care benefits in case of non-catastrophic coverage plus an additional $1,000,000 coverage in case of catastrophic injury, for a total of $2,000,000 in catastrophic injury protection.	• No change to mandatory benefits • Adjustment to priority of benefits whereby accident benefits must be accessed before extended health benefits
Medical, Rehabilitation and Attendant Care benefits: for catastrophic injuries	• $1,000,000 for medical and rehabilitation benefits including assessment costs and attendant care benefits for catastrophic injuries.	• An additional $1,000,000 coverage for medical, rehabilitation and attendant care benefits, including assessment costs in case of catastrophic impairment, is also available. Combine this option with B) above for a total of $3,000,000 in catastrophic injury protection.	• Same as above
Caregiver benefit	• Up to $250 per week for the first dependant plus $50 for each additional dependant; available only for catastrophic injuries.	• Up to $250 per week for the first dependant plus $50 for each additional dependant; available for all injuries.	• No longer a mandatory benefit

Ontario Statutory Accident Benefits

Last updated: August 2024

Accident Benefit	Standard Auto Insurance Policy	Options for Increasing your benefits	Proposed changes
Housekeeping and Home Maintenance expenses	• Up to $100 per week, available only for catastrophic injuries fpr 2 years.	• Up to $100 per week, available for all injuries for 2 years.	• No longer a mandatory benefit
Income Replacement benefit	• 70 per cent of gross income up to $400 per week.	• Weekly limit can be increased to $600, $800 or $1000 per week.	• No longer a mandatory benefit along with Non-earner benefits
Dependant Care benefit	Not provided.	• Up to $75 per week for the first dependant and $25 per week for each additional dependant to a maximum of $150 per week.	• No change
Death and Funeral benefits	• $25,000 lump sum to an eligible spouse; $10,000 lump sum to each dependant; maximum $6,000 funeral benefits.	• $50,000 lump sum to an eligible spouse; $20,000 lump sum to each dependant; maximum $8,000 for funeral benefits.	• No longer a mandatory benefit
Indexation benefit	Not provided.	• Annual adjustment according to the Consumer Price Index for Canada	• No change

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Anandi works exclusively on behalf of injured people and their families to ensure they receive the best possible outcome after an accident. She fights for the rights of her clients in a wide spectrum of cases including traumatic brain injury, spinal cord injuries, catastrophic impairment, disability insurance, wrongful death, nursing home litigation and medical malpractice.

Ross & McBride

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TAB 14

7th Motor Vehicle Litigation Summit

Partial Settlements: Everything You Ever Wanted to Know (PPT)

Pierringer Agreement

Mary Carter Agreement

Colleen Burn, C.S.
Burn Tucker Lachaine PC

Barry Cox, C.S.
Boghosian + Allen LLP

September 18-19, 2024

cpd

Partial Settlements:

Everything You Ever Wanted to Know

(but were afraid to ask)

COLLEEN BURN C.S. – Burn Tucker Lachaine PC

BARRY COX, C.S. – BOGHOSIAN + Allen LLP

BURN TUCKER LACHAÎNE PC/S.P.
PERSONAL INJURY LAWYERS
AVOCATS EN PRÉJUDICES CORPORELS

WHAT IS A PARTIAL SETTLEMENT?

- AN AGREEMENT REACHED IN THE COURSE OF A MULTI-PARTY ACTION;
- ARRIVED AT BETWEEN the plaintiff and SOME (BUT NOT ALL) of the defendants regarding THE APPORTIONMENT OF LIABILITY AND DAMAGES;
- Guarantees the plaintiff a minimum recovery against the settling defendant(s);
- Caps the exposure of the settling defendant(s);
- Permits the plaintiff to continue the case against the non-settling defendant(s);

COMMON TYPES OF PARTIAL SETTLEMENT

- UNDER-INSURED CO-DEFENDANT TENDERS LIMITS;
  - CAPS CO-DEFENDANT'S LIABILITY
  - WHAT HAPPENS TO CROSSCLAIM OF OTHER DEFENDANT?
  - EFFECT OF JOINT AND SEVERAL LIABILITY ON REMAINING DEFENDANT(S)?
- MARY CARTER AGREEMENT;
- PIERRINGER AGREEMENT;

Mary Carter Agreements

- *Booth v. Mary Carter Paint Co* (202 So. 2d 8 Fla. 2d dca 1967);
- 4 elements (in Ontario):
  - (i) The plaintiff receives some consideration from the settling defendant(s);
  - (ii) The exposure of the settling defendant(s) is capped;
  - (iii) The settling defendant remains a part of the action and participates in the trial;
  - (iv) Best practice: (The settling defendant(s)' obligation decreases in direct proportion to any increase in the non-settling defendant(s)' liability as decided at trial)

Pierringer Agreements

- *Pierringer v. Hoger (124) n.w. 2d 106, 21 wisc. 2d 182);*
- 3 elements:
  - (i) Plaintiff settles with defendant(s) for a specified amount;
  - (ii) Action is discontinued/dismissed against settling defendant, and statement of claim amended to make liability several (not joint and several) between settling and non-settling defendant(s);
  - (iii) Only the non-settling defendant(s) participate at trial, which deals with several liability of non-settling defendant(s) only;

Mary Carter Vs. Pierringer

- Mary Carter agreement
  - settling defendant participates at trial (consider strategic implications);
- Pierringer agreement
  - settling defendant does not participate at trial;

WHICH IS BETTER?

(It depends…)

- **Pierringer** Agreements
  - Ends the litigation for the settling defendant – settling defendants like Pierringer agreements;
  - Ability to Divide and conquer – leaves potentially unprepared defendant exposed;
  - Provides plaintiff with a war chest to pursue remaining defendant(s);
  - Leaves behind a “ghost defendant” whom the remaining defendants can blame, and whom plaintiff must sometimes even “defend”;

WHICH IS BETTER? (II)

(It depends…)

- **Mary Carter** agreements:
  - "Litigation makes strange bedfellows" – alliance between settling defendant and plaintiff – plaintiffs like Mary Carter agreements;
  - Takes away the parties' incentive not to go to trial→costs;
  - amount of settlement for contracting party must be proportionate with cost of trial (settlement of $25k then going to $100k trial makes little sense);
  - More complex to draft;

DISCLOSURE OBLIGATIONS

"The answer is obvious. The agreement must be disclosed to the parties and to the court as soon as the agreement is made. The non-contracting defendants must be advised immediately because the agreement may well have an impact on the strategy and line of cross-examination to be pursued and evidence to be led by them. The non-contracting parties must also be aware of the agreement so that they can properly assess the steps being taken from that point forward by the plaintiff and the contracting defendants. In short, procedural fairness requires immediate disclosure. Most importantly, the court must be informed immediately so that it can properly fulfil its role in controlling its process in the interests of fairness and justice to all parties"

Ferrier J., *Pettey v. Avis Car Inc.*, (1993), 13 OR (3d) 725 at 737

DISCLOSURE OBLIGATIONS (ctd)

- Significant change to litigation landscape - Converts the adversarial position between (some of) the parties into a co-operative one
- Disclosure must be ***immediate*** (not “eventually” or “when convenient”)both to the other parties ***AND*** the court;
- Substance of agreement must be disclosed – both the terms and the existence of the settlement (although not quantum – still covered by settlement privilege).
- Confidentiality clauses do not change need for immediate disclosure;
- Consequence of late/improper disclosure → generally a stay of the proceeding;
- Best practice: immediately disclose actual agreement with quantum redacted;

BUT

- *KINGDOM CONSTRUCTION V. PERMA PIPE INC.* (2024) ONCA 593
- APPEAL FROM MOTION DENYING PERMANENT STAY AGAINST NON-CONTRACTING DEFENDANTS FOR LATE DISCLOSURE OF PARTIAL SETTLEMENT (27 DAYS);
- TEST: IS THE PARTIAL SETTLEMENT ONE THAT "CHANGES THE LITIGATION LANDSCAPE"?
- CLAIMS AGAINST SETTLING DEFENDANTS IN CONTRACT
- CLAIMS AGAINST NON-SETTLING DEFENDANTS IN TORT
- MOTION JUDGE: TWO CLAIMS SEVERABLE FROM ONE ANOTHER AND COULD BE DEALT WITH SEPARATELY;
- "IMMEDIATE DISCLOSURE" – PURPOSIVE INTERPRETATION, BASED ON FACTS REASONABLE TIME AND NOT ATTEMPT TO CONCEAL SO IN THIS CASE, DISCLOSURE WAS IMMEDIATE

PITFALL: DOUBLE RECOVERY

- Example *Laudon v. Roberts* 2009 ONCA 383:
  - Plaintiff and defendant 1 enter into a **Mary Carter** for $365,000;
  - Trial proceeds, and jury awards damages of $312,021 apportioning $121,688 against defendant 2;
  - Plaintiff – seeks to recover $121,688 from of defendant 2 ***and*** keep $365,000 paid from defendant 1 under mary carter;
  - Non-settling defendant 2 – settlement funds of $365,000 should be deducted from the judgment to avoid windfall/double recovery;

DOUBLE RECOVERY (II)

- Court of appeal (para 55):

"Clearly in this case the settlement monies received are on account of the same damage for which the plaintiff continued his proceeding against Sullivan, the noncontracting defendant. The plaintiff's total damages have been assessed by a jury at $312,000 which is less than the amount he received from Roberts the contracting defendant. To permit the plaintiff to recover any amount from Sullivan would result in double-recovery to the plaintiff. I am satisfied that the law in this country is well-settled. Double recovery, save in a few narrow exceptions which have no application to the facts here, is not permitted".

- Action was dismissed against defendant no. 1 without costs (pursuant to agreement) and against defendant no. 2 with costs.

DOUBLE RECOVERY (iii)

- Best practice: Sliding scale provision:
  - In the event where the several liability of the non settling defendant plus amount payable under mary carter agreement, net of contributory negligence, exceeds the total judgement as decided at trial, the amount payable under the agreement will be calculated as follows:

Amount payable = (a) trial judgment – (b) several liability of non-settling defendant

DOUBLE RECOVERY (IV)

Using Loudon v. Roberts

(a) trial judgment: $ 312,021

(B) Several liability of non settling defendant: $121,688

Amount payable: (a) – (B)

= $312,021 - $121,688

= $190,333

Plaintiff also recovers $121,688 from non-contracting defendant, so is made whole

Plaintiff Practice Tips (**Colleen**)

- Look for opportunities for both kinds of agreements early;
- Defendants won't necessarily suggest them;
- Plaintiff clients will need much education about these options;
- In light of Laudon, Pierringer might be preferable as it guarantees a minimum outcome;
- Think creatively and work through ramifications (like how collaterals to be deducted / apportioned or subrogated claims impacted).

Defence Practice Tips (**Barry**)

- Pierringers are better, as they avoid incurring cost of trial, as well as cost of settlement;
- The best mary carters are cooked up in the days before trial;
- Pierringer – a valuable tool in the face of an intransigent co-defendant;
- Always participate in damages expert reports, especially if there is no jury;

BY-NC-ND

THANK YOU!!!!

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AVOCATS EN PRÉJUDICES CORPORELS

Court File No. CV-12-345678

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

JESSE PINKMAN

Plaintiff

-and-

WALTER WHITE and SAUL GOODMAN otherwise known as JIMMY McGILL

DRAFT

PIERRINGER AGREEMENT

WHEREAS the Plaintiff was at all material times lab assistant;

AND WHEREAS, in his Amended Statement of Claim in CV-12-345678 (the "Action"), the said Plaintiff alleges, among other things, that the he was enslaved by the Defendants, imprisoned in a subterranean superlab and required to manufacture narcotics against his will.

AND WHEREAS, the Plaintiff and the Defendant Saul Goodman a.k.a. Jimmy McGill (the "Settling Defendant") have agreed to settle the claims made by the Plaintiff against the Settling Defendants in the Action;

AND WHEREAS, the Plaintiffs and the Defendant Walter White (the "Non-Settling Defendant").have not agreed to settle the claims made against the Non-Settling Defendant in the Action;

The Plaintiffs and the Settling Defendant hereby agree as follows:

1. The Plaintiffs are to receive $20,000.00 inclusive of all claims, costs, pre-judgment interest and disbursements ("the Settlement Funds") from the Settling Defendants in full settlement of all claims against the Settling Defendants.

2. This agreement and the Settlement Funds shall not be taken as an admission of liability on the part of the Settling Defendants and is accepted in full satisfaction of the Plaintiff's causes of action, claims or demands of any kind that the Plaintiffs have made or reasonably could have made against the Settling Defendant in the Action.

3. In no event will the liability of the Settling Defendant exceed the $20,000 sum referred to in paragraph 1 of this Agreement. The Plaintiff agrees that he will not claim any amount in excess of the Settlement Funds in any circumstance and regardless of the result at trial or motion in this Action.

4. The Plaintiff and any heirs, executors, successors and assigns, hereby fully and finally agree to release and forever discharge the Settling Defendant and his agents, insurers, employees and assigns from any and all manner of actions, causes of action, suits, covenants, debts, dues, accounts, contracts, rights, claims, damages, monies, losses, indemnity, costs, interests, and injuries whatsoever, whether at law or in equity, whether presently known or unknown, as may hereafter be sustained by the Plaintiff, as a result of the events that form the subject matter of the within Action, and from any matters that were pleaded in or which were capable of having been pleaded in this Action.

5. The Settling Defendant shall not be required to pay the Plaintiff any portion of the Plaintiff's costs of the Action. The Plaintiff shall indemnify and hold harmless the Settling Defendant with respect to any costs adjudged to be payable by the Settling Defendant to the Plaintiff. The Settling Defendant will not seek payment from the Plaintiff for any costs in connection with the Action.

6. The Plaintiff shall indemnify and save harmless the Settling Defendant with respect to any costs adjudged to be payable by the Settling Defendant to the Plaintiff.

DRAFT

7. The Plaintiff shall indemnify and save harmless the Settling Defendant with respect to any and all liability the Settling Defendant might be found to have with the Non-Settling Defendant for contribution and indemnity, and any and all manner of actions, causes of action, suits, covenants, debts, dues, accounts, contracts, rights, claims, damages, monies, losses, indemnity, costs, interests, and injuries whatsoever, whether at law or in equity, whether presently known or unknown, as may hereafter be sustained by the Non-Settling Defendant and in connection with any and all matters arising from, or pertaining to this Action.

8. The Plaintiff shall hold harmless the Settling Defendant in respect of the crossclaims by the Non-Settling Defendant. In effect, this means that neither the Settling Defendant, nor the Non-Settling Defendant shall be exposed to joint and several liability in the within action. As a result, the Non-Settling Defendant is not exposed to joint and several liability but only to several liability.

9. The Plaintiff and the Settling Defendant acknowledge that the Settling Defendant may be found liable to pay the Non-Settling Defendant's costs of any crossclaims. The liability, if any, for those costs will be borne solely by the Plaintiff.

10. The Settling Defendant seek no contribution and/or indemnity from the Non Settling Defendant.

11. In advance of trial, the Plaintiff will amend the Statement of Claim to ensure the Non-Settling Defendant will be accountable for its several liability only and that the Court will have full authority to adjudicate upon the apportionment of liability thereunder.

12. The Plaintiff will not claim from the Settling Defendant for any portion of liability that the Court may determine as attributable to the Settling Defendant. The Plaintiff shall indemnify and save harmless the Settling Defendant with respect to any damages adjudged to be payable by the Settling Defendant to the Plaintiff.

13. The lawyers for the Non-Settling Defendant will be advised of the complete details of this agreement (omitting the monetary sums) forthwith, and a copy of this agreement (omitting the monetary sums) will be filed with the Registrar at the opening of trial, to be opened at the discretion of the Court and a full copy of this agreement will be filed separately with the Registrar at the opening of trial to be opened at the discretion of the Court, following the Court's determination of the liability and damages issues at trial or at such other time as determined by the Court.

DRAFT

14. The Settling Defendant agrees to reasonably co-operate with the Plaintiff by making their relevant documents and witnesses available for the purpose of the Plaintiff's action against the Non-Settling Defendant, if requested.

15. The parties hereto acknowledge and agree that they have each obtained independent legal advice with respect to this Agreement, or have had the opportunity to do so, before executing same and that each has signed this Agreement without duress, coercion or undue influence and fully understanding the nature and consequences of same.

16. The parties hereto agree that this Agreement may be executed in counterparts and exchanged by facsimile transmission or email (pdf), each copy of which shall be deemed to be an original, and such separate counterparts shall together constitute one and the same instrument.

17. This Agreement shall be governed by the laws of the Province of Ontario and the laws of Canada applicable therein.

18. The Plaintiff agrees to an Order dismissing the Action and all crossclaims without costs as against the Settling Defendant.

19. The Plaintiff is at liberty to continue all claims as against the Non-Settling Defendant.

Dated at Toronto, Ontario this day of , 2024

DRAFT

BOGHOSIAN + ALLEN LLP
Barry Cox
Lawyers for the Defendant,
Saul Goodman f.k.a. Jimmy McGill

Dated at Toronto, Ontario this day of , 2024

BURN TUCKER LACHAINE
Colleen Burn
Lawyers for the Plaintiff

DRAFT

Court File No. CV-24-7654321

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

LUKE SKYWALKER

Plaintiff

-and-

DARTH VADER formerly known as ANAKIN SKYWALKER and EMPEROR PALPATINE

Defendants

MARY CARTER AGREEMENT

WHEREAS the Plaintiff's hand was hacked off in the course of a lightsaber battle at Cloud City,

AND WHEREAS the Plaintiff has commenced Action no. CV-24-7654321 ("the Action") against the Defendants for damages in respect of personal injuries as a result of the above-referenced injuries sustained in the above-referenced lightsaber battle,

THE PLAINTIFF AND THE DEFENDANT DARTH VADER (hereinafter "Vader") hereby agree as follows:

1. Vader will pay the Plaintiff the sum of $750,000 for damages and interest, which amount shall be paid to the Plaintiff forthwith;

2. Counsel for the Plaintiff hereby undertakes to hold any and all amounts payable under paragraph 1 of this Agreement in trust until the final amount payable in the Action with the Defendant Emperor Palpatine ("the Non-Contracting Defendant") or by way of Judgment.

3. Vader will pay to the Plaintiff, regardless of the outcome of the trial of the Action, the sum of $75,000 for legal fees (plus HST thereon) and the sum of $50,000 for disbursements (inclusive of HST) for a total of $134,750 in respect of costs. The said funds shall be paid to the Plaintiff forthwith.

4. The Plaintiff shall not recover from Vader any amount in excess of the monies set out in paragraphs 1 and 3 of this Agreement, or any amount as amended pursuant to paragraphs 6 or 7 of this Agreement, nor is the Plaintiff entitled to receive from Vader any amount in excess of the monies set out in paragraphs 1 and 3 of this Agreement, or any amount as amended pursuant to paragraphs 6 or 7 of this Agreement, in any circumstances, regardless of the result at trial of the main action or crossclaims herein.

5. The Plaintiff shall indemnify and hold Vader harmless for any judgment of the crossclaim for contribution or indemnity in favour of the non-contracting Defendant, for damages and interest owing to the Plaintiff.

6. In the event hat the sum of the several liability of the non-contracting Defendant plus the amount payable pursuant to paragraph 1 of this Agreement exceeds the total Judgment for all damages and interest as determined by a Judge or Jury in the Action, the amount payable under this Agreement shall be calculated as follows:

MCAA = TJ – SLNC

Whereas:

"TJ" means the total Judgment awarded to the Plaintiff, inclusive of prejudgement interest and net of any contributory negligence, but including the liability of Vader and the non-contracting Defendant;

"SLNC" means the several liability of the non-contracting Defendant;

"MCAA" means the amount payable under this Agreement as amended by this section;

And any excess funds held in trust by counsel for the Plaintiff shall forthwith be rebated to Vader.

7. If the Plaintiff settles his claim against the non-contracting Defendant for an amount less than $500,000 plus costs, then the amount payable under this Agreement shall be reduced to 50% of the difference between $500,000 and the amount of such settlement and any excess funds held in trust by counsel for the Plaintiff shall forthwith be rebated to Vader.

8. The Plaintiff agrees to an Order dismissing the action without costs against Vader. The Order shall not be taken out until the final amount payable under this Agreement is determined following resolution of the action against the non-contracting Defendant by way of settlement or Judgment.

9. Following resolution of the action against the non-contracting Defendant by way of settlement or Judgment, the Plaintiff will execute a release to Vader in a form acceptable to counsel.

10. Following the execution of this Agreement, Vader shall not argue, cross-examine or commence any Jedi Mind Tricks of any witnesses at trial, whether called by the Plaintiff or the non-contracting Defendant, or call any evidence at trial to contest the damages claimed by the Plaintiff.

11. Counsel for Vader in his written and oral submissions at trial, including opening and closing addresses, shall make no submissions with respect to the damages claimed by the Plaintiff.

12. The Plaintiff and Vader acknowledge that Vader may be found liable to pay the non-contracting Defendant his costs of the Crossclaim. The liability, if any, for these costs shall be borne solely by Vader.

13. Vader shall not be required to pay to the Plaintiff any portion of the Plaintiff's costs save and except the amount(s) set forth in paragraph 3 of this Agreement. The Plaintiff shall indemnify and save harmless Vader with respect to any costs adjudged to be payable by Vader to the Plaintiff.

14. Vader shall not seek payment from the Plaintiff in respect of any costs.

15. The Plaintiff and Vader agree to jointly advocate that the Plaintiff's trial costs ought to be solely paid by the non-contracting Defendant.

16. Vader shall attend trial on or before December 31, 2024 to give evidence. Counsel for Vader shall be present for closing addresses.

17. The Plaintiff acknowledges that subject to the Court's discretion, counsel for Vader shall absent themselves from that part of the trial concerning the Plaintiff's alleged damages.

18. Counsel for all parties and the Trial Judge shall be advised of the complete details of this Agreement, omitting the monetary terms, and a sealed copy of this Agreement (including the monetary terms) shall be filed with the Registrar at the opening of trial following execution of this Agreement, to be opened at the discretion of the Court following the Court's determination of the liability and damages issues at trial.

Dated this 19th day of September 2024

_____
Lawyers for the Plaintiff

_____
Lawyers for the Defendant
Darth Vader

Law Society of Ontario | Barreau de l'Ontario

TAB 15A

7th Motor Vehicle Litigation Summit

Trying a Case Under Rule 76 (PPT)

Robert Becker
Gowland, Boriss Injury Lawyers

Gillian Mays
Aviva Trial Lawyers

Trying a Case Under Rule 76: The Defendant's Perspective

Gillian Mays
Aviva Trial Lawyers

September 18-19, 2024

cpd

TRYING A CASE UNDER RULE 76

Presented by:
Robert Becker, Gowland Borris
Gillian Mays, Aviva Trial Lawyers
7th Motor Vehicle Litigation Summit – September 19, 2024

Introduction

- Practical tips and considerations for trying a case under Rule 76, from the pre-trial stage

- Overall emphasis on streamlined and succinct advocacy

Prior to Pre-Trial

- List of Witnesses
  - A party may not call a person as a witness whose name has not been disclosed in an Affidavit of Documents (r. 76.03(3))

- Each party required to pay for productions up front
  - *Rheaume v. Foster*, 2021 ONSC 5804

Pre-Trial Stage

- Experts
  - Reports to be served 90 days before pre-trial conference as in ordinary procedure

- Trial Management Plan
  - Trial management plan to be agreed upon 30 days before trial, and filed with other materials 5 days before
  - Division of time

Affidavits

- Timetable for exchange of affidavits
  - As agreed upon or ordered at pre-trial
  - Staggered, with enough time to decide if you will cross-examine them (notice due 10 days before trial)
- How to draft affidavits
  - Exhibits
- Pre-trial motions to strike any objectionable evidence or exhibits

Prior to Trial

- 10 days before trial – the party who set the action down shall file a trial record including the affidavits of all parties
- 10 days before trial – notice of intention to cross-examine witnesses
- Joint Document Briefs
- Expect a further pre-trial conference with the trial judge to address issues and timing

Trial

- Opening statements
- Plaintiff witnesses
  - introduction, cross-examination, re-examination
- Defence witnesses
  - Introduction, cross-examination, re-examination

Trial – continued

- Closing arguments
  - Plaintiff first
  - Threshold motion within closing arguments
  - Written submissions likely to follow

- Other trial considerations
  - Be adept at navigating Caselines and have page references ready

Costs and disbursements

- Incentive for parties to be proportional in their incurring of disbursements

- *Ingratta v. McDonald*, 2024 ONSC 1349
  - The maximum for costs and disbursements will be reserved for cases of higher complexity, or situations where an award of substantial indemnity costs is clearly warranted

Final considerations

- Rule 76 trials require early strategic planning and preparation well before trial
- Cooperation between counsel, or judicial mandate, will usually be required to complete the evidence in five days

Questions?

TRYING A CASE UNDER RULE 76:

THE DEFENDANT'S PERSPECTIVE

Gillian Mays, Aviva Trial Lawyers[1]

Introduction

Personal injury actions filed under Rule 76 are on the rise and present unique considerations for trial advocacy. This paper focuses on practical tips for trying a case under simplified procedure rules.

Pre-Trial Conferences

The trial management plan is a unique step under Rule 76 cases and requires counsel to contemplate a comprehensive schedule for trial. It must be agreed upon 30 days before, and filed 5 days before, the pre-trial conference.[2] If the parties are unable to agree, each must file their own version and the pre-trial conference judge will make an order. The approved version should be filed with the trial record.[3]

Cross-examinations in simplified procedure trials generally take less time than I expected. There is no unexpected evidence in examination-in-chief to address; the affidavit evidence has been adduced well before cross-examination begins. Counsel have ideally drafted concise affidavits that contain only necessary evidence, further streamlining the cross-examination.

[1] The views expressed in this paper are solely those of the writer and do not reflect the views of Aviva Trial Lawyers or Aviva Insurance Company of Canada, its affiliated companies, employees and management.
[2] Rule 76.10(2)
[3] Rule 76.11.(4)(d)

The trial management form also contemplates time for “confirming of affidavit evidence”. This time is for the lawyer calling the witness to introduce the witness, establish the qualifications of an expert witness, and confirm the swearing of the affidavit. This time should not be used for a short examination-in-chief.

The pre-trial conference judge shall fix the date for exchanging affidavits.[4] Counsel representing the defendant should request a staggered timeline, with the plaintiff delivering their affidavits first. While the broad concepts of the defence affidavit evidence should be known, I have seen instances where some surprise or deficiency in the plaintiff’s affidavits must be addressed in the defendant’s affidavits.

A further consideration is whether counsel for the defendant wishes to seek an order at the pre-trial conference that affidavits must not be shared between witnesses. In jury trials, especially those where the credibility of the plaintiff is at issue, counsel often seek an order excluding witnesses, other than expert witnesses, from the trial until the completion of their evidence. Such an order may be difficult to enforce with affidavit evidence. Counsel may still seek an order, at the beginning of a simplified procedure trial, to exclude witnesses from the trial until they have finished testifying.

Affidavit Evidence

Drafting affidavit evidence for a simplified procedure trial is a balance between establishing all the facts the case requires and insulating the witness from damaging cross-examination.

[4] Rule 76.10(5)(b)

One routine piece of trial advice, which I find especially relevant for a Rule 76 trial, is to begin with the closing arguments. Counsel should start with what they intend to argue at the conclusion of the trial, and list all the facts that they will need to establish to make those arguments. Each fact should be in an affidavit or obtainable through cross-examination.

Counsel should prepare affidavits that are concise and persuasive. I plan on having at least two to three meetings with each witness before they swear their affidavit. The first meeting is to get their statement before drafting their affidavit. The second and potentially third meeting is to review the draft affidavit with them and address any concerns. In my opinion, persuasive affidavits are clear, organized, and reflect the voice of the witness.

Counsel should take care to include only relevant and necessary evidence in each affidavit. Unnecessary evidence will open the witness up to further, potentially damaging, cross-examination.

Expert affidavits may be lengthier than simply appending their report(s) and Acknowledgment of Expert's Duty. Expert affidavits may address any new evidence (e.g. updated medical records), expand on their qualifications, correct any typographical errors, or respond to new expert opinion evidence.

Another unique issue with affidavit evidence is that almost anything can be put in an affidavit and read by the trial judge before opposing counsel can object. Counsel should, as with any trial, take care that only proper and admissible evidence be put before the trial of fact. If objectionable evidence is put in an affidavit, opposing counsel

should seek to have that evidence struck from the affidavit. Objectionable affidavit evidence can include hearsay, speculation, irrelevant evidence, vague evidence, prejudicial evidence, or improper opinion evidence.

I would address such evidence by advising opposing counsel of the intended objection; if they refuse to strike it from the affidavit, I would serve motion materials ahead of the trial and be prepared to argue it on the first day.

Openings and Closings

The defendant may choose to present their opening statement immediately following the plaintiff's opening statement, and it is much more common to do so in judge-alone trials. With Rule 76 trials taking a maximum of five days, there is less concern that the trier of fact will forget the defendant's theory after the plaintiff closes their case. Unlike in jury trials, the trial judge in a Rule 76 trial may have read the evidence-in-chief and have a good idea of who the witnesses are and what the trial is about, all before counsel begins their opening statements.

The acceptable scope of an opening statement is broader in a judge-alone trial. Counsel may refer to evidence and the law in opening statements, taking care not to tread into argument. Counsel should avoid referring to any evidence that they know or suspect will garner an objection.

After the defendant's opening statement and perhaps motions on the admissibility of evidence, the next step in a Rule 76 trial will be the defendant's cross-examination of the plaintiff (or the plaintiff's first witness). Counsel may wish to make a very brief opening and leave major inconsistencies or themes for cross-examination.

Unlike in jury trials, the defendant will deliver their closing arguments after the plaintiff. Counsel should expect questions from the trial judge and be prepared to jump ahead in submissions. Counsel should also be prepared to file written submissions.

Cross-Examination

In Rule 76 trials, the defendant gets the benefit of starting the first day of trial in cross-examination, and perhaps setting the tone of the trial. Counsel for the defendant should carefully plan their cross-examination to deliver maximum impact.

The scope of cross-examination is not limited to the affidavit of the witness, but can address any issues that are relevant to the trial. Cross-examination can refer to any affidavit evidence or exhibit before the court. If a relevant document has not been appended to an affidavit, counsel may seek to mark it an exhibit in the ordinary course.

Concluding Thoughts

Rule 76 trials are intended to be streamlined and proportional to the issues at hand. Effective trials under simplified procedure rules require early planning and strategy from all parties; much of the work of trial must be completed in the months before the first day of trial.

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TAB 15B

7th Motor Vehicle Litigation Summit

Trying a Case Under Rule 76 – The Simplified Rules of Procedure – The Plaintiff's Perspective

Form 76C

Form 76D

Citation: Maxine Lidia Reid v. 1865088 Ontario Limited 2024 ONSC 4296

Robert Becker
Gowland, Boriss Injury Lawyers

September 18-19, 2024

cpd

TRYING A CASE UNDER RULE 76 – THE SIMPLIFIED RULES OF PROCEDURE – THE PLAINTIFF'S PERSPECTIVE

By: Robert W. Becker

I. INTRODUCTION

1. In *Hyrniak v. Mauldin*, 2014 SCC 7, a unanimous landmark decision dealing with Summary Judgment, the Supreme Court of Canada made the following observations:

> "[1] Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.
>
> [2] Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just."

2. That case goes on to explain why Summary Judgment Motions are one such option. The Simplified Rules of Procedure are another attempt to bring proportionality to the judicial process and ensure greater access to justice.

3. To be clear, it is not suggested that the Simplified Rules of Procedure, Rule 76 of the Ontario *Rules of Civil Procedure* has provided a solution that is ideally tailored to smaller personal injury cases, but it does provide an option in the appropriate case to try a personal injury case, including motor vehicle accident claims, in a faster, more streamlined, and more cost effective manner. The theme of this paper, however, is that, to maximize the effectiveness of this procedure, takes real planning and organization and a realistic assessment of the case at every stage of the proceeding.

II. CASE SELECTION

4. While the focus of this paper will be on trial preparation and trial process, some consideration should be given what should be considered from the time when the client first retains counsel through to the time when the Statement of Claim is issued. It should be decided in that time whether this is an appropriate case to be brought under the Simplified Rules of Procedure. The client's expectations must be managed from the outset.

5. Obviously, the biggest factor as to whether a case is an appropriate one to be brought under the Simplified Rules of Procedure is a realistic assessment of damages and liability, and, if applicable, issues like the prospects of surmounting the verbal threshold and achieving an award significantly in excess of the deductible in a motor vehicle accident case. If the damage award to be awarded by a Judge alone is likely going to be $200,000.00 or less, using the Simplified Rules of Procedure is appropriate, but, if there is some potential for an award above $200,000.00, it is important to ensure that the client is warned well in advance that the award will be capped at $200,000.00 plus pre-judgment interest. A Defendant is entitled to object to the action proceeding under the Simplified Rules of Procedure as not complying with the limitation on damages set out in Rule 76.02(1) if the claim is for more than $200,000.00 plus interest and costs. That puts the Plaintiff to the election of either continuing under the ordinary Rules or abandoning claims in excess of $200,000.00: Rule 76.02(5).

6. In our experience, it is often worth the risk in personal injury cases that can potentially be assessed by a Judge alone at $200,000.00 or somewhat more when one is dealing with "invisible injuries" like chronic pain where the alternative under the ordinary Rules is the uncertainty and risk of a two to three week Jury trial, and there is little upside above $200,000.00 usually due to limited loss of income or future care costs. Juries are not permitted under the Simplified Rules of Procedure.

7. In our experience, we have recommended actions for personal injuries be brought, when the Plaintiff is seriously injured, but a retiree, or on the brink of retirement. Other promising scenarios could include severe scarring cases with little loss of income and modest care costs. The working disabled who have a track record of earning the maximum allowed ($1,000.00 per month and 25% of anything above $1,000.00 now being exempt under ODSP) present another potential category where the Simplified Rules of Procedure should be at least considered. There are bound to be many other cases on their facts that make utilizing Rule 76 a viable option.

8. The second limiting factors that should be considered right from the outset are the limits on costs and disbursement awards. Those limits are set out in Rule 76.12.1(1), which provide that costs shall not exceed $50,000.00 plus HST, nor disbursements exceed $25,000.00 plus HST. This cap can be a real disincentive to commencing an action under the Simplified Rules of Procedure where it is anticipated that a number of forensic experts will have to be retained to provide opinions, respond to defence opinions, and be available for cross-examination at trial. Moreover, some types of experts tend to be more expensive than others. For example, in a brain injury case, if one felt it would be necessary to retain an independent neurologist, neuropsychologist, and Certified Life Care Planner, and expect to need supplementary reports from them updating their opinions before trial, as well as addressing defence opinions, and then be available for trial, there would seem to be little chance of holding disbursements below $25,000.00. Expert fees might well greatly exceed that limit. Moreover, if one has, for example, chronic pain in addition to a brain injury, the number and cost of potential experts that would have to be retained and paid could explode. It is a difficult assessment whether it is worth bringing a case of that sort under the Simplified Rules of Procedure (mostly to

avoid being served a Jury Notice), but, in the appropriate case, if the likely ultimate award is still going to be about $200,000.00 or less, and counsel is prepared to do the considerable work and run the risk necessary to bring such a case, it may be the better option than either risking ordinary Rules or declining the case entirely.

9. Clients should be made aware that any disbursements in excess of the $25,000.00 cap must be paid and will reduce their net recovery even before one takes into account calculation of a contingency fee or other fee arrangement. Further, the impact to the client, if any, of the limitation of the cap on costs at $50,000.00 should be dealt with at an early stage, and will depend on the fee arrangement being used. Not only counsel, but clients, must be willing to run the risks that arise from limited reimbursement.

10. Further, counsel should keep in mind the reimbursement limitations when considering if there are tactics that can be utilized to build the case while limiting the risk that disbursements will exceed the cap. For example, the once common, but now relatively rarely used, practice of obtaining a narrative report from a sympathetic and engaged family doctor may add significantly to the case (without necessarily eliminating the need for forensic experts, however) at relatively low cost. The family doctor's narrative report can be included in an Affidavit of that doctor's evidence together with the doctor's clinical notes and records and be put before the Court, and obviously would be more persuasive than expecting a Trial Judge to sift through clinical notes and records to put the Plaintiff's story together. Care must, however, be taken to ensure that the report does not go beyond the permitted scope of a participant expert, or some or all of the report may be struck for non-compliance with Rule 53.03. *Westerhof v. Gee Estate*, 2015 ONCA 206 has ruled that participating experts may give expert evidence, without complying with Rule 53.03 where the opinion is to be given based on the witness's observations and participation in the events in issue and the witness formed the opinion as part of the ordinary exercise of their skill, knowledge, training, and experience while observing or participating in such events. This will usually mean such an expert can opine on issues including diagnosis, prognosis, and causation. The law would still seem to be unsettled as to exactly how and when a participant expert can also provide an opinion that goes beyond these limitations and is properly within the purview of a Rule 53.03 expert.

11. A final preliminary consideration is whether you have a case that is so strong that you can be confident that it will be successful on a Summary Judgment Motion. While Rule 76 provides for summary trials, that is not the same thing as a Summary Judgment Motion. The caselaw has ruled that Summary Judgment Motions are available under the Simplified Rules of Procedure, but generally Courts have been more reluctant to grant Summary Judgment for actions commenced under Rule 76 compared to those under the ordinary Rules due to concerns over fairness because no cross-examination is permitted on Affidavits filed in support of Motions under Rule 76. See, for example, *Singh v. Concept Plastics Limited*, 2015 ONCA 815. There are, however, cost risks by not utilizing the Simplified Rules of Procedure from the outset, which can be minimized by bringing the Motion right after the close of pleadings: see Rule 76.13.

12. Finally, in theory, Rule 76 provides quite a tight timeline for the action to proceed to Pre-Trial Conference and trial. The practical reality is that the backlog in any given judicial region will determine when a trial is held far more than the timelines set out in the Rules. It is probably fair to observe, however, that summary trials of five days or less can be fitted into a trial schedule far more easily than two and three-week Jury trials, and can expect to be heard significantly sooner.

III. EARLY DISCLOSURE

A. AFFIDAVIT OF DOCUMENTS

13. Both sides are obliged to deliver an Affidavit of Documents within 10 days after the close of pleadings, and the Rule specifically provides that not only shall that party, at its own expense, serve on every party that Affidavit of Documents, but also copies of the documents referred to in Schedule 'A' (the latter being an obligation not expressly provided in the ordinary Rules).

14. The Affidavit of Documents under Rule 76 is different from one under the ordinary Rules in that there is a Schedule 'D' which is a list of the names and addresses of all potential witnesses, or, more particularly, "persons who might reasonably be expected to have knowledge of the matters in issue in the action". Under Rule 76.03(3), failure to disclose such a person prohibits the party from calling that person as a witness unless the Court orders otherwise.

15. In our experience, it is important that the Affidavit of Documents be updated before trial, including any change to the list of potential witnesses. If the deadline for updating has not been agreed between counsel, or even if it has, it may be the subject matter of an Order given on the Pre-Trial Conference, about which more will be said later.

B. ORAL DISCOVERY

16. Oral discovery of limited duration is permitted under Rule 76. No party may exceed a total of three hours of examination regardless of the number of parties or other persons examined. Written discovery is not permitted, nor is pre-trial cross-examination on an Affidavit. Otherwise, the same procedures as are utilized as in the ordinary Rules prevail.

C. EXPERT REPORTS

17. The rules regarding expert reports, particularly Rule 53.03, and under the *Evidence Act*, apply. The big difference is that, for trial, it is specifically provided that the expert's report shall be appended to an Affidavit of the expert in which the expert adopts the report for the purposes of giving evidence in the action. The report cannot simply be filed. This will be discussed more later.

D. EARLY SETTLEMENT DISCUSSIONS

18. Under Rule 76.08, within 60 days after the filing of the first Statement of Defence, the parties shall, in a meeting or telephone call, consider whether all relevant documents have been disclosed (or presumably make requests for additional ones), but also consider whether settlement of any or all of the issues is possible. The purpose of this rule is clearly to get the parties talking to each other as soon as possible about both evidentiary matters and procedures and about the prospects of settlement.

E. SETTING DOWN THE ACTION

19. Under Rule 76.09, and, in theory, within 180 days after the first Statement of Defence, any party may set the action down, which is done by delivering a Notice of Readiness for Pre-Trial Conference (Form 76C – a copy of which is attached as **Schedule 'A'**), not a Trial Record. The Trial Record, the contents of which are specifically enumerated in Rule 76.11, is not filed until close to trial, that is up to 10 days before the date fixed for trial. That Trial Record is to contain a table of contents, and, set out in consecutively numbered pages, not only the pleadings and demand or order for particulars and response, but also any Order respecting the trial, including a copy of the Trial Management Plan approved by the Pre-Trial Conference Judge, and also a copy of the evidence, that is of the Affidavits of the witnesses, including experts. This Trial Record must be certified.

IV. PRE-TRIAL CONFERENCE PREPARATION AND UP UNTIL TRIAL

20. As the Pre-Trial Conference date approaches, there is a renewed emphasis on planning and organization and an expectation of co-operation and communication between Plaintiff and Defence counsel. It is one of the most important steps in the whole procedure.

A. PROPOSED TRIAL MANAGEMENT PLAN

21. At least 30 days before the Pre-Trial Conference, the parties are supposed to agree, to the extent agreement is possible, on a proposed Trial Management Plan. If agreement is not possible, presumably each side files its own Plan, flagging the areas of disagreement for a ruling. This plan is to include:

    (a) A list of every witness, including experts, whose evidence the party tends to adduce at trial (which evidence in chief can be adduced by Affidavit only);

    (b) A division of time between the parties, the total of which shall not exceed five days. It is to be specific in that it sets out the allotted time for each party for:

        (i) Opening statements;

(ii) The presentation of evidence in chief by Affidavit and under Rule 31.11 (use of an Examination for Discovery at trial i.e. reading in portions of the transcript);

(iii) A cross-examination of deponents;

(iv) Re-examination of any deponents who were cross-examined;

(v) Oral argument.

22. It is obvious that the provision that this shall be agreed 30 days in advance is to make sure the parties get moving on this and try to work out as much of the proposed trial plan as possible. If there are going to be disagreements, such as the allocation of time, that disagreement at least will be crystallized for the Pre-Trial Judge to resolve. The proposed Trial Management Plan does not have to be filed with the Court until at least five days before the Pre-Trial Conference, and the Pre-Trial Conference brief is to include the following:

(a) A copy of the proposed Trial Management Plan;

(b) A copy of the party's Affidavit of Documents;

(c) Copies of the documents relied on for the party's claim or defence;

(d) A copy of any expert Affidavit other than supplementary expert Affidavit – note it is contemplated that expert Affidavits will be ready for the Pre-Trial Conference, but, if not, provision should be made as for when they will be available and the reports themselves made available;

(e) Any other material necessary for the Pre-Trial Conference.

23. There is also to be a statement of not more than three pages setting out the issues and the party's position with respect to them.

24. Also, a form, a Trial Management Checklist, Form 76D, is to be provided for completion by the Judge. A copy of Form 76D is attached as **Schedule 'B'**.

B. PRE-TRIAL CONFERENCE

25. On the Pre-Trial Conference, as well as exploring the possibility of settlement using the Trial Management Checklist, the Judge will:

(a) Fix the number of witnesses whose evidence each party may adduce (subject to the Trial Judge's ruling on experts if more than three are sought to be called);

(b) Fix dates for the delivery of any witness Affidavits, including any outstanding expert Affidavits;

(c) Approve the party's proposed Trial Management Plan with any changes to the order or time of presentation, or any other changes that the Pre-Trial Conference Judge may specify, subject to the requirement that the trial not exceed five days;

(d) Make such other Order as the Judge considers necessary or advisable.

26. It might be noted that the form asks whether there are any admissions, whether there will be a Document Brief, which is always a good idea, whether a Request to Admit will be delivered and the timetable for same, and whether any further expert reports are anticipated, or any amendments to the pleadings contemplated. Further there is an inquiry as to whether each party will be delivering a Factum of Law, which we submit most Pre-Trial and Trial Judges would encourage.

27. At this stage, real consideration must be given by counsel to the specifics of the evidence that will be incorporated into Affidavit form and the other matters that will help ensure an orderly trial.

28. For example, not only should a Document Brief, preferably a Joint Document Brief, be prepared and submitted, there must be clear agreement as to purposes for which the documents are being filed, just as if this were a trial under the ordinary Rules. See decisions of Justice Lauwers in both *Bruno v. Dacosta*, 2020 ONCA 602 and *Girao v. Cunningham*, 2020 ONCA 260.

29. Requests to Admit are potentially useful, especially for a Plaintiff who wants to file a number of receipts, for example, for personal out-of-pocket expenses, or records of reimbursement by way of collateral benefits. OHIP Payment Summaries in non-motor vehicle accident cases can also often be dealt with in this fashion. A Factum of Law would be very useful for most Trial Judges as it will set out in advance the basic parameters of what is being claimed, the law concerning liability issues, including contributory negligence in similar cases, the law surrounding issues that may be critical in individual cases, such as causation or "thin skull versus crumbling skull", and precedents for assessment of similar injuries to the extent they are available. Any Factum, we submit, should be succinct and deal directly with the issues the Trial Judge will be asked to decide. If final calculations for care or housekeeping costs are not self-evident, use the Factum to set out the calculation of what is being claimed and refer to any supporting evidence, documents, and law. From the Plaintiff's perspective, it may help set and control the agenda for the trial.

30. There are several issues that arise that must be dealt with by the Trial Management Judge which have not been fully addressed by caselaw. They include:

(a) Timing of exchange of Affidavits. The big issue that is left undetermined by the Rules or caselaw to date is whether the exchange of Affidavits between Plaintiffs

and Defendants should be simultaneous or near simultaneous, or whether the Plaintiff should be forced to deliver their Affidavits a significant time before the Defendant delivers theirs. There are arguments for both sides. For the Defence, one can argue that, since they are responding, the staggered disclosure would be analogous to the time difference for delivering pleadings or for delivering a responding Affidavit in an Application (although all such Application Affidavits must be delivered before cross-examination takes place). The argument for the Plaintiff for simultaneous or near simultaneous exchange is that this best mirrors what would happen in a five-day live trial when there would be little opportunity to ponder the evidence of a Plaintiff witness and tailor evidence to respond. In an action, including one under the Simplified Rules of Procedure, the Defence already has disclosure in the form of the Affidavit of Documents, productions, and live discovery, so should not be at a disadvantage in preparing and filing their evidence simultaneously. The potential for mischief by tailoring evidence in the Defence Affidavits by directly responding as one does in a Statement of Defence, or even in a Responding Affidavit in a Motion or Application, could prove counterproductive in some cases. However, the timing of exchange may vary from case to case depending on the individual circumstances;

(b) Disagreement between counsel as to the time to be allowed for cross-examination of individual witnesses or the overall timetable: this Trial Management Plan is the opportunity for the parties to have a Judge settle such issues where they cannot be agreed. If there has not been good co-operation between counsel for any reason, including simply not having time to direct one's mind to these pre-trial issues, they can and should be dealt with conclusively in the trial management part of the Pre-Trial Conference by the Judge (subject only to the Trial Judge's ultimate discretion). Witness lists should be finalized at this stage (subject only to any minor variations as counsel may agree between themselves and the Trial Judge permits). It is unclear as to how successful these trial management meetings will be in terms of actually stipulating order and timing of witnesses and other changes given the fact that one is typically dealing with busy physicians in personal injury cases, which often leads to some variations in witness order even after the Pre-Trial Conference. When a case is just placed on a list for a sittings rather than being set to commence on a specific date, it is often difficult to accommodate expert witness's schedules when one does not know precisely when the trial will start i.e. what day of the week;

(c) Other orders: since all of the evidence in chief is going in by way of Affidavit, if either side wants what would be tantamount to an Order excluding witnesses, which, in this case, would be an Order that the Affidavits of the witnesses not be shown to each other on either side of the case, or, if only the experts are allowed to look at each other's Affidavits, the precise scope of such permitted disclosure should be ordered at this time if it is to be of any effect.

C. AFFIDAVITS OF SPECIFIC WITNESSES

AFFIDAVIT OF THE PLAINTIFF

31. Great care should be taken in drafting the Plaintiff's own Affidavit. As with all lay witnesses' Affidavits, it must refrain from being, or appearing to be, the product of the lawyer. All common lawyer's words should be eliminated, such as "prior" and "subsequent". Over time, the lawyer has undoubtedly met with the client and discussed the matters that are the subject matter of the Affidavit a number of times, prepared memoranda, and probably received privileged notes and memoranda from the client, and also reviewed the discovery transcript, a copy of which should be given to the Plaintiff and reviewed by the lawyer to ensure consistency between the Affidavit and the transcript, and also consistency between the Plaintiff's evidence and what they are alleged to have said in medical reports or records, unless the discrepancy is itself an issue. Several meetings or email drafts may be needed to finalize what is bound to be a fairly long Affidavit. Without attempting to come up with a comprehensive checklist of what should be in a Plaintiff's Affidavit, the following matters might be addressed in an Affidavit:

    (a) Personal background. Who is this person? Where are they in their life, still young and active or nearing retirement? With what family and friends and enjoying what activities before the accident? Generally, the purpose is to humanize the Plaintiff, and introduce them to the Court as an individual;

    (b) A description of the Plaintiff's residence and whether this has changed over time, their ability to care for same before and after being injured;

    (c) If pertinent, a description of the Plaintiff's employment history and income, at least if there is a loss of income claim;

    (d) A description of the incident that caused the injury in some detail, anticipating arguments, such as contributory negligence and trying to defuse same. If photographs are available, make them exhibits;

    (e) The immediate aftermath of the injury in terms of symptoms, treatment, etcetera;

    (f) The immediate aftermath of the injury – to whom it was reported, when, what discussions took place, if any, with the Defendant or its representatives or authorities;

    (g) A summary of the injuries, both initially and over time, and those that currently impact their life, and whether any developed later, including psychological ones like depression arising from coping with disability;

(h) A discussion of pre-existing health, especially if this is potentially important, with a view to defusing any arguments, and particularly the impact of the pre-existing conditions on function and health;

(i) The impact of the injuries on the Plaintiff's life and lifestyle and activities of daily living and daily functioning, perhaps stressing a before and after injury comparison;

(j) A summary of the treatment with a view to summarizing at least what has been attempted by way of treatment, what has helped, what has not, whether the effect is in improving symptoms or only managing them, and what, if any, treatments the Plaintiff still wishes to try, and any reasons they have not done so to date;

(k) Any miscellaneous issues that should be addressed, such as unusual circumstances in the defence medical examinations or these being of only a short duration, or what surveillance may have shown, or failed to show;

(l) Loss of income: If there is a loss of income, a description of pre-accident employment and attempts to return to work, and, if possible, a calculation of the actual losses being claimed, past, and whether these project into the future;

(m) Out-of-pocket expenses – do a list (which the Plaintiff can adopt) of actual invoices for out-of-pocket expenses incurred to date and a calculation of these – again, these are notoriously difficult to cross-examine about, at least thoroughly;

(n) Explain any collateral benefits received, or available, and how these affect the calculations of expenses or losses;

(o) Housekeeping and home assistance. A description of any impairment that is alleged so as to be coordinated with whatever expert evidence is being called on this issue, such as an Occupational Therapist's evidence;

(p) In a non-MVA case, perhaps include OHIP's subrogated claim – or procure a short Affidavit from an OHIP representative outlining these claims – which also should be addressed in the Request to Admit;

(q) Any other issues or experiences relevant to the individual case.

Add exhibits as appropriate to explain, but it is likely counterproductive and potentially overwhelming to the Judge to attach absolutely every medical note or record to a Plaintiff's Affidavit. This would not even seem to be the best, or even a permissible, way to introduce medical records or notes.

AFFIDAVITS OF LAY WITNESSES

32. It is submitted that it is often helpful in a personal injury case to file Affidavits from lay witnesses. Again, these witnesses should be interviewed thoroughly, and, if they are

willing to provide notes or memoranda, which would be subject to litigation privilege, to review these. Again, it is important to use the witness's own words as much as possible. The lawyer's role is more as an organizer of the thoughts into discrete topics, especially in the Plaintiff's own Affidavit, and care must be taken not to substitute the lawyer's own characterizations or use words or expressions with which the witness is not comfortable. All lay witnesses, including the Plaintiff, should be given ample opportunity to review the draft Affidavits and make any changes before final swearing. It is usually difficult to effectively cross-examine lay witnesses whether they give their evidence in chief live or in an Affidavit.

AFFIDAVITS OF EXPERTS

33. There is a specific Rule, Rule 76.09, that says that the expert's report served under Rule 53.03 shall be appended to an Affidavit of the expert in which the expert adopts the report for the purpose of giving evidence in the action. The actual Affidavits that are filed may expand upon simple adoption to a limited largely non-contentious extent of, for example:

(a) Typically, the witness's Curriculum Vitae is attached as an exhibit, as is advice as to whether the witness has been accepted as an expert by a Court in the past;

(b) The witness should state in the Affidavit that the report accurately sets out the expert's findings and opinions;

(c) The expert report, as well as any report they prepared responding to a defence medical examination, and any supplementary reports, are attached as exhibits;

(d) At least in our case, we also listed any further medical reports and records that were made available since the last medical examination, and advice that they did not change the expert's opinion and report attached to the Affidavit. Note: we even mentioned Affidavits of two lay witnesses, which were originally sworn a year and a half before the trial and sent to the Defence in the hopes of encouraging more palatable settlement offers, but the experts advised, when requested, long before the Pre-Trial Conference, that they would appreciate learning about the observations of friends and family – they were not sent and did not review more recent lay witness Affidavits, including an update by one of the prior lay witnesses prepared just before the trial date;

(e) In our opinion, it is not necessary, or advisable, to try to file an Affidavit from every care provider any more than it would be necessary to call these witnesses live in an ordinary trial. A Notice of Intention under the *Evidence Act* should however be served so that the foundation of experts' opinions may be put to them. There does not seem to be any mechanism to permit an opposing party to compel an expert to attend to testify where their records are listed in the Notice of Intention but they have not filed an Affidavit. Such issues should be anticipated well in advance and are best dealt with by the Pre-Trial Judge, at least in the first instance.

V. TRIAL

34. Rule 76.12 sets out the summary trial procedure. It provides for opening statements of each party before presentation of evidence. The Plaintiff is then allowed to adduce evidence by way of Affidavit. An adverse party may then cross-examine the deponent of any Affidavit, and the Plaintiff then has a right of re-examination.

35. It might be noted that, in handling experts, the Trial Judge in our case preferred that the expert be qualified briefly in oral evidence and that submissions be made as to the exact scope of the expertise, for which their opinion was being tendered, and whether that purpose was accepted by the opposing party.

36. After completion, when all of Plaintiff's evidence has been submitted, then the Defendant has the right to call their own evidence by adducing its own Affidavit evidence. The Plaintiff's counsel cross-examines the Defendant's witnesses on their Affidavits. The Plaintiff then has the right to call reply evidence with leave of the Trial Judge, as stipulated to be "proper reply evidence", although it is unclear exactly what is meant by that phrase. It is not stipulated to be limited to evidence in the form of Affidavits, but presumably a Judge would be reluctant to allow counsel to stray too far from what is already contained in the Affidavits filed, and the limited scope of "reply" generally.

37. It might be noted that a party who tends to cross-examine the deponent of an Affidavit shall, at least 10 days before the date fixed for trial, give notice of that intention to the party who filed the Affidavit, who is then responsible for arranging the deponent's attendance.

38. The Trial Judge, of course, has discretion to vary the times set out in the Trial Management Plan, provided the trial not exceed five days.

39. It is also provided under Rule 76.12(1)(9) that after presentation of the evidence, each party may make oral argument. There is no provision for written argument, but it has been our experience, and our understanding, that most Trial Judges do appreciate written argument, or even a Factum as to the essential issues. If a Factum or a written argument is to be utilized, however, because the Judge's time away from court is limited, it should be succinct and to the point, and, we submit, systematically address the issues the Court is being asked to decide and the position of the Plaintiff on each of them with reference to critical evidence and appropriate caselaw.

40. With good co-operation between counsel, and considerable planning and organization, in the recent occupiers' case in which we were involved, the Court was able to consider the evidence of 15 witnesses, eight for the Plaintiff, including the Plaintiff herself plus three lay witnesses, the family doctor, expert physiatrist, expert psychiatrist, and an Occupational Therapist, all of which were cross-examined, and seven defence witnesses, the Defendants' representative, two medical experts, and four investigators – cross-examination of two of whom was not required, in four days of calling evidence, with closing submissions, including supplemental Factums (the original Factum having been

delivered earlier) and some written submissions, on the fifth day, with some time to spare. A copy of that decision, Maxine Lidia Reid v. 1865088 Ontario Limited, 2024 ONSC 4296, is attached as **Schedule 'C'**.

VI. COSTS

41. As discussed earlier, there appears to be a hard cap on what costs may be awarded under Rule 76.12.1, which says that: "Except as provided for under rule 76.13 or an Act, no party to an action under this Rule may recover costs exceeding $50,000 or disbursements exceeding $25,000, exclusive of harmonized sales tax (HST)." Rule 76.13 deals with cost consequences where Judgment is given in an ordinary procedure case within the Simplified Rules of Procedure monetary jurisdiction or where pleadings are amended late to put the action into the Simplified Rules of Procedure. These situations can provide for some fairly onerous consequences for Plaintiffs who obtain a result that could have been awarded under the Simplified Rules of Procedure, subject to the discretion of the Court in limited circumstances, and even expressly despite Rule 49.10. (Generally, Courts seem to have been forgiving in personal injury cases brought or continued under ordinary procedure, finding such was reasonable in the circumstances, thus avoiding the most onerous costs penalties.) It might be noted that Rule 76.12.1 does not specifically say that the cap on costs and disbursements overrides Rule 49, but, based on review of the cases to date, that is certainly the interpretation that is being put on the section, namely that this is a hard cap. See, for example, *Crawford v. Standard Building Contractors Limited*, 2021 ONSC 655.

42. The recent case of *Ingratta v. McDonald*, 2024 ONSC 1349 may cause some concern. This is a motor vehicle accident, and the Defence prevailed. Damages were assessed at $50,000.00 prior to applying the deductible. It was ruled that the Plaintiff failed to meet threshold. The recovery was therefore zero. The Defence sought the maximum costs allowable, $84,750.00 inclusive of fees, disbursements, and HST, with an account showing actual fees of almost $82,000.00 and disbursements of over $42,000.00. Justice MacFarlane concluded that:

> "[9] In my view, the maximum award for costs under Rule 76.12.1 should be reserved for cases of higher complexity, or situations where an award of substantial indemnity costs is clearly warranted…."

This raises the question whether "higher complexity" means greater complexity than the specific case before him or invokes an abstract scale of complexity more generally. It is submitted the former interpretation is the more efficacious one. Extremely complex litigation likely will never lend itself to five-day summary trials. For example, we may never see a medical malpractice case tried under the Simplified Rules of Procedure nor a complicated products liability one. In all likelihood, personal injury trials with liability issues, causation issues, and claims for multiple heads of damages will be among the most complex cases that lend themselves to utilization of Rule 76.

He goes on to comment that, in his view, neither party made a serious effort to resolve the case on any kind of economically rational basis. Technically, the Defendant had exceeded at least one of its two purported Rule 49 Offers, one to agree to a dismissal of the action without costs (but only if accepted by a certain date) and another offer to pay a little over $1,000.00 towards disbursements in exchange for a Release, with no timeframe for acceptance. Justice MacFarlane characterized the level of spending as compared to the offers as a "scorched earth approach to litigation that is anathema to resolution of disputes". Justice MacFarlane also criticized the way that both sides conducted the case. For example, technically, the Plaintiff claimed special damages as well as non-pecuniary damages, but no evidence was called. As best as can be determined from the decision, only four witnesses were called over four days, the Plaintiff, the Defendant, who was called largely to present what His Honour concluded to be a spurious Act of God defence, and each side called an orthopaedic surgeon. There was also the threshold Motion. Productions designed to be accessed remotely proved to be inaccessible.

43. It is submitted that, generally, speaking, among the types of cases that would lend themselves to five-day summary trials, many personal injury cases will be among the most complex that will be heard. For example, whether a motor vehicle accident or otherwise, the determination of liability, including contributory negligence, and issues of the impact of prior unrelated medical conditions, the assessment of non-pecuniary damages, the determination of any loss of income past and future, the determination of any care costs past and future, and the determination of any loss of housekeeping capacity or replacement of housekeeping services past and future, if supported by evidence and properly presented, are likely to be among the more complex cases tried under the Simplified Rules of Procedure even if this specific case, *Ingratta*, was not. With appropriate attempts to save costs, such as delivering Requests to Admit, good faith attempts to agree on issues, and especially with effective use of Rule 49 Offers, it is submitted that awards of costs and disbursements at the maximum permitted under Rule 76.12.1 should not prove to be unusual in personal injury cases.

VII. CONCLUSION

44. The Simplified Rules of Procedure are not specifically tailored to trying personal injury cases in the form of a summary trial and they do not constitute a perfect solution to providing proportionality and reducing costs in litigation. They are, however, a significant improvement over the alternative that will permit some Plaintiffs who would otherwise be denied access to justice to obtain merited compensation. For counsel, it will be difficult to keep costs and disbursements below the cap, if the case must proceed through trial, and once one reaches the cap, especially in disbursements, there is no further cost incentive for the opposing party to try to resolve the case. This problem will potentially grow worse with inflation.

45. Tactically, there are potential advantages for both sides arising from the Rule 76 trial procedures. The Plaintiffs have the advantage of outlining their case in carefully planned, organized, and executed writing. The Defence has the opportunity to cross-examine a "cold" witness, who may not have "come alive" in their Affidavit, and thus has the

advantage of the primacy effect in creating the impression before the Court as to what sort of person the Plaintiff and their witnesses may be. Either side has the opportunity to try to set the agenda for the trial by filing a Factum early in the trial. The question will after be which side will maximize its advantages.

46. Anyone contemplating representing a party in a Simplified Rules of Procedure personal injury action must be prepared to engage in considerable planning and organization beginning at the earliest stages of the file and continuing through the pre-trial and trial to maximize prospects of success. Further, a realistic assessment of the case at an early stage on both sides is invaluable. Co-operation between counsel is implicit in the Rules and should be encouraged at every step of proceedings.

47. It seems clear that the Simplified Rules of Procedure, particularly from the time that the sides must negotiate on a Trial Management Plan through to the completion of the trial itself, relies on the lawyers representing the parties taking seriously their duty of courtesy and good faith under Section 7.2 of the Rules of Professional Conduct, particularly 7.2-1 and 7.2-1.1, which state as follows:

> "7.2-1 A lawyer shall be courteous, civil, and act in good faith with all persons with whom the lawyer has dealings in the course of their practice.
>
> 7.2-1.1 A lawyer shall agree to reasonable requests concerning trial dates, adjournments, the waiver of procedural formalities, and similar matters that do not prejudice the rights of the client."

48. Good luck in trying your own Simplified Rules of Procedure personal injury cases.

FORM 76C

Courts of Justice Act

NOTICE OF READINESS FOR PRE-TRIAL CONFERENCE

(General heading)

NOTICE OF READINESS FOR PRE-TRIAL CONFERENCE

The *(identify party)* is ready for a pre-trial conference and is setting this action down for trial. A pre-trial conference in the action will proceed as scheduled and the trial will proceed when the action is reached on the trial list, unless the court orders otherwise.

CERTIFICATE

I CERTIFY that there was a settlement discussion under rule 76.08.

Date (Signature)

(Name, address and telephone and e-mail addresses of lawyer or party giving notice)

TO *(Name and address of lawyer or party receiving notice)*

RCP-E 76C (February 1, 2021)

FORM 76D

Courts of Justice Act

TRIAL MANAGEMENT CHECKLIST

(General heading)
(Insert name of party filing this form)

TRIAL MANAGEMENT CHECKLIST

Trial Lawyer — Plaintiff (s):

Trial Lawyer — Defendant (s):

Filed by Plaintiff
Filed by Defendant
Filed by Subsequent Party

1. Issues Outstanding

   (a) liability:
   .....

   (b) damages:
   .....

   (c) other
   .....

2. Names of Plaintiff's Witnesses
   .....

3. Names of Defendant's Witnesses
   .....

4. Admissions
   .....

   Are the parties prepared to admit any facts for the purposes of the trial? yes □ no □

5. Document Brief

   Will there be a document brief? yes □ no □

6. Request to Admit

   Will there be a request to admit? yes □ no □

   If so, have the parties agreed to a timetable? yes □ no □

7. Expert's Reports

   Are any expert's reports anticipated? yes □ no □

8. Amendments to Pleadings

   Are any amendments likely to be sought? yes □ no □

9. Factum of Law

   Will the parties be submitting factums of law? yes □ no □

RCP-E 76D (May 1, 2019)

CITATION**:** Maxine Lidia Reid v. 1865088 Ontario Limited, 2024 ONSC 4296
COURT FILE NO. CV-20-00000002-SR
DATE: 20240731

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Maxine Lidia Reid Plaintiff	)	
– and –	)	*Robert Becker,* for the plaintiff
1865088 Ontario Limited and McCowan and Associates Ltd. Defendants	)	*Gillian Mays* and *Tina Le*, for the defendants

Heard November 27-30
and December 1, 2023, at Peterborough

S.T. BALE J.: -

Introduction

[1] The plaintiff's claim is for injuries suffered in a fall in a mall parking lot. After parking her car, she stepped into a pothole, lost her footing and landed on her right knee. The incident took place on May 9, 2019.

[2] Approximately 15 years before the subject incident, the plaintiff fell through a deck which was under construction. As a result, she sustained several injuries including a fractured coccyx and sacrum, from which she continues to suffer.

[3] The primary issues in this case are whether the defendants met their standard of care under the *Occupiers' Liability Act,* and the effect of the plaintiff's pre-existing injuries on her claim for damages in this action.

Plaintiff's evidence

Evidence of Maxine Reid

[4] The plaintiff described her pain from this accident to be initially in the right knee and sacroiliac joint. She says that she continues to suffer constant, intense pain originating from her right-side sacroiliac joint which is sharp and throbbing and aggravated by activity. She now has pain in other areas including her neck and left leg. She also has difficulty with sleep and fatigue, and suffers from anxiety.

[5] The plaintiff suffered from pain before this accident but says that the pain she has suffered since the accident is different. Before the accident, it was a low-level dull aching pain in her lower back which was not particularly disabling except during periods of flare-ups. She also had difficulties with sleep and fatigue and suffered from anxiety before the accident but says these problems have since become far worse.

[6] The plaintiff says that before the accident, she was energetic and outgoing, enjoying many activities. She says that she is no longer able to go on long walks or work out, because lifting, bending, kneeling, squatting and climbing stairs cause her pain. She says that she is limited in her driving distance because she needs to take breaks and plan her routes carefully.

[7] The plaintiff has tried a wide range of treatments but has found none with lasting improvement.

Lay witness evidence

[8] The plaintiff's daughter, Tracy Ward, testified that before her mother's trip and fall, they would go for long walks together and exercise together, but that because of the accident, they no longer exercise together and can only go for short walks. She said that before the accident her mother would drive to Burlington to visit her but is no longer able to do so. Since the accident, Tracy has helped her mother with grocery shopping and cooking. She says her mother's mood has deteriorated. She says that the changes following the accident were sudden and drastic.

[9] Christine Herr is the plaintiff's oldest sister. She testified that the plaintiff began to struggle right after the accident. Before the accident, the plaintiff was always helping her. After the accident, she had to help the plaintiff which she did until moving to Newfoundland. She says that since the accident, the plaintiff has become very depressed and self-isolating.

[10] Donna Wiggers is a long-time friend of the plaintiff. She testified that before the accident, the plaintiff was spontaneous and active but that after the accident there was a drastic and sudden change. She says the plaintiff appears to become frustrated about not being able to do the things she did before which appears to have taken an emotional toll on her. She says that she has caught the plaintiff bursting into tears.

Evidence of Dr. Koopmans

[11] Dr. Koopmans was the plaintiff's family doctor until the end of August 2022 when she gave up her family practice.

[12] In her report, Dr. Koopmans related that the plaintiff had pre-existing fibromyalgia with chronic generalized aches and pains. She had pre-existing low back pain and osteo-arthritis of her right knee. She noted that the plaintiff had pre-existing intolerance to vigorous exercise which tended to worsen her pain. She managed better with gradual gentle exercise and had always been diligent about doing moderate exercise and going for walks. She also had pre-existing struggles with anxiety and sometimes mild to moderate depression. She had a pre-existing hypersensitive pain response. She said that as of the date of the subject accident, the plaintiff was managing well.

[13] She said that as a result of the fall on her right knee, the impact of the jolt was transferred to the plaintiff's right sacroiliac joint and lower back, leading to pain in those areas and a flare-up of the osteoarthritis in her knee.

[14] Dr. Koopmans said that as a result of the plaintiff's pre-existing hypersensitivity, the severity of her pain response was much longer and stronger than in most people.

[15] She said that the plaintiff was slowly and gradually improving but that in view of her pre-existing sensitivity, she expected a longer than usual recovery time.

Dr. Vladimir Djuric

[16] Dr. Djuric is a physician certified as a specialist in the field of physical medicine and rehabilitation. He is also qualified to practice in pain management and practices primarily in the field of interventional pain management.

[17] He diagnosed the plaintiff as having lumbosacral/sacroiliac sprain/strain with resultant chronic dysfunction; chronic myofascial pain/fibromyalgia; right knee osteoarthritis; anxiety disorder; depressed mood; and sleep disorder resulting in daytime fatigue. He says her prognosis is guarded to poor.

[18] Dr. Djuric's opinion is that the plaintiff is one of the 10-15 per cent of patients who do not recover quickly and go on to develop chronic pain. He believes that the plaintiff suffered from multifocal chronic pain stemming from arthritis and degenerative disc disease "but the advancement of these degenerative conditions by the accident was responsible for her current state." He said that the plaintiff has largely lost the control she previously had and that as a result, her anxiety and depression have increased.

Dr. Zohar Waisman

[19] Dr. Waisman is a physician certified as a specialist in geriatric and forensic psychiatry.

[20] He diagnosed the plaintiff as suffering both a Somatic Symptoms Disorder with predominate pain and a Major Depressive Disorder, both caused by the accident. He said that the symptoms which the plaintiff had before the accident made her more vulnerable to trauma.

[21] Dr. Waisman recommended psychotherapy and a cognitive behavioural approach to help her cope. He says that her prognosis is poor.

Lisa McGowan

[22] Lisa McGowan is a certified occupational therapist. She performed an in-home occupational therapy assessment of the plaintiff for the purpose of making recommendations with respect to improving the plaintiff's functional status with a view to returning her, to the extent possible, to her pre-accident activities of daily living.

[23] I consider her recommendations under "damages" below.

Defendants' evidence

Dr. Gianni Maistrelli

[24] Dr. Maistrelli is an orthopaedic surgeon retained by the defendants to provide an opinion with respect to the plaintiff's injuries.

[25] Dr. Maistrelli was dismissive of Dr. Djuric's opinion with respect to causation, arguing that there is no clinical objective evidence to explain how the plaintiff's pre-existing degenerative conditions were aggravated by the subject accident. He also disagreed with Dr. Djuric's diagnosis of chronic pain, saying that "[c]hronic pain remains a medically elusive and controversial syndrome whose nature and existence are strongly contested. It is important to note that chronic

pain has become a convenient default diagnosis for unexplained ongoing complaints that are typically out of proportion to an otherwise minor traumatic event" (emphasis in original).

[26] However, the reality of chronic pain has been accepted by the courts. In *Martin v. Nova Scotia (Workers Compensation Board),* 2003 SCC 54, at para. 1, the court said the following:

> Chronic pain syndrome and related medical conditions have emerged in recent years as one of the most difficult problems facing workers' compensation schemes in Canada and around the world. There is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real.

[27] I do not accept Dr. Maistrelli's criticism of Dr. Djuric's opinion.

Dr. Lawrie Reznek

[28] Dr. Reznek is a psychiatrist retained by the defendants to determine the psychiatric consequences of the plaintiff's accident.

[29] In his report, Dr. Reznek concludes that the plaintiff likely suffers from a pre-existing Major Depressive Disorder and a pre-existing Chronic Pain Disorder but argues that they are unrelated to the trip and fall accident. In his oral evidence at trial, he conceded that the plaintiff also suffers from a Major Depressive Disorder and a Somatic Symptom Disorder (after having denied same in his report).

[30] In finding that the plaintiff's psychiatric disorders were pre-existing, Dr. Reznek attributes them to genetic factors and childhood physical and emotional abuse. However, the plaintiff was never diagnosed with psychiatric illnesses prior to the accident, nor did she ever seek treatment from any mental health professional. She did have some history of anxiety and mild to moderate depression but nothing that would amount to the disorders from which she now suffers.

[31] It also appears that Dr. Reznek's diagnosis was affected by a suspicion that the plaintiff was malingering. In his report, he said that his testing "strongly suggests malingering"; however, in his oral evidence at trial, he said that that was a very minor point in his report and conceded that one cannot conclude malingering from his testing.

[32] In the result, I prefer the evidence of Dr. Waisman to that of Dr. Reznek.

Analysis

Liability

[33] The defendants admit that they were occupiers of the premises and that they owed a statutory duty of care to the plaintiff under s. 3(1) the *Occupiers' Liability Act,* s. 3(1):

> 3(1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that persons entering on the premises,

> and the property brought on the premises by those persons are reasonably safe while on the premises.

[34] The defendants submit that their failure to patch what they refer to as a "minor discrepancy in a large parking lot" did not amount to a breach of the required standard of care. They say that they had an on-site operations supervisor, Jennifer McLauchlan, whose job it was to look for issues, including potholes or level discrepancies in the parking lot. They say that they also had a property manager, Dave Manser, who was responsible for patrolling the property and coordinating repairs and services. However, the defendants have produced no evidence that any such inspections were carried out in the parking lot.

[35] The plaintiff submits that the following factors should be considered in determining the extent of the duty of care arising from the nature of the premises:

- the parking lot is a busy shopping mall parking lot;
- users have to walk from their cars to the various stores over the parking lot surface, so it must be reasonably safe for pedestrians as well as vehicles;
- users have to negotiate between parked vehicles and around moving vehicles and other pedestrians, all of which requires them to keep their eyes up, not staring down at every foot of pavement where they step or are about to step; and
- since the parking lot was intended for use by shoppers, it is reasonable to expect that many users would be exiting or entering vehicles carrying bags or parcels and would therefore not necessarily have an uninterrupted view immediately ahead of them.

[36] I agree with the plaintiff that in not remedying the defect in the pavement involved in her trip and fall, the defendants failed to meet the required standard of care.

Contributory negligence

[37] The defendants argue that if they are found to have breached their standard of care, the plaintiff was contributorily negligent. They submit that the plaintiff should be held 50 per cent responsible pursuant to s. 4 of the *Negligence Act* which provides that where it is not practical to determine the respect degree of negligence as between the parties, they are deemed to be equally at fault.

[38] A plaintiff is guilty of contributory negligence if she ought reasonably to have foreseen that if she failed to take reasonable care, she might injure herself: *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.,* [1997] 3 S.C.R. 1210, at para. 76.

[39] The onus to prove contributory negligence is on the defendant: *Cromarty v. Waterloo (City),* 2022 ONSC 1322, at para. 102.

[40] The defendants argue that the plaintiff ought reasonably to have foreseen that she might hurt herself if she acted carelessly by stepping out of her vehicle and walking away without first looking at the ground to determine that it was free of potential hazards.

[41] In support of their position, the defendants cite *Lombard v. Whitby (Town),* 2007 CanLII 2163 (ON SC) at paras. 16-17, 38-40, & 43-44; *Lopez v. Toronto (City)* 2013 ONSC 848, at para. 98 and *Grayling v. Haldimand (County),* 2014 ONSC 198, at para. 51.

[42] In *Lombard*, the court found that the plaintiff could not have helped but see there were cracks in the sidewalk because of the many cracks with strips of grass growing in them, and she was no stranger to the area. In *Lopez*, the court found that the patch of ice slipped on was sufficiently visible from at least five feet away and that the plaintiff therefore had ample time to see and avoid it. In *Grayling*, the court found that the differential in the height of the two slabs of the sidewalk was there to be seen, as shown in the photographs.

[43] In response, the plaintiff cites *Alison Braks v. Dundeal Canada (G.P.) Inc.*, 2022 ONSC 3978, at paras. 42 to 47, for the following principles:

- that mere forgetfulness or want of attention, or failure to look for some source of danger that is not present to the plaintiff's mind, is not contributory negligence; and
- that pedestrians are not expected to walk with their eyes focused downward immediately in front of their feet.

[44] In the present case, the plaintiff says that she tripped over a pothole on the first or second step she took after parking her car. She said that she would not have been able to see the pothole until she closed the car door and took that first or second step. The surface of a parking lot should be safe for walking. Because parking lots are also used by cars, a pedestrian's attention must be divided between watching for defects or obstacles over which one might trip and watching for vehicles which might run one down. In the present case, I am not satisfied that the plaintiff frequented the area of the parking lot where she fell and knew of its condition or that the pothole was sufficiently far enough ahead of her that she ought to have seen and avoided it. However, after getting out of the car and closing the door, she could easily have looked down at the surface of the parking lot *and* ahead to see where she was going, before moving forward. I find that in failing to do so, she paid insufficient attention to where she was walking. The fact that her vision of the pothole may have been obscured by the car door before she closed it, is neither here nor there.

[45] In these circumstances, I find the plaintiff to be 25 per cent responsible for her injuries.

Damages

Crumbling skull principle

[46] The crumbling skull principle applies where a tortious act accelerates the degeneration of the plaintiff's pre-existing condition. "If there is a 'measurable risk' that the condition suffered by the plaintiff would have affected the plaintiff in the future regardless of the defendant's tortious act, the defendant will be liable for the effect of his act on the degenerative process. However, the defendant need not compensate the plaintiff for any debilitating effects of the pre-existing condition that would have occurred in any event (citation omitted)": *B. (M.) v. 2014052 Ontario Ltd.*, 2012 ONCA 135, at para. 36.

[47] The evidence in this case supports a finding that although she was coping with her pre-existing injuries prior to her fall, her condition was declining (or would likely decline in the future) without the fall. This finding is supported by the evidence of Dr. Djuric. His said: "I believe Ms. Reid's previous medical history put her at high risk for the development of a chronic pain disorder. Her pre-existent chronic pain issues and multifocal osteoarthritis elevated her risk of pain intensification and development of more severe chronic pain and disability. … Had the accident not occurred, I think that it is more likely than not that Ms. Reid's condition would not have deteriorated nearly as much or as rapidly as it has." I take it from this evidence that Dr. Djuric

would have expected the plaintiff's condition to deteriorate over time – just not as fast as it has, as a result of the injuries suffered in her fall. With respect to the extent of the effect of the accident on her pre-existing condition, Dr. Djuric said, "[t]he trajectory of her age-related functional decline has been moderately accelerated by the subject parking lot accident."

General damages

[48] General damages compensate for past and future non-pecuniary loss such as physical and mental pain and suffering, loss of the amenities and enjoyment of life, and loss of expectation of life: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 SCR 229.

[49] There are three principles that anchor the assessment of general damages. The first is that these awards are by their very nature arbitrary and turn on the experience of each individual, both in terms of physical and psychological suffering. The second is that the award must be fair, reasonable, and consistent with other decisions involving similar injuries. The third is that general damages award compensation to provide an injured person with reasonable solace for her misfortune: *Higashi v. Chiarot*, 2021 ONSC 8201, at para. 132.

[50] In this case, the plaintiff submits that general damages should be assessed in the range of $85,000 to $105,000, citing *Rizzi v. Marvos*, 2008 ONCA 172, *Pisani v. McDaniel*, 2022 ONSC 224 and *Waller v. Brown*, 2022 ONSC 3510 as similar cases.

[51] The defendants submit that if general damages are to be awarded, they should not exceed $20,000, that amount being for "a scraped knee which has healed without residual scarring." In support of their submissions, they cite *LeBlanc v. Fortis Properties*, 2012 ONSC 1124, *Seyom v. T.T.C.*, 2018 ONSC 6848, *Lesniak v. Mississauga (City)*, 2002 CanLII 22270 (ON SC), *Brown v. Dhaliwal*, 2019 ONSC 1544, and *Manning v. 3980 Investments Ltd.*, 2003 CanLII 2906 (ON SC). In those cases, the general damage awards when adjusted for inflation were *Seyom* ($41,394.08), *Lesniak* ($86,195.65, *Brown* ($60,857.98) and *Manning* ($30,856.03).

[52] Having regard to the plaintiff's pain and suffering, loss of enjoyment of life and the authorities provided by counsel, I assess her non-pecuniary damages at $76,500. In doing so, I have taken into consideration the fact that the plaintiff's condition was declining pre-accident (and would likely have continued to decline) had the accident not happened. The effect of the subject accident was to accelerate that decline.

Past housekeeping claim

[53] The plaintiff estimates that she paid $2,345.00 to have her grass cut and her driveway plowed when she lived in a rental house from the date of the accident to the end of January 2022. I accept that claim.

[54] The plaintiff claims $10,000 for past housekeeping for the four-and-a-half years since the accident. She was able to do some housekeeping but did it less well and with pain. I accept the basis of the claim but would discount it because her ongoing pain from before the accident would likely have interfered with her housekeeping in any event. I allow the claim at $8,500.

Future housekeeping claim

[55] Based upon the plaintiff's evidence that activities such as laundry, shopping, cooking and floor care are painful, Lisa McGowan estimated the cost of weekly housekeeping at the plaintiff's

home, at $25 per hour, to be in the range of $3,900-$5,200 per year. In addition, she estimated an additional $1,600 per year for deep cleaning, four times per year, for 15 hours at $100 an hour. Her total assessment for housekeeping was therefore $5,650 to $6,950 per year.

[56] The plaintiff asks for housekeeping expenses for a period of 10 years based upon an average life expectancy of 86. However, because of her pre-existing arthritis and degenerative disc disease, I find it likely that she would have required housekeeping services before reaching the age of 86, in any event.

[57] I allow the claim for future housekeeping at $47,250.

Past and future care costs

[58] The test for determining future care expenses is set out in *Higashi v. Chiarot,* 2021 ONSC 8201, at para. 246:

> The standard of real and substantial risk applies to future care expenses. The test for determining the appropriate award for future care costs is an objective one, based on medical evidence. To prove a claim for future care costs, the following conditions apply: (a) there must be medical justification for the claims; (b) the award must be fair and moderate; and (c) the claims must be reasonably necessary, having in mind personal circumstances. [Citation omitted.]

[59] The plaintiff claims past out-of-pocket care costs and travel expenses of $6,736.36. I find that amount to be reasonable. Applying a deduction related to her pre-existing injuries, I allow $5,725 for past care and travel costs.

[60] The plaintiff claims one-time future care costs for the purchase of a step stool, perching stool, electric tricycle, walking poles and a Pulsed Electromagnetic Field Mat (PEFM). The total claim ranges from $7,315 to $9,365 with the PEFM, or $2,315 to $2,365 without. I find these items to be reasonably necessary, except for the PEMF for which there is no supporting medical evidence. Applying a deduction related to her pre-existing injuries, I allow $2,000 for one-time future care costs.

[61] The plaintiff claims annual costs associated with a Dolphin Neurostim device, maintenance of a water purification system and running shoes, for a period of 10 years. I am not satisfied that the costs associated with the Dolphin device are medically necessary. In her evidence, the plaintiff said that the early indications were that the treatment would at least help control her pain but that the Dolphin treatment was later discontinued when the hoped-for results were not achieved. The claim for a water purification system is based on the plaintiff's inability to lift water jugs. However, no explanation was provided as to why she cannot use municipal tap water. I disallow the claim for running shoes because they are a common item worn by people whether injured or not.

[62] The plaintiff claims "less frequent costs" for replacement of a Dolphin device, boots with cleats, and sandals. I disallow the costs related to the Dolphin device for the reasons stated. Boots with cleats and sandals are said to be "appropriate supportive footwear." While wearing supportive footwear is appropriate, I am not satisfied that there is a medical need for cleats or sandals as a result of the accident.

[63] The plaintiff claims the expenses of "other recommendations and services" including: physiotherapy for the next two to three years ($720-$1,080); and for the next 10 years, craniosacral

therapy ($2,600 per year), Biofreeze patches ($832 per year), O.T. attendances related to Dolphin device ($7,200), mindfulness pain management program – possibly covered by OHIP ($150-$200), CPAP machine – possibly covered by OHIP ($150 to $700), and activator poles ($100 to $150). The approximate cost of these items would be about $42,340 over 10 years. For the reasons given, I am not satisfied that the costs associated with the Dolphin device are medically necessary. For the balance of the items, I allow $30,000 for the 10-year period.

[64] In the result, I allow a total of $32,000 for the cost of future care.

OHIP claim

[65] OHIP's subrogated claim is $1,212 plus costs.

Pre-judgment interest

[66] The prejudgment interest rate for non-pecuniary damages will be 5 per cent per year and for pecuniary damages, 2 per cent per year.

Disposition

[67] For the reasons given, the plaintiff will have judgment against the defendants in the sum of $130,149.00, calculated as follows:

General damages	$76,500.00
Past housekeeping costs	10,845.00
Future housekeeping costs	47,250.00
Past care costs	5,725.00
Future care costs	32,000.00
OHIP claim	1,212.00
Subtotal	$173,532.00
Reduction for contributory negligence	43,383.00
Total damages	$130,149.00

[68] If the parties are unable to agree on costs or pre-judgment interest, I will consider brief written argument provided that it is delivered to monica.mayer@ontario.ca, no later than September 10, 2024.

Released: July 31, 2024

CITATION**:** Reid v. 1865088 Ontario Limited, 2024 ONSC 4296
COURT FILE NO. CV-20-00000002-SR
DATE: 20240731

ONTARIO

SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED
at Peterborough

BETWEEN:

Maxine Lidia Reid

Plaintiff

– and –

1865088 Ontario Limited
and McCowan and Associates Ltd.

Defendants

REASONS FOR JUDGMENT

S.T. Bale J.

Released: July 31, 2024

Law Society of Ontario | Barreau de l'Ontario

TAB 16

7th Motor Vehicle Litigation Summit

Introduction to Trauma-Informed Litigation (PPT)

Introduction to Trauma-Informed Lawyering

Mitchell Brown
Lerners LLP

September 18-19, 2024

cpd

LERNERS

INTRODUCTION TO TRAUMA-INFORMED LITIGATION

Presented by Mitchell C. Brown

Law Society of Ontario – 7th Motor Vehicle Litigation Summit
September 18-19, 2024

"[I]t is important to describe what I mean by a trauma-informed process. It is **not** one that aims to heal the trauma that participants in the process have experienced. It is **not** about manners or kindness. It is about adapting our processes in a way that seeks to minimize the trauma that the legal process itself can create, and it is about understanding how a person's trauma might inform or affect their interactions with the legal system." [Emphasis added]

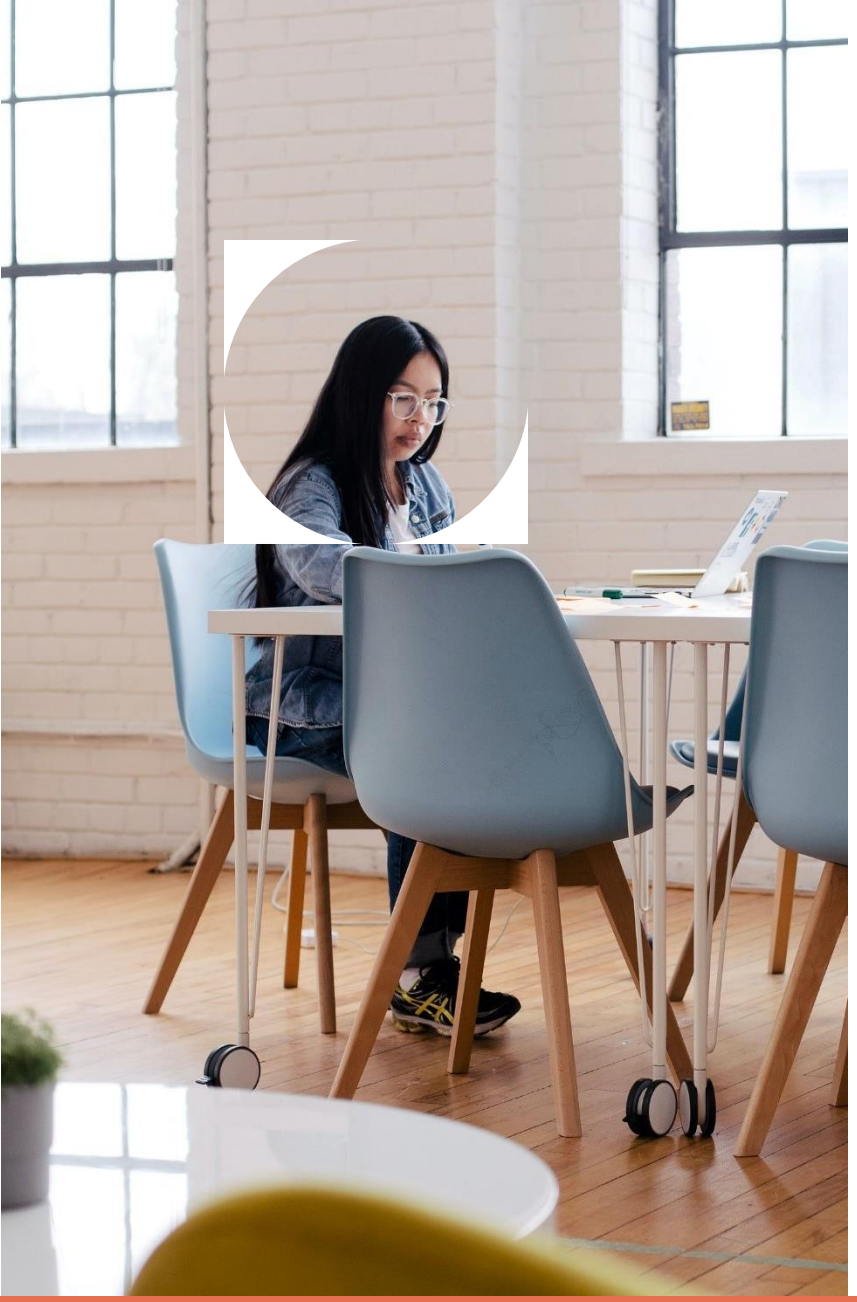
J.T. Akbarali J.
S. v. Ukraine International Airlines JSC, 2024 ONSC 3303

What it is Not…

- Just feelings, sympathies, sensitivity
- Substitute for counselling, therapy, primary care
- A static “checked box” pedagogy
- An alternative (or impediment) to adversarial system or zealous advocacy

What it is For…

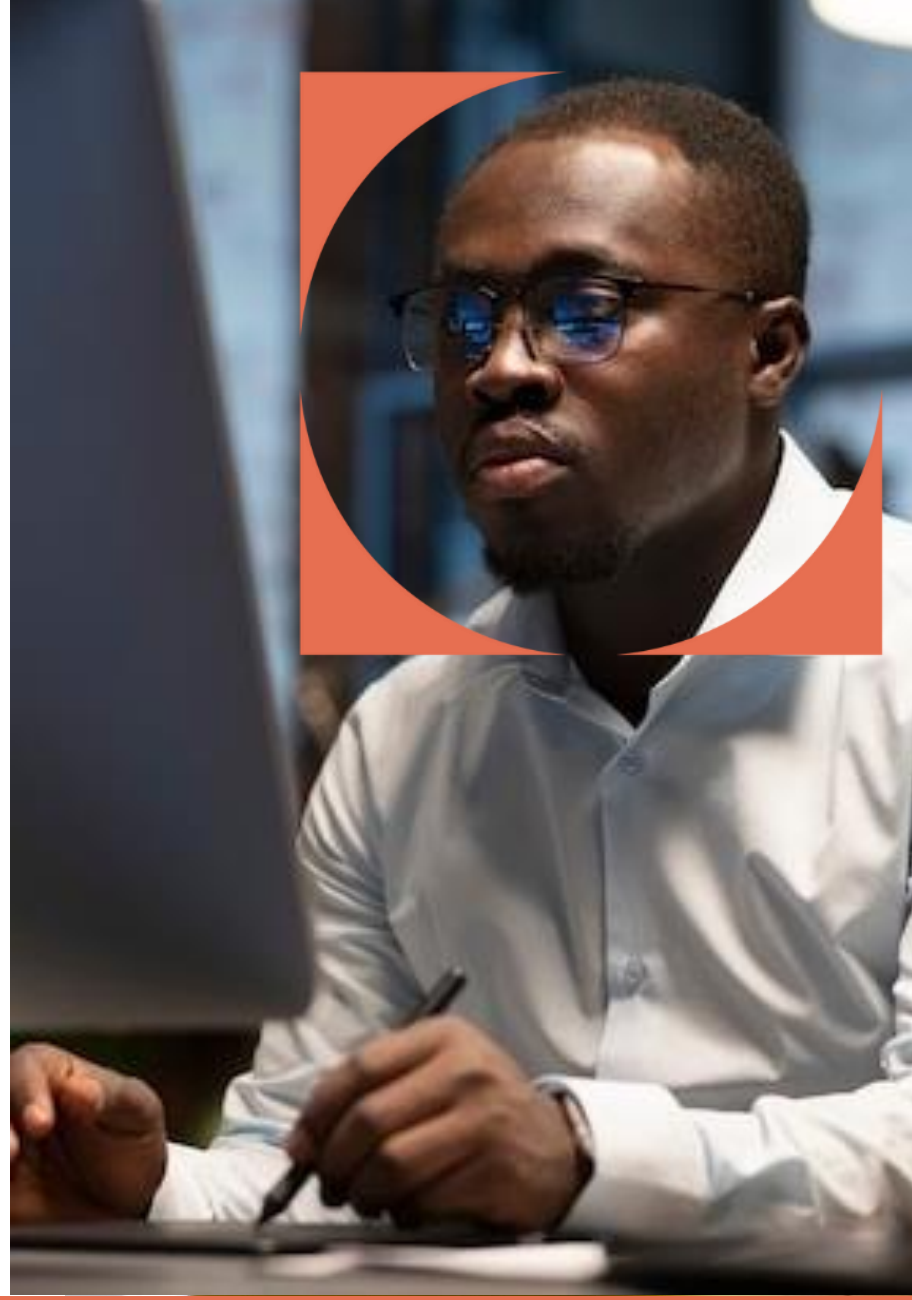
- Improve effectiveness of advocacy and litigation outcomes
- Improve quality of evidence and fact-finding process
- Reduce strains of litigation processes (increase buy-in, trust, and confidence in judicial system)
- Reducing vicarious impacts on non-litigants (lawyers, staff, courts)



TOPICS COVERED

1. Core Concepts and Theory (“What”)
2. Skills and Application in Litigation (“How”)
3. Sample Trial Protocol
4. Q/A

1. “Trauma-Informed”: Core Concepts and Theory



THE THREE "E'S" OF TRAUMA

EVENT

- Disruptive or abnormal incident(s) or event(s)
- Can be physical, psychological, financial, professional, spiritual, etc. (either singular / acute or in combination)

EXPERIENCE

- How the event is experienced by the individual in the moment
- Varies between individuals, circumstances, times, and events

EFFECTS

- The lasting imprint left by the event + experience
- Non-static; evolves over time with the individual and their environments
- Manifests as adaptive or maladaptive behaviours or responses

IMPACTS OF TRAUMA

- Memory storage and retrieval processes
- Traumatic memories may be fragmented, disjointed, and disordered
- Recall gaps, errors, repetitions, out of sequence
- Decreased focus, critical thinking, processing new information
- Lasting physical and physiological tolls
- Emotional dysregulation (confusion, distress, aversion, “Four F” responses)

TRAUMA RESPONSES | FOUR F'S

FIGHT

- Bullying, controlling, hyper-critical of others

FLIGHT

- Panic, anxiety, workaholic, perfectionism

FREEZE

- Numbness, disassociation, difficulty making decisions

FAWN

- People-pleasing, no boundaries, co-dependent, identity anxiety

ZONES OF TOLERANCE

HYPER-ACTIVE ("RED ZONE")

- Reactive, combative, defensive
- Unable to reflect, over-communicates

OPTIMAL ZONE ("GREEN ZONE")

- Calm, present, under control
- Able to reflect and communicate

HYPO-ACTIVE ("BLUE ZONE")

- Numb, shut-down, frozen
- Unable to communicate, over-internalized

DYSREGULATION

LEAVING OUR OPTIMAL ZONE

Everyone has different baselines for the “width” of their zones

Everyone has different reaction profile when responding “up” or “down” from different stressors

Everyone fluctuates throughout the day between these zones (sleep, food, background stressors, foreground events, etc.)

2. “How” to Use a Trauma-Informed Approach

KEY OBJECTIVES

ENGAGEMENT: KEEP SPEAKER WITHIN OPTIMAL ZONE OF TOLERANCE

- Increases the quality and quantity of evidence you can elicit
- Increases the predictability of both substantive evidence and processes
- Reduces unnecessary worsening of trauma as a cost of securing outcomes

AGENCY: KEEP SPEAKER ORIENTED WITHIN THE PROCESS

- Reduces alienation / disorientation in the “process” (for participants and the public)
- Improves clarity of instructions, decision-making, and buy-in toward outcomes
- Allows for acknowledgement of trauma as well as the limits of legal processes

A. Client Management

Proactive Intake ("Stress Plan")

- Identify difficult topics / areas and boundaries
- Outline communication plan
- Discuss complementary support

Routine Process Check-Ins

- Early overview road-maps
- Consistent small updates
- Always re-situate process steps within broader outline

Active Listening

- Open-ended questions
- Active body-language (engagement cues)
- Mirroring language
- "I'm hearing you" vs "I understand"
- This should be exhausting

B. Discovery Examinations

Opening Orientation

- Overview process and purpose of examination
- Outline general topics and evidence that will be discussed

Ongoing Check-Ins

- Re-Orient on outline at each chapter
- Proactively check-in for breaks
- Give “Sign-Post” or “Caution” notices before sensitive topics or evidence

Active Listening

- Open-ended questions
- Active body-language (engagement cues)
- Mirroring language
- “I’m hearing you” vs “I understand”
- This should be exhausting (especially on zoom)

C. Trial Management

Proactive Case Management

- Raise possibility of formal or informal protocol
- Designated client/participant preparation to review trial process for stress-management

Ongoing Courtroom Strategies

- Daily outlines of general topics
- "Sign Posting" before raising sensitive/difficult evidence
- Reminders on available facilities, resources, supports

Affective Cross-Examination

- Respectful – conscientious about tone, body-language, delivery
- Focused – targeting key issues and evidence; avoid meandering or gratuitous bludgeoning
- Fair – tactical sign-posting, orientation, and mirroring language all *increase* effectiveness (while decreasing dysregulation)

3. SAMPLE TRIAL PROTOCOL

S. v. Ukraine International Airlines JSC, 2024 ONSC 3303

Key Facts and Issues

- Ukraine International Airlines' flight PS752, civilian commercial airliner shot down by Iran's Islamic Revolutionary Guard on January 8, 2020.

- Ukraine International Airlines named as defendant in one class proceeding and 101 individual actions, most governed by *Montreal Conventional* and some by the *Warsaw Convention* (public int'l law treaties governing commercial aircraft). This trial was for class action and all individual *Montreal Convention* actions.

- Key issues at trial were competing experts regarding the airline's safety diligence process in approving the flight for take-off out of Tehran International Airport, the Iranian government's official incident investigation report (and credibility concerns arising from the same), and the general geopolitical context at the time.

Reason for Trauma-Informed Protocol

- Reasons, **paras 97-109**

- **Court-initiated** request for trauma-informed protocol during case management
- Counsel, court, and external consultants (social work) collaborated on protocol
- Court acknowledgment of added-importance of mitigating risk of re-traumatization even though “most of the evidence” focused on aviation security and experts

Key Features of Protocol

- **Before start of trial**, all counsel prepared their witnesses and observers on potential for retraumatizing and vicarious trauma.
- "Trauma Informed Care Guides" prepared and made available to all observers/participants (categorized for participants, observers, court staff etc.).
- **At the start of each day**, counsel would announce an overview of what evidence was likely to be covered that day so observers could decide whether to attend
- **At the start of each examination**, counsel would identify any areas of their examination that could cause an emotional response to provide some advance notice.
- **Before displaying any sensitive exhibits** (audio or text messages), counsel would announce the same to allow persons to prepare and/or leave.
- Trauma counselling specialists were available via phone (English and Farsi) throughout trial.

Other Steps Taken

- Justice Akbarali addressed all participants directly at outset and conclusion of trial acknowledging loss and emphasizing the court's recognition of the same notwithstanding underlying dispute and complexity of evidence

- One family member was permitted to give evidence in chief via affidavit and cross-examination was limited to reduce unnecessary treading of undisputed facts

- The complete Trauma-Informed Trial Protocol and all of the Care Guide materials were attached to the Reasons as Appendices

Takeaways…

- “Trauma-informed legal processes are not yet broadly understood or widely deployed. […] We can aspire to a systemic shift to a trauma-informed legal system, but that shift will begin one hearing at a time.” (para 99)

- “A trauma-informed process can thus operate to remove barriers to just outcomes, and enhance public respect for, and the legitimacy of, the administration of justice.” (para 100)

- “I am sure there is room for improvement in the process we employed, but I am equally sure that employing the process was infinitely better, and more human, than conducting the trial on a business-as-usual basis. The issues between the parties remained hotly contested and all counsel were able to advocate effectively for their clients. The trauma-informed guidelines counsel consented to, and I approved, did not, and were not intended to, alter the adversarial nature of the trial.” (para 108).

ADDITIONAL READING

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- Levin, Peter A. (2015), *Trauma and Memory Brain and Body in a Search of the Living Past: A Practical Guide to Understanding and Working with Traumatic Memory*, Berkeley, California, North Atlantic.
- Bruce, Caroline Dr. (2020) Applying trauma informed principles to support witnesses to stay within their window of tolerance (https://vimeo.com/380211535).
- "Vicarious Trauma: Signs and Strategies for Coping", British Medical Association, 2022 (https://www.bma.org.uk/advice-and-support/your-wellbeing/vicarious-trauma/vicarious-trauma-signs-and-strategies-for-coping).
- *Trauma-Informed Legal Practice Toolkit*, Golden Eagle Rising Society and The Law Foundation of British Columbia (September 2020) (https://www.goldeneaglerising.org/photos/trauma-informed-legal-practice-toolkit).
- Paulson, Thor et al. (2023) Toward a Trauma-Informed Approach to Evidence Law: Witness Credibility and Reliability. *Canadian Bar Review*. (https://cbr.cba.org/index.php/cbr/article/view/4875/4556).
- Maki, Helgi, et al. (2023) Trauma-Informed Law: A Primer for Lawyer Resilience and Healing. *American Bar Association: Law Practice Division* (2023).

QUESTIONS / DISCUSSION

With Thanks

LERNERS

CITATION: S. v. Ukraine International Airlines JSC, 2024 ONSC 3303
COURT FILE NO.: CV-21-00659475-0000
CV-20-00634770-00CP
CV-21-00660737-0000
CV-20-00637718-0000
CV-21-00661405-0000
CV-21-00674491-0000
CV-21-00670960-0000
DATE: 20240610

2024 ONSC 3303 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

N.S. in her personal capacity and as Trustee of the Estate of H.A., deceased, and as Litigation Representative of the Estate of K.A., deceased	)	*Joe Fiorante, K.C., Jamie Thornback, Valérie Lord and Paul Miller,* for the plaintiff
Plaintiff	)	
– and –	)	
Ukraine International Airlines JSC	)	*Clay Hunter and Jiwan Son,* for the defendant
Defendant	)	
AND BETWEEN:	)	
Omid Arsalani in the capacity of Estate Trustee Without a Will of Hiva Molani, Fatholla (Vahid) Hezarkhani in the Capacity of Administrator of the Estate of Naser Pourshabosibi, Fatholla (Vahid) Hezarkhani in the Capacity of Administrator of the Estate of Firouzeh Madani and Habib Haghjoo	)	*Tom Arndt,* for the class
Plaintiffs	)	
– and –	)	
Ukrainian International Airlines JSC	)	*Clay Hunter and Jiwan Son,* for the defendant

Defendant	)	
AND BETWEEN:	)	
	)	
The Estate of Behnaz Ebrahimi-Khoei, The Estate of Rahmtin Ahmadi, Hadi Ahmadi, Farnaz Moinzad, Manijeh Maali, Mahmoud Ahmadi and Hossein Ebrahimi-Khoii	)	*Vincent Genova, Peter Jervis, Douglas Worndl and Pritpal Mann*, for the plaintiff
Plaintiffs	)	
– and –	)	
Ukraine International Airlines JSC	)	*Clay Hunter and Jiwan Son*, for the defendant
Defendant	)	
AND BETWEEN:	)	
Razia Dhirani, Rehana Dhirani and Arif Dhirani, Jibraan Dhirani, Isa Dhirani, Deen Dhirani, minors by their litigation guardian, Arif Dhirani, Kian Hossain, Qais Hossain, by their litigation guardian Rehana Dhirani, and the Estate of Asgar Dhirani, by its Executor Razia Dhirani	)	*Roderick S.W. Winsor and Steven Kelly*, for the plaintiffs
Plaintiffs	)	
-and-	)	
Ukraine International Airlines PJSC	)	*Clay Hunter and Jiwan Son*, for the defendant
Defendant	)	
AND BETWEEN:	)	
Ali Ahmari-Moghaddam, Administrator of the Estate of Mojtaba Abbasnezhad, Gholamhossein Abbasnezhad and Sina Abbas Nejad	)	*Jordan D. Assaraf*, for the plaintiffs
Plaintiffs	)	

2024 ONSC 3303 (CanLII)

-and-	)	
Ukraine international Airlines PJSC Defendant	)	*Clay Hunter and Jiwan Son*, for the defendant
AND BETWEEN:	)	
A.H.P. and P.E.P. by their Litigation Guardian, K.K. Plaintiffs	)	*Frances Shapiro Munn and Hamish Mills-McEwan*, for the plaintiffs
-and-	)	
Ukraine International Airlines Defendant	)	*Clay Hunter and Jiwan Son*, for the defendant
AND BETWEEN:	)	
The Estate of Seyed Mehran Abtahi Foroushani, by its Litigation Administrator, Seyed Arman Abtahi, Seyed Arman Abtahi, personally, Behnoosh Mohammadi Jazi, Seyed Mahdi Abtahi, Fatemeh Hatami Varnosfaderani, Seyed Iman Abtahi and Amooshahi Varnosfaderani Plaintiffs	)	*Stephen Birman and Lucy Jackson*, for the plaintiff
-and-	)	
Ukraine International Airlines Defendant	)	*Clay Hunter and Jiwan Son*, for the defendant
	)	**HEARD:** November 20, 21, 22, 23, 24, 27, 28, 29, 30, December 1, 4, 5, 6, 7, 8, 2023, January 10, 11, 12, 2024

J.T. AKBARALI J.

Overview

2024 ONSC 3303 (CanLII)

[1] On January 8, 2020, Ukraine International Airlines' flight PS752 ("PS752") departed from Tehran Imam Khomeini International Airport ("IKA"). Shortly after take-off, the flight was hit by two surface-to-air missiles launched by members of Iran's Islamic Revolutionary Guard Corps ("IRGC"). Tragically, all 176 passengers and crew aboard PS752 lost their lives.

[2] Ukraine International Airlines JSC ("UIA") has been named as a defendant in one class proceeding, and 101 individual actions, arising out of the accident.[1] Most of these claims are governed by the *Montreal Convention for the Unification of Certain Rules for International Carriage by Air,* 1999 (the "*Montreal Convention*"). A few are governed by the *Warsaw Convention*.

[3] These reasons relate to the trial of the class proceeding, and six representative individual actions, all of which are governed by the *Montreal Convention*. The parties have agreed that the result of this trial will apply across all actions commenced in the Ontario Superior Court of Justice to the extent that the claims in those actions are governed by the *Montreal Convention*. These reasons do not affect the actions governed by the *Warsaw Convention*.

[4] The parties to this trial agree that an "accident" as defined in the *Montreal Convention* has taken place.[2] They agree that, under the terms of the *Montreal Convention*, UIA is strictly liable for the accident. That liability is unlimited unless, under the *Montreal Convention*, UIA can prove that it was not negligent in allowing PS752 to depart Tehran on the morning of January 8, 2020. UIA's reverse onus defence that it was not negligent is the issue in this trial.

Brief Conclusion

[5] For the reasons I set out below, I find that UIA has failed to prove, on a balance of probabilities, that it was not negligent in allowing PS752 to depart Tehran on January 8, 2020. As such, its liability under the *Montreal Convention* is unlimited.

Background

[6] At this stage in these reasons, I set out some background to assist the reader in understanding the analysis that follows.

<u>The Geopolitical Context: Military Tensions between the United States and Iran</u>

[1] UIA disputes that Ontario has jurisdiction over one of the claims, but the jurisdictional question is not at issue in this trial.
[2] "Accident" means "an unexpected or unusual event or happening that is external to the passenger": *Bland v. EVA Airways Corporations*, 2013 WL 12324773 (SDNY), at p. 3.

2024 ONSC 3303 (CanLII)

[7] The long history of tensions between the United States and Iran is the backdrop against which the tragedy of PS752 unfolded. This history was explained at trial by Dr. Michael Wallace[3], whom I qualified as an expert to provide opinions on the structure of the Iranian military, and the history of military tensions between Iran and the United States.

[8] Dr. Wallace explained that, following the Iranian Revolution in 1979, Iran established a Shia Muslim country which sees not only countries such as Israel and the United States as its competitors, but also Sunni Muslim countries like Saudi Arabia.

[9] Prior to the Iranian Revolution in 1979, there was a single military in Iran, the Artesh, which had been trained in significant measure by the United States. At the time of the Iranian Revolution, the Iranian military was already highly professional, but not trusted by Ayatollah Khomeini, Iran's then-supreme leader, because of its historical ties to Western governments.

[10] For that reason, Ayatollah Khomeini established a second military command and control structure in Iran: the IRGC, which is made up of about 190,000 personnel in ground, naval, air and unconventional forces who are known to be fervently devoted to the Iranian regime.

[11] Artesh focuses on defending Iran against external threats while the IRGC focuses on threats to the Iranian regime, including threats to its nuclear program. The IRGC includes the Qods force, a clandestine branch of the IRGC which focuses on extra-territorial operations, including exporting the Iranian Revolution through support for terrorist activities abroad.

[12] I make no attempt to set out a comprehensive history of the tensions in the Middle East involving Iran since 1979; it suffices to note that, at least since 1979, these tensions have been present, often through proxies. The Qods force has been involved in the proxy battles that have been ongoing at least since the Iranian Revolution.

[13] However, a series of events beginning in 2018 are relevant to understanding the state of the tensions at the time PS752 was shot down.

[14] In April 2018, the government of the United States designated the IRGC as a foreign terrorist organization, marking the first time an official military government force had been so designated. In May 2018, the United States withdrew from the 2015 Joint Comprehensive Plan

[3] Dr. Wallace is a Senior Professor of Practice (since 2014) and the Director of Emergency and Security Studies (since 2012) at Tulane University, and an adjunct professor at the U.S. Naval War College (since 2019). He teaches courses including terrorism and intelligence analysis, and theatre decision making. Prior to his academic career, he was an American naval officer for 20 years, and a senior intelligence analyst with the Joint Chiefs of Staff JW at the Pentagon. Iran has been one of the focuses of his work.

2024 ONSC 3303 (CanLII)

of Action ("JCPOA") nuclear agreement, an agreement with the objective of slowing down Iran's nuclear power program that had been entered into while Barack Obama was president. This withdrawal worsened relations between Iran and the United States. The withdrawal from the JCPOA was in furtherance of a new American policy to apply maximum pressure on Iran's economy in order to force Iran to renegotiate the JCPOA and to deny Iran revenue to develop its strategic capabilities or to support unrest in the region.

[15] In May and June 2019, oil tankers from Saudi Arabia, the United Arab Emirates, and Norway were attacked. The United States attributed those attacks to the IRGC.

[16] On June 20, 2019, Iran shot down an unmanned American aircraft ("UAV") that it claimed violated its airspace. A week earlier it had attempted to shoot down another unmanned American aircraft. The following month, on July 18, 2019, American forces downed an Iranian drone via jamming in the Strait of Hormuz.[4]

[17] Also in July 2019, the United Kingdom impounded an Iranian tanker off Gibraltar for violating the European Union embargo on oil to Syria. In retaliation, Iran seized a British-flagged tanker in the Strait of Hormuz. The Iranian tanker was released following an order of a court in the United Kingdom on August 15, 2019. Iran released the British tanker on September 22, 2019.

[18] Through its proxy, the Houthi movement in Yemen, Iran launched a cruise missile attack against Saudi Arabian energy infrastructure in September 2019, which shut down a significant portion of Saudi Arabian oil production, and further escalated tensions between Iran and the United States.

[19] Then, in mid-December 2019, Iran launched rockets against Iraqi military facilities where American forces were co-located. Iran launched a subsequent attack on December 27, 2019, which killed an American contractor and wounded four American troops near Kirkuk, Iraq.

[20] On December 29, 2019, the United States launched airstrikes on targets in Iraq and Syria against an Iranian-backed group, Kata'ib Hezbollah.

[21] On December 31, 2019, supporters of Kata'ib Hezbollah and other Shia militias surrounded and entered the American embassy in Baghdad. Some of the outer embassy buildings were set on fire. The militias withdrew from the embassy on a promise from the Iraqi parliament that it would hold a vote on expelling American forces from Iraq.

[4] The Strait of Hormuz is a narrow channel between the Omani Musandam Penninsula and Iran, which connects the Persian Gulf to the Gulf of Oman.

2024 ONSC 3303 (CanLII)

[22] Then, in a major escalation of tensions, on January 3, 2020, the United States launched an airstrike that killed Qods Force Commander Major General Qasem Soleimani and Kata'ib Hezbollah leader Abu Mahdi Al-Muhandis. The open assassination of a senior leader in a foreign government by the American government was unprecedented. The assassination of General Soleimani was met with outrage in Iran, where he was very popular and influential; by some accounts, General Soleimani was the second most powerful person in Iran. In any event, it is certain that General Soleimani was extremely powerful in Iran. The Iranian Supreme Leader Khamenei threatened to retaliate for the killings.

[23] The then-American president, Donald Trump, warned Iran on Twitter (as it then was), that if it retaliated for the killing of General Soleimani, the United States military had identified 52 sites, "some at a very high level & important to Iran and Iranian culture" and would hit them "VERY FAST AND HARD".

[24] On January 8, 2020, at about 2:00 a.m. local time in Tehran, or 22:30 UTC[5], Iran launched "Operation Martyr Soleimani", launching ballistic missiles — perhaps as many as 16 of them — at two Iraqi bases at which American soldiers were stationed. This response to the killing of General Soleimani was notable because it marked the first time American forces had been subjected to a ballistic missile attack by Iran, raising the stakes higher than they had been in the past. The attack continued for about three hours.

[25] No American was killed in the attack, but many were injured, including with traumatic brain injuries.

[26] Following the attack on Americans in Iraq, the Iranian military went into a state of high alert, in view of Mr. Trump's vow to retaliate fast and hard. Iran would not have known where or when the Americans would attack, but the Commander of the IRGC Aerospace Force said Iran was "totally prepared for a full-fledged war".

[27] Thus, on January 8, 2020, Iran's air defence forces, including its surface-to-air missiles ("SAMs") were prepared for an American attack, partly because Mr. Trump had vowed to respond very fast and hard, and partly because, due to the length of the attack on the Iraqi bases, American forces would have been keen to neutralize the threat against them emanating from Iran.

[28] This was the political and military situation as it existed in the early morning of January 8, 2020, in Tehran, when PS752 was supposed to take off to return to Kyiv.

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[5] In these reasons, I sometimes refer to the time in Tehran, or in Kyiv, or Coordinated Universal Time, also referred to as Greenwich Mean time ("UTC"). In choosing which time zone to use, I refer to the time zone that I think best explains the narrative. For clarity, Kyiv time is UTC + two hours, and Tehran time is UTC + 3.5 hours.

2024 ONSC 3303 (CanLII)

History of UIA's Kyiv-Tehran-Kyiv Route

[29] UIA established its flight route between Boryspil International Airport, in Kyiv, Ukraine to IKA in June 2014. The flight call number from Kyiv to Tehran was PS751, while the return flight call number was PS752.

[30] To establish the route, UIA obtained permission from the States of Ukraine, Iran, and Türkiye, as the route overflew the airspace of each of those states. UIA operated the route several times each week. The route operated on a repetitive flight path that, by January 8, 2020, had not changed since the route's inception.

[31] In order to establish the route, UIA had to undertake an initial security assessment of the route. At this point in the narrative of events, it is useful to understand, in a summary way, the difference between aviation security and aviation safety. I address this topic in detail in my analysis of the issues.

[32] UIA's Vice President of Flight Operations, Captain Igor Sosnovskyi, describes aviation security as being concerned with acts of unlawful interference that may jeopardize the safety of civil aviation, including unlawful seizure, hostage-taking, introduction of weaponry on board an aircraft or at an airport, use of an aircraft for purpose of causing harm, communication of false information to jeopardize the safety of an aircraft, and destruction of an aircraft in service.

[33] Aviation safety is concerned with identifying and assessing hazards that have potential to cause damage to an aircraft's operations, including organization hazards, environmental hazards, human factor hazards, and technical hazards.

[34] A hazard identification and safety assessment is done before each flight to ensure, for example, that an aircraft has the minimum required equipment, or that there are no weather patterns that could endanger the flight. If safety hazards are identified, mitigations are put in place as required.

[35] UIA did not routinely undertake security assessments with respect to its flights. Rather, the Kyiv-Tehran-Kyiv route underwent four separate security assessments up to January 8, 2020: one at the inception of the route, and the others when UIA determined that a change in circumstances warranted an updated security assessment. Those updated security assessments occurred: (i) in June 2019, after Iran shot down an unmanned American drone; (ii) on January 6, 2020, after the assassination of General Soleimani; and, (iii) on January 8, 2020, after Iran's missile attack on US forces at Iraqi bases, but before PS752 took off from IKA.

[36] The sufficiency of these aviation security assessments is hotly contested.

[37] A security assessment can only be performed by someone qualified, trained, and certified to undertake one. UIA had a Directorate of Aviation Security ("AVSEC") with three employees qualified to undertake security assessments. UIA's Deputy President and Director of AVSEC, Petro Martynenko, gave evidence at trial about the establishment of the route, and the security

2024 ONSC 3303 (CanLII)

assessments done between the establishment of the route and the shoot-down of flight PS752. I review this evidence in detail in my analysis of the issues.

[38] I also review in detail the role of international organizations, states, and airlines in ensuring aviation security, as well as the documents that set out industry standards for aviation security and safety in my analysis of the issues.

2024 ONSC 3303 (CanLII)

The Events of January 7-8, 2020

[39] January 7, 2020 was Orthodox Christmas, a holiday in Ukraine. Mr. Martynenko was on duty on the evening of January 7, 2020, and into the morning of January 8, 2020, while the other members of AVSEC enjoyed the holiday with their families. Mr. Martynenko had taken a nap in the afternoon of January 7, 2020, so that he could be rested in order to monitor the situation in the Middle East, where there were concerns that Iran might respond to the assassination of General Soleimani. Mr. Martynenko's concern was for the security of PS752, which was scheduled to depart Tehran on the morning of January 8, 2020.

[40] Before the ballistic missile attack, PS751 arrived at IKA following an uneventful flight from Kyiv, landing in Tehran at 00:57 local time on January 8, 2020. The flight crew, all of whom were adequately trained and qualified, left IKA after PS751 landed to get some rest at a hotel near the airport. The hotel likely did not have news channels available on television, or at least none that the flight crew, none of whom spoke Farsi, could understand.

[41] Iran launched the ballistic missile attack on American forces at Iraqi bases in the hours following the landing of PS751. There is no evidence that the flight crew was aware of the ballistic missile attack before PS752 departed, although there is evidence that passengers were aware, and concerned about air safety.

[42] Mr. Martynenko gave evidence that he became aware of the ballistic missile strike at some time between 2:00 a.m. and 3:15 a.m. Kyiv time (3:30 to 4:45 a.m. Tehran time) and thereafter conducted an updated security assessment, which I address in greater detail below. In the result, he determined that the risk for PS752 to depart Tehran was higher than it had been assessed on January 6, 2020, but still acceptable.

[43] Prior to the departure of PS752 but after the commencement of the ballistic missile attack, 15 planes departed from, and eight planes landed at, IKA. Some of those planes flew routes of a similar trajectory to the usual flight path of PS752. In addition, other airlines overflew the airspace over Tehran (known as "Tehran FIR"). Certain other airlines altered their flight paths, both in the days before January 8, 2020, and in the days after, such that they would not overfly Tehran FIR. Some did so due to the security risk. For others, there is no evidence in the record as to why they changed their flight paths.

[44] PS752's departure from Tehran, scheduled for 5:15 a.m. Tehran time, had been delayed. At 6:12 a.m. Tehran time, or 2:42 UTC, PS752 finally departed IKA for Kyiv. It did not deviate

from its approved flight path. The aircraft was airworthy, and all aircraft systems were functioning properly at take-off.

[45] Notably, the evidence indicates that PS752 had a working dual transponder system, which enables a secondary radar surveillance system that can be used in addition to a primary radar system. The importance of the radar surveillance systems was explained by Ian Gilbert[6], whom I qualified at trial to give evidence on avionics and the operation of the transponder on board PS752.

[46] Mr. Gilbert explained that primary radar surveillance systems use ground-based antennae to transmit a radar pulse, and then listen for the small amount of return energy that is reflected back from an aircraft to position or track it. The time delay between the transmission of the pulse and the reflected return measures the distance of the aircraft. Primary radar surveillance can be used to locate an aircraft that has no on-board equipment.

[47] A secondary radar system requires an airborne transponder which sends its signal from the aircraft without being interrogated by ground antenna first. PS752 was equipped with dual transponders, providing redundancy should one fail. Different ground-based systems can be used for secondary radar surveillance, that is, to receive signals, and therefore information, from an airborne transponder.

[48] Consistent with Mr. Gilbert's information from other sources, Iranian media has reported that IKA has a modern airport radar system including "Monopulse Secondary Surveillance Radar", indicating that it would be able to receive return signals from PS752's transponder. Those signals would identify PS752's altitude, speed, position, heading, and callsign, plus a code showing the radio frequencies the crew are listening to and the air traffic control services they are using at any given time. Given what is known about the sophistication of the Iranian aviation authorities and Iran's military, I infer that IKA did have this type of modern radar system. Thus, were IKA or Iranian military to have interrogated PS752's transponder, they would have received a valid response which ought to have made it clear that PS752 was a commercial airline, and not a military threat.

[49] The evidence indicates that PS752's transponder was transmitting information until it was struck by a SAM, after which the transponders stopped transmitting, likely due to loss of electrical power. PS752's path was tracked by primary radar surveillance until it crashed.

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[6] Mr. Gilbert, a chartered engineer, has over 50 years experience in avionics, including with British Airways as a senior development engineer, and with Honeywell, as Director Technical Services, Europe, Middle East, Africa and the CIS. Since 2007, he has worked as a consultant to aerospace companies consulting on platforms and systems including global positioning, data link, satellite communications, flight management and unidentified aerial vehicles.

2024 ONSC 3303 (CanLII)

[50] According to Iran's investigation report, to which I turn shortly, PS752 was deconflicted and permission was obtained from the Iranian military to allow it to depart. There is no objective evidence to back up these conclusions; there is only Iran's say-so. As will become apparent, Iran's statements about the cause of the destruction of PS752 are, at best, wholly unreliable, and at worst, deliberate mistruths. Thus, while it is possible that the flight was deconflicted and permission granted from the military for it to leave, we will likely never know for sure.

[51] There was absolutely no reason that PS752 should have been taken to be anything other than a commercial jet airliner. It was flying away from Tehran, gaining altitude, flying at a speed that was expected for a commercial airliner but not for a missile, at an altitude that was not consistent with a missile, and with a working transponder system that, were secondary radar surveillance in use, would have provided the Iranian military with information about the commercial aircraft if they interrogated it.

[52] Notwithstanding, mere minutes after takeoff at 6:12 am Tehran time, PS752 was struck by two SAM missiles fired in succession by an Air Defence Unit ("ADU") operated by the IRGC. The missile strikes rendered the aircraft uncontrollable. It crashed, killing everyone aboard.

[53] Immediately after the crash, the cause was unclear (except, presumably, to the IRGC). Aircraft continued to land at, depart from, and overfly IKA. After three days of denials, Iran finally admitted that it had shot down PS752.

The Questionable Iranian Investigation

[54] Iran is a state party member of the *Convention on International Civil Aviation*, commonly known as the *Chicago Convention*, which sets out principles and arrangements respecting civil aviation to ensure its safety, among other things. As a state party member to the *Chicago Convention*, Iran was required to conduct an investigation into the destruction of PS752. In the end, Iran concluded that human error was at fault.

[55] According to Iran, the radar of the SAM unit that fired the missiles at PS752 was misaligned after it was "relocated for the last time" at 04:54 local time, by a distance of around 100 metres. Iran claims that the relocation introduced a bearing error of 105 degrees into the SAM's fire control system and that the operator failed to realign the unit properly, such that the unit displayed objects as moving in a space and direction that the objects were not actually moving in. This alleged misalignment was demonstrated by a video created by Dr. Kara Greene[7],

[7] Dr. Greene is a pilot, a former member of the U.S. Airforce, and a mechanical and aeronautical engineer who specializes in aircraft accident reconstruction and analysis. She holds a Ph.D. in aerospace engineering, and has taught courses at the Air Force Academy in aeronautics, experimental methods, a capstone mathematics course, and flight test techniques.

2024 ONSC 3303 (CanLII)

whom I qualified as an expert in aircraft performance and flight path accident reconstruction. Dr. Greene's accident reconstruction video revealed that the 105-degree misalignment would have wrongly shown planes that were taking off from IKA and following the trajectory of PS752's regular flight path, away from Tehran, as originating from the southwest direction, and flying towards Tehran.

[56] Iran's report alleges that the SAM had been kept in standby mode (so that its radar was not operating) from 04:54 until about 06:07, when it was placed in operating mode. Shortly thereafter, at 06:14, the SAM detected PS752 but due to the misalignment, it appeared to be flying toward Tehran. The SAM operator reported the "target" to higher command at 06:14:19, and then, having received no response, fired a missile at 06:14:39. According to Iran, therefore, about 40 seconds elapsed between the SAM detecting PS752 and the first missile being fired.

[57] Iran claims that the misalignment, when coupled with an anticipated US response to Iran's ballistic missile strike, led the ADU to incorrectly identify PS752 as an incoming US cruise missile.

[58] There are many reasons why Iran's explanation makes absolutely no sense. I have already described why the working transponder system makes it unlikely that PS752 could have been mistaken for a threat by the ADU if the military were employing a secondary radar surveillance system. In addition, had the military deployed a primary radar system to interrogate PS752, doing so would have corrected the alleged misalignment problem, and PS752 would have been identified as coming from the direction of IKA, flying north, away from Tehran.

[59] Moreover, Iran's explanation does not make sense given the capability of the air defence system it was using. UIA led evidence from Dr. Justin Bronk[8], whom I qualified as an expert in air defence weapons systems. Dr. Bronk's evidence confirmed that Iran's explanation that the shootdown of PS752 was caused by human error, at least in the manner it describes, is unconvincing.

[60] Dr. Bronk explained that the type of SAM at issue here (a 9K331 Tor-M1, which I will continue to refer to as a SAM in these reasons) is a Russian-made short-ranged air defence system that is optimized for engaging incoming precision guided munitions including cruise

[8] Dr. Bronk is a Senior Research Fellow for Combat Airpower and Military Technology at the Royal United Services Institute. His work includes briefing international politicians, senior military and business leaders, conducting fieldwork, conducting site visits to military bases, facilities and ships with UK and international armed services, and editing the Royal United Services Institutes' online journal. His experience includes acting as a weapons expert in connection with the shoot-down of Malaysia Airlines flight MH-17. Dr. Bronk is also a Professor in Airpower Studies at the Royal Norwegian Air Force Academy. Dr. Bronk holds a Ph.D. from the Defence Studies Department at Kings College London, University of London.

2024 ONSC 3303 (CanLII)

missiles. To be able to engage fast incoming missiles, the SAM needs a fire control system capable of extremely rapid engagements and a powerful, high-frequency, high-resolution radar.

[61] The SAM is designed to be moved frequently to keep pace with the armoured formations it was designed to protect. It was designed around a highly mobile tracked chassis with target acquisition and fire control radars and missiles, all mounted on the same vehicle.

[62] The SAM system is highly automated, and is designed to track incoming targets while it is moving. It must stop moving to fire a missile, but only for seconds. The minimum time from target detection to missile launch is 3.5 to 10 seconds when stationary. If the SAM is moving, it requires an additional two seconds to stop, to allow it to fire.

[63] The SAM also has a secondary TV tracking system that provides visual target identification capability.

[64] Given the capabilities of the SAM system, the Iranian explanation of human error is implausible.

[65] First, a 100-metre relocation of the SAM should not have introduced an uncorrected bearing error into the SAM's radar. Deconfliction is a crucial part of any military air defence system, especially one capable of rapid engagement, like the SAM. No military wants to down its own aircraft accidentally. The SAM system is designed to move. It should not have required a bearing correction after a move of just 100 m, and certainly not in the magnitude of 105 degrees. Dr. Bronk explained that the only time an error of the magnitude Iran claims could be introduced into the system is if the SAM were moved other than under its own power, like on a train or trailer.

[66] Second, if the SAM was moved only 100 metres, it should have detected other commercial airlines that followed a similar flight path to PS752 prior to the departure of PS752. Given the implausibility of the 105-degree bearing error, the SAM should have detected those other flights as following the same flight path as it detected PS752 flying. An alert crew should also have detected other aircraft flying a similar path to PS752. None of those other flights were interfered with. There is no explanation for why only PS752 was identified as a target. Moreover, the SAM crew should have been aware that they were stationed near IKA, the primary international airport serving Tehran, and thus been aware of the possibility of civilian aircraft in the area.

[67] Third, it is logical that the SAM would relocate by 100 metres or so, and do so repeatedly during the night, consistent with how one would expect an air defence system to respond to an anticipated strike. Regular, short movements of the SAM would both protect Iran's airspace and make it less likely that the SAM itself would be located and targeted by the Americans. However, a SAM that is moving in the night in circumstances where the military is on high alert would not be on stand-by, but would be active, with its radar system on, and the system set ready to fire throughout the night.

2024 ONSC 3303 (CanLII)

[68] Thus, a SAM that is being repositioned by 100 metres would have its radar surveillance coverage operational while repositioning in order to maintain situational awareness, especially since it only needs two seconds to stop to fire, which takes between 3.5 and 10 seconds. The SAM can be moved 100 metres while still providing air defence capability, which is how one would expect Iran would employ its SAMs while anticipating an American strike.

[69] Fourth, the SAM should have identified PS752 as a larger and slower contact than an incoming cruise missile, and should have identified that PS752 was in a steady climb, rising from 2400 feet above ground level at the time of detection and climbing to about 4100 feet above ground level by the time the missile was launched. For comparison, an American cruise missile flies much faster and at altitudes of about 30-100 feet over hostile territory to minimize its chances of being shot down.

[70] Fifth, the crew of the SAM could easily have used the SAM's optical sensor capability to visually identify the target before firing. The standard lights on a civilian aircraft would have identified PS752 as a commercial airliner even if there were no other optical aids on the SAM.

[71] Sixth, if it is correct that the Iranian military gave PS752 permission to take off, and deconflicted it, the SAM crew near the airport ought to have been looped into that communication.

[72] Seventh, Dr. Bronk also explained that SAMs are a short-ranged system that function as a last line of defence. There is no reason why a SAM crew deep in Iranian territory that was in communication with other defence units and maintaining situational awareness would expect to be the first defence unit confronted with a US cruise missile attack.

[73] Finally, Dr. Bronk questioned what rules of engagement the SAM crew had been issued, and why they felt authorized to fire missiles without higher command authority. Were they in fact authorized to fire live weapons without higher command authority when they were stationed so close to a major civilian airport, and if so, why? Or did the crew act in breach of the rules of engagement, and if so, why? The accident raises questions about the training of, and adequacy of communication between, the IRGC command structure and the ADU, none of which are answered by Iran's implausible explanation.

[74] I admitted the report resulting from Iran's investigation into evidence, because it is part of the narrative of events. But I do not rely on Iran's report for proof of the truth of its contents, given its lack of credibility, which I have just described.

[75] Given the number of Canadians on board PS752, the Government of Canada delivered two reports into the tragedy. Both are in evidence before me. The first, entitled *Flight PS752: The long road to transparency, accountability and justice*, was published in December 2020. The second, entitled *The Downing of Ukraine International Airlines Flight 752, Factual Analysis, Forensic Examination and Assessment Team*, was published on June 24, 2021.

2024 ONSC 3303 (CanLII)

[76] The Canadian reports are limited by the fact that Canada did not have unfettered access to the source material that would have allowed for a proper investigation. However, to the extent that the Canadian reports identify information relevant to the shoot-down of PS752, I accept that that information is credible and reliable. I note that the parties themselves agree that the Canadian reports are admissible for proof of the truth of their contents. As required, I deal with the Canadian reports in greater detail in my analysis.

[77] While there was more relevant evidence that was led at trial, at this juncture I turn to the issues in the case. I address other relevant evidence, as necessary, in my analysis of the issues.

Issues

[78] The following issues must be determined:

a. Has UIA proven that it did not breach the standard of care in making its assessment of risk to PS752 from taking off, and in permitting PS752 to take off from IKA on January 8, 2020? Answering this question involves determining the content of the standard of care and assessing whether UIA breached it.

b. If UIA cannot prove that it did not breach the standard of care, has UIA proven that its breach of the standard of care did not cause the passengers' damages in fact; that is, but for UIA's breach of the standard of care, would the passengers have been killed?

c. If UIA cannot disprove causation in fact, are the passengers' losses too remote to be recoverable? That is, has UIA proven that there is no causation in law?

First Preliminary Issue: The Protective Order

[79] Prior to this action coming to trial, Glustein J., in his capacity as case management judge, issued two protective orders, dated November 19, 2021, and June 13, 2022. These orders sought to protect from disclosure sensitive information relating to airline safety and security which, if broadly known, could pose a risk to the travelling public.

[80] UIA sought an order that would extend Glustein J.'s protective orders and make specific provision for how to deal with confidential information in the context of the trial.

[81] I directed UIA to bring a motion at the outset of trial for the confidentiality order it sought, and to provide notice to the media of its motion in accordance with the court's practice direction. No media attended to motion to make submissions.

[82] There was some dispute between the parties as to which portions of documents should be subject to a protective order. In the end, after negotiations between the parties, UIA redacted a number of its documents to remove sensitive information that was not relevant to the issues in this trial.

2024 ONSC 3303 (CanLII)

[83] There remained only one document with respect to which UIA sought a protective order, and about which I heard argument.

[84] The document in issue is known as Order 390, which is a collection of guidelines on assessing the level of threat to the security of the civil aviation of Ukraine. This document was issued as "Official (restricted) use only" by the Ministry of Infrastructure of Ukraine.

[85] To obtain a copy of Order 390, UIA had to undertake not to disclose or otherwise use Order 390 in open speech, publication in the media, in court proceedings, exhibitions, showrooms, or any other public spaces unless it obtains the written consent of the Ministry of Infrastructure of Ukraine.

[86] Order 390 has been superseded by another order. Despite multiple requests from UIA, the Ministry of Infrastructure of Ukraine has not provided its written consent to UIA to disclose or otherwise use Order 390 publicly.

[87] Should UIA breach its undertaking, under article 172(8) of the Code of Ukraine on Administrative Violations, UIA's Chief Executive Officer is at risk of a penalty which could be a fine of up to 150 times the Ukrainian minimum wage.

[88] Accordingly, because Order 390 has relevance to these proceedings, UIA sought an order allowing it to file that document under seal, and to exclude everyone except for court staff, lawyers, and the relevant witness, whenever evidence was being given with respect to Order 390 at trial.

[89] The legal principles relevant to a protective order are set out in *Sherman Estate v. Donovan*, 2021 SCC 25, [2021] 2 S.C.R. 75. First, it is necessary to recall the fundamental importance of the open court principle. In *Sherman Estate*, at para. 1, the Supreme Court of Canada wrote:

> This Court has been resolute in recognizing that the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy. As a general rule, the public can attend hearings and consult court files and the press — the eyes and ears of the public — is left free to inquire and comment on the workings of the courts, all of which helps make the justice system fair and accountable.

[90] The Court confirmed the "strong presumption in favour of open courts", but allowed that exceptional circumstances arise in which competing interests justify imposing a restriction on the open court principle. In such cases, the applicant must demonstrate first, "as a threshold requirement, that openness presents a serious risk to a competing interest of public importance" – a high bar that serves to maintain the strong presumption of open courts: *Sherman Estate*, at para. 2; see also paras. 3, 37.

2024 ONSC 3303 (CanLII)

[91] The court has inherent jurisdiction to make a confidentiality order, and jurisdiction under s. 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, to make an order sealing documents.

[92] Under s. 135(2) of the *Courts of Justice Act*, the court may order the public to be excluded from a hearing where the possibility of serious harm or injustice to any person justifies a departure from the general principle that court hearings should be open to the public.

[93] The legal test to grant a confidentiality order is set out by the Supreme Court of Canada in *Sherman Estate*, at para. 38. There are three prerequisites that a party must establish when it is asking a court to exercise its discretion in a way that limits the open court principle:

a. Public disclosure would pose a serious risk to an important public interest;

b. No reasonable alternative means would prevent this risk; and

c. The benefits of the order outweigh any negative effects.

[94] The Supreme Court of Canada held that only when all of these prerequisites are met can a discretionary limit on openness be ordered. The test applies to all discretionary limits on court openness, such as publication bans, sealing orders, an order excluding the public from a hearing, or a redaction order, subject only to valid legislative enactments: *Sherman Estate*, at para. 38.

[95] At the trial, I determined that the protective order sought by UIA was appropriate:

a. Public disclosure of Order 390 would have involved forcing UIA to breach its undertaking given to the Ukrainian government to keep confidential sensitive information. Even though the Order has been superseded, there is an important public interest in ensuring that an airline respects its undertaking to a government entity, especially here, where the undertaking was made in order to receive sensitive security-related information.

b. The order proposed was very narrow in scope. It provided for only one document to be sealed. Only one witness gave evidence about Order 390, and that evidence was brief. The protective order was so narrowly tailored that no other reasonable alternatives would have prevented the risk.

c. I considered whether the observers in the courtroom could be allowed to remain while evidence was given about Order 390. However, during the day prior to the evidence being given about Order 390, court staff reported having observed people in the courtroom gallery recording parts of the proceedings, in violation of s. 136 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, despite the s. 136 warning having been given. I addressed the issue about recording directly, and also asked counsel to speak to their clients about it. But given that breach of the legislation, I was not prepared to allow evidence about Order 390 to potentially be recorded by an observer.

2024 ONSC 3303 (CanLII)

d. Finally, the benefits of the order were significant, while the negative effects were minimal.

[96] In the result, I signed the protective order permitting Order 390 to be sealed, and directing that evidence about Order 390 be given in the absence of everyone except the witness in question, court staff, and the parties' lawyers and their staff.

Second Preliminary Issue: Guidelines for a Trauma-Informed Process

[97] Because the plane crash that gave rise to these actions was a traumatic event, I was concerned about the potential for the usual trial processes to retraumatize those parties and observers who lost loved ones in the crash of PS752, and those witnesses who had been involved in the events. I was also concerned about the potential for vicarious traumatization of others involved in the trial processes, including counsel and staff, other observers, court staff, and me.

[98] For that reason, at the trial management conference, I asked counsel to consider the nature of the evidence that would be led, and the orders or directions that could be given to assist in minimizing the potential for retraumatization or vicarious traumatization during the trial.

[99] Trauma-informed legal processes[9] are not yet broadly understood or widely deployed. Although the process we followed is not relevant to my determination on the merits of the trial, I describe how we approached the trial in the hopes that it will aid counsel and courts who seek to fashion a trauma-informed process in their individual trials and hearings. We can aspire to a systemic shift to a trauma-informed legal system, but that shift will begin one hearing at a time.

[100] First, it is important to describe what I mean by a trauma-informed process. It is not one that aims to heal the trauma that participants in the process have experienced. It is not about manners or kindness. It is about adapting our processes in a way that seeks to minimize the trauma that the legal process itself can create, and it is about understanding how a person's trauma might inform or affect their interactions with the legal system. A trauma-informed process can thus operate to remove barriers to just outcomes, and enhance public respect for, and the legitimacy of, the administration of justice.

[9] Information about trauma-informed legal processes may be found in, for example, a publication of the Substance Abuse and Mental Health Services Administration, an agency within the US Government's Department of Health and Human Services, entitled "SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach*"* (July 2014), found at SAMHSA's Concept of Trauma and Guidance for a Trauma-Informed Approach (hhs.gov), or in Helgi Maki, Marjorie Florestal, Myrna McCallum, and J. Kim Wright, *Trauma-Informed Law: A Primer for Practicing Lawyers and a Pathway of Resilience and Healing* (United States of America: American Bar Association, 2023).

2024 ONSC 3303 (CanLII)

[101] In this case, most of the evidence given focused on aviation security and safety assessments, and much of it was given by experts. Thus, the most important focus of a trauma-informed process in this trial was to minimize the potential that the trial itself could lead to re-traumatization, or vicarious traumatization, rather than on removing barriers to just outcomes in the process due to the impacts of trauma.[10]

[102] In advance of the trial, counsel prepared and agreed to Trauma Informed Trial Guidelines, which were entered as a lettered exhibit at trial. The guidelines required that participants in the process be given ample advance notice, as well as immediate advance notice, before any evidence was led that was expected to be traumatic. This enabled observers, and certain participants in the trial whose presence for the evidence was not strictly necessary, to absent themselves if they wished to do so.

[103] The guidelines filed by counsel included three appendices: (i) Trauma Informed Care Guide for Claimants; (ii) Trauma Informed Care Guide for Counsel, Court Staff; and (iii) Trauma Informed Care Guide to Preparing for Trial. These appendices included information for observers and participants on how to recognize trauma, how to cope with and process trauma during the trial process, and how to process trauma after the conclusion of the trial. These appendices were made available in hard copy in the courtroom and were posted in the chat on the zoom for those participants attending remotely, both towards the beginning of trial and when traumatic evidence was expected. Counsel also made the appendices available to their clients in advance of trial.

[104] One family member whose sister died in the accident offered evidence through an affidavit. Questioning of the family member was very limited, so as to minimize the need for him to orally give evidence that might have been difficult for him, and that was not really in dispute in any event. It also shielded observers from evidence that might have been traumatic to hear.

[105] Counsel arranged to have trauma specialists available by phone during the trial. Those specialists were able to provide support to anyone experiencing trauma in English and in Farsi.

[106] Throughout the trial, I reviewed with counsel where we were in the process, and what evidence was expected next. Apart from being a good trial management practice, doing so enabled me to ensure that the observers to the trial knew what to expect next, hopefully demystifying the process for them, and empowering them with information.

[107] At the outset of trial, and at the conclusion, I addressed the family members and participants directly. I acknowledged their loss and their suffering. I reminded them that they were free to take breaks whenever they needed. I indicated they should not be embarrassed if

[10] For example, this was not a trial where the impacts of trauma on memory created any concerns with respect to the assessment of the credibility of the evidence.

2024 ONSC 3303 (CanLII)

they cried in the courtroom. I assured them that at no point during the trial process did I, court staff, or any of the lawyers and their staff, forget that underlying all the evidence about aviation security and safety procedures, was a tragedy that had caused all of them immeasurable grief, a fact that is obvious in the circumstances.

[108] I am sure there is room for improvement in the process we employed, but I am equally sure that employing the process we did was infinitely better, and more human, than conducting the trial on a business-as-usual basis. The issues between the parties remained hotly contested and counsel were all able to advocate effectively for their clients. The trauma-informed guidelines counsel consented to, and I approved, did not, and were not intended to, alter the adversarial nature of the trial. Rather, they allowed the contested trial to unfold without causing unnecessary trauma to the trial participants and observers.

[109] With the permission of the professional who prepared the appendices for the guidelines, I attach the guidelines and their appendices to these reasons, to make them available as a resource for others who seek to bring a trauma-informed perspective to their cases.

Third Preliminary Issue: The Defendant's Expert Edmond Soliday

[110] UIA engaged Edmond Soliday as a proposed expert on the issues of airline safety and security. At the outset of Mr. Soliday's evidence, the plaintiffs indicated that they would object to his qualification as an expert, but all parties agreed that the nature of the objections required me to hear his evidence and cross-examination in its entirety before argument was made on the issue. I agreed to proceed in that manner.

[111] Mr. Soliday testified on November 28 and 29, 2023, and the argument with respect to his proposed qualification as an expert was heard on December 4, 2023. On December 8, 2023, I advised the parties that I had decided I would not qualify Mr. Soliday as an expert witness, and that my reasons for that conclusion would form part of my reasons on the merits. What follows are my reasons for declining to qualify Mr. Soliday.

[112] I begin with the principles governing admissibility of expert evidence, about which the parties are in agreement.

[113] Determining whether to admit expert evidence involves a two-stage analysis. In the first stage, there are four threshold requirements that must be established (*White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182, at paras. 19 and 23, citing *R. v. Mohan*, 1994 CanLII 80 (SCC), [1994] 2 S.C.R. 9, at pp. 20-25; see also *R. v. Abbey*, 2017 ONCA 640, 140 O.R. (3d) 40 (C.A.) at para. 48):

a. Relevance, which at this stage means logical relevance;

b. Necessity in assisting the trier of fact;

c. Absence of an exclusionary rule; and

2024 ONSC 3303 (CanLII)

d. A properly qualified expert, which includes the requirement that the expert be willing and able to fulfil the expert's duty to the court to provide evidence that is impartial, independent and unbiased.

[114] If the threshold requirements are met, the court moves on to the second stage of the analysis. There, the judge, as gatekeeper, determines whether the benefits of admitting the evidence outweigh its potential risks, considering factors such as legal relevance, necessity, reliability, and absence of bias.

[115] In applying these principles, the court must remain cognizant of its gatekeeping role. As I stated in *O'Brien v. Maxar Technologies Inc.*, 2022 ONSC 1572, at para. 34:

> In *White Burgess*, the Supreme Court of Canada, at paras. 16-19, noted that the jurisprudence has emphasized "the important role that judges should play as 'gatekeepers' to screen out proposed evidence whose value does not justify the risk of confusion, time and expense that may result from its admission." The Court reiterated the dangers of expert evidence, relying on its earlier decision in *Mohan*, including: (i) that the trier of fact will inappropriately defer to the expert's opinion rather than carefully evaluate it; (ii) the potential prejudice created by the expert's reliance on unproven material not subject to cross examination; and (iii) that it may lead to an inordinate expenditure of time and money.

[116] In this case, given that all parties agreed I had to first hear Mr. Soliday's evidence in its entirety, my gatekeeping function was not directed at saving time or money, but rather centered on the other risks of expert evidence, described above.

[117] I begin by considering Mr. Soliday's qualifications, described in his report, his *curriculum vitae*, and his oral evidence.

[118] Mr. Soliday had a successful career in airline safety and security at United Airlines. He began in the industry at the age of 19. By the age of 21, he was employed as a flight engineer for United Airlines. He left United Airlines for a period of time to serve in the military, where he flew helicopters, and then eventually returned to United Airlines. By 1985, he was working as a flight manager at United Airlines, and about a year after that, he became the Senior Staff Executive to the Senior Vice President of Flight. According to Mr. Soliday, he interfaced with United Airlines' safety department and its security department. In the last eleven years that Mr. Soliday was at United Airlines, he was the Vice President of Safety, Quality Assurance and Security.

[119] Mr. Soliday also sat on a number of aviation safety related advisory boards and commissions, and was the "Most Knowledgeable Witness" for United Airlines in the proceedings that followed the 9/11 attacks in the United States.

2024 ONSC 3303 (CanLII)

[120] Mr. Soliday retired from United Airlines shortly after 9/11, but continued to consult for it in connection with the 9/11 proceedings. He began a new career when he was elected to the Indiana House of Representatives in 2006, where he continues to serve. Currently he is the Chair of the Utilities, Energy and Transportation Committee.

[121] Mr. Soliday has done some aviation consulting since he ceased consulting for United Airlines in about 2004. He gave two examples in his evidence. He is consulting with respect to a case involving fuel dumping over Los Angeles, and in a case involving a shooting in the Fort Lauderdale airport. He has never consulted with respect to flying into a conflict zone, and has never used International Civil Aviation Organization ("ICAO") document 10084 ("ICAO 10084"), which the parties agree is a key document with respect to identifying the industry standard for security threat risk assessments for airlines flying over or near conflict zones.

[122] Mr. Soliday's experience is very impressive, but insofar as he has experience dealing with flights over or near conflict zones, from either a safety or a security perspective, the experience relates to his time as a full-time employee at United Airlines, over twenty years ago.

[123] According to Mr. Soliday, ICAO document 10084 is simply a memorialization of the security process he used to undertake when he was employed by United Airlines, such that his experience is directly relevant to its use. He never explained how he was able to attest to that. I do not accept that evidence. ICAO 10084 was drafted in response to reports of the Dutch Safety Board ("DSB") on the downing of Malaysia Airlines Flight MH17 ("MH17") over Eastern Ukraine on July 17, 2014. The DSB sought to identify gaps in the industry's approach to flying over or near conflict zones in its report into that tragedy. It is simply not possible that nothing changed following the downing of MH17 in terms of the industry standards. Moreover, Mr. Soliday stated that ICAO 10084 introduced new "mitigations" relevant to flying over or near conflict zones, while at the same time insisting it was simply a memorialization of how risk assessments were always conducted. But mitigations necessarily impact risk analysis. There is no explanation for the inconsistency in Mr. Soliday's evidence.

[124] Other aspects of Mr. Soliday's evidence gave me concern. For example, it is widely known in the aviation industry that the United States' Federal Aviation Administration ("FAA") conveys information to aviators through Notices to Airmen ("NOTAMs"). There are NOTAMs at issue in this litigation. NOTAMs include a location indicator, to allow users to identify what airspace they refer to. Each state is responsible for issuing NOTAMs applicable to their own airspace.

[125] In this case, the FAA issued NOTAMs which bore the identifier KICZ. That identifier refers to a conflict zone ("CZ") with a ghost location, because a civil aviation authority like the FAA has no jurisdiction to issue a NOTAM with respect to the airspace of other states. Mr Soliday did not know that the KICZ identifier referred to a conflict zone. Although no formal document was identified that specifically defined KICZ as an identifier for a conflict zone NOTAM, multiple witnesses testified that it is understood to be a conflict zone NOTAM identifier in their evidence. Moreover, ICAO 10084 defines certain acronyms including: (i) CZIB

2024 ONSC 3303 (CanLII)

– conflict zone information bulletin; and (ii) CZIR – conflict zone information repository. If Mr. Soliday were current on aviation security, he would have known that a NOTAM with the identifier KICZ referes to a conflict zone.

[126] Thus, while Mr. Soliday has had an impressive career in airline safety and security, his expertise is out of date. For that reason, Mr. Soliday does not pass the first threshold of the *Mohan* test. He is not a properly qualified expert.

[127] The plaintiffs raised other concerns with Mr. Soliday's evidence, including that he relied on facts that were not in the record anywhere and that UIA was not even attempting to establish. These include (by way of example only) that: (i) the security department of UIA had spoken with UIA's Operational Control Centre ("OCC") to determine if OCC had received threat information before PS752 took off on January 8, 2020; and (ii) OCC was monitoring events in the Tehran airspace in the hours before PS752 took off. The plaintiffs question the relevance and necessity of a report that relies on facts that would be key if true, but which no party asserts, and which are inconsistent with the only evidence in the record on those points.

[128] The plaintiffs also raised concerns about Mr. Soliday's mischaracterization of the plaintiffs' experts' evidence. I agree that Mr. Soliday, in his written report and oral testimony, mischaracterized the evidence of Mr. Gillespie and Mr. Edwards, in effect setting up a straw man to take down. The plaintiffs argue that this is improper advocacy, and question how an expert's evidence can be helpful if it deliberately obfuscates the questions in issue and causes confusion.

[129] I note too that Mr. Soliday did not make concessions that should have been made, failed to acknowledge errors in his report when they were pointed out to him, and indicated in his evidence that he had placed only certain tweets before me when others were clearly relevant, but omitted. Generally, the information he omitted was less favourable to UIA's position. The plaintiffs argue that this demonstrates improper advocacy.

[130] On their own, if Mr. Soliday were a properly qualified expert, I would not have considered any of these individual factors to require a conclusion that Mr. Soliday's evidence would not have passed the first stage of the *Mohan* test. However, even if Mr. Soliday were a properly qualified expert, the collective effect of these other concerns would have led me to conclude that the benefits of admitting Mr. Soliday's evidence would not have been outweighed by the risks of its admission.

[131] Finally, if I am wrong to have excluded Mr. Soliday's evidence on both the first and the second branch of the *Mohan* test such that it should have been admitted, the factors I reference above would have led me to assign his evidence no weight.

Fourth Preliminary Issue: Admission of the Other Expert Evidence

[132] Almost all the witnesses in this trial were offered as experts in their respective fields. I qualified all the other proposed experts, apart from Mr. Soliday. No objections were raised with respect to their qualifications or otherwise to the admission of their evidence.

2024 ONSC 3303 (CanLII)

[133] I do not propose to write reasons setting out the *White Burgess* analysis for each expert. These reasons are long enough; it is neither necessary nor efficient to memorialize uncontested qualification determinations for many expert witnesses. I was satisfied that each proposed expert was an appropriately qualified expert in the field in which they were proffered. Each offered evidence that was necessary and relevant. As I refer to the evidence of each expert in these reasons, I note the scope of the expertise for which I qualified them to testify, and a brief description of their qualifications.

[134] The sole exception to this is Alec Moffat, who inadvertently was not formally qualified at trial, but whose qualifications I address, and accept, when I reach the analysis of his evidence.

Framework of the *Montreal Convention*

[135] As I have noted, the parties agree that the vast majority of the actions commenced in Ontario against UIA relate to claims governed exclusively by the *Montreal Convention*, which was incorporated into law in Canada through the enactment of the *Carriage by Air Act*, R.S.C. 1985, c. C-26. At this point, I set out the relevant framework from the *Montreal Convention*, as it is within this framework that the issues in this action must be determined.

[136] Article 29 of the *Montreal Convention*, incorporated in the *Carriage by Air Act*, Schedule VI, provides for the exclusivity of the *Montreal Convention* with respect to those claims that fall within its scope. Actions for damages in relation to matters falling within the scope of the *Montreal Convention* may only be pursued if they are the types of actions specifically permitted under the provisions of the *Montreal Convention: Thibodeau v. Air Canada*, 2014 SCC 67, [2014] 3 S.C.R. 340, at para. 57.

[137] In *Thibodeau*, the Supreme Court of Canada held that the *Montreal Convention* has three main purposes: (i) to create uniform rules governing claims arising from international air transportation, (ii) to protect the international air carriage industry by limiting carrier liability; and (iii) to balance that protective goal with the interests of passengers and others seeking recovery: at para. 41.

[138] Article 17(1) of the *Montreal Convention* permits a cause of action for damages for bodily injury or death of a passenger arising from international carriage by air:

> The carrier is liable for damage sustained in the case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

[139] Because UIA has admitted that the shooting down of PS752 is an accident within the meaning of article 17 of the *Montreal Convention*, it is strictly liable for unlimited damages relating to the death of the passengers.

2024 ONSC 3303 (CanLII)

[140] However, Article 21 of the *Montreal Convention* provides that the liability of UIA is limited to "128,821 Special Drawing Rights"[11], if UIA proves that:

a. such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or

b. such damage was solely due to the negligence or other wrongful act or omission of a third party.

[141] When applying Article 21 of the *Montreal Convention*, courts apply local concepts of negligence: *Lee v. Air Canada*, 228 F. Supp. 3d 302 (S.D.N.Y. 2017).

[142] To the extent that Article 21 refers to negligence, that is a concept well-known in Canadian law. There is no definition in the *Montreal Convention* of "other wrongful act or omission". *Black's Law Dictionary* (11th ed., 2019) defines "wrongful" as "contrary to law".

[143] In *JR v. Austrian Airlines AG*, Case C-589/20 at paras. 71-73, the Regional Court in Korneuberg, Austria found that the ordinary meaning of "wrongful" is usually a broad synonym of unfair, illegal, harmful or blameworthy, while 'negligence' refers to the failure to give the required care and attention to someone or something for whom or which one is responsible.

[144] UIA argues that "wrongful act or omission" contemplates intentional harm and torts other than negligence, none of which is alleged in this case. As a result, UIA focuses its submissions on negligence. The plaintiffs also focus on negligence in their submissions. No one contends that any other "wrongful act or omission" is at issue in this case. As a result, I confine my analysis to concepts of negligence.

[145] There is no disagreement about the elements of negligence. The Supreme Court of Canada reiterated the elements of negligence in *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114, at para. 3. Negligence requires: (i) a duty of care; (ii) the defendant's behaviour breached the standard of care; (iii) the plaintiffs suffered damage; and (iv) the damage was caused, in fact and in law, by the defendant's breach.

[146] As I have noted, Article 21 creates a reverse onus on UIA to establish that it was not negligent. The Alberta Court of Appeal addressed the nature of the burden created by a reverse onus provision in *Bradford v. Snyder*, 2016 ABCA 94, 37 Alta. L.R. (6th) 102, finding, at para.

[11] A "Special Drawing Right" is an artificial currency, the value of which is based on a basket of currencies, including the U.S. dollar, the British pound and the Japanese yen. I was advised at trial that 128,821 Special Drawing Rights is roughly equivalent to $230,000 CAD.

2024 ONSC 3303 (CanLII)

21, that if the evidence shows that the party who bears the reverse onus is at fault, or if the evidence is too meagre or too evenly balanced for a court to determine the issue, the presumption will not be rebutted.

[147] Where a third party's negligence contributes to a passenger's injury, principles of apportionment are inapplicable. It is only when the injury is solely due to the negligence of the third party that the *Montreal Convention* limits an airline's liability. Thus, if UIA is even 1% responsible in negligence for the passengers' death, its liability under the *Montreal Convention* is unlimited: *Nelson v. Lorenzo*, 2021 WL 930163 (J.D. Hartford 2021), at p. 4.

[148] For purposes of this trial, UIA admits that it owed the passengers and crew aboard PS752 a duty of care. UIA also admits that the passengers and crew aboard PS752 suffered damage.

[149] The questions are thus whether UIA breached the standard of care, and if so, whether the passengers' damages were caused, in law and in fact, by UIA's breach.

Did UIA breach the standard of care?

Legal Framework

[150] The standard of care in negligence is that of the reasonable person in similar circumstances. Where the defendant has special skills and experience, the defendant must "live up to the standards possessed by persons of reasonable skill and experience in that calling": *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, at para. 69; see also para. 73.

[151] "The standard is not perfection, or even the optimum, judged from the vantage of hindsight. … The law of negligence does not require perfection of professionals; nor does it guarantee desired results": *Hill*, at para. 73.

[152] In *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, at para. 28, the Supreme Court of Canada described the standard of care as follows:

> Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.

[153] The question is thus whether UIA and its personnel met the standard required of a reasonable airline and its personnel in similar circumstances as those underlying this action.

2024 ONSC 3303 (CanLII)

[154] At para. 29 of *Ryan*, the Court described the relationship between legislative standards and the standard of care as follows:

> Legislative standards are relevant to the common law standard of care, but the two are not necessarily co-extensive. The fact that a statute prescribes or prohibits certain activities may constitute evidence of reasonable conduct in a given situation, but it does not extinguish the underlying obligation of reasonableness. … Thus, a statutory breach does not automatically give rise to civil liability; it is merely some evidence of negligence. … By the same token, mere compliance with a statute does not, in and of itself, preclude a finding of civil liability. … Statutory standards can, however, be highly relevant to the assessment of reasonable conduct in a particular case, and in fact may render reasonable an act or omission which would otherwise appear to be negligent. This allows courts to consider the legislative framework in which people and companies must operate, while at the same time recognizing that one cannot avoid the underlying obligation of reasonable care simply by discharging statutory duties. [Citations omitted.]

[155] The Court went on, at para. 40 of its decision in *Ryan*, to find that, where a statute strictly defines the manner of performance and precautions to be taken, it is more likely that compliance with the statute constitutes reasonable care without additional measures being necessary. On the other hand, where a statute is general or provides for discretion as to the manner of performance, or where unusual circumstances exist that are not clearly within the scope of the statute, mere compliance is unlikely to exhaust the standard of care.

[156] External indicators of reasonable conduct relevant to determining the content of the standard of care also include custom, industry practice, professional standards, and regulatory standards in addition to statutory standards: *Hill*, at para. 70, *Krawchuk v. Scherbak*, 2011 ONCA 352, 106 O.R. (3d) 598, at para. 125; *R. v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, at pp. 227-228.

[157] Parties have been found to be negligent even when acting in compliance with statutory standards, or other external indicators of reasonable conduct, such as industry practice: see, for example, *Zsoldos v. Canadian Pacific Railway*, 2009 ONCA 55, at paras. 30, 42-44; *Murphy v. Atlantic Speedy Propane* (1979), 103 D.L.R. (3d) 545 (N.S.S.C.).

[158] Having identified the relevant legal principles, I turn to a discussion of the framework of the aviation industry, and the relevant practices, statutes, and professional standards to assist in determining the content of the standard of care.

Industry Framework

[159] At an international level, civil aviation is regulated as between states that are party to the *Chicago Convention*.

2024 ONSC 3303 (CanLII)

[160] The *Chicago Convention* contemplates the creation of ICAO and identifies its role: to organize and support the international cooperation that a global civil aviation industry requires, including by adopting and amending international standards and recommended practices and procedures dealing with international civil aviation.

[161] ICAO was thus founded as a result of the *Chicago Convention*. Among other things, ICAO promulgates international standards and recommended practices, policies and guidelines which apply directly to states that are party to the *Chicago Convention.*

[162] States party to the *Chicago Convention* may implement ICAO standards nationally through law, nationally approved standards, recommended practices, policies, and guidelines. Airlines subject to a particular state's authority may be required to obtain approval for their manuals, practices, policies, guidelines and procedures from the regulator in that state. It is undisputed that an airline is bound to follow the standards required of it by its governing state.

[163] Thus, one important purpose of ICAO standards is that they filter down into a state's regulations, and into the manuals, documentation, processes and procedures of the airlines regulated by that state. However, all parties agree that if a particular state that is a party to the *Chicago Convention* does not implement certain ICAO standards nationally, an airline in that state may still look to ICAO publications and elsewhere for guidance on industry practices.

[164] In addition, airlines may be members of the International Air Transport Association ("IATA") which administers a safety audit program known as the IATA Operational Safety Audit ("IOSA"). As explained by Jonathan Gillespie,[12] whom I qualified at trial as an expert in aviation safety management systems and the conduct of aviation safety risk assessments, IOSA is a safety audit process that was established by IATA to facilitate code-sharing between airlines. The IOSA process is based on IOSA standards, which themselves are based upon ICAO standards. Before airlines had access to the IOSA process, the regulator in each state would require an airline under its authority to audit its codeshare partners, which was an expensive and

[12] Mr. Gillespie has been a pilot since 1980. Between 1993 and 1996, he was the Flight Safety Officer (a title later changed to Flight Safety Manager) with Emirates. In that role, he participated in the development of one of the first airline safety management systems before such systems were mandated by ICAO. Between 1996 and 2005, he was an Air Safety Investigation Manager for Emirates, providing expert safety investigation and risk analysis services within the Flight Safety Department. Between 2005 and 2010, Mr. Gillespie took on the role of VP-Flight Safety for Emirates, accountable directly to the CEO and the regulatory authority for independent safety and quality oversight of all flight and ground operational activity. He managed the team responsible for the air safety reporting program, accident and incident investigation, flight data management, operational hazard identification, risk assessment and management, and liaised with industry bodies, regulators and others. Since 2010, Mr. Gillespie has worked as an aviation safety and risk management specialist consulting with industry worldwide, and has acted as an expert witness in the field of flight operations and safety.

2024 ONSC 3303 (CanLII)

drawn-out process. IOSA processes offer a standardized method by which each state regulator is reassured that an IOSA-certified airline adheres to industry standards and can be accepted as a codeshare partner of the airlines under that regulator's jurisdiction, without the need for costly individual audits.

[165] UIA had been through the IOSA process successfully. At the time of the downing of PS752, UIA held an IOSA certificate that was valid until June 17, 2021.

[166] States party to the *Chicago Convention* are also subject to civil aviation safety audits which measure their compliance with ICAO guidelines. ICAO runs a Universal Safety Oversight Audit Program through which it audits states. In 2018, Iran was audited and found to be above the global average in most categories of civil aviation safety (legislation, organization, licensing, accident investigation, air navigation services and aerodromes). It was below the global average in operations (where it scored 60% in effective implementation of guidelines) and airworthiness (where it scored close to 80% in effective implementation of guidelines).

[167] ICAO is also involved in certifying training programs. For example, Mr. Martynenko was certified by the State Aviation Administration of Ukraine (the "SAAU"), Ukraine's civil aviation regulatory authority, to perform aviation security threat risk assessments after he completed a training course approved by ICAO at the "ICAO Aviation Security Training Centre of the State Enterprise 'Boryspil International Airport.'" Thus, although Mr. Martynenko was certified to conduct security threat risk assessments by the SAAU, the training program he undertook was certified by ICAO.

[168] This framework reveals that there are various sources to which one may look to determine the legal and industry standards that inform the standard of care, including ICAO documents, IOSA documents, the laws of Ukraine, the regulations of the SAAU, and the policies, procedures, guidelines and manuals of UIA.

Relevant Guidelines, Standards, Procedures and Policies

[169] There was substantial evidence led about the different industry documents which could have guided or did guide UIA's actions with respect to PS752. Many of the documents are repetitive of newer or more authoritative sources.

[170] The documents disclose a shared responsibility for civil aviation safety and security between, among others, states party to the *Chicago Convention* and airlines.

[171] I describe below what I view to be the most important aspects of the most relevant documents that were placed in evidence. In doing so, I draw, not just from the documents themselves, but from the evidence given by Mr. Gillespie with respect to airline safety, and by

2024 ONSC 3303 (CanLII)

John Edwards[13], whom I qualified as an expert on aviation security threats and risk assessments, with respect to matters within his scope of expertise.

Some High-level Obligations of States, Regulators, and Airlines

[172] The *Chicago Convention*, article 1, recognizes that every state has "complete and exclusive sovereignty over the airspace above its territory." Any scheduled international air service that seeks to operate over or into the territory of a contracting state requires that state's permission. States are entitled to restrict or prohibit aircraft from flying over certain areas of its territory for reasons of military necessity or public safety. In exceptional circumstances or during a period of emergency, or in the interest of public safety, a state may temporarily restrict or prohibit flying over the whole or any part of its territory: articles 6, 9(a) and (b) of the *Chicago Convention*.

[173] Any state party to the *Chicago Convention* that finds it impracticable to comply in all respects with ICAO's standards, or which deems it necessary to adopt regulations or practices that differ from those established by ICAO, "shall give immediate notification" to ICAO of the differences: article 38.

[174] ICAO document "Annex 17 to the Convention on International Civil Aviation: Security, Safeguarding International Civil Aviation Against Acts of Unlawful Interference" ("Annex 17") sets out standards and recommended practices to be applied by contracting states with respect to acts of unlawful interference, which, by the terms of Annex 17, include destruction of an aircraft in service. Section 2.1 of Annex 17 sets out its objectives, which have as their thrust the obligation of each state to safeguard against unlawful interference with civil aviation to protect the safety of passengers, crew, ground personnel and the general public (see also ICAO 8973, Aviation Security Manual, at para. 2.1.1). In furtherance of this objective, each state is

[13] Mr. Edwards has 40 years of aviation experience. He currently holds positions including: (i) with McLarens Aviation Ltd., an aviation survey and loss adjusting services provider, in the course of which he undertakes security and safety risk reviews of different aspects of the civil aviation industry; (ii) aviation consultant for a global securities provider, conducting due diligence of scheduled and charter flight service providers when operating within or into countries or airports at high to extreme security risk; (iii) aviation consultant providing services for aviation security and safety compliance and performance, risk management, crisis management and emergency planning. His past positions include Assistant Director, Security Policy for IATA, Event Organizer and Lead for the 2013 AVSEC World Conference, and Head of Cargo Security & Quality Assurance, Corporate Security at British Airways. In his years of experience, he developed the first IATA (and industry) Assistance & Capacity Building Program aimed at working alongside regulators and airports to assist states in need of support, and managed the drafting of the Aviation Security Annex, working with government stakeholders. He has also worked in diverse cross-border environments and has participated in consultations aimed at amending or developing aviation security legislation.

2024 ONSC 3303 (CanLII)

responsible for establishing an organization and developing and implementing regulations, practices and procedures to safeguard civil aviation. In Ukraine, this is the SAAU.

[175] Annex 17 requires each contracting state to keep "under constant review the level and nature of threat to civil aviation within its territory and airspace above it, and establish and implement policies and procedures to adjust relevant elements of its national civil aviation security program accordingly" based upon a security risk assessment carried out by the relevant national authorities: see s. 3.1.3.

[176] Also relevant is ICAO Doc. 9554-AN/932, entitled "Manual Concerning Safety Measures Relating to Military Activities Potentially Hazardous to Civil Aircraft Operations". The purpose of this guidance, set out in s. 1.1, is to assist states "in providing for the safe and orderly flow of international air traffic in the event that military activities, which constitute potential hazards to civil aircraft, are planned and conducted". It requires that the common use of airspace by civil and military aviation shall be arranged to ensure the safety, regularity, and efficiency of international civil air traffic. This requires cooperation, including with air traffic services authorities. Air traffic services authorities are directed to provide appropriate military units with flight plan and other data concerning flights of civil aircraft: see, for example, paras. 2 (background), 3.1, and 3.2.1.

[177] Paragraph 4.1 of ICAO Doc 9554-AN/932 notes that a NOTAM "shall be originated and issued by States regarding the presence of hazards which affect air navigation" in their territory. It also underscores the need for coordination between military and air traffic services to ensure the safety of civil aviation, and notes that the need for close coordination is even more critical where there is armed conflict or the potential for armed conflict: paragraph 10.1.

[178] Annex 15 to the Convention on International Civil Aviation, Aeronautical Information Services, para. 6.3.2.3 requires that a NOTAM be issued when there is the "presence of hazards which affect air navigations", including military exercises.

[179] ICAO Annex 19, 2d edition, July 2016 establishes a requirement that state regulators ensure service providers, such as international airlines, have a safety management system ("SMS") in place to manage safety risks: para. 3.3.2. Annex 19 defines a safety risk to be "the predicted probability and severity of the consequences or outcomes of a hazard". An SMS includes provisions relating to the identification of hazards (based on a combination of reactive and proactive measures), the assessment of safety risks, and mitigation measures: see Appendix 2 to Annex 19.

[180] Annex 19 also notes that guidance on the implementation of the framework of an SMS is contained in ICAO document 9859, entitled "Safety Management Manual", about which I say more below.

2024 ONSC 3303 (CanLII)

[181] States party to the *Chicago Convention* agree to ensure that the civil aviation operators within their jurisdiction adhere to standards, policies, procedures and guidance with respect to both aviation security and aviation safety.

[182] This expectation was codified into Ukrainian law. The *Air Code of Ukraine* (the "*Code*"), October 20, 2019, acknowledges, in article 4, that Ukraine is responsible for the fulfillment of international obligations as a member of ICAO. In article 85, the *Code* places the responsibility for the development and implementation of a program of civil aviation safety and security on the SAAU. The SAAU's obligation to assess risks and levels of threat to civil aviation security is formalized in the *Code*. Article 87 provides that the SAAU constantly assesses risks and the level of threat to the safety of civil aviation.

[183] Article 86(2) of the *Code* requires subjects of aviation activity to develop and update, on the basis of the state program of civil aviation security, their aviation security programs and take measures to protect civil aviation from acts of illegal interference, but it does not specify how the development and updating of an aviation security program ought to be done.

[184] It is uncontroverted that UIA was subject to the law of Ukraine. UIA's aviation security program and aviation safety program were reviewed and approved by the SAAU, as required by Ukrainian law.

[185] From this review, I note that Ukraine was responsible, through the SAAU, to ensure UIA's security and safety programs were effective. Ukraine and SAAU were also responsible for conducting their own assessments of risks to civil aviation, in particular within Ukrainian airspace. Iran was responsible for ensuring adequate communication between its military and civil aviation authorities, and for releasing a NOTAM and/or closing some or all of its airspace when there were risks to civil aviation in the airspace that justified doing so.

[186] At this time, I delve deeper into the industry standards, policies, practices and guidelines related to aviation security. Thereafter, I turn to the question of airline safety. There is some overlap in the sections below on security and safety, just as there is overlap in the concepts and their application to civil aviation.

Aviation Security

[187] ICAO Doc. 8973 provides guidance with respect to aviation security. I note the following from the document:

a. Sensitive aviation security information should be limited to those who have a need-to-know (para. 2.3.6(a));

b. States should ensure that the aircraft commander (the pilot-in-command) is authorized to protect the safety of the aircraft and the persons and property on board (para. 3.6(a));

2024 ONSC 3303 (CanLII)

c. Formal and informal lines of communication between the aviation security officials of states assist in the rapid exchange of information, including any increase in the threat level (para. 4.4.1.1);

d. A state should make its own assessment of the risk applying to its territory and assets and establish risk mitigation measures (para. 9.1.1.5);

e. To establish or improve security culture in organizations, measures should be developed to enhance such norms, beliefs, values, attitudes, and assumptions. Those enhancements should aim at furthering principles including: (i) allowing the necessary time and making the necessary efforts to comply with security measures, even when under pressure; (ii) challenging other personnel in case of irregularities and accepting being challenged; and (iii) fostering critical thinking regarding security and interest in identifying potential security vulnerabilities, deviation from applicable procedures, and solutions (para. 9.2.1.2 (c), (e) and (g));

f. Security Management Systems ("SeMS") are designed to be integrated with, or connected to, other structured managements systems such as an SMS or a quality management system (para. 9.3.1);

g. States should carry out periodic threat and risks assessments at a national level, taking into account international, national and regional situations and environments, from which mitigating measures are developed (para. 9.3.4.1);

h. Entities implementing SeMS should develop and carry out a local threat identification process supplementing national threat and risk assessments in coordination with other local parties involved (para. 9.3.4.2); and

i. Changes in the threat environment may require the urgent application of additional security measures or, when no other alternatives exist at that point in time, the suspension of operations (para. 9.3.4.5).

[188] There was some discussion in evidence about ICAO document 10108, entitled "Aviation Security, Global Risk Context Statement". ICAO 10108 focuses on the threat of terrorism and offers a methodology and a framework for states to conduct risk assessments at the national level. It describes itself as being primarily aimed at "decision makers, practitioners and other relevant stakeholders within Member States who are responsible for conducting aviation security risk assessments": see paragraphs 1.1, 1.2, 1.5.

[189] ICAO 10108 sets out a risk assessment method and process map, along with information about how to assess vulnerabilities, and the importance of assembling information to assist in evaluating the threat. Among other things, it discusses the risk to civil aviation posed by SAMs, noting that they are are predominantly under the control of state actors with effective command and control systems in place, and can only be operated as designed by fully trained personnel. However, it also notes that some SAMs have likely passed into the hands of non-state actors. The

2024 ONSC 3303 (CanLII)

ICAO Aviation Security Panel Working Group on Threat and Risk ("WGTR"), which prepared ICAO 10108, concluded that the risk to civil aviation from a deliberate SAM attack was low. The WGTR also concluded that the only effective mitigation against a SAM attack is to avoid airspace within range of the SAM. The WGTR noted that a SAM attack on civil aircraft could occur because of lack of appropriate command and control leading to misidentification or mistargeting, examples of which exist, albeit rare. Among the risk factors associated with misidentification was routing over locations or assets of high strategic importance.

[190] I turn now to ICAO 10084, which is, in my view, the most important document in the context of the security threat risk assessment that UIA had to undertake on January 8, 2020.

[191] ICAO 10084, entitled Risk Assessment Manual for Civil Aircraft Operations Over or Near Conflict Zones, is ICAO's memorialized standards, practices, procedures and guidance for flights over or near conflict zones. Although geared to flights at altitude, it is the guidance that most closely addresses the situation UIA was faced with assessing on January 8, 2020.

[192] Before I turn to the document itself, I note that it arose from the reports delivered by the DSB after the downing of MH17 over Eastern Ukraine in 2014. MH17 originated in Amsterdam and was en route to Kuala Lumpur when it was shot down by a SAM.

[193] The DSB issued three reports into the crash of MH17, dated October 2015, February 28, 2019, and 2021. The first of these pre-dated the crash of PS752. In that report, the DSB was critical of traditional security threat risk assessment methods which focused on attempting to define the probability of a SAM threat to civil aviation as opposed to addressing in a qualitative manner the risk-increasing and uncertain factors that need to be included as part of a threat analysis.

[194] The DSB's lengthy reports made recommendations to improve the safety of international civil aviation flying over or near conflict zones. The first DSB report was the genesis of ICAO 10084, the second edition of which was published in 2018.

[195] I do not intend to delve into the content of the DSB reports in detail, although I refer to them in my analysis below as needed. At this stage, it suffices to note that the recommendations in the first DSB report were adopted in significant measure into ICAO 10084.

[196] As a preliminary matter, I note that UIA disagrees that Tehran FIR was a conflict zone on January 8, 2020, and as a result, seemed at first to be calling into question the relevance of ICAO 10084. In a sense this disagreement over whether Tehran FIR was a conflict zone is immaterial, because UIA also acknowledges that ICAO 10084 was a relevant document for it to consider when conducting its security assessment of PS752 on January 8, 2020, and moreover, its evidence is that it did consider ICAO 10084. In his evidence, Mr. Martynenko deposed that, at all material times, AVSEC was guided by the standards, recommended practices, procedures and guidance provided by ICAO, including ICAO 10084.

2024 ONSC 3303 (CanLII)

[197] In any event, I find no traction in UIA's argument that Tehran FIR was not a conflict zone, which seems to hinge on the notion that a conflict zone must be officially declared in order to exist. First, waiting for a bureaucratic operation to formally declare an airspace to be a conflict zone before conducting risk assessments or implementing mitigating measures would run counter to the overall goal of protecting the safety of international civil aviation.

[198] Second, ICAO 10084 defines "conflict zones" as:

> [a]irspace over areas where armed conflict is occurring or is likely to occur between militarized parties, and is also taken to include airspace over areas where such parties are in a heightened state of military alert or tension, which might endanger civil aircraft.

[199] In the hours before PS752 took off, Iran launched ballistic missiles through its airspace over a period of hours towards American troops in Iraq, after the then-President of the United States had threatened to retaliate "FAST AND HARD" against Iran for any attack responding to the killing of General Soleimani. UIA's own expert, Dr. Bronk, gave evidence that, prior to the take-off of PS752, Iran would have been in a heightened state of military alert or tension, as it would have been anticipating retaliatory strikes from the United States. On the morning of January 8, 2020, Tehran FIR was a textbook example of a conflict zone.

[200] Moreover, I note that the Canadian Report, *The Downing of Ukraine International Airlines Flight 752: Factual Analysis*, records that Canada's Forensic Team determined that the conditions in Iran on January 8, 2020 were consistent with a conflict zone as defined by ICAO guidance. The parties agreed that the Canadian Reports into the downing of PS752 may be admitted as proof of the truth of their contents.

[201] A second preliminary issue arose at trial with respect to the applicability of ICAO 10084, that is, whether UIA was obligated under Ukrainian law to apply ICAO 10084. The plaintiffs rely on an Operational Directive issued by the SAAU which was drafted in Ukrainian and translated into English in the original. The English portion of the directive includes the following (errors in original):

> With the aim of updating threats assessment process, which is implemented in accordance with the Ministry of transport order #390 (confidential) dated 11.05.2007, and introduction of measures to decrease the risks level during flights planning over/near conflict zones, I propose to conduct the mentioned assessment and introduce measures aimed at decreasing the risk level using the information published at the ICAO site … as well as methodology and information resources indicated in ICAO working paper HLSC/15-WP/10.

[202] The ICAO working paper referred to in the directive is the predecessor to ICAO 10084, and is consistent with ICAO 10084 and the DSB reports (the first of which had been released at the time the working paper came into existence).

2024 ONSC 3303 (CanLII)

[203] As with the question of whether Tehran FIR was a conflict zone, the question of whether the effect of the directive was to make UIA obliged by Ukrainian law to consider ICAO 10084 when conducting its assessment of whether PS752 should be permitted to take off from IKA is not relevant. UIA's evidence is that it took ICAO 10084 into consideration. UIA's position is that ICAO 10084 was a relevant guide that it considered. The question, which I address below, is not whether it had to consider it; it is whether it did so in a manner that complied with its obligations.

[204] I now turn to the content of ICAO 10084, which entails a lengthy review of the document given its importance to the analysis.

[205] The purpose of ICAO 10084 is described in paragraph 1.1.1 as follows:

> This manual contains advice to States, aircraft operators, (civil and military) air navigation service provides (ANSPs), and other entities deemed appropriate on the subject of risk assessment for civil aircraft operations over or near conflict zones. It contains consolidated guidance to support implementation of relevant ICAO Standards and Recommended Practices (SARPs), ICAO guidance material and industry best practices. It covers the risk from both deliberate acts and unintentional hazards to civil aircraft operations over or near conflict zones.

[206] Thus, while it is clear that states party to the *Chicago Convention* are responsible for implementing ICAO guidance nationally, it is also clear that ICAO 10084 is a tool to guide civil aircraft operators, like UIA, who have to perform security threat risk assessments due to flying over or near conflict zones.

[207] ICAO 10084 focuses primarily on the risk posed by SAMs, "as these are currently considered to pose the most significant risk to civil aircraft operating over or near conflict zones": para. 1.1.2.

[208] ICAO 10084 acknowledges that the decision as to whether a civil aircraft will be flown through airspace that could otherwise be considered unsafe relies on various parties involved, including the state that manages the airspace (here, Iran), aircraft operators (here, UIA), ANSPs, the state of the operator (here, Ukraine), ICAO, regional civil aviation authorities and other stakeholders: para. 1.2.4.

[209] With respect to risks to civil aircraft from operations over or near conflict zones, ICAO 10084 notes the high risk to civil aircraft from SAMs if targeted. Aircraft are an easy and vulnerable target due to their size, and are generally neither equipped nor tasked to consider tactically responding to being fired upon: para. 2.1.1.

[210] ICAO 10084 notes that SAM attacks on civil aviation are extremely rare, referring to three documented occurrences, the most recent of which (prior to PS752) was the downing of MH17. In two of these cases, the targeting was likely unintentional, while the third occurred

2024 ONSC 3303 (CanLII)

during a military training exercise. There were no documented cases of an intentional SAM attack on a civilian aircraft: para. 2.2.

[211] Thus, there is a higher risk to civil aviation as an unintended target when flying over or near conflict zones based on misidentification. However, ICAO 10084 also notes that there are well-established mitigations in place, such as airspace management, surveillance, navigation and communication systems, which should enable civilian aircraft flying through controlled airspace to be readily identified. Generally, the risk of unintentional shoot-down by a SAM is low, but it "may vary significantly over time, and from place to place, as a result of events, and higher levels of risk are particularly associated with overflying areas of armed conflict": paras. 2.4.1, and 2.4.2.

[212] Appendix A of ICAO 10084 presents the risk factors most likely to be associated with an elevated level of risk of an intentional SAM attack on a civilian aircraft. Of note:

a. The availability of SAMs is widespread and growing, and many are highly mobile. Information about the military deployment of SAMs will not be available in many cases. Thus, the local presence of SAMs is only likely to be a useful factor in assessing risk if their presence in an area can be ruled out with high confidence.

b. The existence of armed conflict, including the threat of conflict where the parties are on a high state of military alert or heightened tension, in an area over which a flight is operating is a significant risk factor.

c. When flying over or near conflict zones, the most important risk factors are:

    i. Use of military aircraft in a combat role or for hostile reconnaissance by at least one party in the conflict, including unmanned aircraft;

    ii. Use of aircraft to transport ground troops or military equipment by at least one party;

    iii. Poorly trained or inexperienced personnel operating SAMs, and the absence of robust command and control procedures for authorizing launch, which is likely to increase the risk of misidentification of civil aircraft;

    iv. Lack of effective air traffic management over the relevant airspace;

    v. Routing passes over or close to locations or assets of high strategic importance that may be considered vulnerable to aerial attack in a conflict situation.

[213] Appendix A also identifies information that aircraft operators or states wishing to conduct a risk assessment may wish to understand:

2024 ONSC 3303 (CanLII)

a. The types of military equipment available to the parties and the likelihood that they may have access to SAMs;

b. The broader military capabilities of parties;

c. The nature of the conflict, and whether one side was reported to be using, or considered likely to use, air power against the other;

d. Indications or notifications of the loss of effective control over the relevant airspace by the state or organization responsible for providing air navigation services; and

e. Specific areas or locations that may be of particular strategic importance or sensitivity in the context of the conflict, such as key infrastructure or sites of military importance, and which might be considered as likely targets for air attack.

[214] Appendix A advises that "those who do not have reliable access to this sort of information may wish to consider subscribing to services provided by organizations that specialize in providing information and analysis about conflict and security issues." When I turn to the application of the facts to the standard of care, I will address one such organization, Osprey Flight Solutions. One of Osprey's founders testified at trial about Osprey's information-gathering processes and its conclusions, publicly released in the hours before the shootdown of PS752, that the risk to civil aviation was "EXTREME" for all Iranian airspace at all altitudes. Osprey's assessment culminated in a general advisory against all flight in or over Iran at all altitudes at 00:47 UTC on January 8, 2020, subject to an operation specific risk assessment.

[215] With respect to information gathering, para. 4.3.1 – 4.3.2 of ICAO 10084 acknowledges that relevant information and intelligence may not always be readily available (hence the suggestion in Appendix A to subscribe to a service). Where information obtained by states through direct intelligence gathering or through the exchange and sharing of such information with partner states is available, that information should be the primary source for operators to conduct their own risk assessment, but it should not be considered in isolation. Rather, cross-validating available information is necessary to establish a comprehensive risk picture.

[216] ICAO 10084 identifies, in para. 4.3.2, helpful sources of information to include:

a. Aeronautical information, such as NOTAMS and other official advisories;

b. Information from states, which may include non-public details;

c. Information from membership networks, for example, operator alliance networks and commercial entities offering membership to information exchange platforms;

d. Information from aerodromes;

2024 ONSC 3303 (CanLII)

e. Open-source information, such as newspapers, magazines, television and social media platforms.

[217] ICAO 10084 recognizes the responsibility of the state with territorial control of the airspace to provide parties with essential risk information related to that airspace to feed into the risk assessment process, and to ensure coordination of military forces and air traffic services to ensure the safety of civil aircraft operations in the airspace if such operations are allowed: para. 3.1.

[218] The responsibilities of the aircraft operator are outlined in section 3.2 of ICAO 10084. These include ensuring that flights will not commence unless risk assessments are carried out and appropriate mitigation actions are taken to ensure the safety and security of the aircraft on the intended flight route from departure to arrival. This includes assessing the airspace over or near areas where there is armed conflict posing a risk to civil aviation: para. 3.2.1.

[219] Of note, "the absence of any restriction in foreign airspace should not preclude the operator from making its own determination on the safety/security risks of the airspace to be flown through". In doing so, the aircraft operator can use various information sources such as government advisories, other aircraft operators and open-source intelligence: para. 3.2.2.

[220] Aircraft operators should also ensure that the necessary information and advice is updated and passed to the pilot-in-command in real time, usually before take-off. If the situation is rapidly changing, information must be provided in-flight: para. 3.2.4.

[221] When conducting risk assessments for flying over or near conflict zones, para 4.1.2 of ICAO 10084 provides that "the characteristics of armed conflicts require a risk assessment process that should appropriately consider both security and safety elements". Although security and safety assessments are different in nature, "they need to be complementary":

> Security deals with the intentional act to commit an act of unlawful interference, whereas safety is concerned with the management of hazards stemming from unintentional negative impact on the performance of the systems related to the operation. A comprehensive risk assessment process will address all potential actions involving implications for civil aircraft operations over or near conflict zones.

[222] Security assessments are more qualitative, as they are geared to determining threats based on the intent and capability of involved actors. Where intent cannot be determined, "intelligence information about military capabilities may nonetheless be a valuable source for the identification of hazards that could pose an unintentional risk to civil aviation. The available information on existing threats and hazards is the necessary input to the risk assessment process which serves to inform decisions on whether to continue civil aircraft operations over or near conflict zones": para. 4.1.3.

2024 ONSC 3303 (CanLII)

[223] The complete risk assessment is based on an assessment of threat likelihood, consequence, vulnerability and hazard. General assumptions that can be made include:

a. The reasonable worst-case consequences of successfully downing a passenger aircraft are high, based upon the loss of life and economic repercussions of the attack;

b. There are no mitigating actions available once civil aircraft is on a dedicated flight path and a SAM is deployed;

c. Therefore, the most important risk factor is the threat likelihood.

[224] Section 4.2 of ICAO 10084 contains a graphic demonstrating a risk assessment cycle, and a graphic demonstrating the conduct of risk assessments for flying over or near conflict zones which I reproduce below:

2024 ONSC 3303 (CanLII)

A1615

2024 ONSC 3303 (CanLII)

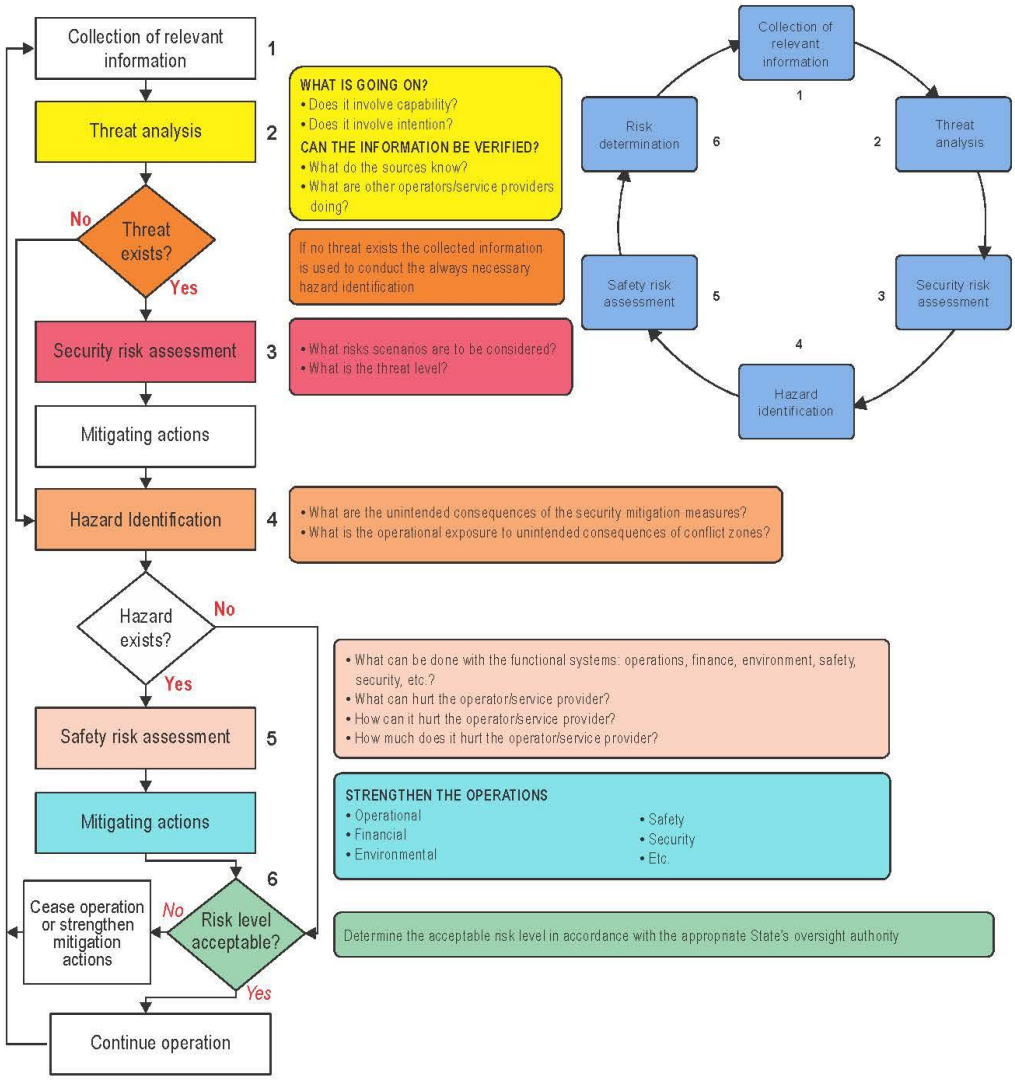

Figure 4-2. Flow chart of the risk assessment cycle for operators and service providers

A1615

[225] From the circular graphic above that sets out the risk assessment cycle when assessing the risk of flying over or near conflict zones, I note: (i) the collection of relevant information to the risk assessment is both the starting point and an ongoing obligation; and (ii) a security risk assessment is followed by a hazard identification, which in turn is followed by a safety risk assessment, all in the context of evaluating risk when flying over or near conflict zones.

[226] The flow chart reproduced above develops each of the steps in the risk assessment cycle. From this, I note that if, after a threat analysis, one concludes that no threat exists, one must still proceed to a hazard identification, which includes asking the question "what is the operational exposure to unintended consequences of conflict zones?" The next step, if a hazard is identified, is to undertake a safety risk assessment.

[227] On the other hand, if a threat analysis leads to a conclusion that there is a threat, one must first conduct a security risk assessment, and consider mitigating actions, and thereafter turn to the hazard identification process. At that point, one would also ask "what are the unintended consequences of the security mitigation measures?" in addition to asking about the operational exposure to unintended consequences of conflict zones. If a hazard is identified, the safety risk assessment must then be undertaken.

[228] This is relevant to a contested issue at trial, that is, whether UIA was required to undertake a safety assessment having regard to the information available about the conflict in Tehran FIR on January 8, 2020. It is common ground that a hazard identification process and related safety assessment is always required before any flight, but the parties disagree about whether this process ought to have included an assessment of operational risks that could arise from exposure to unintended consequences of conflict zones when flying in or near conflict zones.

[229] In my view, ICAO 10084 supports the plaintiffs' position that a safety and a security assessment were each required in the context of assessing risk to PS752 from flying in or near a conflict zone. This conclusion is consistent with the evidence of Mr. Gillespie, and also with FLT 1.12.2[14] from IOSA Standards Manual, which provides that:

> The Operator shall have a safety risk assessment and mitigation program in the flight operations organization that specifies processes to ensure:
>
> (i) Hazards are analyzed to determine the corresponding safety risks to aircraft operations;

[14] To similar effect is DSP 1.12.1 from ISOA Standards Manual.

2024 ONSC 3303 (CanLII)

(ii) Safety risks are assessed to determine the requirement for risk mitigation action(s);

(iii) When required, risk mitigation actions are developed and implemented in flight operations.

[230] FLT 1.12.2 identifies "hazards relevant to the conduct of aircraft operations" as being potentially associated with, among other things, "operations in airspace affected by armed conflict".

[231] I note also that ICAO document 9859 discusses the fact that successful risk management in aviation should aim for overall risk reduction in the system, and thus it is necessary to consider the fact that "effective security measures may have negative impacts on safety, and vice versa", thus acknowledging the linkage between airline safety and airline security and the need for the security and safety programs to be complementary: see paras. 1.4.2-1.4.3.

[232] ICAO 10084 also identifies possible mitigations of the risk, including (i) conduct of specific risk assessments to inform routing decisions; (ii) provisions by ICAO, states, and/or other entities of guidance and information to assist in making risk assessments and routing decisions, and (iii) avoidance by civil aircraft of airspace over conflict zones where the risk of unintentional attack is assessed as unacceptably high.

[233] Appendix A provides further guidance on the risk assessment. It sets out a three-element risk assessment: (i) analysis of plausible threats, likelihoods and consequences; (ii) residual risk assessment; and (iii) recommendations for further risk-based work and possible mitigation.

[234] It identifies the key components for completion of the risk assessment to be: (i) threat scenario, that is, identification and description of a credible attack; (ii) likelihood of an attack, that is, the probability or likelihood of that attack being attempted, based on terrorist intentions and capabilities but not taking into account current security measures; (iii) consequences, that is the nature and scale of the consequences in human, economic and reputational terms under a reasonable worst case scenario; (iv) current mitigating measures; (v) residual vulnerabilities, once the current mitigating measures have been taken into account; (vi) residual risk, that is, the overall risk which remains assuming current mitigating measures have been implemented; and (vii) possible additional mitigation to further mitigate residual risks where necessary.

[235] Likelihood, consequences and vulnerability are each scored on a five-point scale. Likelihood is scored as follows:

a. High likelihood means a very plausible scenario with an actual attack of this kind having occurred in the past few years, or strong evidence of capability, intent and planning;

b. Medium-high means a clearly plausible scenario with relatively recent examples or evidence of early attack planning or hostile reconnaissance;

2024 ONSC 3303 (CanLII)

c. Medium means an essentially plausible scenario with some evidence of intent and capability and possibly some examples, but no evidence of current attack planning;

d. Medium-low means a scenario for which there are no, or no recent, examples, but some evidence of intent; and

e. Low means a theoretically plausible scenario but with no examples of signs of attack or attack planning, and a theoretical intent but no apparent capability.

[236] Consequences are:

a. High, if they comprise hundreds of deaths, economic costs in the billions, and severe disruption to services and confidence in the aviation system;

b. Medium-high if they have some, but not all, of the high consequences;

c. Medium if they comprise tens of deaths, economic costs in the tens or hundreds of millions of dollars, and substantial disruption to services and confidence in the aviation system;

d. Medium-low if they have some but not all of the medium consequences above; and

e. Low if they comprise possibly some deaths and injuries, some economic impact, and some disruption to services and confidence in the aviation system.

[237] The vulnerability ratings are:

a. High, if no mitigating measures are in general effect;

b. Medium-high if mitigation has a limited scope;

c. Medium if features of both medium-high and medium-low vulnerabilities are present;

d. Medium-low if mitigating measures are generally in place but may be immature or only partially effective;

e. Low if mitigating measures are generally regarded as effective and are in widespread use.

[238] Using these scales, each plausible scenario is given a residual risk score on a five-point scale based on a combination of the assessed scores for likelihood, consequences and vulnerability.

2024 ONSC 3303 (CanLII)

[239] UIA's aviation security risk management program is outlined in a manual, several versions of which were entered in evidence. I focus on the manual revised in November 2019, in force at the time of the shootdown of PS752.

[240] The manual indicates that the purpose of UIA's security risk management program is to prevent acts of unlawful interference with UIA activities "due to timely detection of negative factors" affecting airline security, and to eliminate them. The manual recognizes that effective prevention of acts of unlawful interference "can only be achieved in case of involvement of all complexes and units, management, flight crews and service personnel".

[241] Consistent with ICAO guidance, the manual sets out a three-stage risk assessment methodology: (i) analysis of possible threats, probability of their implementation and their consequences; (ii) residual risk assessment; and (iii) preparation of recommendations for further work on risk assessment and its possible minimization.

[242] Of note, the manual does not provide any specific methodology with respect to assessing threats presented by SAMs; rather, its guidance is with respect to security risks generally. As I noted in my review of the law with respect to the standard of care, where guidance is general, it is less likely that mere compliance with the guidance will exhaust the standard of care.

Aviation Safety

[243] As I have already explained, while aviation safety and aviation security are different, the safety and security risk management programs must be complementary. I have found that, in circumstances where an airline will be flying in or near a conflict zone, both a security and a safety assessment are required to identify the risks specifically related to the proximity of the plane to the conflict.

[244] Safety is defined in ICAO 9859 as "the state in which risks associated with aviation activities, related to, or in direct support of the operation of aircraft, are reduced and controlled to an acceptable level". This definition is also reflected in Annex 19.

[245] ICAO 9859 also addresses record-keeping. Paragraph 2.5.8.1 provides that safety risk management activities should be documented, including any assumptions underlying the probability and severity assessment, decisions made, and any safety risk mitigation actions taken.

[246] ICAO 9859 also notes that aviation safety is dynamic, in that new safety hazards and risks continuously emerge and must be mitigated: para. 2.1.3.

[247] Appendix B to ICAO 10084, which is consistent with and in part duplicative of ICAO 9859, provides an example of a safety risk assessment methodology. First, one determines the safety risk probability, by asking how likely it is that a safety risk or consequence will occur: para. 1.1. A safety occurrence is considered foreseeable "if a reasonable person could have expected the kind of occurrence to have happened under the same circumstances": para. 1.3.

2024 ONSC 3303 (CanLII)

[248] Appendix B includes a typical safety risk probability classification table. It includes five categories to denote the probability related to an unsafe event or condition, the description of each category, and an assignment of a value to each category. In this example:

a. Frequent likelihood means the safety risk is likely to occur many times (has occurred frequently) and is valued at 5;

b. Occasional likelihood means the safety risk is likely to occur sometimes (has occurred infrequently) and is valued at 4;

c. Remote likelihood means the safety risk is unlikely to occur but possible (has occurred rarely) and is valued at 3;

d. Improbable likelihood means the safety risk is very unlikely to occur (not known to have occurred) and is valued at 2;

e. Extremely improbable likelihood means it is almost inconceivable that the event will occur, and is valued at 1.

[249] The second step is to assess the severity of the safety risk, taking into account the potential consequences related to the hazard, to determine the extent of harm that might reasonably be expected to occur as a consequence or outcome of the identified hazard. It considers fatalities or serious injuries, damage to the aircraft, and damage to air traffic services or aerodrome equipment.

[250] In this example, there are five categories of severity, as follows:

a. Catastrophic, meaning the aircraft/equipment are destroyed and there are multiple deaths, valued as A;

b. Hazardous, meaning a large reduction in safety margins, physical distress or a workload such that operational personnel cannot be relied upon to perform their tasks accurately or completely, serious injury, and major equipment damage, valued as B;

c. Major, meaning a significant reduction in safety margins, a reduction in the ability of operational personnel to cope with adverse operating conditions as a result of an increase in workload or as a result of conditions impairing their efficiency, a serious incident, and injury to persons, valued as C;

d. Minor, meaning nuisance, operating limitations, use of emergency procedures, and a minor incident, valued as D;

e. Negligible, meaning few consequences, valued as E.

2024 ONSC 3303 (CanLII)

[251] Next, a safety risk index rating is created by combining the results of the probability and severity scores. A matrix is created that results in each combination of factors obtaining a score. For example, a safety risk with remote probability (3), but catastrophic consequences (A), is scored as 3A.

[252] The index is then exported to a safety risk tolerability table that describes in narrative form the tolerability criteria for the particular organization. Safety risks are conceptually assessed as acceptable, tolerable, or intolerable. In the example provided in Appendix B, a safety risk range of 3A yields a safety risk description of intolerable, requiring the airline to take immediate action to mitigate the risk or stop the activity. A tolerable risk can be tolerated based on the safety risk mitigation, and may require a management decision to accept the risk. An acceptable risk requires no further safety risk mitigation.

[253] UIA maintains a Safety Management Manual. Under s. 2.1.5, the Safety Management Manual sets out a general framework for the assessment and mitigation of safety risks which is consistent with that identified by the various ICAO documents: an assessment of risk probability, risk severity, risk assessment and risk acceptance. Section 2.1.6 requires accurate keeping, maintenance, storage and destruction of safety records.

[254] The Safety Action Group of UIA's OCC was tasked with hazard identification and safety risk assessment, including the assessment of hazards related to operations in airspace affected by armed conflict: see UIA Operations Control Manual, s. 1.3.4. One of the identified risk assessment and mitigation methods identified in the Operations Control Manual was to "react to unwanted events and problems as they occur and develop appropriate remedial action", suggesting that responses to arising safety hazards should be capable of being nimble and rapid.

[255] Neither the Safety Management Manual nor the Operation Control Manual set out a specific framework or process for the assessment of safety risks associated with operations in airspace affected by armed conflict. As I have noted, when the guidance is general, as was the guidance for conducting a hazard identification and safety risk assessment process associated with operations in a conflict zone, it is more likely that merely following the guidance does not exhaust the standard of care.

Did UIA meet the standard of care?

[256] After spending considerable time reviewing the industry and legal standards applicable to airline security and safety risk assessments, I turn to consider whether UIA met the standard of care required of it on the morning of January 8, 2020. Having regard to the law I set out earlier at paras. 154-156, from *Ryan*, *Hill*, *Krawchuk*, and *Saskatchewan Wheat Pool*, I conclude that all of the industry and legal standards I describe above are relevant to understanding the standard of care that UIA had to meet. The standards I review above that address the responsibilities of other stakeholders in the civil aviation scheme are relevant in assessing to what extent UIA was justified in relying on, in particular, civil aviation authorities and states, when conducting its risk assessment on January 8, 2020.

2024 ONSC 3303 (CanLII)

[257] I find that mere compliance with UIA's manuals or the law of Ukraine was not sufficient to exhaust UIA's standard of care on the morning of January 8, 2020. None of those sources provided anything more than general information about conducting risk assessments related to flying over, in, or near conflict zones. To meet the standard of care, UIA was required to follow the guidance provided by ICAO with respect to security threat risk assessments, safety risk assessments, and flying over or near conflict zones, in addition to the guidance set out in its manuals and in the laws of Ukraine.

[258] In considering whether UIA met the standard of care, I place particular importance on the content of ICAO 10084, as it is the guidance that is most responsive to the situation UIA had to assess on January 8, 2020, and on ICAO 8973 which provides useful guidance on security threat risk assessments.

[259] In order to assess UIA's conduct against the standard of care required of it, I begin with an outline of how security and safety assessments were conducted generally at UIA.

UIA's Structure and Processes

UIA's Aviation Security Directorate

[260] As I have noted, Mr. Martynenko was the Deputy President and Director of the Directorate of Aviation Security.

[261] Before Mr. Martynenko joined UIA, he worked as a police officer, and then in security at an airport. Mr. Martynenko began his employment with UIA in 2006 as an inspector with AVSEC, and gradually worked his way up, gaining additional levels of responsibility with respect to aviation security. As I have already noted, Mr. Martynenko was certified in aviation security by the SAAU. At the time of the shoot-down of PS752, Mr. Martynenko's then-current certificate was dated July 27, 2018. Mr. Martynenko explained that it was mandatory for him to retrain every two years to renew his certification to conduct aviation security threat risk assessments.

[262] Mr. Martynenko explained that the aviation security department at UIA was divided into two parts: first, personnel working in the field, and second, mid-level management personnel who worked five days a week. Around the time of the shoot-down of PS752, two mid-level management personnel assisted Mr. Martynenko in conducting security threat risk assessments: Yuriy Bobrovnyk, Head of AVSEC, and Evgeniy Blakyta, Deputy Head of AVSEC. Of the three, only Mr. Blakyta spoke English. In addition, there were an additional 24 or 25 employees who were part of the AVSEC team.

[263] AVSEC worked on a 9 am – 6 pm shift. When AVSEC was not on duty, it relied on the OCC to contact them if OCC received information relevant to aviation security. According to Mr. Martynenko, through this system, UIA was conducting daily monitoring and daily assessments of incoming information relevant to security risks.

2024 ONSC 3303 (CanLII)

[264] When Mr. Blakyta would begin a shift, he would contact OCC to obtain whatever information they had received while AVSEC was off shift. Mr. Blakyta would also monitor media through the internet and news bulletins.

[265] When conducting monitoring, UIA would use primary news and information sources including Russian and Ukrainian language mass media outlets as well as major international mass media websites. Mr. Blakyta would monitor English language websites.

[266] According to Mr. Martynenko, UIA did not subscribe to Osprey Flight Solutions, or any other open-source risk management provider. He explained that AVSEC would look to the publicly available information from such providers only in circumstances where additional detail or information was necessary or would be helpful after having reviewed the available applicable official notices or information issued by or with the authority of the relevant states, information from its own personnel and providers, and information from media reports.

UIA's Flight Operations Department

[267] As I have already noted, UIA led evidence at trial from Mr. Sosnovskyi, UIA's Vice President of Flight Operations. Mr. Sosnovskyi joined UIA at its inception in November 1992, and continues to hold positions as Captain, Instructor, and Examiner. He became Vice President of Flight Operations in February 2004.

[268] Mr. Sosnovskyi explained that, in this role, he was responsible for the management and supervision of all flight operations activities, the development and implementation of flight operations and crew training, and the management of safety within flight operations activities and ensuring the overall safe and efficient conduct of all flights.

[269] Mr. Sosnovskyi described how UIA addressed its responsibilities under the umbrella of aviation safety. First, as I have already described, UIA had an aviation security risk management system, that is AVSEC. Second, UIA had an aviation safety risk management system concerned with the aviation safety of the operation of its flights, including quality and safety management, continuing airworthiness, flight operations and ground operations (which include the OCC) and flight dispatch.

[270] According to Mr. Sosnovskyi, a threat or risk that pertains to potential acts of unlawful interference, such as the destruction of an aircraft in service, would trigger an assessment of aviation security threats and risks within AVSEC's mandate. If the threat pertains to potential hazards, whether organizational, environmental, human factor or technical, the assessment of aviation safety threats and risks would be performed within the mandate of the Flight Operations System.

[271] I note that Mr. Sosnovskyi gave evidence that a safety risk assessment relating to conflict zones would not be undertaken unless there was some kind of official recognition of armed conflict. That may have been UIA's practice, but I do not accept that it is what the industry standards required; it is inconsistent with, for example, para. 3.2.2 of ICAO 10084. As I have

2024 ONSC 3303 (CanLII)

already noted, waiting for an official declaration that an airspace is a conflict zone before conducting safety risk assessments or implementing mitigating measures runs counter to the primary goal of protecting passengers, crew, and the public, which is the whole purpose of having security and safety risk assessments in the first place. To conclude an official declaration is needed elevates form over substance. Put more bluntly, the passengers and crew on a plane that find themselves flying through airspace where missiles are being launched do not care whether the airspace in question has been officially designated a conflict zone. They care about not being hit by the missiles.

[272] UIA's operation of a particular route falls within the ambit of the OCC, which has around-the-clock operational control over all flights planned in the 72-hour period prior to scheduled departure until completion.

[273] Twelve hours before the schedule departure of a planned flight, OCC is responsible to ensure, for example, that a commander of the flight (also called the pilot commander, or the pilot in charge) has been designated, a complete crew has been scheduled, and the aircraft is airworthy.

[274] The commander is the pilot designated by OCC to be responsible for the operation and safety of the aircraft, and has the final authority as to the operation of the aircraft. The commander must take all measures required for safety, whether the aircraft is on the ground or in flight. The commander has the ultimate responsibility and final authority to make decisions with respect to the operation of the flight.

[275] This structure is referred to as a "non-shared responsibility" model, where the commander is supported by flight dispatch and the OCC, neither of which have authority to overrule the final decision of the commander.

[276] Prior to the flight, the commander has responsibilities for flight preparation. These include pre-flight checks, a crew briefing, and review of an electronic briefing package.

[277] The electronic briefing package is designed to contain all available applicable and relevant aeronautical and meteorological information with respect to the flight, including applicable and relevant NOTAMs, Internal Notification to Crew ("INTAMs"), Snow Notices to Airmen ("SNOWTAMs"), runway and conditions, temperature, pressure reports, upper wind and aerodrome meteorological forecasts.

[278] UIA used a third-party service provider known as Jeppesen to prepare the electronic briefing package. Jeppesen would include only NOTAMs with a location designation along the route in the briefing package.

[279] If information in the briefing package raises a potential hazard that puts into question the safe operation of the flight, a safety risk assessment is done to determine whether the risk is significant enough to postpone or cancel the flight. The safety risk assessment is undertaken by

2024 ONSC 3303 (CanLII)

those involved in the flight operations system, such as the flight dispatcher and OCC at the outset of flight preparation, or the commander with the support of the flight dispatcher and OCC.

[280] The commander also has a line of communication open to OCC or flight dispatch to report any information she observes on the ground, in the air, or on arrival at the airport. If such information pertains to threats related to the safe operation of a flight, a safety risks assessment is undertaken.

[281] According to Mr. Sosnovskyi, if AVSEC becomes aware of information that triggers the need for a security risk assessment, Flight Operations is only informed if AVSEC concludes the aviation security risk is unacceptable, and cancels the flight. Mr. Sosnovskyi gave evidence that neither Flight Operations nor the commander are trained to conduct security risks assessments, and thus could add nothing to the process of assessing security threats. He testified that they rely on AVSEC to do the job it is trained to do. In other words, despite the UIA manual, and other industry documentation that require a safety risk assessment of hazards related to flying in or near conflict zones, in practice, UIA did not conduct any such safety risk assessment.

Risk Assessments Related to the Kyiv-Tehran Route

[282] I next turn to the specific risk assessments related to the Kyiv-Tehran route.

[283] Because each security threat risk assessment undertaken by UIA built on the previous one(s), it is necessary to begin with a discussion of the three previous security threat risk assessments undertaken of the route before January 8, 2020.

[284] An initial security risk assessment, of both IKA and the Kyiv-Tehran flight route, was undertaken by AVSEC prior to the commencement of the route. According to Mr. Martynenko, some of the factors AVSEC considered were:

a. All States from and over which the route was to be operated were states party to the *Chicago Convention* and members of ICAO. In Mr. Martynenko's view, the states could thus be relied upon to conduct themselves in accordance with ICAO guidelines.

b. Ukraine would conduct its own threat and risk assessment before granting approval to UIA to operate the route.

[285] In conducting its assessment, AVSEC reviewed available information from the SAAU with respect to the threats and risks to aviation security in regard to Iran and Türkiye, directives and notices issued by ICAO and IATA, among others, the existence of flight prohibitions or restrictions applicable to the route, aeronautical information publications ("AIPs") and aeronautical information circulators ("AICs") issued by or with the authority of the relevant states, CZIBs issued by or with the authority of relevant states and applicable to the route, NOTAMs issued by states applicable to the route, and information available from open sources including news media and risk websites.

2024 ONSC 3303 (CanLII)

[286] AVSEC concluded the aviation risks of the route were acceptable, particularly with the addition of mitigating steps including, of note:

a. Instituting continual monitoring, going forward, of the security (military and political) situation at IKA, in Iran and in the region of states through/over which the route was to be operated. Mr. Martynenko explained that "continual" did not mean constant, but rather that AVSEC monitored open-source information daily but periodically;

b. Instituting continual monitoring and following, going forward, of any incident related to the aviation security at IKA, in Iran and in the region of states through/over which the route was to be operated; and

c. Ad hoc or random interviews of aircraft crew members with respect to their observations or knowledge of suspicious military activity at or around IKA.

[287] UIA obtained permission to operate the route from Ukraine, Türkiye, and Iran. Mr. Martynenko deposed that AVSEC understood that, by granting permission to UIA to operate the route, each state had conducted its own threats and risks assessment for the route. In his oral evidence, Mr. Martynenko insisted that Iran would not have given permission to UIA to fly a route that would take it close to high value, strategic or military targets.

[288] I note here that Mr. Martynenko was incorrect in this assumption. Open-source information from 2011 placed in evidence describes an arsenal explosion at the Alghadir missile base, located about 30 miles to the west of Tehran. Dr. Bronk noted in his evidence that the location of the SAM that shot down PS752 would have been near to the Alghadir missile base. UIA's flight route was thus also near to the Alghadir missile base, a fact that AVSEC could have learned had it sought out the information.

[289] Mr. Sosnovskyi deposed that, prior to the commencement of the route, ground operations and flight operations undertook an initial aviation safety risks assessment, which included assessing such factors as IKA's dimensions, availability of ground service facilities and immigration authorities, alternative airports, fuel calculations, climate and meteorological phenomena along the route, and the NOTAMs applicable and relevant to the route.

[290] UIA also undertook periodic security reviews of the operations at IKA between 2016 and 2019, none of which identified any concerns.

[291] A second risk assessment of the route was performed in June 2019, after AVSEC learned from media reports that Iran had shot down an American UAV. Mr. Martynenko explained that, based on statements in open-source information, AVSEC understood that the United States would not retaliate militarily against Iran for the strike because doing so would be disproportionate. He explained that AVSEC understood that historically, tensions between the United States and Iran were characterized by proportionate responses to actions taken by one or the other.

2024 ONSC 3303 (CanLII)

[292] In updating its security risk assessment for the route, AVSEC considered: whether any of Ukraine, Türkiye or Iran had issued restrictions or prohibitions on their airspace (they had not); that Iran had been audited by ICAO in 2018; information provided by crew members of aircraft operating the route as to their observations of operations at IKA; its past assessments of the security situation at IKA; NOTAMs, AIPs, AICs and CZIBs issued by Ukraine, Türkiye or Iran, and applicable to the route; the fact that the route operated on a repetitive flight plan authorized and approved by Iran; all flights operating the route and the flight path in and out of IKA would require approval and clearance from Iranian authorities, which, in AVSEC's understanding, included civilian and military authorities; the UIA airplane on the route was a Boeing 737 which would be known to Iranian authorities, and was equipped with transponders; the shootdown of the UAV occurred 1200 km from IKA and even further from the flight path of the route; the Iranian military was a sophisticated organization; the American presence in the Persian Gulf was long-standing, and the American military was sophisticated; IKA is an international airport that operates solely in the realm of civil aviation; a commercial airliner would not be a potential target of a US military reaction to the shootdown of the UAV; and any American response to the shootdown would be proportionate.

[293] On June 21, 2019, UIA was asked by a reporter about a NOTAM issued by the FAA on that same day, prohibiting all aircraft operators from operating flights in the overwater area of the Tehran FIR only above the Persian Gulf and Gulf of Oman. The June 2019 NOTAM did not come to UIA's attention through its usual monitoring sources.

[294] Mr. Martynenko explained that the US NOTAM would not have come to UIA's attention because it bore the location indicator KICZ, which was not designated to the Tehran FIR and was not related to any of the stages of the route. Moreover, it applied only to US aircraft operators, and airlines flying code share flights with American operators, and thus did not bind UIA.

[295] The June 2019 NOTAM could not have borne a location indicator designated to the Tehran FIR because only the states with territorial control over airspace may issue NOTAMs with respect to that airspace. That is why it bore the identifier KICZ, which I have already explained, denotes a conflict zone with a ghost location.

[296] Given that UIA had received a copy of the June 2019 NOTAM, AVSEC considered it and confirmed it had no applicability to the route, as the UIA route did not operate in the overwater area above the Persian Gulf and the Gulf of Oman. Mr. Martynenko said the NOTAM did not provide UIA with any new information which could be related to the types or levels of threats in the region.

[297] AVSEC concluded that the risk of misidentification of UIA's aircraft by either Iran or the United States was low or minimal. It concluded that the aviation security risks were acceptable with the measures already in place and with additional risk mitigation steps:

2024 ONSC 3303 (CanLII)

a. Standardizing the information gathering and interviewing of crew members, and implementing interviews after each flight from IKA; and

b. Increasing the intensity and level of monitoring of the military and political situation at IKA, in Iran, in Türkiye and in Ukraine.

[298] The killing of General Soleimani in Baghdad on Friday January 3, 2020 was a major event. After the killing of General Soleimani, Iran's Supreme Leader Khamenei vowed to retaliate for the murder, and Iran publicly indicated it was assessing thirteen options for retaliation. At the same time, then-President Trump vowed to retaliate for any Iranian response.

[299] Mr. Blakyta, the only AVSEC member proficient in English, monitored English language open sources. According to Mr. Martynenko, by January 6, 2020, AVSEC had concluded from its ongoing monitoring of sources that the degree of tension between the United States and Iran had risen so much that a threat from Iran was real, and required an updated security risk assessment.

[300] To undertake this risk assessment, Mr. Martynenko, Mr. Bobrovnyk and Mr. Blakyta met during the course of their regular working day on January 6, 2020 to review the information AVSEC had obtained and the sources it had monitored since January 3, 2020.

[301] Those sources are set out in a document that AVSEC prepared for its counsel that was entered into evidence (without any objection). Mr. Blakyta participated in its preparation and noted the open-source information UIA used to monitor the situation in Iran between January 3, 2020 and January 6, 2020. These included CNN, the Washington Post, the BBC, the Daily Mail, Al Jazeera, www.controlrisks.com, www.safeairspace.net, UNN, Fars News, www.easa.europa.eu, https://ops.group/story and Osprey Flight Solutions.

[302] In the course of this security risk assessment, AVSEC considered: the factors from its previous risk assessments; media reports which showed an increase in temperature in the tensions between Iran and the United States; the distance from IKA to Baghdad (900 km by road, and 695 km by air); the route did not operate in Iraqi airspace or near the Iraqi border; IKA was operating in the usual course; no crew members reported observation of suspicious military activity at IKA or in the surrounding area; the commercial airlines that typically operated scheduled flights into and out of IKA were, to UIA's knowledge, operating in the usual course; UIA understood each of these airlines conducted their own security threats and risks assessment, and so UIA concluded that the other airlines deemed the security risks acceptable; information from the ControlRisks Middle East Riskmap 2020 indicating the security risk forecast for Iran was moderate and the political risk forecast was high, in keeping with the usual course in respect of Iran, and consistent with the 2019 forecast; and potential targets of an Iranian military response to the killing of General Soleimani would be outside of Iran and far from IKA.

[303] As a result, AVSEC concluded that the risk of misidentification to UIA's aircraft was low or minimal. Using the framework and methodology set out in UIA's aviation security risk

2024 ONSC 3303 (CanLII)

management program, AVSEC documented its conclusions on a certificate on assessment of threats and risks to security of the route and IKA. Although it understood that the tensions between Iran and the United States had heightened, AVSEC concluded that, in view of the totality of the factors it considered, the increase in tension did not provide sufficient grounds for stopping the route.

[304] AVSEC documented, with respect to a threat of the use of SAMs, that:

a. the probability level was medium-low, meaning there are no, or no recent, examples, but some evidence of intent, yet with a method apparently not sufficiently developed for a successful attack scenario or probably superseded by other forms of attack;

b. the level of implications was high, meaning that were the risk to come to pass, there would be hundreds of deaths, billions of dollars in economic loss, and severe disruption to services and confidence in the aviation system;

c. the level of vulnerability was medium, meaning that some of the following features are present: mitigation has a limited scope, or mitigating measures are generally in place, but they may be immature or only partially effective;

d. the risk category was medium-low, with the mitigation measures already in place.

[305] As such, AVSEC concluded that the risk was acceptable.

[306] I note that the analysis for probability of the security threat risk, focusing as it does on intent, is misaligned with the concern that an aircraft may become a target of a SAM through miscommunication, misidentification or miscalculation. This is despite the fact that unintentional shoot-down is a risk identified in ICAO 10084. The misalignment is both a feature of the nature of the security risk analysis iterated by ICAO, and another factor that supports the need for a complementary safety risk assessment. However, no safety risk assessment with respect to a flight in or near a conflict zone was done on January 6, 2020.

[307] According to Mr. Martynenko, after the January 6, 2020 security threat risk assessment, AVSEC continued to monitor the security situation in Iran with an increased intensity and level of monitoring.

The Risk Assessment on January 8, 2020

[308] Recall that January 7, 2020 was Orthodox Christmas in Ukraine. Mr. Martynenko was on duty beginning in the evening of January 7, 2020, while Mr. Blakyta and Mr. Bobrovnyk spent the holiday with their families. Knowing he would need to be awake overnight, as PS752 was scheduled to depart in the middle of the night Kyiv time, Mr. Martynenko took a two-hour nap on the afternoon of January 7, 2020.

2024 ONSC 3303 (CanLII)

[309] Mr. Martynenko testified that, before he came on duty on January 7, 2020, flight operations personnel had been instructed to monitor media sources, and Mr. Blakyta had agreed to keep monitoring media sources from home while Mr. Martynenko spent time with his family earlier in the day.

[310] At 8 p.m. on January 7, 2020, Mr. Martynenko received a report from the personnel in the Kyiv airport at the time of their shift change, and began to monitor media sources. He indicated that he was confident that any official information that arose (NOTAMs, AIPs, AICs and CZIBs) issued with the authority of Ukraine, Türkiye, or Iran would be communicated to him by OCC.

[311] No one other than Mr. Martynenko was monitoring for security threat risk information at that time. OCC, which had apparently been monitoring unofficial and official sources of information during the day on January 7, 2020, was not monitoring any sources of unofficial information in the evening and overnight. OCC did not even learn about the ballistic missile attack on Iraqi bases until after PS752 had been shot down.

[312] The ballistic missile attack launched by Iran commenced at around 1:30 a.m. Tehran time, which is midnight in Kyiv. Mr. Martynenko could not recall exactly when he became aware of it, but deposed that it would have been sometime between 2:00 a.m. and 3:15 a.m. in Kyiv, or about two to three hours after the attack. Although he was monitoring for the very type of risk that materialized, it took at least two hours after the attack began for him to learn about it. The BBC, one of the sources Mr. Blakyta had monitored in the days prior, began reporting on the missile strike 23 minutes after it began.

[313] Mr. Martynenko monitored Russian and Ukrainian language news sites. He also saw some CNN reports, but it is unclear whether that is because he went to the CNN site and used Google translate, or whether he went to a site that republished the CNN reports.

[314] As a result of his monitoring, Mr. Martynenko learned that Iran had launched missiles at Iraqi military bases housing American personnel in the area of Erbil, Iraq, and the Ain al-Asad air base in Western Iraq. He learned that the missiles were likely launched from the Kermanshah province of Iran.

[315] According to Mr. Martynenko, he understood that there were no reported American casualties. However, initial media reports about casualties were inconsistent, and in any event, unclear in the hours immediately after the ballistic missile attacks.

[316] Mr. Martynenko also testified that he understood that Iraqi military bases had been warned by Iran in advance of the launch of the missiles. He did not recall where he saw those early reports. In cross-examination, Dr. Wallace confirmed that while he was aware of reports that Iran had warned Iraq about the incoming missiles, he was not aware of any reports that Iran had given warnings to American authorities about the incoming attack. When asked whether it was reasonable to believe that Iraq would pass the warning onto American troops, Dr. Wallace

2024 ONSC 3303 (CanLII)

said it was not. He noted the then-existing tensions between Iraq and the United States, which had just assassinated a foreign government leader on Iraqi soil, along with a number of Iraqis. Iraq was, Dr. Wallace described, very upset about the American failure to respect its territorial sovereignty.

[317] Mr. Martynenko stated that, after the initial reports of the ballistic missile strikes, there were no media reports of any further or subsequent military action by either Iran or the United States.

[318] Mr. Martynenko testified that, given what he had learned, he determined it was necessary to update the security threat risk assessment for PS752, and that he began to do so at around 3:00 a.m. Kyiv time.

[319] Mr. Martynenko was the only person involved in the security risk assessment on January 8, 2020. He did not contact any colleagues in AVSEC, including Mr. Blakyta, who could have assisted with monitoring English language news sites. These sites had information available faster than did the Ukrainian and Russian websites. Mr. Martynenko did not contact anyone in Flight Operations to conduct a hazard identification and safety review. He did not contact the commander of the aircraft.

[320] Mr. Martynenko deposed that he began with the security risk assessment documented in the certificate dated January 6, 2020. He considered all the factors he and his colleagues considered on January 6, 2020, and additionally he considered that:

a. PS751 had landed as scheduled and was on the ground at IKA prepared for its scheduled departure until ultimately cleared for take-off by Iranian authorities;

b. There was no information from the commander of PS751 and PS752 or any crew members of anything other than normal and usual operations at IKA;

c. No official information, such as a NOTAM, had been provided by Iranian authorities in relation to civil aviation or noting that Iran had placed its military on high alert at IKA or elsewhere;

d. To his knowledge, commercial airlines were continuing to operate in and out of IKA in the usual course, and he expected each airline would have conducted their own aviation security threats and risks assessments and had concluded that the risk of flying were acceptable;

e. No NOTAM, AIP, AIC or CZIB issued by Ukraine, Türkiye, or Iran revealed any prohibitions or restrictions on the airspace through which the route would fly;

f. The missiles had been launched from Kermanshah, which is 420 km from IKA;

g. IKA was 840 km and 670 km from the targets of Iran’s ballistic missile launch;

2024 ONSC 3303 (CanLII)

h. The route of PS752 did not fly through the airspace of Iraq, but far from it, and further still from the targets of Iran's ballistic missile launch;

i. Any American response to the missile attack would be proportionate and likely with advance warning to Iran;

j. Potential targets of a US military response would seek to avoid civilian consequences, civilian aircraft would not be targeted, and targets would likely be the Iranian missile batteries that launched the missiles on January 8, 2020;

k. PS752's flight plan had been approved by Iranian authorities and was expected to be cleared for take-off by Iranian authorities, which included civilian and military authorities.

[321] Mr. Martynenko deposed that, on January 6, 2020, AVSEC had considered possible retaliatory actions that Iran might take, and the missile strikes it launched on January 8, 2020 were not as significant as other possibilities AVSEC had considered. There is no evidence about what other retaliatory actions AVSEC had considered.

[322] Mr. Martynenko acknowledged that the events and early media reports indicated a further increase or escalation in temperature of the tensions between Iran and the United States.

[323] Mr. Martynenko concluded that the risk of continuing the operation of the route was acceptable.

[324] Mr. Martynenko documented his risk assessment later in the day on January 8, 2020, after PS752 had been shot down. In the certificate dated January 8, 2020, Mr. Martynenko recorded:

a. The threat of SAMs was of medium probability, which was an increase from the medium-low assessment of January 6, 2020;

b. The threat of SAMs had a high level of implications, unchanged from the assessment on January 6, 2020;

c. The level of vulnerability from the threat of SAMs was medium, unchanged from the assessment on January 6, 2020;

d. The risk category was medium, an increase from the medium-low assessment on January 6, 2020;

e. The risk acceptance criteria remained acceptable, as it had been assessed on January 6, 2020.

2024 ONSC 3303 (CanLII)

[325] There was other information publicly available, and free, that Mr. Martynenko could have accessed, but did not, in the course of conducting his risk assessment on January 8, 2020.

The FAA NOTAM

[326] At 00:07 UTC on January 8, 2020, the FAA issued a conflict zone NOTAM prohibiting US registered aircraft from entering Iranian airspace "due to heightened military activities and increased political tensions in the middle east, which present an inadvertent risk to US civil aviation operations due to the potential for miscalculation or mis-identification."

[327] An FAA NOTAM can be publicly accessed in a number of ways. There is no dispute that, were Mr. Martynenko to have searched to see if the FAA had issued a NOTAM, he could have found it. But despite knowing the FAA had issued a NOTAM after the shoot-down of the American UAV in June 2019, and knowing the FAA is an organ of one of the two governments that was party to the ongoing conflict, he did not look to see if the FAA had issued a NOTAM.

[328] At 3:45 am Kyiv time, CNN made a post on Twitter stating that the FAA had issued a restriction on flights in Iran, Iraq, the Persian Gulf, and the Gulf of Oman. Although Mr. Martynenko was monitoring internet sources, and stated that he had seen some information from CNN, he did not see any information from CNN about the FAA NOTAM.

[329] Mr. Martynenko testified that, even if had seen the NOTAM, it would not have changed his assessment, because he considered the risks of misidentification in his assessment. I note, however, that Mr. Martynenko also maintained that the risk of misidentification was higher for American operators than it would be for others, like UIA. I disagree with this assessment. It is illogical. The risk to American operators would likely be different than to other operators if the threat at issue was intentional targeting of civilian flights. But by its nature, miscalculation and mis-identification involve unintentional targeting, a risk that affects all civilian aircraft in the airspace equally.

Osprey Flight Solutions

[330] Osprey Flight Solutions is, as I have noted, a commercial service provider that provides specialized risk assessment advice to the global aviation industry with a particular focus on the risks of operation in or near conflict zones. In January 2020, Osprey maintained a public Twitter (as it was then known) feed and a website that had some public information on it. It also maintained a free email service to which anyone could subscribe to get the full text of Osprey's alerts by emails. In addition, it provided paid subscription services. UIA did not subscribe to Osprey's services, but it did monitor Osprey's website between January 3 and January 6, 2020.

2024 ONSC 3303 (CanLII)

[331] Osprey was founded in 2017 by three individuals, one of whom, David Nicholson[15], gave evidence at trial.

[332] Osprey developed proprietary software, based on the peer-reviewed master's thesis of one of its founders, to gather intelligence from open sources on potential risk to aviation across the globe. By January 2020, Osprey was on its third iteration of the software platform.

[333] Osprey's software gathers information from over 200,000 sources in 65 different languages across a broad spectrum of sources including social media, government websites, intelligence, data providers, and media. It scrapes the sources every 15 minutes, and gathers about 1.5 million data points daily. The software filters the data for relevance, geolocates incidents, and date-stamps and categorizes incidents into 80 different subtypes. It is designed to insure cross-verification of information and avoid single source reports, or circular reports where the same information is reported repeatedly. The data is then sent to a human analyst for quality control. Once quality controlled by a person, the information goes into Osprey's database as a verified ping. The database creates a digital model of aviation security risk, and has artificial intelligence capabilities.

[334] Forecasts go out daily. Analysts create notification alerts to notify recipients of incidents that have a significant impact on aviation. Osprey scores potential concerns using four categories of risk, each of which includes five criteria. The numerical score is converted into a risk description ranging from incidental to extreme.

[335] Osprey assessed airspace over Iran to be low risk at all altitudes at the beginning of 2019. In June 2019, Osprey raised its risk level of Iranian airspace to moderate at all altitudes due to the increase in conventional military activity in the region.

[336] On June 13, 2019, after Iran shot down the American UAV, Osprey raised its risk rating for southern Iranian airspace from moderate to high at all altitudes. Then, on September 14,

[15] Mr. Nicholson is an engineer who served in the UK Armed Forces for 12 years, the last six of which were as a member of the Special Forces. He had a number of tours of duty in conflict regions including Iraq and Afghanistan. Following his retirement, he joined a maritime security firm, where a significant portion of his work included assessing security issues in high threat areas marked by conflict, and in engaging with government and regulatory authorities. He subsequently joined International SOS and Control Risks as Global Security Director for Aviation and Maritime where he headed up the aviation security team. After the downing of MH17, Mr. Nicholson formed the view that there were serious gaps in the aviation industry's approach to operations in or near conflict zones. He concluded there was a need for more sophisticated, data driven risk assessment tools to assess the risk to civilian aviation operations in areas marked by conflict. The co-founders of Osprey have equally impressive experience, including as in the field of intelligence, terrorism studies, and aviation analysis.

2024 ONSC 3303 (CanLII)

2019, following Iranian cruise missile and drone strikes on Saudi Arabian oil facilities, Osprey raised its risk rating for all Iranian airspace at all altitudes to high.

[337] Throughout 2019 and January 2020, Osprey issued a total of 83 alerts for events in the Gulf region that included Iran. Osprey's risk assessment of operating in Iranian airspace took into account key events, and factors including, by way of example only:

a. The United States pulling out of the JCPOA nuclear deal with Iran;

b. The downing of the American UAV by Iran in June 2019;

c. The assassination of General Soleimani;

d. Iran's history of not issuing notice of activities that could affect flight safety;

e. Iran's aggressive shoot-down policy, which, though unlikely to target civilian flights, in Osprey's assessment significantly increases the risk to civilian aircraft of misidentification or miscommunication during times of military conflict or rising tensions;

f. Osprey's view that Iran's military command and control structure, is complicated and increases the risk of errors and misadventure;

g. The escalating conflict between Iran and the United States, each of which had at their disposal a large range of weapons including long range ballistic missiles and short-range ballistic missiles ("SRBMs"). In Osprey's view, it was not possible to reliably predict when or where attacks would take place.

[338] On January 7, 2020, at 22:30 UTC, after the ballistic missile attack, Osprey raised its risk assessment of Iranian airspace to extreme, and immediately pushed its assessment out to its clients via its risk assessment reporting products.

[339] At 00:47 UTC, just around the time Mr. Martynenko was commencing his security threat risk assessment, Osprey issued its increased risk assessment to the public via Twitter and its email subscription service. The Twitter post said: "Iraq – Iran conducts ballistic missile strikes against US military targets, defer all flight over Iraq & Iran."

[340] The email provided information about the Iranian ballistic missile strikes, indicating that the US Department of Defence confirmed that Iran launched more than 12 SRBMs at the Iraqi targets, and no information had been verified with respect to casualties, however:

> details are still emerging as the situation remains fluid and subject to change. Additional SRBM launches from Iran into Iraq targeting locations where US military advisers are present could occur within the next 12-24 hours without notice.

2024 ONSC 3303 (CanLII)

[341] Osprey's analysis of the security situation included the following:

> The US is likely to respond to the reported SRBM attacks into Iraq with strikes against military-centric targets in Iran within the next 72-96 hours. Follow-on Iranian ballistic and/or cruise missile as well as drone strikes against US interests in the Middle East region would become a credible scenario depending on the scale and severity of any US strikes. …
>
> Risk area recommendation: Defer all flights subject to an operation specific risk assessment.

[342] Osprey's advice in the email included ensuring crews scheduled to operate to or over the country in the near term were fully aware of the latest security situation.

[343] Osprey also commented on Iran's shoot-down policy as follows:

> The country has an aggressive air intercept and shoot-down policy which allows air and air defence forces to intercept and disable aerial targets violating airspace regulations. Military air and air defence assets may be employed to down aerial targets under the auspice of the policy. While legal civil aviation flights are unlikely to be directly targeted, there remains a latent but credible risk of misidentification and interception by military air and air defence assets.

[344] The Osprey alert also indicated that Iran "has a history of not issuing adequate notice of activities in its airspace that could affect flight safety".

[345] Osprey received the FAA Notam when it was first issued through the FAA's distribution system. The NOTAM was published through FAA's email system and prohibitions page (which is publicly available) at 00:57 UTC, right around when Mr. Martynenko was beginning his security threat risk assessment.

[346] The FAA NOTAM restricting flight was consistent with Osprey's assessment. Given the nature of the threat disclosed in the FAA NOTAM (miscalculation or mis-identification), there was nothing to suggest to Osprey that the risk was confined to American operators only. The FAA NOTAM was directed at American operators and airlines operating codeshare flights with American operators in the region because those were the limits of the FAA's jurisdiction, not because the risk was not present for other civil aviation operators in the region.

[347] Osprey issued a second advisory at 1:32 UTC on January 8, 2020, while Mr. Martynenko would have been actively conducting the security threat risk assessment, in which it advised that the FAA had issued the NOTAM prohibiting US civil aviation operations over Iraq, Iran, the Persian Gulf, and the Gulf of Oman. It repeated that additional SRBM launches from Iran into Iraq could occur within the next 12-24 hours and that the United States was expected to respond within the next 72-96 hours.

2024 ONSC 3303 (CanLII)

[348] Osprey repeated its risk recommendation: Defer all flights subject to an operation specific assessment. It also repeated its advice to ensure crews scheduled to operate to or over the country in the near term are fully aware of the latest security situation.

[349] Osprey repeated its assessment of Iran's aggressive shoot-down policy, and the "latent but credible risk of misidentification and interception by military air and air defence assets". It repeated that Iran has a history of not issuing adequate notice of activities in its airspace that could affect flight safety.

[350] Although AVSEC had monitored Osprey's publicly available information about the security situation in Iran between January 3 and 6, 2020, Mr. Martynenko did not access that information on January 8, 2020.

[351] Mr. Martynenko indicated that, even had he been aware of the Osprey risk rating, he did what it indicated he ought to do, that is, conduct an operation specific risk assessment, and consider the risk of misidentification or miscalculation. Mr. Nicholson testified that recommending an operation specific risk assessment is a phrase Osprey uses recognizing that some of its clients, such as the Red Cross, must fly into high-risk environments. He was also clear in his evidence that Osprey is not a decisionmaker for civil aviation operators, but rather provides input for decisionmakers to use when determining the risks to their aviation.

Did the risk assessment of January 8, 2020 meet the standard of care?

[352] In my view, the risk assessment conducted on January 8, 2020 failed to meet the standard of care required of UIA and its employees in a number of ways, which I describe below.

Lack of Information and Analytical Failings

[353] Although gathering and continuing to gather relevant information is the cornerstone of a competent security threat risk assessment, UIA had neither set itself up to have the required information on January 8, 2020, nor did Mr. Martynenko acquire that information on January 8, 2020. Without information that was reliable in breadth and in depth, the analytical process of the security threat risk assessment was necessarily diminished.

[354] As I described earlier, ICAO 10084 sets out key risk factors to consider when flying over or near conflict zones where it may be assumed that SAMs are available to a party engaged in the conflict. There is no evidence that Mr. Martynenko considered any one of those factors.

[355] In particular, there is no evidence that he considered the use of military aircraft in a combat role or for hostile reconnaissance by at least one party in the conflict, although he was aware that Iran had used SAMs to attack an American UAV about six months before.

[356] Nor is there any evidence that he considered the likelihood of the use of aircraft to transport ground troops or military equipment by at least one party, although on January 6, 2020,

2024 ONSC 3303 (CanLII)

it was reported that six American bombers were being repositioned for possible operations in Iran, if ordered.

[357] Crucially in my view, there is no evidence that Mr. Martynenko considered whether UIA's flight route passed over or close to locations or assets of high strategic importance that might have been considered vulnerable to aerial attack in a conflict situation.

[358] Mr. Martynenko acknowledged that he did not have any information about whether there were SAM missile crews along the flight route, or how well-trained they were. He did not know about the Iranian military structure. He admitted that he did not know if Iran had an aggressive shoot-down policy. He did not know PS752's flight route passed close to an Iranian missile base. And Mr. Martynenko did not attempt to access the broader swath of sources of information recommended in ICAO 10084 that would have shed light on these matters.

[359] Although there was open-source information available, at no time did UIA or Mr. Martynenko try to find it. Had he done so, he would have learned from that open-source information that commanders in Iran's dual military structure may delegate authority to shoot down in times of crisis, which can lead to complications and mistakes. He would have learned that Iran has an aggressive shoot-down policy. He would have learned that UIA's flight route passed close to Alghadir missile base.

[360] The thread running through the informational failures of January 8, 2020 is Mr. Martynenko's assumptions, which served to facilitate his confirmation bias, and reveal UIA's lackadaisical approach to security.

[361] Mr. Martynenko assumed that the state of Ukraine would have done its own security threat risk assessment, and if it had information relevant to the security situation in Iran, it would have advised him. As a result, he saw no need to contact state authorities. He had no information to support this assumption. Moreover, it was Orthodox Christmas. A telephone call to the SAAU would have ensured that the SAAU had not missed relevant information due to the holiday that was important to a risk assessment for PS752.

[362] Mr. Martynenko assumed that, if the commander or flight crew had any relevant information, they would contact him or OCC, and that their failure to do so suggested there was no issue on the ground at or near IKA. There was no basis for this assumption either. The flight crew had spent a few hours to rest late at night in a hotel without news in a language they could understand. Their opportunity to make any observations was limited. And if they had made any relevant observations, it was entirely possible that they were without crucial context to understand the import of the observations they had made such that the importance of such observations was not apparent to them.

[363] Mr. Martynenko assumed that Iran would not have given permission for UIA to follow a flight route that flew over or near a military facility, although he acknowledged that were he aware of a military base near IKA it would have impacted his final risk assessment. As we know,

2024 ONSC 3303 (CanLII)

there was open-source information available that disclosed the presence of Alghadir military base close to IKA from at least 2011, but AVSEC did not take steps to find that information at any time.

[364] Mr. Martynenko assumed that Iran would abide by its international obligations and issue a NOTAM or close its airspace if there were risk to civil aviation within it. This assumption is belied by the fact that Iran launched ballistic missiles on the same day through airspace through which civil aviation also flies without issuing a NOTAM or closing its airspace. And to Mr. Martynenko's knowledge, it had done so in the past, for example, when it shot down the American UAV in June 2019. Moreover, the Osprey flight alert made reference to Iran having a history of not issuing adequate notice of circumstances or events in its airspace that could impact flight safety, but Mr. Martynenko did not know that because he did not look for it.

[365] I note too that Mr. Martynenko acknowledged in cross-examination that there was a lack of transparency with respect to Iran and its affairs. He had no basis to conclude that Iran would comply with its obligations to issue a NOTAM or close its airspace on January 8, 2020.

[366] ICAO 10084 and ICAO 8973 also make clear that an operator must conduct a security threat risk assessment even if the state whose airspace is at issue has not issued a NOTAM.

[367] Moreover, Mr. Martynenko did not consider the fact that if Iran were to use a SAM defensively, it would not have the time to issue a NOTAM or close its airspace.

[368] Because a number of airlines continued to take-off from, or land at, IKA or overfly Tehran FIR between the launch of the ballistic missiles and the shoot-down of PS752, Mr. Martynenko assumed that other airlines had conducted a security threat risk assessment and decided the risks of flying into and out of IKA were acceptable. He had absolutely no evidence to back up this assumption. Mr. Martynenko did not contact any other airlines at any time.

[369] The question of the behaviour of other airlines requires some analysis.

[370] First, of the flights that arrived at IKA after the ballistic missile attack, but before the shoot-down of PS752, eleven landed before the Osprey advisory was issued, seven of which landed before the FAA NOTAM was issued. Three more landed after the Osprey advisory. An additional flight landed within minutes of the shoot-down. It is unclear what warnings or information the other airlines had accessed during this time, or the basis on which they made those decisions.

[371] Mr. Gillespie testified that, were he an airline captain who was made aware that missiles had been launched in nearby airspace, he might continue to land. Mr. Nicholson also testified that rerouting aircraft could be more dangerous than landing. This makes sense for several reasons. First, in a situation when missiles might be flying, one would want to be out of range of the missiles as soon as possible to minimize risk. Second, a plane on a regularly scheduled flight to IKA would have other considerations, including where to divert to, and what hazards or risks an alternate route would present, including whether there was sufficient fuel on board to get to

2024 ONSC 3303 (CanLII)

the alternate airport safely. While a regular pre-flight safety risk assessment includes identifying alternate airports to which a flight can divert if necessary, there is no evidence as to whether the airlines that landed at IKA had identified alternate airports that were in locations more dangerous than IKA, given the then-current unfolding state of affairs.

[372] Of the eight flights that departed IKA on January 8, 2020 prior to the shoot-down of PS752, two departed prior to the issuance of the FAA NOTAM. One departed minutes after the Osprey alert was issued. Four of the airlines that departed IKA subscribed to Osprey's email service, but there was no evidence as to which department in the airline received the alert email, nor what use, if any, they made of it.

[373] Moreover, there is evidence in the record from Alec Moffat[16], who was offered as an expert in aviation forensics and investigations, to indicate that certain airlines altered their behaviour in the days after January 3, 2020, up to and including January 8, 2020. For example:

a. Singapore Airlines began avoiding Iranian airspace as of January 6, 2020, consistent with reports that it had diverted flights due to developments in the region;

b. Two British Airways flights made abrupt course changes between 01:17 UTC and 01:47 UTC and diverted to Istanbul. A third British Airways flight made a circling course change over Kuwait at approximately 01:25 UTC before heading west over Saudi Arabia.

[16] Mr. Moffat currently holds the position of President and Director of Investigations with RJ Waldron, an aviation forensics firm. He has conducted over 700 investigations into aviation accidents, incidents and aircraft system failures worldwide, including on-site investigations, accident reconstruction and laboratory examinations. Mr. Moffat is also an instructor with the Southern California Safety Institute specializing in the Accident Investigation Course, and Aircraft Fire and Explosion Course, among others. He has previously held positions as an accident investigator with the Transportation Safety Board of Canada, as an instructor for the Avionics Technology Program at the British Columbia Institute of Technology and as a technical instructor and course developer for Air Canada and Canadian Airlines. He is a full member of the International Society of Air Safety Investigations. He has acted as an expert witness in numerous cases. I noted on review of Mr. Moffat's evidence as I prepared my reasons that I did not at the time of trial qualify him as an expert. It appears that I, and counsel, carried on with his evidence, offered as an expert, inadvertently, and because there was no objection with respect to his qualifications. To dispel any doubt, Mr. Moffat is a properly qualified expert to give evidence with respect to the questions he was asked to opine on: (i) whether reliable flight data is available to determine if any of a number of airlines re-routed flights to avoid Iranian airspace prior to the downing of PS752, (ii) whether any other air carrier felt that the situation prior to the departure of PS752 defined the entire Tehran FIT as a conflict zone. Moreover, the evidence he offered was both relevant and necessary to my determinations. I conclude that the two-stage analysis in *Mohan* is made out and qualify Mr. Moffat as an expert on aviation forensics and investigation.

2024 ONSC 3303 (CanLII)

[374] I note that there is no evidence in the record that is not hearsay as to why these airlines altered their behaviour.

[375] The June 2021 DSB report, which the parties have agreed may be admitted for proof of the truth of its contents, indicates that KLM became aware of the FAA NOTAM on January 8, 2020. It consulted open sources and the Netherlands Defence Intelligence and Security Service. A decision was taken less than an hour later to stop flying over Iran and Iraq, because "missiles had been fired and further unforeseen events might occur". The decision to stop flying was taken one and a half hours before PS752 was shot down.

[376] The Canadian report, "Flight PS752: The Long Road to Transparency, Accountability and Justice", which the parties have agreed may be admitted for proof of the truth of its contents, indicates that, on January 7, 2020, Canadian aviation authorities became aware that Iran launched a missile strike, and that there was the possibility of further military action. Canadian aviation authorities spoke to their American counterparts and were advised that the FAA was in the process of issuing a NOTAM directing American airlines not to fly into the airspace of Iran or Iraq. Transport Canada officials then reached out to Air Canada, the only Canadian airline that operates in the Middle East, and received confirmation from Air Canada officials that they were already taking action to divert their flights away from the danger zone.

[377] There thus is evidence in the record that KLM and Air Canada altered their flight paths because of their unfavourable risk assessment with respect to flights over Iran and Iraq.

[378] Mr. Gillespie also gave evidence that the fact that other airlines are operating does not indicate that it is safe to do so, without liaising with them to determine on what basis they are conducting operations.

[379] Mr. Martynenko's assumption that other airlines had judged the security risk of flying in Iranian and Iraqi airspace to be acceptable was wrong, at least with respect to some airlines, who had reached the opposite conclusion. And he had no basis to assume that those airlines that continued to operate in Tehran FIR had judged the risk of doing so to be acceptable, because he did not liaise with any other airline. There is absolutely no evidence on the record as to whether the airlines that continued to operate in Tehran FIR conducted any security threat risk assessment or safety assessment of doing so.

[380] Mr. Martynenko assumed the threat risk to PS752 lay in the potential American response to Iran's ballistic missile attack. However, he had no basis to conclude that Iran would not launch further SRBMs. Nor did he consider whether Iran might respond to American retaliation, or perceived American retaliation, by engaging its air defence systems, an act which necessarily must be taken quickly, and under pressure, leading to an increased risk of misidentification and miscalculation.

[381] Mr. Martynenko assumed that any American retaliation against Iran for the ballistic missile strikes would have been against the source of the missiles, although that was inconsistent

2024 ONSC 3303 (CanLII)

with the threats made by American government officials in the days before the ballistic missile strike Iran launched.

[382] Mr. Martynenko assumed that the American and Iranian militaries were sophisticated and would not target a civilian aircraft. However, as Dr. Bronk testified, deconfliction is a problem for all militaries, even advanced ones. Dr. Bronk also testified that factors that may lead to misidentification resulting in friendly fire strikes have been researched and include stress, inadequate coordination, faulty information, reduced visibility, inadequate training, chaotic conditions, inexperience, psychological warfare, panic, carelessness and the necessity for split second decisions. Mr. Martynenko did not consider these factors, although at least some of them must have been present on January 8, 2020, including stress, chaotic conditions, and the necessity for split second decisions. Dr. Bronk also testified that the Iranian military was likely scared of being hit in a retaliatory American strike and that fear was compounded by the fear of failing to properly respond to a US strike if it did occur. Thus, the assumption that the Iranian and American militaries were sophisticated and would not target PS752 unintentionally had no factual foundation.

[383] Mr. Martynenko also assumed that the Iranian military would be involved in clearing PS752 for take-off. While the evidence suggests that there may have been some military involvement in clearing PS752 to take off, even assuming that to be true, there was no basis to conclude that as a result, PS752 would be safe, when deconfliction remains an ongoing problem for even sophisticated militaries.

[384] Mr. Martynenko did not check whether the FAA had issued a NOTAM. He assumed any FAA NOTAM would not apply to UIA and that there would be nothing relevant he could learn from an FAA NOTAM. However, he acknowledged that the FAA had significantly more resources, expertise, and information available to it, both in terms of quantity and quality, than UIA did. Moreover, as an American entity, it was attached to one of the two parties to the conflict that created the security risk he was assessing. It thus could be expected to have access to better, non-public, information, which ICAO 10084 identifies as being particularly valuable, and which could have been reflected in any NOTAM that it issued.

[385] In contrast, while denying the FAA NOTAM would have changed his risk assessment, Mr. Martynenko indicated that, had German authorities issued a NOTAM, he would have considered it on January 8, 2020 because Lufthansa at the time executed flights to Iran. It defies logic to think that German authorities would have had better information than the FAA. Mr. Martynenko had no basis to conclude that there would be nothing relevant from the FAA to assist with his security threat risk assessment on January 8, 2020.

[386] Notwithstanding that AVSEC had monitored Osprey's publicly available information between January 3, 2020 and January 6, 2020, Mr. Martynenko did not check to see if Osprey or any other private risk assessment service had released any advisories, although ICAO 10084 recommends that operators consider using such a service if they do not have access to sufficient information sources to make informed risk assessments. He assumed Osprey could offer no new

2024 ONSC 3303 (CanLII)

information, and that his own monitoring of media would be as good as Osprey's. He ignored a free and available source of information that UIA had judged to be valuable just days before.

[387] Although the information from Osprey was in English, Mr. Martynenko could have readily accessed it and used Google translate, as he said he did with other English language sources of information, or he could have involved Mr. Blakyta to assist.

[388] Given the short time frame between PS752's scheduled take-off and when Mr. Martynenko learned about the ballistic missile launch on January 8, 2020, a source like Osprey would have had a far greater capability to assess available information than did one man, by himself in his home in the middle of the night, reading mostly Russian and Ukrainian language news sources which were slower to publish news than other sources. The circumstances that existed on January 8, 2020 made the recommendation in ICAO 10084 to access a service that provides risk assessments particularly apt.

[389] It would have cost Mr. Martynenko nothing to check to see what Osprey had concluded. Although UIA's position is that the Osprey alerts provided no new information, because Mr. Martynenko considered the risk of misidentification, the Osprey alert contained information that would have challenged at least some of the assumptions Mr. Martynenko made, or filled in gaps in his knowledge. For example, the Osprey alert included information about Iran's aggressive shoot-down policy, about which Mr. Martynenko stated he was not aware. The Osprey alert would have challenged Mr. Martynenko's illogical assumption that American aircraft were at greater risk of misidentification than other aircraft were. The Osprey alert would also have challenged Mr. Martynenko's assumption that he could rely on Iran to close its airspace or issue a NOTAM if it were aware of a risk in its airspace that could affect flight safety. It would have challenged his assumption that only some of the airspace in the region presented risk. Realizing that he was operating on assumptions that were not warranted should have led Mr. Martynenko to reevaluate his assumptions, and should have changed the quality of the security threat risk analysis that he was undertaking.

[390] ICAO 8973 highlights the importance of critical thinking, challenging other personnel and accepting being challenged when conducting aviation security threat risk assessments. Mr. Martynenko did not bring in any others to the security threat risk assessment he was undertaking, so no other person had the opportunity to challenge his assumptions. Osprey's alert could have offered a test of his assumptions, but he did not access it.

[391] The time pressure he was under is also relevant. While ICAO 8973 also highlights the importance of allowing the necessary time and making the necessary efforts to comply with security measures, even when under pressure, Mr. Martynenko did not decide to delay the flight to allow himself more time to complete the security threat risk assessment on a more thorough collection of information. Nor did he access Osprey or any other private risk assessment provider to gain access to a more robust collection of information.

2024 ONSC 3303 (CanLII)

[392] If there were any day that Mr. Martynenko should have looked to see what Osprey's assessment of the situation was, it was when he was by himself, at home, in the middle of the night, in the early morning hours after Orthodox Christmas, with a plane on the ground in Tehran scheduled to depart in perhaps as little as a half hour, having just learned that Iran had launched ballistic missiles at American troops in Iraq mere hours before, and being unable to read English language sources of information, which update faster than Ukrainian or Russian language sources. It is not best practice to have one person (untrained in safety risk assessments) making the decision as to whether the flight should be allowed to depart, be delayed, or be cancelled in such circumstances. To not involve others to help, to not take more time to gather information, and to not take advantage of the superior capabilities of Osprey or some other provider to accumulate and analyze masses of information quickly to reach a recommendation and analysis that could have assisted UIA in its assessment process, was pure hubris.

[393] I conclude that UIA breached the standard of care by failing to consider, or even attempting to consider, the information identified by ICAO 10084, and failing to seek information from all the recommended sources.

[394] Mr. Martynenko assumed that the absence of information from sources like Iran, or Ukraine, or the commander, supported a decision to fly when in fact the absence of evidence burdened his security threat risk assessment with unwarranted assumptions and diminished the quality of the analysis. The quality of the analysis could only be as good as the quality of the information gathered; the analysis thus also fell below the standard of care.

Failure to Conduct a Hazard Identification and Safety Assessment

[395] By failing to contact anyone in flight operations or OCC to advise of the missile attack on Iraq from Iranian airspace, Mr. Martynenko ensured that no one at UIA could fulfil their obligation to conduct a hazard identification and safety risk assessment that was required when flying in or near a conflict zone.

[396] While I accept the evidence of UIA employees, Mr. Martynenko and Mr. Sosnovskyi, that they did not consider it necessary for a hazard identification and safety risk assessment to be undertaken, I have already explained why, in my view, industry standards and indeed UIA's own manual required exactly that.

[397] By failing to ensure a hazard identification and safety risk assessment was undertaken, UIA fell below the standard of care.

Failure to Communicate with the Commander

[398] There is also no question the commander of PS752 had the authority (as did Mr. Martynenko) to delay or cancel the flight. Annex 6 to the Convention on International Civil Aviation clearly identifies the commander as being in command and charged with the safe conduct of a flight.

2024 ONSC 3303 (CanLII)

[399] Although Mr. Martynenko denied that there was any reason for him to contact the commander of PS752, in July 2019, he had issued a memorandum entitled "Instructions for the Aviation Security Service personnel regarding Informing and interviewing crews on high-risk flights". Flights to and from the airports of the Middle East, such as the Kyiv-Tehran route, were identified in the memo to be high-risk flights, and as such the memorandum applied to the Kyiv-Tehran route.

[400] The memorandum includes the following direction:

> During the preparation of flights with a high degree of risk, before the departure, aviation security service personnel must inform the flight crew about the specifics of the flight and point out the issues that require increased attention from the crew, namely:
>
> - The presence of suspicious persons near the aircraft or at the airport;
> - The presence of armed persons directly at the airport or in the surrounding area;
> - Suspicious activities at the airport
> - The presence of military equipment directly at the airport or nearby territory;
> - Availability of any information on military activities in the region of flights.

[401] This memorandum indicates that the commander ought to have been made aware of the presence of military equipment and the military activities ongoing in the region of IKA. This requirement is consistent with section 3.2.4 of ICAO 10084.

[402] On cross-examination, Mr. Martynenko testified that there were no military activities ongoing in Iran at the time PS752 was scheduled to take off. He denied that Iran having fired ballistic missiles was military activity, but said that American retaliation would have been. In my view, this is a poor effort at rationalizing what was going on during the early hours of January 8, 2020. It defies logic to suggest there were no military activities ongoing in the region of the flight. By Mr. Martynenko's own direction, the commander of PS752 ought to have been notified about what was going on.

[403] Furthermore, one of two of the mitigation measures put in place to lower the security threat risk to PS751 and PS752 was to obtain information from the UIA crew with respect to security. Yet in the midst of a significant escalation in military tension between the United States and Iran, with the UIA aircraft on the ground in Tehran, Mr. Martynenko decided it was not necessary to contact the commander.

2024 ONSC 3303 (CanLII)

[404] Moreover, Osprey's advice included that airlines ensure that the crew of any flight flying in Iran be fully briefed about the security situation. This is a sensible mitigation. While the commander is not trained to conduct security threat risk assessments, he and the crew was trained in security generally, and with information about the then-current security situation in Iran, observations that the crew might not have evaluated properly in an informational vacuum might have become important once they were fully briefed.

[405] By failing to contact the commander, Mr. Martynenko not only deprived himself of the opportunity to obtain potentially relevant information, but deprived the commander of the opportunity to make fully informed decisions when discharging his duty to ensure the safe operation of the flight. This is another way in which UIA's conduct fell below the standard of care.

Causation in Fact

[406] The parties agree that the appropriate test for determining causation in fact is the "but for" test; that is, but for the defendant's negligent act, would the plaintiff's damages have occurred? To find causation in fact, the defendant's negligence must have been necessary to bring about the plaintiff's injury: *Clements v. Clements*, 2012 SCC 332, at paras. 8 and 13.

[407] The "but for" test must be applied "in a robust common sense fashion", with no need for "scientific evidence of the precise contribution the defendant's negligence made to the injury": *Clements*, at para. 9.

[408] The Court of Appeal has identified three steps in the process that a trier of fact uses to determine causation. The first is to determine what likely happened. The second is to consider what likely would have happened if the defendant had not breached the standard of care. The third step is to allocate fault among the negligent defendants (although, in the circumstances of this case, the third step is not relevant): *Sacks v. Ross*, 2017 ONCA 773, at para. 47. I note that there is no debate that Iran's conduct was a but for cause of the plaintiffs' loss. This analysis focuses on whether UIA's conduct was also a but for cause.

[409] Although normally the plaintiff's burden to prove causation in fact on a balance of probabilities, given the reverse onus, the burden here lies with UIA to disprove causation in fact.

[410] UIA argues that any breach of the standard of care was not a cause of the plaintiffs' damages. It relies on the third report of the DSB, which, it argues, concluded that using the standard for risk assessment methodology described in ICAO 10084 prevailing at the time of the shoot-down of PS752, both states and airlines assessed the scenarios drawing uncertain threats with catastrophic consequences to civil aircraft as being unlikely, and concluded that continuing flights in Iranian airspace was acceptable. UIA argues that even absent a breach of the standard of care, under the prevailing standard for risk assessment methodology in ICAO 10084, UIA could and would have still arrived at the same conclusion that it was acceptable to continue the operation of PS752, just as a reasonable airline in similar circumstances would have done.

2024 ONSC 3303 (CanLII)

[411] The DSB, in its third report, noted that the increase in tensions in the Iran and Iraq region in the period January 2 – January 7, 2020 and the uncertainty about the development of the conflict situation did not lead to a noticeable change in flight behavior of the European Union airlines that it investigated. “Only after the risk level further increased due to the ballistic missile attacks in Iraq, the number of flights dropped clearly.”

[412] The DSB noted that in the timeframe between the missile attack and the shoot-down of PS752, 24 flights operated to or from IKA, of which two were EU airlines. In the same timeframe, 31 flights of EU airlines from eight different countries overflew Iran or Iraq.

[413] The DSB report concluded that, despite indications of growing military tensions and the presence of missiles, neither states nor airlines took the decision to stop flying. The DSB considered it desirable to “further develop the risk assessment method for flying over and near conflict zones, in which, based on the precautionary principle, greater weight should be given to uncertain but catastrophic scenarios”.

[414] The DSB found that the uncertain situation that emerges in any escalating conflict is still underestimated by all parties involved, and noted that this can be “explained by the fact that the likelihood of a threat occurring is given a considerable weighting in the risk assessment method employed”. It concluded that the risk assessment methods then-currently in use are insufficient in situations characterized by unpredictable conflict.

[415] The DSB recommended that, instead of considering the likelihood of a risk, the impact of the scenario based on the precautionary principle should be leading.

[416] The problem UIA faces is that the criticism of the DSB in its third report was principally directed at the fact that most airlines continued to operate in Iranian and Iraqi airspace in the time period between January 2 and January 7, 2020, and it was only after the ballistic missile strike that airlines began to alter their behaviour.

[417] The causation question would be of a different quality if I were charged with assessing UIA’s security threat risk assessment on January 6, 2020, but the assessment at issue is the one undertaken on January 8, 2020, after the ballistic missile strike.

[418] Moreover, the very first DSB report also addressed uncertainty in security threat risk assessments:

> The Dutch Safety Board expects uncertainty to be the basic point of departure of the approach adopted by the parties. This means that the parties concerned shall remain constantly alert and receptive to signals that could indicate the inaccuracy or incompleteness of earlier assumptions. This requires them to be constantly vigilant with regard to risks and be prepared to question common assumptions.

2024 ONSC 3303 (CanLII)

[419] The first DSB report also recommended that ICAO and states amend their relevant standards and regulations such that "risk-increasing and uncertain factors" are included in risk assessments.

[420] I do not accept UIA's argument that, on January 8, 2020, it applied the prevailing standard of risk assessment methodology, and would have reached the same conclusion in any event.

[421] It did not apply the prevailing standard of risk assessment methodology, in that it failed to collect or even attempt to collect the necessary information, including from the recommended sources, before assessing the security threat risk to PS752. It was not prepared to question its assumptions.

[422] Had it done so, it would have determined, as did KLM and Air Canada, and as did Osprey and the FAA, that the uncertainty of the risk of misidentification and miscalculation in Iranian airspace warranted that PS752 be, at the very least, delayed for a period of time to see how the situation developed, in particular given the proximity of its flight route to the Alghadir missile base.

[423] This conclusion is consistent with the evidence of Mr. Edwards, who undertook his own security threat risk analysis. While necessarily completed after the shoot-down of PS752, Mr. Edwards conducted it based on the information that was available at the time Mr. Martynenko completed his security threat risk assessment, prior to the shoot-down of PS752.

[424] Mr. Martynenko and Mr. Edwards formulated their security threat risk matrices in different ways. While Mr. Martynenko considered the risk of SAMs having regard to their probability, implications, vulnerability and risk category, Mr. Edwards considered the likelihood, consequences, current mitigating measures, residual vulnerability, residual risk and possible additional mitigations of each of the five factors identified in ICAO 10084 as key factors affecting risk of SAMs.

[425] There was much debate about whose approach to the matrix was correct, but in my view, the focus on the chart itself is unhelpful. ICAO 10084 identifies the factors to be considered and sources of information to access. Unlike a safety risk assessment, there is no clear manner in which security threat risks should be documented, likely due to the often-sensitive nature of the information. The question is about how one performs the assessment, not how one records it.

[426] As I have noted, there is no evidence that Mr. Martynenko considered the five key threat scenarios that have the most impact on the assessment of the risk of SAMs.

[427] Mr. Edwards, however, did consider those factors. He noted that certain of those threats — use of military aircraft in a combat role or for hostile reconnaissance or use of missiles; misidentification of aircraft to transport ground troops of military equipment; and flight routing passes over or close to locations or assets of high strategic importance — had high likelihood and

2024 ONSC 3303 (CanLII)

high consequences, but no current mitigating measures, and no possible mitigating measure apart from cancelling the flight.

[428] I conclude that, had Mr. Martynenko considered the five key factors from ICAO 10084, and had he obtained the relevant information that was easily available, he would have reached the same conclusion as Mr. Edwards.

[429] I also note Mr. Edwards' evidence that, even if Mr. Martynenko's January 8, 2020 assessment of the security threat risk of a SAM attack were correct, having raised the probability level of an attack to medium, and the risk category to medium, there can be no explanation for the risk acceptance criteria remaining unchanged at the lowest level of "acceptable". Even on his own analysis, he should have at least delayed the flight.

[430] I thus find that UIA has failed to prove that its breach of the standard of care was not a but for cause of the plaintiffs' damages.

[431] While I have focused above on the impact of the failure to conduct a security threat risk assessment, I note that UIA offered no evidence that a safety risk assessment would have supported a decision to fly; it maintained its position that no safety risk assessment was required.

[432] Nor did UIA offer any evidence that the flight would have departed had the commander of PS752 been advised of the situation. That is, perhaps, unknowable.

[433] Regardless, UIA has also failed to prove that a safety risk assessment would have yielded a conclusion that the risk to PS752 was acceptable, or that the flight would have taken off even if the commander was fully informed of the situation in Iran.

[434] These are additional reasons why UIA has failed to prove that its breach of the standard of care was not a but for cause of the plaintiffs' damages.

Remoteness

[435] A finding of negligence requires that the defendant's breach of duty must have caused the plaintiff's harm in law. The question is whether the harm is too unrelated to the wrongful conduct to hold the defendant fairly liable, or, put another way, whether plaintiff's harm is too remote to warrant recovery: *Mustapha*, at paras. 11-12.

[436] To determine whether the harm is foreseeable, and not too remote, the court applies the standard of the foresight of the reasonable person. The degree of probability to satisfy the reasonable foreseeability requirement is one which would occur to the mind of a reasonable person in the position of the defendant, and which they would not brush aside as far-fetched: *Mustapha*, at paras. 12-13.

[437] It is the general harm that must be reasonably foreseeable, and not its manner of incidence: *Bingley v. Morrison Fuels*, 2009 ONCA 319, at para. 24.

2024 ONSC 3303 (CanLII)

[438] While it is usually for the plaintiff to prove causation at law on a balance of probabilities, in this case due to the reverse onus that applies, it is the defendant's burden to prove that the injury is too remote to warrant recovery.

[439] UIA argues that the degree of probability of the human error that resulted in the shoot-down of PS752 does not meet the foreseeability requirement, and points again to the DSB third report indicating that airlines assessed the risk of the threat as being unlikely, such that it was acceptable to continue to fly.

[440] I reiterate that the DSB criticisms related principally to the time leading up to the ballistic missile strike, and not thereafter. The DSB's third report does not assist the defendant.

[441] Moreover, UIA's arguments with respect to remoteness are burdened by the mistake the Court of Appeal warned about in *Bingley*, that is, focusing on the foreseeability of the particular chain of events that occurred rather than on foreseeability of the general harm.

[442] The precise chain of events did not need to be reasonably foreseeable. The question is whether the risk of PS752 being struck by a SAM would occur to a reasonable person, and they would not brush it aside as far-fetched.

[443] In my view, the risk of PS752 being struck by a SAM was reasonably foreseeable:

a. Osprey, using its sophisticated software and analysis, warned of the very risk that transpired;

b. The FAA warned of the very risk that transpired in its NOTAM;

c. There was a relatively recent example of a flight, MH17, being struck unintentionally by a SAM when flying in a conflict zone;

d. Mr. Martynenko himself decided the risk was worth undertaking a security threat risk assessment and concluded the risk was medium;

e. A passenger on the plane texted her brother expressing fear of the very risk that materialized.

[444] I thus conclude that UIA has failed to establish that the plaintiffs' losses are too remote.

Costs

[445] At the close of trial, the parties agreed to provide me with their costs submissions, which I would review after I had completed my reasons on the merits. I have followed this process.

2024 ONSC 3303 (CanLII)

[446] The three main purposes of modern costs rules are to indemnify successful litigants for the costs of litigation, to encourage settlement, and to discourage and sanction inappropriate behaviour by litigants: see *Fong v. Chan* (1999), 46 O.R. (3d) 330 (C.A.), at para. 22.

[447] Subject to the provisions of an act or the rules of this court, costs are in the discretion of the court, pursuant to s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. The court exercises its discretion considering the factors enumerated in r. 57.01 of the *Rules of Civil Procedure*, including the principle of indemnity, the reasonable expectations of the unsuccessful party, and the complexity and importance of the issues. Overall, costs must be fair and reasonable: see *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.), at para. 38. A costs award should reflect what the court views as a fair and reasonable contribution by the unsuccessful party to the successful party rather than any exact measure of the actual costs to the successful litigant: see *Zesta Engineering Ltd. v. Cloutier* (2002), 21 C.C.E.L. (3d) 161 (Ont. C.A.), at para. 4.

[448] The plaintiffs are the successful parties and as such, they are presumptively entitled to their costs.

[449] The plaintiffs seek costs on a substantial indemnity scale. They argue that UIA unnecessarily lengthened and complicated the proceeding, by, for example, creating undue complexity with respect to the confidentiality of documents, and by taking positions that were without merit.

[450] I agree that certain of UIA's positions were difficult to understand. In particular, it is hard to understand why UIA took the position for most of the trial that ICAO 10084 was not a relevant source of guidance for it on January 8, 2020, when Mr. Martynenko testified that he considered it, and given its clear application to flights over or near conflict zones. As I noted, UIA also took the position that Iran was not a conflict zone, when it clearly was. UIA also failed to agree that tensions escalated in the region after the killing of General Soleimani, when they clearly had, based on the open-source information in the record and the evidence of the witnesses.

[451] However, while some of UIA's positions were unwarranted, overall, it did not conduct the trial or the litigation in a manner deserving of sanction.

[452] Nor are there any offers that, in my view, impact the assessment of costs. UIA made an offer to pay the limited liability to which it would be subject under the *Montreal Convention*, which it did not beat. The plaintiffs offered to settle the trial on the basis that UIA would admit negligence, and therefore its unlimited liability under the *Montreal Convention*, and counsel would recommend a 5% reduction in the plaintiffs' assessed losses. A recommendation to make a concession is of uncertain value.

2024 ONSC 3303 (CanLII)

[453] As a result, while I am not inclined to order substantial indemnity costs, in assessing the quantum of costs, I shall keep in mind that, in some respects, UIA's choices increased the time that the plaintiffs had to spend on the trial.

[454] In terms of assessing the quantum of costs, I note the following factors:

a. The litigation was complex, involving an examination of facts including the geo-political situation in the region, military strategy, weapons capability, and aviation standards and practices.

b. The litigation required a significant expenditure on expert witnesses to illuminate all of those areas of fact.

c. The litigation was extremely important. At issue is not just millions, and perhaps tens of millions, of dollars, but for the plaintiffs, the litigation was also about getting answers and seeking accountability. Moreover, the litigation has ramifications for the aviation industry, airline insurers, and public safety.

d. The litigation involved a novel issue. Counsel advise that they are unaware of any other case in the world that has considered the standards to which airlines must adhere when flying in or near conflict zones.

e. The litigation involved significant work. Unlike most aviation litigation, the plaintiffs did not have the benefit of a reliable accident investigation report, as Iran's report was not credible, and was widely criticized. The Canadian reports were limited by access to information, and in any event, did not focus on the conduct of UIA. Unlike UIA, which has experience with civil aviation standards and practices, the plaintiffs had to build their case from scratch, through the assistance of experts and investigations. It was extraordinarily time-consuming.

f. Having opted for a streamlined trial process involving the class action and seven individual actions, the overall costs of the litigation arising out of PS752 was minimized. Although the costs of the litigation are significant in monetary terms, they are a fraction of what it would have cost to litigate all actions individually.

g. The streamlined trial process minimized the amount of trial time required, but the preparation to ensure that the trial proceeded smoothly and effectively was more than would normally be the case. The upfront effort was necessary to prosecute all the cases in a cost-effective and efficient manner.

h. In my view, the plaintiff counsel groups successfully avoided duplication of effort to the extent feasible.

i. Those plaintiffs whose lawyers participated in the trial but in a less active capacity were still entitled to have lawyers present and to have their lawyers

2024 ONSC 3303 (CanLII)

prepare for the litigation, review productions, attend discoveries, case conferences and the trial, and generally to advise them.

j. The hourly rates charged by plaintiffs' counsel are appropriate and competitive in their markets;

k. UIA would reasonably have expected that, given the stakes of this litigation, the plaintiffs would have prosecuted the litigation to the fullest extent. They would also have expected that the plaintiffs would have had to incur all the expenses associated with developing the case without the benefit of a proper accident investigation report.

l. UIA's own bill of costs discloses partial indemnity costs of $670,827.83.

[455] In view of the factors above, I turn to consider each group of plaintiffs' counsel to assess the quantum of costs that is fair and reasonable for each.

Howie Sacks & Henry LLP and Camp Fiorante Matthews Mogerman LLP

[456] Howie Sacks & Henry LLP ("HSH") worked as a team with Camp Fiorante Matthews Mogerman LLP ("CFM"). The bills of costs support full indemnity costs of $1,078,929.50 plus disbursements of $86,433.89, for HSH and $1,501,537 plus disbursements of $292,219.69 for CFM. It appears that the claim for fees is exclusive of HST. On a partial indemnity scale, they would seek costs of $540,000 for HSH and $750,700 for CFM.

[457] HSH and CFM took on the greatest responsibility in this proceeding for the plaintiffs. They led the lion's share of the plaintiffs' evidence and conducted many of the cross-examinations. Their efforts supported the efforts of other plaintiff groups, who would otherwise have had higher costs.

[458] As a result, the HSH and CFM plaintiffs have borne the brunt of the impact of the unwarranted positions that UIA took in the litigation.

[459] In my view, it is fair and reasonable for UIA to pay to the HSH and CFM plaintiffs costs as follows:

a. With respect to HSH, $600,000 plus HST plus disbursements of $86,433.89;

b. With respect to CFM, $850,000 plus HST plus disbursements of $292,219.69.

Rochon Genova LLP

[460] Rochon Genova LLP ("RG") took the lead for the plaintiffs with respect to the issues around the sufficiency of the security threat risk assessment, which analytically was very

2024 ONSC 3303 (CanLII)

important, especially given that UIA only did a security threat risk assessment, and not a safety risk assessment.

[461] RG has calculated its partial indemnity costs at $1,855,266.57, inclusive of HST and disbursements. Its actual fees are $2,283,930.00.

[462] While I accept that RG will have costs higher than many of the other plaintiff groups as a result of their lead role with respect to the security threat risk assessment issue, I can find no justification for awarding RG more in costs than HSH and CFM, given their respective responsibilities. I conclude that the time spent by RG is excessive.

[463] In the result, I award the RG plaintiffs their costs fixed at $1,150,000 plus HST plus disbursements of $299,062.04.

Blaney McMurtry LLP and Thomson Rogers

[464] Blaney McMurtry LLP ("Blaney") and Thomson Rogers ("TR"), although counsel on two separate actions, worked as a team, and participated actively in the trial. In my view, their work added significant value to the development of the record and to the argument.

[465] Blaney quantifies its partial indemnity costs at $740,823.39 plus HST, and claims disbursements of $56,372.35. TR's partial indemnity costs are $250,204.20 plus HST plus disbursements of $30,340.45.

[466] In my view, fair and reasonable costs awards are as follows:

a. With respect to the Blaney plaintiffs, costs fixed at $740,000 plus HST plus disbursements of $56,372.35;

b. With respect to the TR plaintiffs, costs fixed at $250,000 plus HST plus disbursements of $30,340.45.

Gluckstein Personal Injury Lawyers

[467] Gluckstein Personal Injury Lawyers ("Gluckstein") did the bulk of its work behind the scenes for its clients. It had only one lawyer and an articling student attend trial.

[468] In addition, Mr. Assaraf took the lead on developing the trauma-informed guidelines that were used to manage this trial.

[469] Gluckstein's partial indemnity costs are $168,595.77 all inclusive. Of this amount, $45,616.74 are disbursements.

[470] I fix the Gluckstein plaintiffs' fair and reasonable costs at $168,595.77 all inclusive.

2024 ONSC 3303 (CanLII)

TWA Law

[471] TWA Law ("TWA") is class counsel for the class action. Its bill of costs does not include preparation of the pleading, the funding motion, the carriage motion, the certification motion, the cost of dealing with opt-out procedures or the costs of preparing costs submissions (in this respect, it is alone).

[472] The class action was not as integrated in the process to trial as were the other actions. The order that this matter proceed to a joint, streamlined, trial was made over opposition of the class.

[473] The class was not included in UIA's offer to settle. As a result, TWA had to be ready to proceed to trial on its own in the event that the other plaintiffs were able to reach a resolution with UIA.

[474] TWA participated in the trial in a manner that minimized duplication and trial costs. It also participated in the preparation of the matter for trial, including reviewing productions, attending discoveries, attending case conferences, and attending trial, all of which was necessary work and required to advise the class.

[475] TWA claims partial indemnity costs of $397,598.50 plus disbursements of $37,429.67. It appears that the partial indemnity costs are exclusive of HST.

[476] I fix the class's costs at $397,598.50 plus HST plus disbursements of $37,429.67.

Nelligan O'Brien Payne LLP

[477] Nelligan O'Brien Payne LLP ("NOP") played a comparatively minor role in the trial. To the extent counsel attended, they did so via zoom. The NOP plaintiffs seek partial indemnity costs of $6,528.36 inclusive of HST. This amount includes $356.40 in partial indemnity costs for the preparation of its bill of costs.

[478] NOP minimized its costs in light of the number of parties involved. The costs it incurred were minor in relation to the gravity of the claim advanced on behalf of the NOP plaintiffs. It was able to limit its costs by reliance on the work of others who took a greater role in the trial. In my view, NOP's request for costs is more than reasonable in the circumstances.

[479] I fix the NOP plaintiffs' costs at $6,528.36, all inclusive.

Summary of Orders

[480] In summary, I make the following orders:

a. I declare that the defendant has failed to prove, on a balance of probabilities, under article 21 of the *Montreal Convention*, that the plaintiffs' damage was not due to the negligence or other wrongful act or omission of the carrier or its

2024 ONSC 3303 (CanLII)

servants or agents; or that such damage was solely due to the negligence or other wrongful act or omission of a third party.

b. The defendant, UIA, shall pay costs to the plaintiff groups as set out below, within 60 days:

   i. To the HSH and CFM plaintiffs: with respect to HSH, costs fixed at $600,000 plus HST plus disbursements of $86,433.89; and with respect to CFM, costs fixed at $850,000 plus HST plus disbursements of $292,219.69.

   ii. To the RG plaintiffs, costs fixed at $1,150,000 plus HST plus disbursements of $299,062.04.

   iii. To the Blaney and TR plaintiffs: with respect to Blaney, costs fixed at $740,000 plus HST plus disbursements of $56,372.35; and with respect to TR, costs fixed at $250,000 plus HST plus disbursements of $30,340.45.

   iv. With respect to the Gluckstein plaintiffs, costs fixed at $168,595.77 all inclusive.

   v. With respect to the class, costs fixed at $397,598.50 plus HST plus disbursements of $37,429.67.

   vi. With respect to the Nelligan plaintiffs, costs fixed at $6,528.36, all inclusive.

[481] Finally, I wish to thank all counsel for the high quality of their work and for their considerable efforts to manage the trial process efficiently, and in a trauma-informed manner.

J.T. Akbarali J.

Released: June 10, 2024

2024 ONSC 3303 (CanLII)

Exhibit GG

Court File No.: CV-21-00659[illegible]000

F223

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

N.S. in her personal capacity and as Trustee of the Estate of H.A., deceased, and as Litigation Representative of the Estate of K.A., deceased

Plaintiff

-and-

UKRAINE INTERNATIONAL AIRLINES

Defendant

TRAUMA INFORMED TRIAL GUIDELINES

To minimize re-traumatization and vicarious trauma experienced by witnesses providing testimony, Counsel, court staff and observers of the proceedings, the following measures are recommended:

1. Counsel will prepare witnesses and observers ahead of time for the potential of re-traumatization and vicarious trauma.
2. Witnesses and/or observers have been encouraged to view the resource material prepared by a trauma specialist with respect to what re-traumatization and vicarious trauma is and how to best cope/support others.

    Appendix A – Trauma Informed Care Guide for Claimants

    Appendix B – Trauma Informed Care Guide for Counsel, Court Staff

    Appendix C – Trauma Informed Care Guide to Preparing for Trial
3. Counsel will announce what will be covered on each day in court so observers can make an informed decision on whether to attend. In addition, Counsel will announce before commencing an examination which areas could cause an emotional response. Counsel will announce immediately before any audio is played or text messages of victims are displayed in court to allow persons to prepare and/or leave.
4. Witnesses and/or observers will be reminded they can take a break at any time.
5. Counsel will have a trauma specialist available, via phone, for support during the trial.

F223

2024 ONSC 3303 (CanLII)

Appendix A

Exhibit GG

F224

2024 ONSC 3303 (CanLII)

A Trauma Informed Care Guide to Preparing for Trial to prevent Re-Traumatization: A Guide for Claimants

Prepared by:
Eden Dales, B.A., M.S.W., R.S.W., Registered Social Worker
Owner and Director, Eden Dales Social Work

Recommendations for Claimants to Reduce the Risk of Re-traumatization:

Crisis Intervention Services to be aware of for Claimants:

1. Eden Dales Social Work (ESDW)

   - EDSW is a community based social work practice, specializing in trauma
   - EDSW is comprised of a group of registered social workers, who will be available to claimants over the course of the trial to offer crisis counselling, to address intense emotional experiences during the trial.
   - Services can be offered by video or phone, and provided within 48 hours of your request.
   - Requests for social work services should be directed to the main office, by email info@edendales.com or phone 416.398.1888
   - Rate for services is $200.00 per hour and services are covered by most extended health benefit plans

2. Public Mental Health and Crisis Resources:

   - If crisis intervention is required, you are encouraged to proceed to the emergency department, call 911, or call the Toronto Distress Line, https://www.dcogt.com/ or 416 408-4357 or 408-HELP

F224

- These are free resources and can be accessed immediately.

1. **In Advance of the Trial:**

Communication with the Court:

- If comfortable, communicate trauma-related needs with the court, such as requesting when breaks are offered, or accommodations to manage emotional distress.
- Ask specific questions and ask to be informed when sensitive topics will be discussed, offering an opportunity to remove yourself if topics that have been triggering in the past will be addressed.

Trial Overview:

- Ask for a clear and simple overview of the trial process, including key stages, such as opening statements, examination of evidence, witness testimonies, and closing arguments.
- Gain as much information as possible about the schedule, agenda, plan
- Remember, any information you are excluded from hearing is a protective measure, decided upon by the judge, council, and court staff as a protective measure to prevent re-traumatization and support you.
- Ask to be notified prior to sensitive information being presented, offering a chance to take a break.
- Ask for a schedule to be notified when breaks are offered.

Pre-Trial Preparation:

- Take 5 -10 minutes to read about trauma, complex trauma and how trauma impacts functioning.
- Your knowledge and awareness of trauma will help you in your coping and managing your stress, or helping support others by understanding their experience.
- Resources about trauma, complex trauma, how to cope with distress, care for yourself, communicate empathy, and how to have a positive impact on yourself and others are all included below.

2024 ONSC 3303 (CanLII)

2024 ONSC 3303 (CanLII)

- Be aware of potential triggers and develop personal coping strategies.

- Come prepared with a trial prep pack:

    - pen and paper (to note down thoughts, feelings, perceived inaccuracies, concerns)
    - large cold water
    - snack
    - something to hold/squeeze to maintain stress
    - cheat sheet of stress reducing activities: reminders such as this is not personal, this all part of the process, this is over soon, visualize cool air on face, muscle relaxation exercise -tighten and release each muscle group from head to toe (stress starts in the body, therefore healing must start with the body, not the mind), reminders of helpful tips

Establishing Boundaries and Setting Boundaries:

- Clearly identify personal boundaries for self-care and stick to them
- This will empower you to cope with the distressing trial process, and manage the long days and exhausting experience.
- Your emotional well-being is of the utmost priority and taking care of yourself will result in a healthy recovery from trauma.

Managing Exposure:

- Discuss with legal representatives about managing exposure to distressing details and images during the trial, when, where, how, why etc
- De-personalize this process (this is something that happened to you, and this process is what is required for the hopeful outcome, by removing yourself from distressing evidence discussions, you are taking an active role in your own healing and recovery)

Knowledge of Rights:

- Understand individual rights within the legal process and feel empowered to reach out to your council outside of the courtroom, with specific questions, thoughts, inaccuracies etc. This information will help with your coping.
- Keeping a pad and pen next to you is important to note down perceived inaccuracies, strong opinions, strong feelings, and thoughts so you can address

2024 ONSC 3303 (CanLII)

them at the appropriate time with the appropriate person, to get your needs met for information.
- Find out how to have a daily successful debrief after each day in trial, with those who have a shared experience.
- This daily healing habit will have a positive impact on your overall recovery from trauma.

2. **During Trial**

Successful breaks Taking:

- Connect with a trusted support person.
- meet physiological needs regardless of how you are feeling
- having something to eat
- having something cold to drink
- breathing fresh air (change environment, we cannot heal in the same room in which we became distressed)
- regulate and re-set nervous system
- see HALT model

Documenting Triggers:

- have a pen and paper next to you during trial to write down thoughts, ideas, observations, inaccuracies, questions to be addressed and topics to debrief (thoughts, feelings, physical sensations)

Awareness of Triggers:

- the better you can name your emotions and know your triggers, the better prepared you will be to endure this stressful proceeding.
- Identify and communicate potential triggers to legal and mental health professionals to minimize exposure during the trial.

Your Role in the Process:

- Understanding your requirements for attendance and participation: Clarify your role during the trial, what is required of you, ahead of trial.

- be clear on who is being called to provide evidence/offer opinions, and what will be presented.
- reducing the number of unpredictable stressors, by asking specific questions outside of the courtroom, will help immensely.

Nature of Evidence:

- Detailed Explanation: gain details about the type of evidence that will be presented, and when.
- Anticipating Challenges: think about potential challenging aspects of the evidence, planning to remove yourself periodically.
- This helps to mentally prepare for what you might encounter.

Trauma Triggers:

- Identification: Identify potential triggers related to the evidence, such as specific details, images, or testimonies.
- Think empathetically about what may be triggering and notify council ahead of trial and prior to discussing these topics during trial
- Coping Strategies: Discuss coping strategies with your support network to manage triggers, practice tools, including breathing exercises, grounding techniques, or requesting breaks during testimony.

Legal Terminology Review:

- If possible, ask for legal vocabulary so you are prepared for unfamiliar terminology.
- Refer to the Ontario Court Glossary of Terminology to familiarize yourselves with the language in the courtroom.
- https://www.ontariocourts.ca/ocj/criminal-court/definitions-and-glossary/
- Languages: Have a support person who speaks English and can help you understand the process in your own language
- Refer to Costi Agency for resources in a variety of languages-https https://www.costi.org/lb/languages.php

Supportive Services:

2024 ONSC 3303 (CanLII)

2024 ONSC 3303 (CanLII)

- Refer to the above listed information for urgent mental health support during and outside of the trial
- Obtain mental health support before crisis presents, to learn healthy coping tools
- Peer Support: connect with others who have a shared experience to share your experience, listen to heirs, offer support, obtain support, and collaborate on coping strategies.

Safety Measures:

- Come with a safety plan if panic presents (template in resources)
- Come prepared with a cheat sheet of coping tools (template below)

Have a trusted support person available by phone or physically present:

- Have someone available to you to check in with who understands your own experience.
- Educate your support person on tools to help you feel calm and regulated.

Continuous Communication:

- Maintain open lines of communication, keeping a list of thoughts, feelings, questions.
- Manage distress around perceived inaccuracies and know when to address these.

3. Post-trial

Post-Trial Support:

- Obtain ongoing mental health support after the trial, recognizing that the conclusion of legal proceedings may bring up new emotions.
- Obtain information about available resources for grief counseling, trauma counselling, and support groups.

- Debriefing Sessions: Encourage clients to debrief daily after trial, discuss their emotional experience that day, with those who have a shared experience, to obtain and offer support, and prepare them to cope with future trial dates.
- Continue to reach out to others who are struggling to cope with this trauma, and the distress of the trial. Helping others helps YOU immensely.
- Remember that every individual's response to trauma is unique, so be gentle with yourself and others.
- Team and individual support are crucial, and your experience may change with new challenges to be addressed.

Trauma-Informed Approach to Post-Trial Coping:

- Detailed Information: Obtain clear and detailed information about the post-trial process, potential challenges, and plan for addressing perceived inaccuracies and heightened emotions related to the experience of the trial
- Manage expectations for future actions.
- Plan for post-trial trauma processing therapy with a trusted mental health professional (to address emotional impact) before symptoms become unmanageable. Learning healthy ways to process grief and trauma is vital to healing and recovery.

2024 ONSC 3303 (CanLII)

Appendix B

Exhibit GG

EDEN DALES SOCIAL WORK
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F231

2024 ONSC 3303 (CanLII)

A Trauma Informed Care Guide to Preparing for Trial to prevent Re-Traumatization: A guide for Judges, Council and Court Staff

Prepared by:
Eden Dales, B.A., M.S.W., R.S.W., Registered Social Worker
Owner and Director, Eden Dales Social Work

Crisis Intervention Services to be aware of for Claimants:

1. Eden Dales Social Work (ESDW)

   - EDSW is a community based social work practice, specializing in trauma
   - EDSW is comprised of a group of registered social workers, who will be available to claimants over the course of the trial to offer crisis counselling, to address intense emotional experiences during the trial.
   - Services can be offered by video or phone, and provided within 48 hours of your request.
   - Requests for social work services should be directed to the main office, by email info@edendales.com or phone 416.398.1888
   - Rate for services is $200.00 per hour and services are covered by most extended health benefit plans

2. Public Mental Health and Crisis Resources:

   - If crisis intervention is required, you are encouraged to proceed to the emergency department, call 911, or call the Toronto Distress Line, https://www.dcogt.com/ or 416 408-4357 or 408-HELP
   - These are free resources and can be accessed immediately.

2024 ONSC 3303 (CanLII)

Recommendations for Judge, Counsel, and Court Staff

1. In Advance of Trial

Trial Overview:

- Explanation of Legal Process: Provide a clear and simple overview of the trial process, including key stages, such as opening statements, examination of evidence, witness testimonies, and closing arguments.
- Provide as much information as possible about the schedule, agenda, plan.
- Reassure claimants any information they are excluded from hearing is a protective measure, decided upon by the judge, council, and court staff as a protective measure to prevent re-traumatization.
- Inform claimants you will do your best to notify them prior to sensitive information being presented, offering a chance to take a break.
- Inform claimants when breaks will be offered.

Trial Preparation:

- Take 5 -10 minutes to read about trauma, complex trauma and how trauma impacts functioning.
- Your knowledge and awareness of trauma will be communicated in your approach and will help reduce the risk of re-traumatization.
- Resources about trauma, complex trauma, how to communicate empathy, and how to have a positive impact on claimants are all included below.
- Review when breaks will be provided, advise how to take breaks effectively (support person, meet physiological needs regardless of how they feel - something to eat, something cold to drink, breathe fresh air, connect with a trusted supportive person-regulate nervous system, re-set, H.A.L.T. model)
- Address potential triggers and develop coping strategies.

- Ensure claimants have trial prep pack ready:

    - pen and paper (to note down thoughts, feelings, perceived inaccuracies, concerns)
    - large cold water
    - snack

2024 ONSC 3303 (CanLII)

- something to hold/squeeze to maintain stress
- cheat sheet of stress reducing activities: reminders such as this is not personal, this all part of the process, this is over soon, visualize cool air on face, muscle relaxation exercise -tighten and release each muscle group from head to toe (stress starts in the body, therefore healing must start with the body, not the mind), reminders of helpful tips

Their Role in the Process:

- Understanding Participation: Clarify the client's role during the trial, whether they will be testifying, attending specific sessions, or providing input on key decisions.

- Empowerment: Emphasize the claimants to take notes during the trial, write down questions and thoughts, which can be discussed with council outside of the courtroom.

- Communicate empathy and compassion and validate claimants' input, questions and thoughts, as their input is valuable.

Nature of Evidence:

- Detailed Explanation: Prepare clients for the type of evidence that will be presented, explaining that it may include documents, reports, and potentially graphic or detailed information.

- Anticipating Challenges: Discuss potential challenging aspects of the evidence, allowing clients to mentally prepare for what they might encounter.

Trauma Triggers:

- Identification: Help clients identify potential triggers related to the evidence, such as specific details, images, or testimonies.
- Think empathetically about what may be triggering and notify claimants ahead of trial and prior to discussing these topics during trial

2024 ONSC 3303 (CanLII)

- Coping Strategies: Discuss coping strategies to manage triggers, including breathing exercises, grounding techniques, or requesting breaks during testimony.

Legal Terminology Review:

- Encourage claimants to refer to the Ontario Court Glossary of Terminology to familiarize themselves with the language in the courtroom.
- https://www.ontariocourts.ca/ocj/criminal-court/definitions-and-glossary/
- Languages: Encourage claimants to have a support person who speaks English and can help them understand the process in their language
- Refer to Costi Agency for resources in a variety of languages- https://www.costi.org/lb/languages.php

Supportive Services:

- Access to Mental Health Professionals: Refer to the information above about how to access crisis resources and familiarize yourself with this in the event that a claimant is in distress and needs urgent support, encourage them to take a break and reach out for help
- Peer Support: Facilitate connections with support groups or peer networks to share experiences and coping strategies.

Safety Measures:

- Security Measures: Discuss security measures in place to ensure the physical safety of clients during the trial.
- Confidentiality: Emphasize confidentiality measures to protect sensitive information.

Provide Information and Education:

- Clearly communicate the trial process, potential triggers, and what to expect during proceedings.
- Offer information on the legal terminology and procedures to empower claimants and reduce uncertainty.

Create a Safe and Supportive Environment:

2024 ONSC 3303 (CanLII)

- Establish a safe space for meetings and discussions, ensuring physical and emotional safety.
- Provide access to mental health professionals and support groups before, during, and after trial proceedings.
- Encourage them to bring a pen, pad of paper, drink, and snack to have with them for sustainability and coping and have someone they trust available by phone to help support them.
  Encourage claimants to know themselves best and remove themselves when topics that have been triggering previously are discussed.

Trauma-Informed Legal Support:

- Educate yourselves in trauma informed care and court proceedings as a method to prevent re-traumatization.
- Ensure that legal teams use empathetic language, avoid retraumatizing questions, and prioritize sensitivity during interactions.

Crisis Intervention Plan:

- Encourage claimants to prepare a personal crisis intervention plan in case of heightened emotional distress during the trial, who to call, have number handy.
- Identify designated professionals who can provide immediate support if needed.

2. During Trial

Trauma Informed Communication:

- Communicate empathy, compassion, humanity, make direct eye contact, soften, remember this is another human being who has suffered unimaginable pain, and remember demonstrating compassion has nothing to do with your defence/position/outcome/advocacy for your client. Both can occur simultaneously. Imagine if this was your loved one…

2024 ONSC 3303 (CanLII)

- *Statements that communicate empathy:*
  1. thank you for sharing that….
  2. I am glad you are telling me….
  3. I am so sorry this happened…
  4. is there someone you would like to be here with you?
  5. Is this ok ?
  6. can we continue?
  7. Is it ok if I ask about….
  8. I am thinking about how devastating this must be for you….
  9. We will continue for xxxx minutes, and then you can have a break, would that be ok?
  10. This will take xxxxx time….
  11. Now we are going to review evidence, ok?
  12. Do you need a minute before we proceed?
  13. Pause, soften, allow space for grief-this will always help and never hurt

Community and Peer Support:

- Encourage peer support and group therapy sessions, fostering a sense of community among claimants.
- Share stories of resilience and recovery from individuals who have experienced similar traumas.

Continuous Communication:

- Maintain open lines of communication, allowing claimants to express their concerns and ask questions.
- Provide regular updates on trial proceedings and any changes in the legal process.

3. Post-trial

Post-Trial Support:

- Refer to resources above for ongoing mental health support after the trial, recognizing that the conclusion of legal proceedings may bring up new emotions.
- Review above information about available resources for grief counseling and support groups.
- Offer support regardless of outcome.
- Remember that every individual's response to trauma is unique, so flexibility and individualized support are crucial. Regularly assess the effectiveness of your approach and adjust based on the evolving needs of the claimants.

Legal Team Collaboration:

- Collaborative Approach: Ensure effective communication between mental health professionals and the legal team to address the client's emotional well-being during trial proceedings.
- By providing comprehensive information, addressing concerns, and offering ongoing support, clients can be better prepared to navigate the trial process with a reduced risk of re-traumatization.

Trauma-Informed Approach to Post-Trial Coping:

- Detailed Information: Provide clear and detailed information about the post-trial process, potential challenges, and plan for addressing perceived inaccuracies and heightened emotions related to the experience of the trial
- Manage expectations for future actions.
- Check in on them, this goes a long way
- Debriefing Sessions: Encourage clients to debrief daily after trial, discuss their emotional experience that day, with those who have a shared experience, to obtain and offer support, and prepare them to cope with future trial dates.
- Continued Support: Ensure ongoing access to mental health support and resources after the trial concludes.

Clear Communication:

- Regular Updates: Keep clients informed about the trial's progress, changes in schedule, and any developments to minimize uncertainty.
- Communication Channels: Establish clear channels for clients to express concerns and ask questions during and after the trial, outside of the courtroom and how to access this information (refer to their own council)

2024 ONSC 3303 (CanLII)

2024 ONSC 3303 (CanLII)

Appendix C

Exhibit GG

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F239

2024 ONSC 3303 (CanLII)

A Trauma Informed Care Guide to Preparing for Trial to prevent Re-Traumatization: Coping Tools and Resources for Claimants, Judges, Council and Court Staff

Prepared by:
Eden Dales, B.A., M.S.W., R.S.W., Registered Social Worker
Owner and Director, Eden Dales Social Work

Crisis Intervention Services to be aware of for Claimants:

1. Eden Dales Social Work (ESDW)

   - EDSW is a community based social work practice, specializing in trauma
   - EDSW is comprised of a group of registered social workers, who will be available to claimants over the course of the trial to offer crisis counselling, to address intense emotional experiences during the trial.
   - Services can be offered by video or phone, and provided within 48 hours of your request.
   - Requests for social work services should be directed to the main office, by email info@edendales.com or phone 416.398.1888
   - Rate for services is $200.00 per hour and services are covered by most extended health benefit plans

2. Public Mental Health and Crisis Resources:

   - If crisis intervention is required, you are encouraged to proceed to the emergency department, call 911, or call the Toronto Distress Line, https://www.dcogt.com/ or 416 408-4357 or 408-HELP

- These are free resources and can be accessed immediately.

Resources and Tools for All:

Understanding Trauma

Complex trauma

- Complex post-trauma stress response: trauma can have profound and enduring effects on individuals, often impacting various aspects of their lives.

Signs of complex trauma:

Emotional Signs:

- Intense Mood Swings: Individuals may experience intense and unpredictable mood swings, ranging from anger and irritability to sadness and anxiety.
- Difficulty Regulating Emotions: Challenges in managing and regulating emotions, leading to emotional dysregulation.
- Persistent Sadness or Depression: Long-lasting feelings of sadness or depression, often unrelated to current circumstances.
- Heightened Anxiety: Chronic anxiety, hypervigilance, and a heightened startle response.

Behavioral Signs:

- Impaired Relationships: Difficulty forming and maintaining healthy relationships, including trust issues and fear of abandonment.
- Self-Harming Behaviors: Engaging in self-harming behaviors, such as cutting or substance abuse, as a way to cope with emotional pain.
- Avoidance: Avoidance of people, places, or activities that trigger traumatic memories.
- Aggression or Violence: Outbursts of anger, aggression, or violent behavior, often as a response to perceived threats.

Cognitive Signs:

2024 ONSC 3303 (CanLII)

- Memory Impairments: Difficulty with memory, concentration, and cognitive functioning, possibly stemming from the impact of trauma on the brain.
- Negative Self-Perception: Low self-esteem, negative self-image, and a persistent sense of shame or guilt.
- Distorted Beliefs: Developing distorted beliefs about oneself, others, and the world, often influenced by traumatic experiences.

Relational Signs:

- Difficulty Trusting Others: A pervasive difficulty in trusting others, leading to challenges in forming and maintaining healthy relationships.
- Fear of Abandonment: An intense fear of being abandoned or rejected, stemming from past experiences of loss or neglect.
- Isolation: Social withdrawal and isolation, as individuals may feel safer when avoiding potential triggers.

Physical Signs:

- Sleep Disturbances: Insomnia, nightmares, or other sleep disturbances related to traumatic memories.
- Chronic Pain: The manifestation of physical pain and somatic symptoms, often with no clear medical explanation.

Coping Mechanisms:

- Maladaptive Coping: Engaging in maladaptive coping mechanisms, such as substance abuse, self-harm, or disordered eating, to manage overwhelming emotions.
- Dissociation: Periods of dissociation or feeling detached from one's body or surroundings as a defense mechanism against emotional pain.
- It's important to note that individuals may exhibit a combination of these signs, and the severity can vary. Furthermore, symptoms of complex trauma may not always be immediately apparent and can emerge over time.
- Seeking professional help from mental health experts, such as psychologists or trauma-informed therapists, is crucial for a comprehensive assessment and appropriate intervention.

Strategies:

Psychoeducation and Information Sessions:

2024 ONSC 3303 (CanLII)

2024 ONSC 3303 (CanLII)

- Gain clear and detailed information about the trial process, what to expect, and the specific topics that will be addressed.
- Anticipatory actions: Gain insights into potential stressors during the trial, helping individuals anticipate and prepare for emotional challenges.
- Obtain Trauma-Informed Counseling before and during the trial to address emotional distress and enhance coping skills.
- Identify sources of support with family, friends, community or a trauma therapist: Establishing a trusting therapeutic relationship to create a safe space can allow one to express their feelings and concerns.

Stress Management Coping Strategies:

- Grounding Techniques: Teach grounding techniques to help individuals stay connected to the present moment during moments of distress.

- Mindfulness Practices: Introduce mindfulness and relaxation techniques to manage anxiety and overwhelming emotions.

- Breathing Exercises: Teach controlled breathing exercises to promote relaxation and emotional regulation.

- Building Resilience and healthy self-esteem

- Strengths-Based Approach: Focus on individuals' strengths and resilience to empower them in facing challenges.

- Positive Coping Skills: Encourage the development of positive coping skills that align with individual preferences and abilities.

- Safety Planning: Develop safety plans, both emotional and physical, to help individuals manage distressing emotions or situations.

- Emergency Contacts: Provide access to emergency contacts and crisis intervention services for additional support.

2024 ONSC 3303 (CanLII)

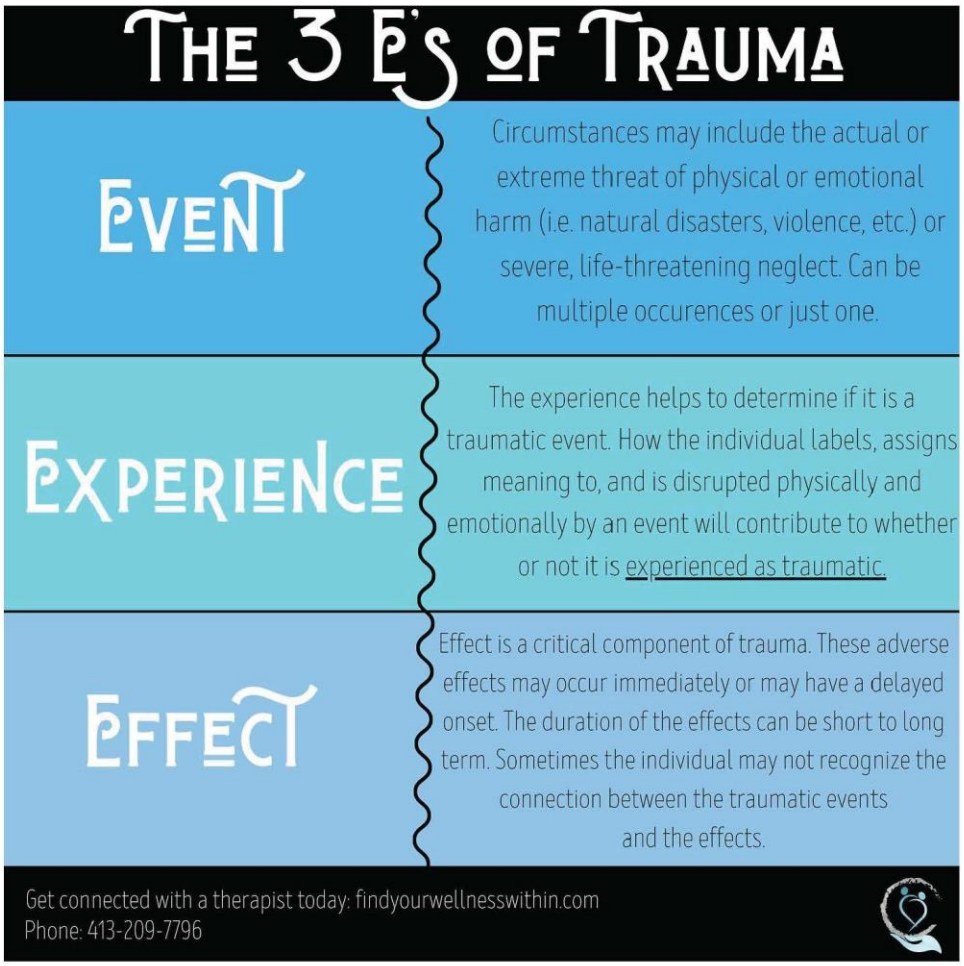
- Support Networks and Social Support: Encourage individuals to maintain connections with supportive friends, family, or community members during the trial.
- Support Groups: Facilitate access to support groups or networks of individuals who have faced similar legal proceedings.

- Self-Care Practices: Collaborate on the development of personalized self-care strategies that individuals can implement during and after trial days.

- Regular Check-Ins: Conduct regular check-ins to assess well-being and adjust support strategies as needed.

- Legal Professionals: Collaborate with legal professionals who have a trauma-informed understanding to create a courtroom environment that minimizes re-traumatization.

Individuals facing trial after traumatic events require a holistic and collaborative approach that combines legal, therapeutic, and supportive measures. Flexibility, empathy, and a trauma-informed perspective are essential components of preparing individuals to tolerate the distress associated with the trial process.



Understanding Trauma's Impact

TRAUMA: 3 E's

- Trauma results from an event, series of events, or set of circumstances that is experienced by an individual as physically or emotionally harmful or life threatening and that has lasting adverse effects on the individual's functioning and mental, physical, social, emotional, or spiritual well-being.

2024 ONSC 3303 (CanLII)

- Trauma is a NORMAL response to an ABNORMAL event

The "three E's" included in the SAMHSA definition distinguish trauma from other crises or negative life events because of the lasting effects the event(s) can have on a person:

Event: the actual event

Experience: the individual's experience of the event (differs among everyone, depends on a variety of bio-psycho-social and environmental factors such as history of trauma, history of chronic stress, other health conditions, lack of support, lack of resources, lack of coping tools and more)

Effect: the lasting effect of the event and experience which is unique to all, and largely depends on how the individual experienced the event.

******this is why a group of people can experience the same event, but have a completely different outcome.**

"When you go through a crisis, you get broken apart, and you're able to put yourself back together. When you live through a trauma, you're shattered, and you can't put the pieces back together, not the same way they were."

2024 ONSC 3303 (CanLII)

2024 ONSC 3303 (CanLII)

Stress/Distress Management:

Grounding Techniques in Trauma-Informed Care

- strategies designed to help individuals stay connected to the present moment, manage overwhelming emotions, and prevent re-traumatization.
- These techniques can be valuable tools for individuals facing distressing situations, such as legal proceedings, where they may be at risk of re-experiencing trauma.

Deep Breathing:

- Instruct the individual to take slow, deep breaths. Focus on the sensation of the breath moving in and out, grounding them in the present moment.

Mindfulness Meditation:

- Guide the person through mindfulness exercises, encouraging them to observe their thoughts and feelings without judgment. Techniques may include body scans or awareness of the breath.

5-4-3-2-1 Technique:

- Name five things you can see, four things you can touch, three things you can hear, two things you can smell, and one thing you can taste. This sensory exercise engages the senses to promote awareness.

Grounding Objects:

- Carry a small object with sensory significance, like a smooth stone or a textured item. Touching and focusing on the object can provide a tangible connection to the present.

Self-Talk:

- Encourage positive and reassuring self-talk. Have the individual repeat affirmations or comforting phrases to themselves to counteract negative thoughts.

2024 ONSC 3303 (CanLII)

Guided Imagery:

- Use guided imagery to create a mental safe space. Have the person imagine a calm and secure environment, describing details like sights, sounds, and textures.

Body Scan:

- Guide the individual to bring attention to each part of their body, starting from the toes and moving upward. This promotes awareness of physical sensations and breaks the focus on distressing thoughts.

Grounding Through Touch:

- Engage the sense of touch by squeezing a stress ball, holding onto an object, or feeling the texture of surfaces. Physical touch can provide a connection to the present.

Movement and Stretching:

- Encourage gentle movements or stretching exercises. This helps release tension in the body and brings attention to physical sensations.

Coloring or Drawing:

- Provide coloring materials or encourage drawing as a way to shift focus to a creative and calming activity.

Naming Emotions:

- Have the person identify and verbally express their current emotions. Naming emotions can contribute to a sense of understanding and control.

Safe Place Visualization:

- Guide the individual to visualize a safe and comforting place. This could be a real location or an imaginary space that brings a sense of security.

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Progressive Muscle Relaxation:

- Lead the person through a sequence of tensing and then relaxing different muscle groups. This technique promotes bodily awareness and relaxation.

Affirmation Cards:

- Create or use cards with positive affirmations. The individual can read these affirmations to themselves when feeling overwhelmed.

Connecting with the Environment:

- Encourage the person to focus on the external environment by describing details in the room, such as colors, shapes, or sounds.

Tailoring grounding techniques to individual preferences and needs is crucial in trauma-informed care. These techniques provide a toolkit for managing distressing moments and maintaining a sense of safety during potentially triggering situations.

Exhibit GG

NAMING OUR EMOTIONS GIVES US CONTROL OVER EMOTIONAL REGULATION AND HELPS US ADVOCATE TO GET OUR OWN NEEDS MET:

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What Can You Do to Counter Re-traumatization? *(for* anyone involved in this process)

Communicate empathy and compassion:

- Demonstrating empathy and compassion does not mean changing your professional stance or legal decision
- Make Eye contact
- Communicate non-verbally a caring stance, considering what it may feel like to be in their shoes
- Communicate verbally that you are listening, you are considering their distress, you are glad to hear their story….
- Safe, compassionate statements:
    - I am listening to you and thinking about what it feels like to experience what you experienced
    - thank you for sharing your story with me, it really helps me understand your experience
    - I am glad you are telling me this
    - Make space for their story
    - Follow up:
        - Be sure to check in afterwards
        - offer to support them, ask what may help (can someone you trust be with you
        - let me know if you need a break
        - I know this is hard, are you ok for me to continue?

Use Systematic Relaxation

- Prepare for trial with systematic relaxation skills
- deep relaxing breathing
- mindfulness meditations
- Yoga
- Movement (repetitive, rhythmic)

These techniques help to calm the nervous system down after becoming activated.

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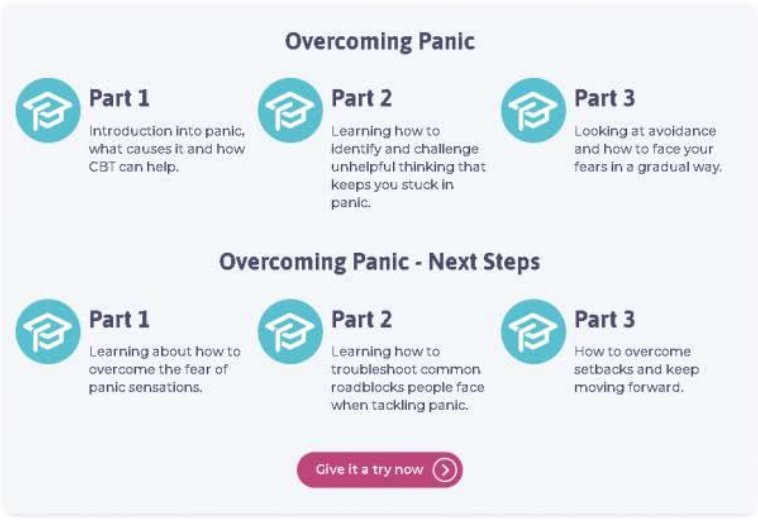
Tools to Cope with Panic and Distress:



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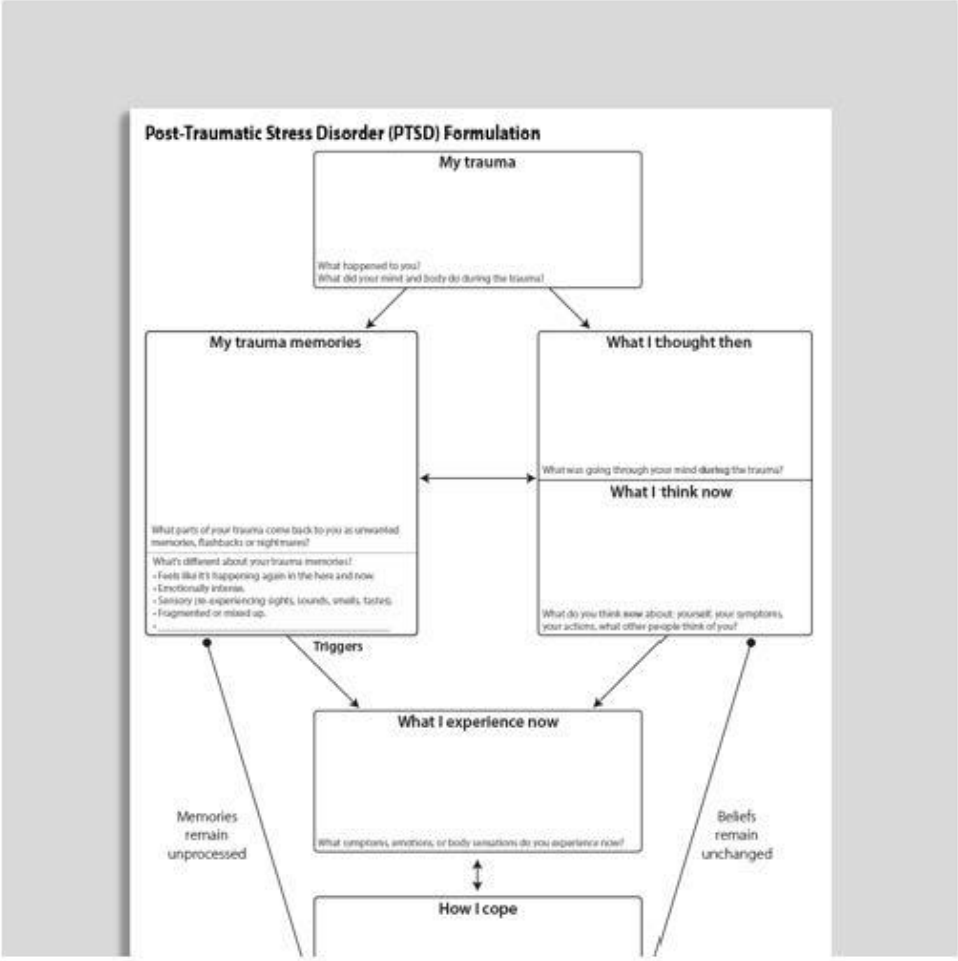

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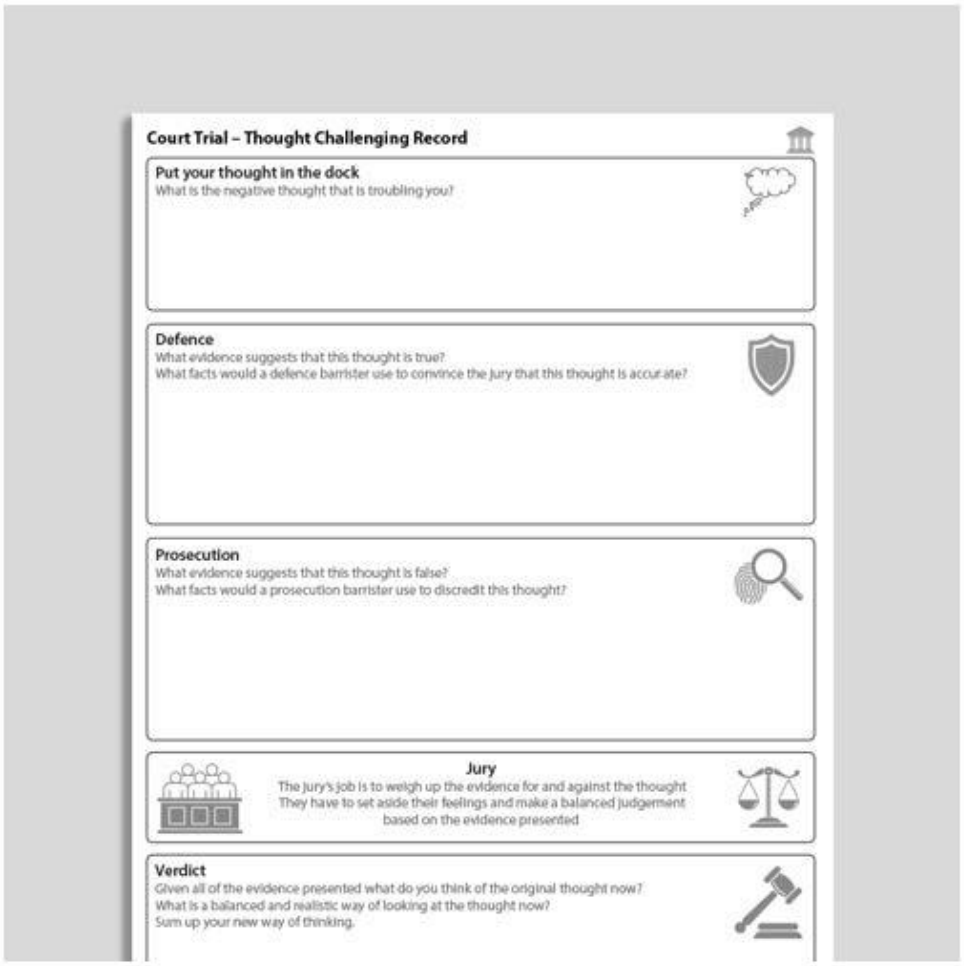

Court Trial – Thought Challenging Record

Put your thought in the dock
What is the negative thought that is troubling you?

Defence
What evidence suggests that this thought is true?
What facts would a defence barrister use to convince the jury that this thought is accurate?

Prosecution
What evidence suggests that this thought is false?
What facts would a prosecution barrister use to discredit this thought?

Jury
The jury's job is to weigh up the evidence for and against the thought
They have to set aside their feelings and make a balanced judgement based on the evidence presented

Verdict
Given all of the evidence presented what do you think of the original thought now?
What is a balanced and realistic way of looking at the thought now?
Sum up your new way of thinking.

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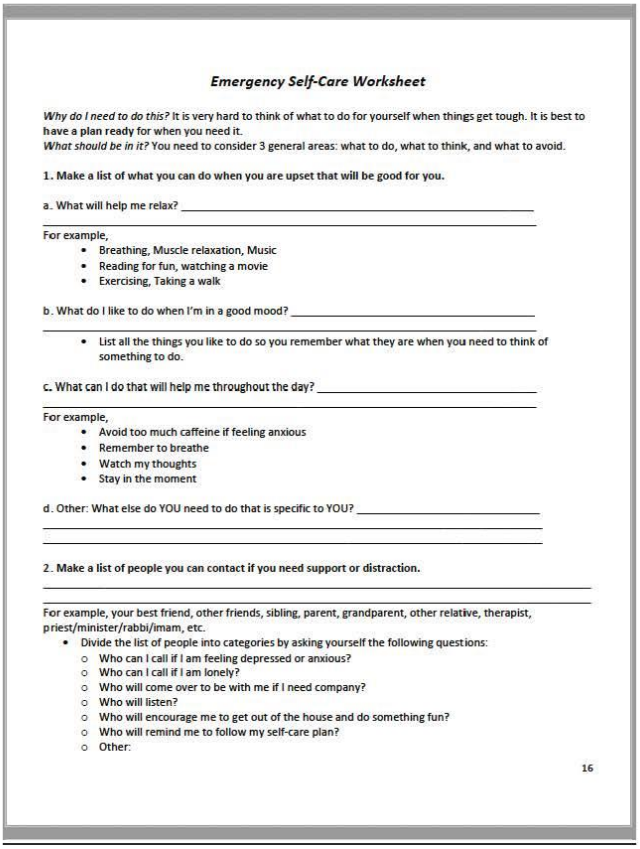
Be prepared

know yourself, know your triggers and bring reminders: *tip sheet for coping*



Emergency Self-Care Worksheet

Why do I need to do this? It is very hard to think of what to do for yourself when things get tough. It is best to have a plan ready for when you need it.
What should be in it? You need to consider 3 general areas: what to do, what to think, and what to avoid.

1. Make a list of what you can do when you are upset that will be good for you.

a. What will help me relax? _____
_____
For example,
- Breathing, Muscle relaxation, Music
- Reading for fun, watching a movie
- Exercising, Taking a walk

b. What do I like to do when I'm in a good mood? _____
_____
- List all the things you like to do so you remember what they are when you need to think of something to do.

c. What can I do that will help me throughout the day? _____
_____
For example,
- Avoid too much caffeine if feeling anxious
- Remember to breathe
- Watch my thoughts
- Stay in the moment

d. Other: What else do YOU need to do that is specific to YOU? _____
_____
_____

2. Make a list of people you can contact if you need support or distraction.
_____
_____
For example, your best friend, other friends, sibling, parent, grandparent, other relative, therapist, priest/minister/rabbi/imam, etc.
- Divide the list of people into categories by asking yourself the following questions:
  - Who can I call if I am feeling depressed or anxious?
  - Who can I call if I am lonely?
  - Who will come over to be with me if I need company?
  - Who will listen?
  - Who will encourage me to get out of the house and do something fun?
  - Who will remind me to follow my self-care plan?
  - Other:

16

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3. Next, make a list of positive things to say to yourself when you are giving yourself a hard time.

_____

_____

Examples of negative self-talk:

- "I got a B- on the paper; that proves that I shouldn't be in graduate school." CHANGE to: "That is a good grade. I will work on getting a better one."
- "I do not understand research methods, I am so dumb." CHANGE to: "A lot of students are having a problem with this course. Maybe we should start a study group to help each other."
- "I can't get all this work done. I should just drop out." CHANGE to: "I will develop a schedule so that I can get this all done." "I can check with other students for ideas." "I can get some feedback from the professors that might help me do the assignments."

You get it. Try to think about what you would say to a client with the same struggles and apply it to yourself.

4. Next, make a list of who and what to avoid when you are having a hard time.

_____

_____

_____

Examples of people to avoid:

- My boy(girl)friend broke up with me. I will not call my sister as she always hated him. She'll be happy he's gone.
- I didn't get my assignment in on time and I'm worried about my grade. I will not call my dad. He is a stickler for doing things in advance so that they are never late. He'll just give me a hard time.
- I am discouraged about my grades. I won't call my best friend because she'll just tell me not to worry about it and to quit school if it's such a hassle.

You get this too. Not everyone can be supportive or helpful with every situation. Go to the ones who can be supportive about the specific issue you are dealing with.
Examples of things to avoid:

- I should not stay in the house all day.
- I should not stay in bed all day.
- I should open the shades and let the light in.
- I should not listen to sad music.
- I should not drink too much alcohol.
- Other:

Again, you get it.

5. Write this plan on a 3x5" card. Keep it in your purse/wallet (and on your phone if you can). Look at it often. Add any good ideas to it whenever you can. USE IT!

(Prepared by Elaine S. Rinfrette, PhD, LCSW-R)

17

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Trauma Coping Tools:

"Most people who suffer from trauma are used to living 'from the neck up' as Bessel Van der Kolk, MD, has said, and using the body to help aid in dealing with trauma can be very helpful."

Concept	Key Aspects	Implications for Care
Trauma has individual impacts	➢ Event(s) ➢ Experience of event(s) ➢ Effect of event(s)	• *Understand that people with similar experiences may have different sequelae, ranging from none to PTSD.*
Prerequisites for trauma-informed care	➢ Realization ➢ Recognition ➢ Response ➢ Resisting re-traumatization	• *Be aware of the prevalence and impact of trauma.* • *Recognize the signs of trauma in patients and colleagues.* • *Integrate knowledge and awareness with action to make clinical services safe for survivors of trauma, whether patients or staff.* • *Identify and ameliorate policies and practices that could re-traumatize patients or staff.*
Principles of trauma-informed care	➢ Safety ➢ Trustworthiness and Transparency ➢ Peer Support ➢ Collaboration and Mutuality ➢ Empowerment, Voice and Choice ➢ Cultural, Historical, and Gender Issues	• *Prioritize safety of patients and staff.* • *Make systems transparent so patients and staff can trust in and feel safe in their workplace.* • *Link survivors to others with shared experience.* • *Minimize administrative hierarchy and create a culture of shared decision-making between patients and clinicians.* • *Ensure patients, clinicians, and other staff feel free to speak and seek their needs without fear of repercussion.* • *Educate clinicians and staff on pertinent past and present systemic injustices so everyone has a shared mental model of different potential sources of trauma patients and colleagues may experience.*

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Understanding Trauma and how it impacts daily functioning is key to recovery:
Information is power:

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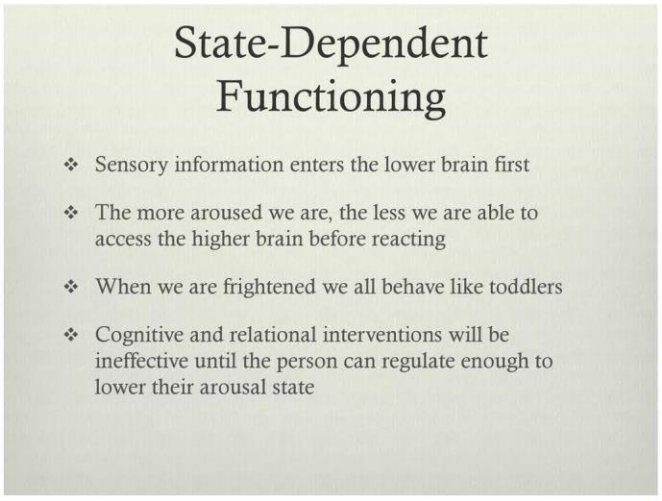
State Dependent Functioning

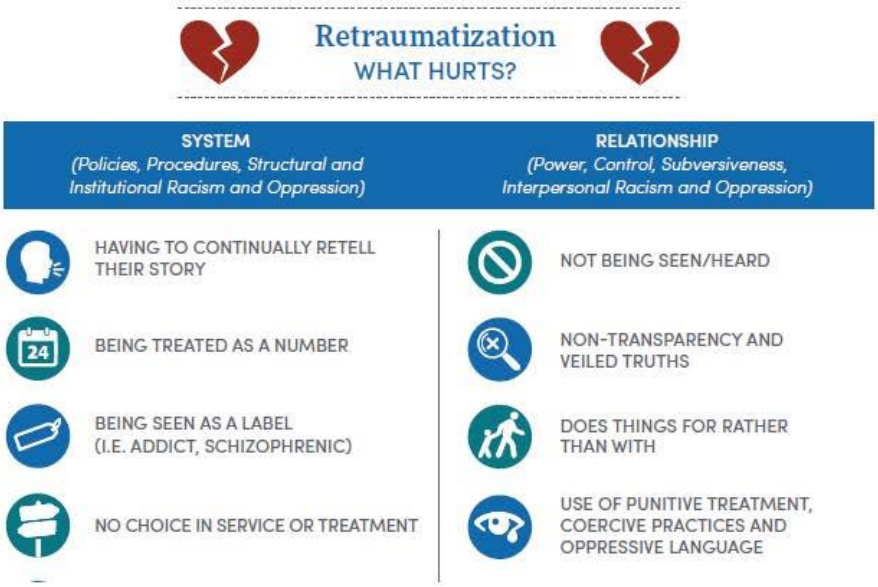
We all behave, and function, based on the brain state we are currently in. When we are stressed, angry, panicked, distressed, depressed, anxious, worried, or unsettled emotionally, we are not able to use reason and logic to heal. Follow these steps:

1. **Regulate**:
   a. regulate our nervous system (breathe fresh air, eat something, hold ice in each hand, cold water on neck and face, cold drink, change the room/environment briefly, go outside)
   b. We cannot heal in the same environment in which we became distressed

2. **Relate**
   a. Connect with a trusted support person, review tools and reminders from someone you trust

3. **Reason**
   a. Only when we are regulated, can we use logic and reason to problem solve
   b. Suggesting someone see things differently, when they are distressed, is futile until they are calm, regulated and in the brain state where reasoning is possible.





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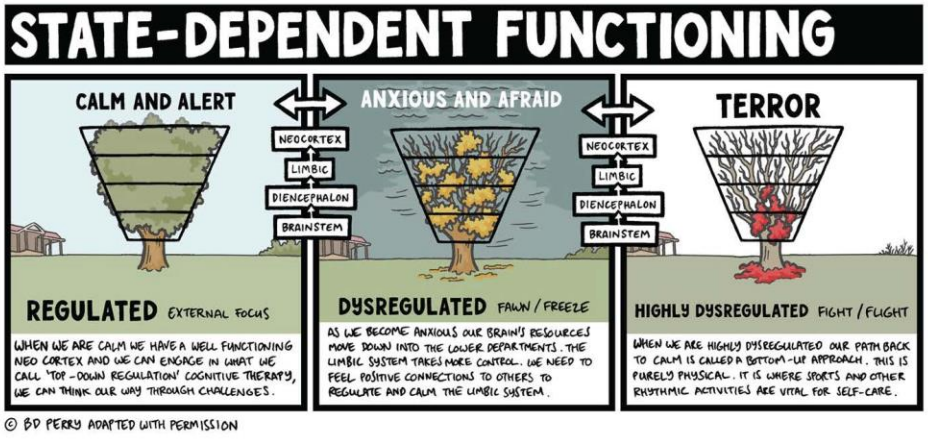
Compensate for my Brain State: Dr Bruce Perry's Arousal Continuum

EdPsychInsight

"I feel safe and comfortable. The top part of my brain is working well to keep a lid on my feelings. I'm able to think in more abstract and rational way. I can consider the past, present and future".	CALM	All functioning is "State-Dependent". Prolonged stress or traumatic experiences will heighten a child's sensitivity to demands and changes – some may have an "Alarm" baseline and quickly become emotionally dysregulated.
"My thinking is more concrete and less creative. I now perceive time in terms of hours and days. I may be a little nervous about new or unfamiliar things, but I can be reassured by structure, routine and connection".	ALERT	All teaching of new concepts and skills elicits some stress. We need to aim for the arousal sweet-spot between Calm and Alert – content which is engaging, challenging but not overwhelming. Increased structure, repetition and time for reflection will help it reach the top of the brain.
"I'm struggling to process what you are teaching and stay focused. My breathing and heart rate have changed. I'm more sensitive to the way you look and move. The present is just hours and minutes to me".	ALARM	Rewards and sanctions will be of little use when the child can't make connections between actions and consequences. We need to focus on regulating the lower parts of the brain – using movement, dance, art, music, breathing and grounding - and providing healthy relational experiences.
"I'm feeling overwhelmed. I'm more reactive to my surroundings and more prone to fight, flight or freeze. My sense of time is restricted to minutes and seconds. I won't easily trust you. I'm just trying to survive".	FEAR	Teaching children about feelings and how to express them – through words, gestures and visuals – is important in helping them to notice changes in their state and seek support before they fall down the arousal continuum.
"The bottom part of my brain is completely in charge. I have no sense of time. I'm not really thinking any more. You're seeing my reflexes. I may want to move or stay still; lash out or run away. I need you to keep me safe. It will take time for my terror to subside".	TERROR	In order to be a source of safety, comfort and reassurance, we need to keep track of our own brain state. Prioritising self-care will enable YOU to stay regulated.



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UCDAVIS CHILDREN'S HOSPITAL

PC-CARE
Caregivers and Children Together™

Co-Regulation Techniques

TECHNIQUE	DESCRIPTION
Label Feelings	Help your child **identify** big feelings by labeling your child's feelings in a neutral tone of voice. For example, "It seems like that really frustrated you," or "I can see it made you sad when . . ."
Breathe Together	Calmly take **deep breaths** so your child can see you practicing self-calming. If it does not make your child more upset, sit next to or hold your child while you breathe deeply so your child can feel the rhythm of breathing.
Body Calming	Slowly and rhythmically rub your child's back, feet, etc, when they are recovered. Connecting like this lets them know that you will be there when they are ready to talk.
Back Stories	Tell your child a story while **drawing** on the top half of your child's back. For example, draw a circle with rays for the sun, draw triangles for mountains, tap your fingers to walk up the mountain, and brush your hand back forth to make wind. Then, **switch places** and let your child tell a story on your back.
Music	Sing or play relaxing songs. Model how to sing/dance/play an instrument. Your child will learn to use **music** as an **active calming tool**.
Sensory Activities	Creating a **soothing environment** can reduce distress. Try lowering lights and turning off noisy toys and devices. Weighted blankets or other objects that children can touch or feel can help them focus and calm down. A cold washcloth over the eyes can **reduce** visual stimulation and calm an overly stressed system.

Timmer, S., Hawk, B., Lundquist, K., Forte, L., Aviv, R., Boys, D., & Urquiza, A. (2016) *PC-CARE: Course of Treatment Manual.* Unpublished Manuscript.

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Trauma Affect Regulation: Guide for Education and Therapy:

- (TARGET) is a manualized, trauma-focused psychotherapy
- For those suffering from posttraumatic stress disorder (PTSD)
- TARGET teaches skills for processing and managing trauma-related reactions to stressful situations, such as PTSD symptoms, traumatic grief, survivor guilt, and shame
- The goal of treatment is to help individuals regulate intense emotions and gain control of posttraumatic stress reactions
- It provides a framework for understanding and managing trauma memories and affecting dysregulation.
- Therapy focuses on the client's core values and hopes, resilience, and client strengths
- TARGET draws on cognitive-behavioral therapy and self/relational models of treatment to define a set of steps for clients to learn how to regulate intense emotions and solve social problems while simultaneously managing distress.

The program introduces a seven-step skill sequence–known by the acronym FREEDOM–that helps individuals learn to process and manage trauma-related reactions to stressful current situations.

These steps are:

- **F**ocus. A step to reduce anxiety and increase mental alertness.
- **R**ecognize. An activity to help individuals recognize specific stress triggers.
- **E**motions. A step to identify primary feelings.
- **E**valuate. A step in which individuals evaluate main thoughts/self-statements.
- **D**efine. An activity to help individuals determine and define their main personal goal(s).
- **O**ption. An activity where individuals identify one choice that represents a successful step toward the main goal(s) that he or she actually accomplished during a current stressful experience.
- **M**ake a contribution. An activity to help individuals recognize how that option reflected their core values and made a difference in others' lives.

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The 5-4-3-2-1 Grounding Technique

Ease your state of mind in stressful moments.

Acknowledge **5** things that you can see around you.

Acknowledge **4** things that you can touch around you.

Acknowledge **3** things that you can hear around you.

Acknowledge **2** things that you can smell around you.

Acknowledge **1** thing that you can taste around you.

#DeStressMonday DeStressMonday.org

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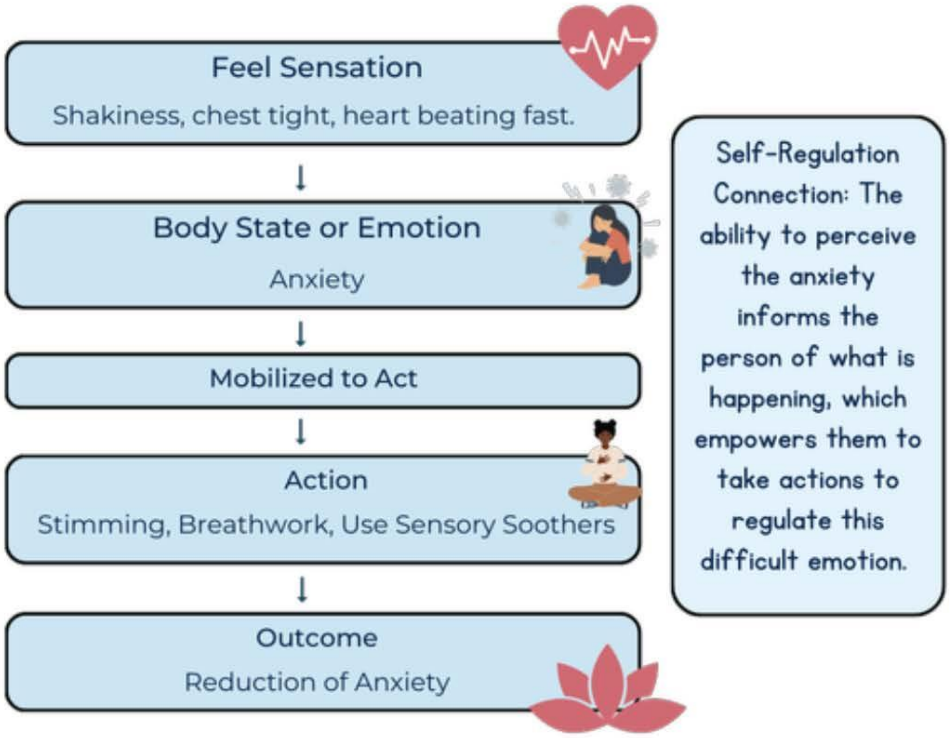
November 17th, 2023
F264

A Trauma Informed Guide to Reduce Risk of Re-Traumatization



Noticing Freeze

- Bored, not interested
- Confused, forgetful
- Distracted, not listening
- Clumsy
- Talking about something else
- Not moving to where you've asked
- Scanning the room
- Wide eyed, pupils might dilate
- Daydreaming, staring into space

Grounding Freeze

- Stay with me, don't leave me
- Tell me I'm ok & that I am safe
- Watching TV
- Deep breathing
- Spinning on a swing
- Climbing & hanging
- Rolling or cycling down a hill
- Digging in mud or sand
- Jumping on a trampoline
- Do my chores with me
- Gently wonder where I have gone & invite me back to you
- If I have forgotten what I was supposed to be doing, remind me again gently
- Hot chocolate & toast
- A warm bath & a warm towel
- A soft teddy for bedtime

Noticing Flight

- Hyperactive, manic, silly
- Aggressive, threatening: stiffening up, clenching fists
- Running away, escaping, disappearing, hiding under the table/bed/sofa
- Clumsy
- Disruptive, loud & noisy
- Can't cope with free play
- Can't follow house rules
- Not doing what you've asked
- Lonely
- Keeping super busy
- Baby talk/silly voices
- Bumping into people
- Needing to get into the car/house/park first

Grounding Flight

- Keep me close by
- Find me again happily or patiently
- Deep breathing
- Give me a familiar & easy chore
- Crunchy foods - carrot sticks, a biscuit, a rice cake or crisps
- Tell me that I am safe with you
- Hanging from monkey bars
- Talk through what you think I am finding tricky using a kind voice
- Heavy blankets
- Create a safe space where I can hide away I when I need to
- Tug of war
- Cup of warm milk or hot chocolate
- Hot water bottle & a soft teddy
- Recognize I sometimes find 'normal' family life threatening
- Accept that if I feel threatened, I feel in real danger.
- If you send me to do something & I forget, just patiently ask again

Noticing Fight

- Hot and bothered
- Argumentative, angry and aggressive
- Controlling, demanding and inflexible
- Lie or blaming
- Unable to concentrate on one thing
- Unable to follow the house rules
- Confrontational
- Disrespectful
- Disregarding of others, pushing away friends/family members
- Shouting, loud and noisy
- Immature

Grounding Fight

- Tell me you love me even when my I push you away
- Don't punish me for being cross; reward me with your kindness and love for getting calm again
- Keep me safe from hurting myself
- Match my energy
- Deep breathing
- Chewy foods
- Support me socially
- Hanging, swinging and climbing
- Warm bath with lots of bubbles
- Warm milk or a hot chocolate
- Hot water bottle
- A super soft teddy and/or blanket
- Give me a task that makes me feel important
- Connect with me and show me empathy before exploring the consequences of my behavior
- Create somewhere safe to go to so I can calm down
- Make things predictable. Tell me about changes before they happen, especially if strangers are coming to the house or I'm going somewhere new
- Accept I might not know why I behaved in that way & I might not remember what happened
- Listen and acknowledge how I feel, even if you see it differently, it will help me feel listened to

Noticing Submit

- Unhappy, low mood
- Alone or withdrawn
- Fidgety but not disruptive, anxious
- Never questioning or asking questions
- Never drawing unnecessary attention
- Yes or no answers - doing just enough to avoid being noticed, unable to think
- Quiet & passive, compliant

Grounding Submit

- See me, listen to me
- Give me small repetitive things to do
- Weighted blanket
- Building with Lego or Play-doh
- Tell me I am safe
- Deep breathing
- Swinging
- Let me spend quiet time just with you
- Understand that social media might symbolizes a comforting connection
- Hot chocolate and a crunchy biscuit
- Wrap me up in a soft blanket & watch TV
- Understand that playing computer games, lets me be by myself somewhere safe
- Recognize I am hurting inside & might need professional help
- Know that I am easily bullied, look out for this don't expect me to tell you.
- Notice I will say what I think you want me to say
- Be aware that I am an easy target & can be coerced easily to keep the peace
- Know I can't cope being the center of attention
- Watch for me removing myself
- Warm bath and a warm towel
- Warm pyjamas

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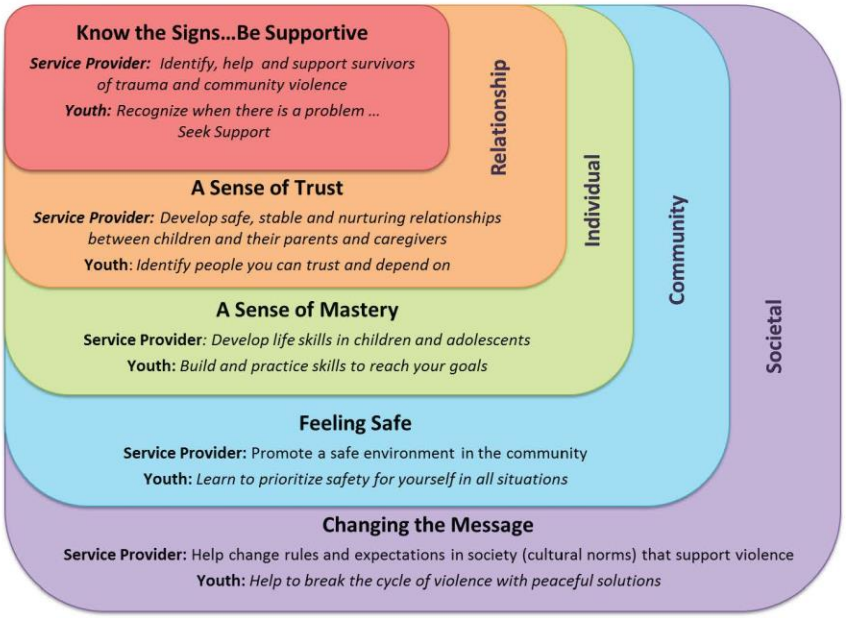
How to support those who have experienced trauma:



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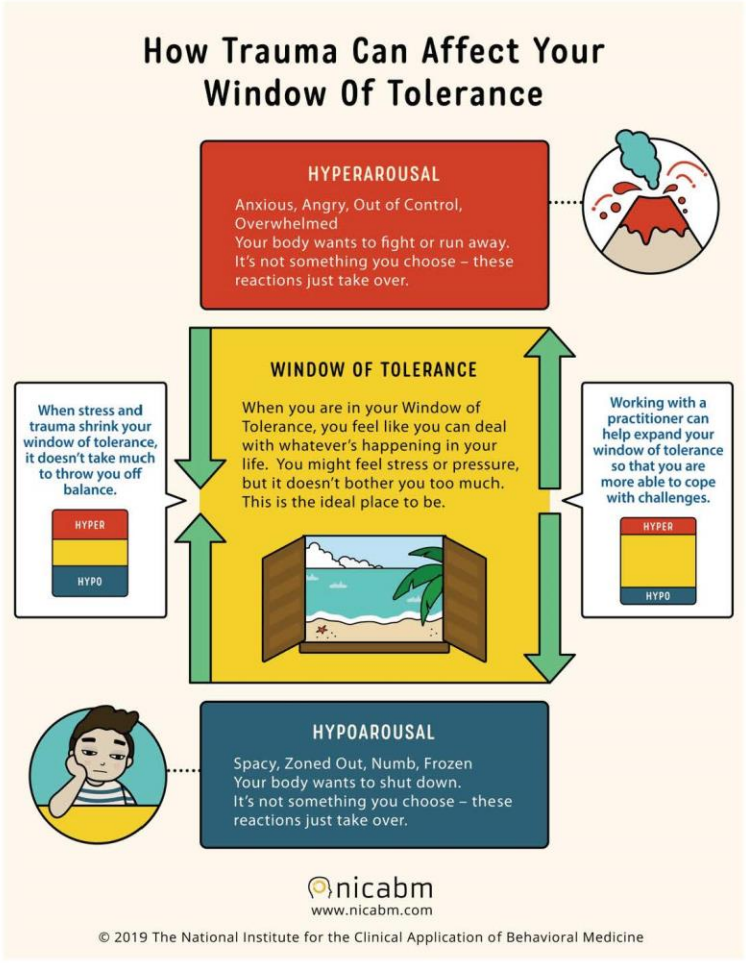

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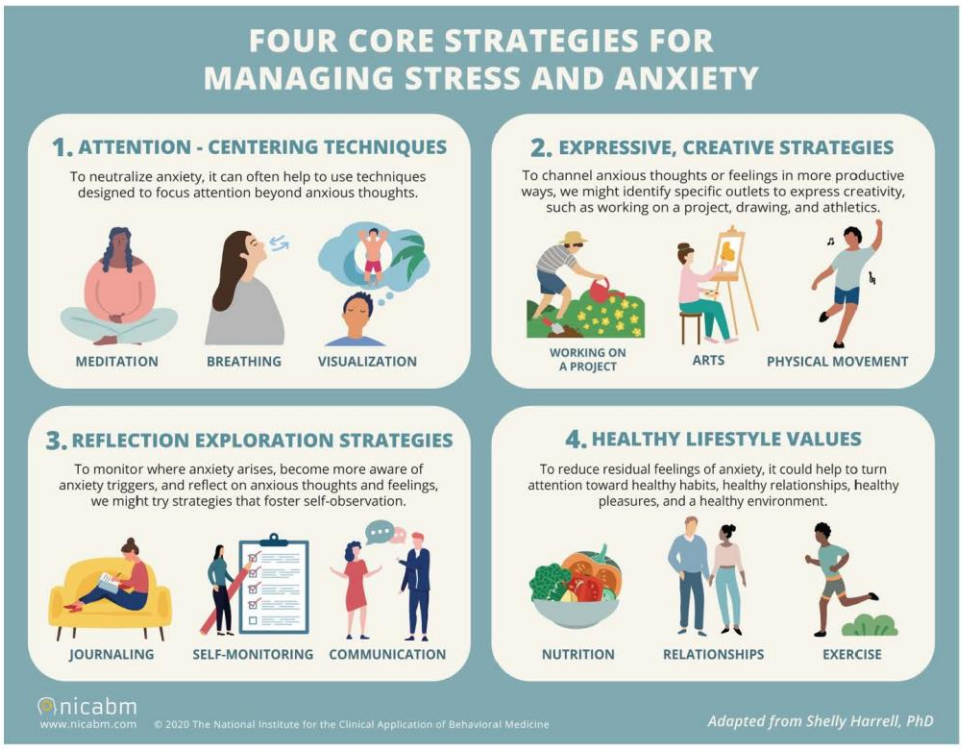

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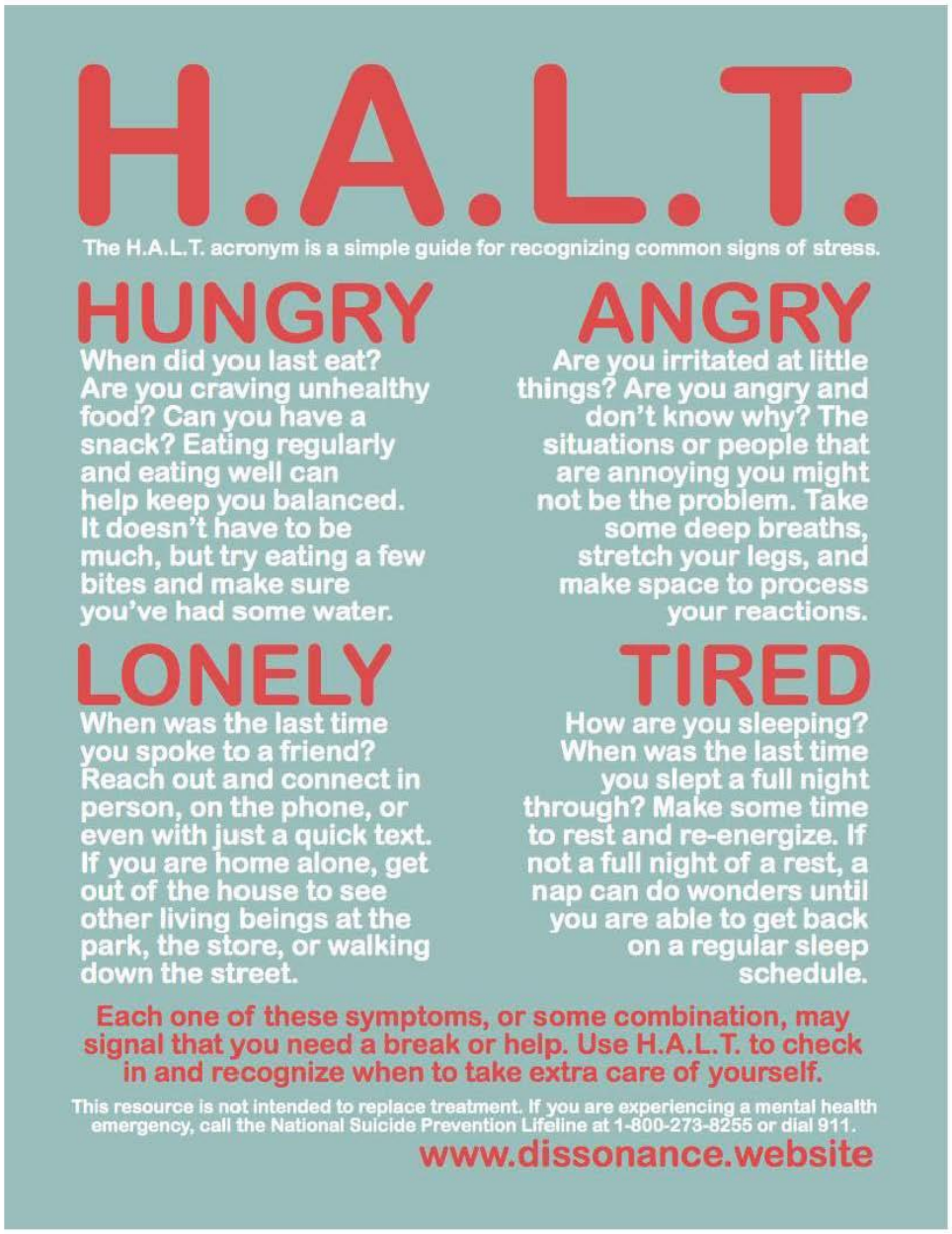

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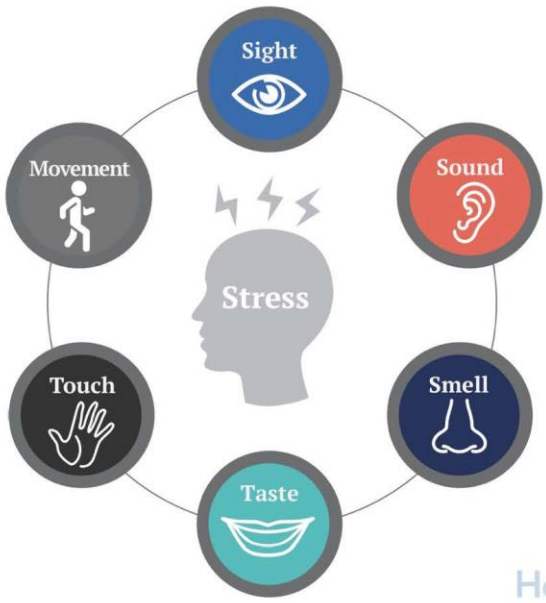
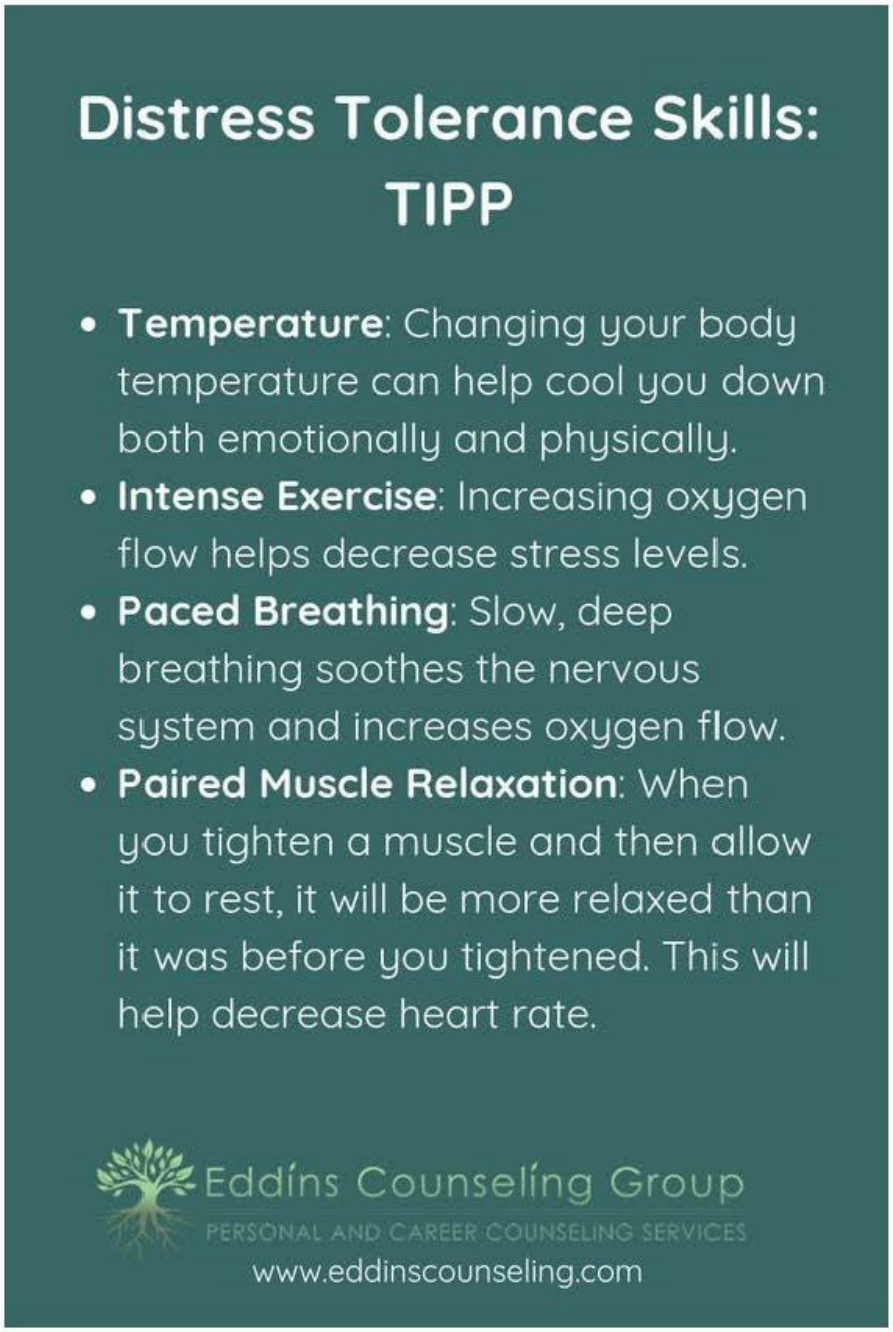
Use Your Senses to Relieve Stress





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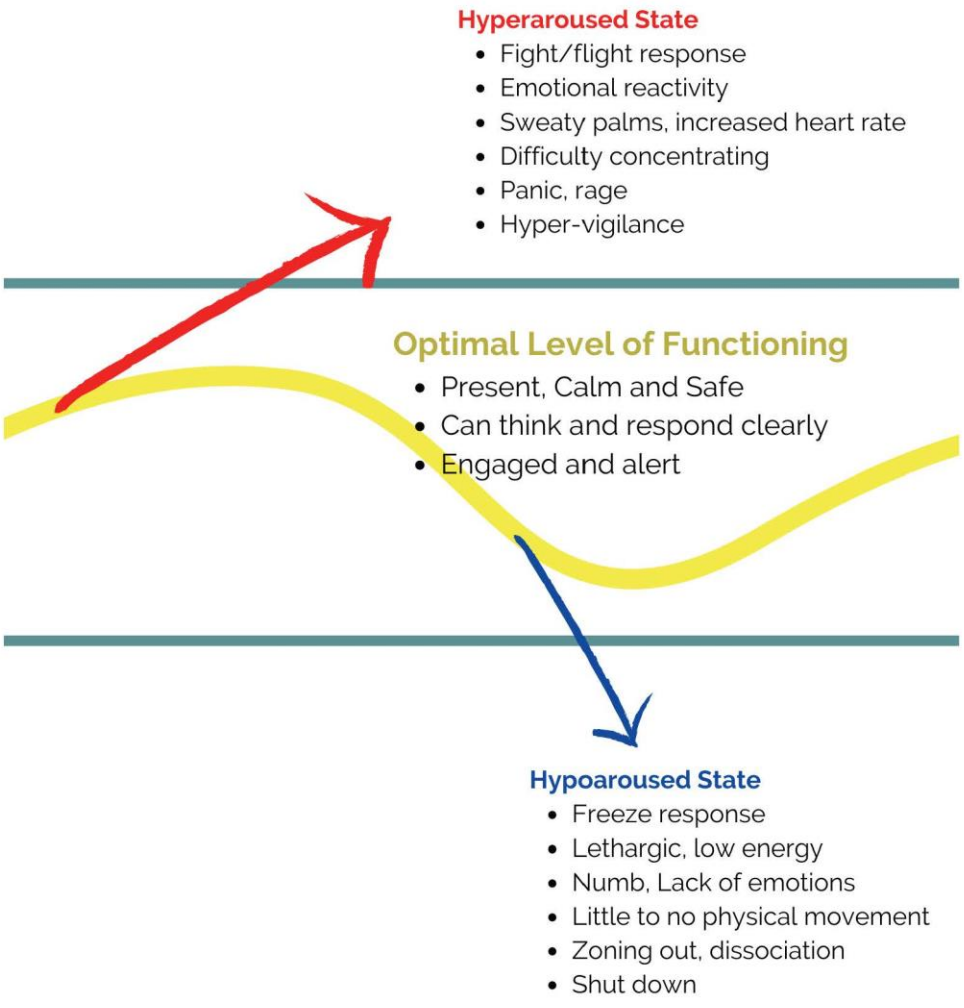
Window of Tolerance



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Self-Assessment -how am I coping?

NovoPsych

PTSD Checklist 5 (PCL-5)

Instructions:

Below is a list of problems and complaints that people sometimes have in response to stressful life experiences. How much you have been bothered by that problem IN THE LAST MONTH.

		Not at all	A little bit	Moderately	Quite a bit	Extremely
1	Repeated, disturbing, and unwanted memories of the stressful experience?	0	1	2	3	4
2	Repeated, disturbing dreams of the stressful experience?	0	1	2	3	4
3	Suddenly feeling or acting as if the stressful experience were actually happening again (as if you were actually back there reliving it)?	0	1	2	3	4
4	Feeling very upset when something reminded you of the stressful experience?	0	1	2	3	4
5	Having strong physical reactions when something reminded you of the stressful experience (for example, heart pounding, trouble breathing, sweating)?	0	1	2	3	4
6	Avoiding memories, thoughts, or feelings related to the stressful experience?	0	1	2	3	4
7	Avoiding external reminders of the stressful experience (for example, people, places, conversations, activities, objects, or situations)?	0	1	2	3	4
8	Trouble remembering important parts of the stressful experience?	0	1	2	3	4
9	Having strong negative beliefs about yourself, other people, or the world (for example, having thoughts such as: I am bad, there is something seriously wrong with me, no one can be trusted, the world is completely dangerous)?	0	1	2	3	4
10	Blaming yourself or someone else for the stressful experience or what happened after it?	0	1	2	3	4
11	Having strong negative feelings such as fear, horror, anger, guilt, or shame?	0	1	2	3	4
12	Loss of interest in activities that you used to enjoy?	0	1	2	3	4
13	Feeling distant or cut off from other people?	0	1	2	3	4
14	Trouble experiencing positive feelings (for example, being unable to feel happiness or have loving feelings for people close to you)?	0	1	2	3	4
15	Irritable behaviour, angry outbursts, or acting aggressively?	0	1	2	3	4
16	Taking too many risks or doing things that could cause you harm?	0	1	2	3	4

Page 1 of 2

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HealthyPlace.com

How to Cope with Triggered Trauma Memories

- **Move your body.** Get your body moving to release endorphins and shift your body's response.

- **Use grounding techniques.** Bring yourself into the present by getting in touch with your senses.

- **Go outside.** This is a great place to apply grounding techniques. Breathe the fresh air.

- **Practice cozy self-care.** Draw a warm bath. Put on your comfiest pajamas.

- **Let emotions be.** Allow yourself to process the emotions with patience.

- **Try tapping.** Tapping calms anxiety, builds self-acceptance and draws your awareness into your senses.

- **Get support.** Having a sense of community is essential to avoid falling prey to isolation.

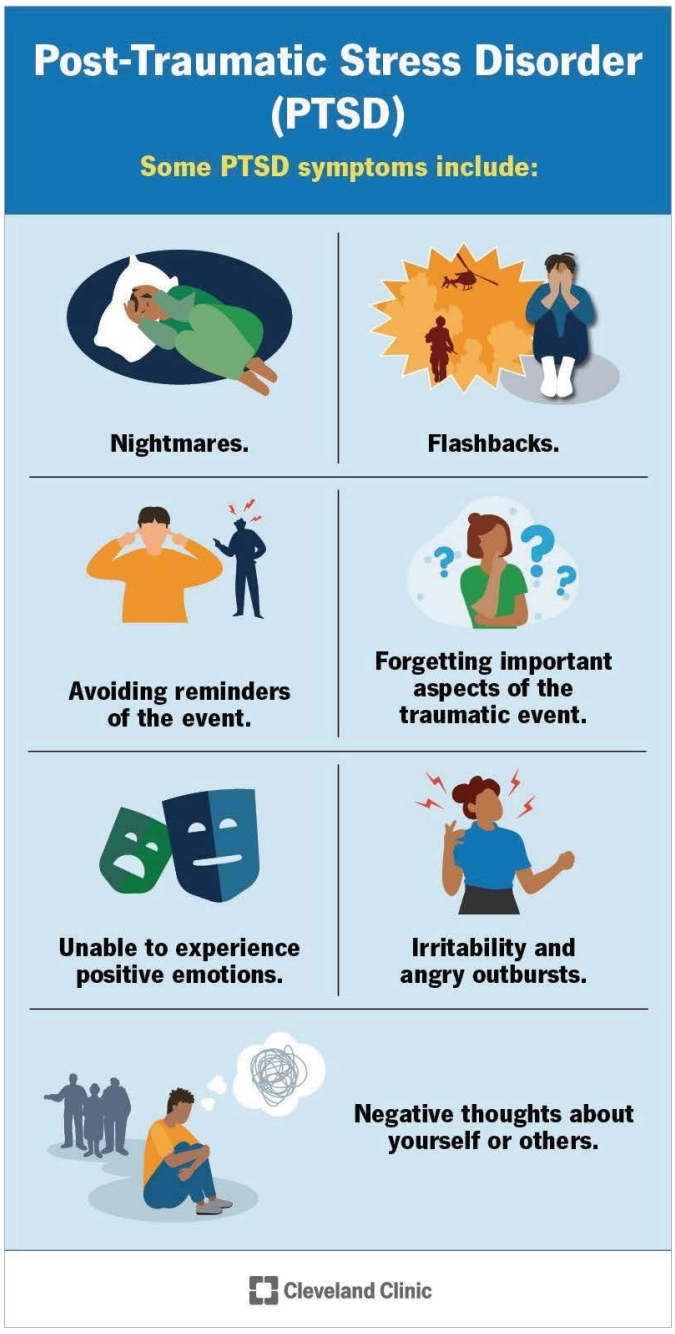

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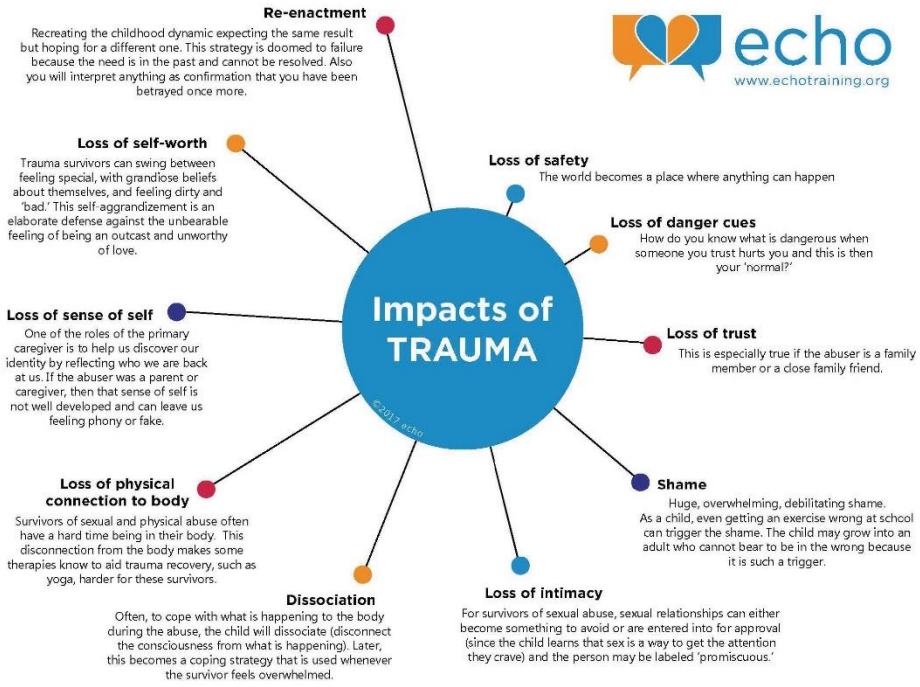
Exhibit GG
Eden Dales Social Work



Learn your Triggers

It's especially hard when a trauma response hits you when you don't expect it. You may be at the grocery store or getting gas, and suddenly, a trigger catches you off guard and you feel an immense sense of danger or dread. To help prevent such a reaction, it's important to learn about your own trauma triggers and what might set them off. This will help you better understand yourself and the healthy boundaries you may need to set.

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Triggers

Trigger: A stimulus—such as a person, place, situation, or thing—that contributes to an unwanted emotional or behavioral response.

The Problem

Describe the problem your triggers are contributing to. What's the worst-case scenario, if you are exposed to your triggers?

Trigger Categories

Just about *anything* can be a trigger. To begin exploring your own triggers, think about each of the categories listed below. Is there a specific emotion that acts as a trigger for you? How about a person or place? List your responses in the provided spaces.

Emotional State	
People	
Places	
Things	
Thoughts	
Activities / Situations	

Tips for Dealing with Triggers

- Oftentimes, the best way to deal with a trigger is to avoid it. This might mean making changes to your lifestyle, relationships, or daily routine.
- Create a strategy to deal with your triggers head on, just in case. Your strategy might include coping skills, a list of trusted people you can talk to, or rehearsed phrases to help you get out of a troublesome situation.
- Don't wait until the heat of the moment to test your coping strategy. *Practice!*

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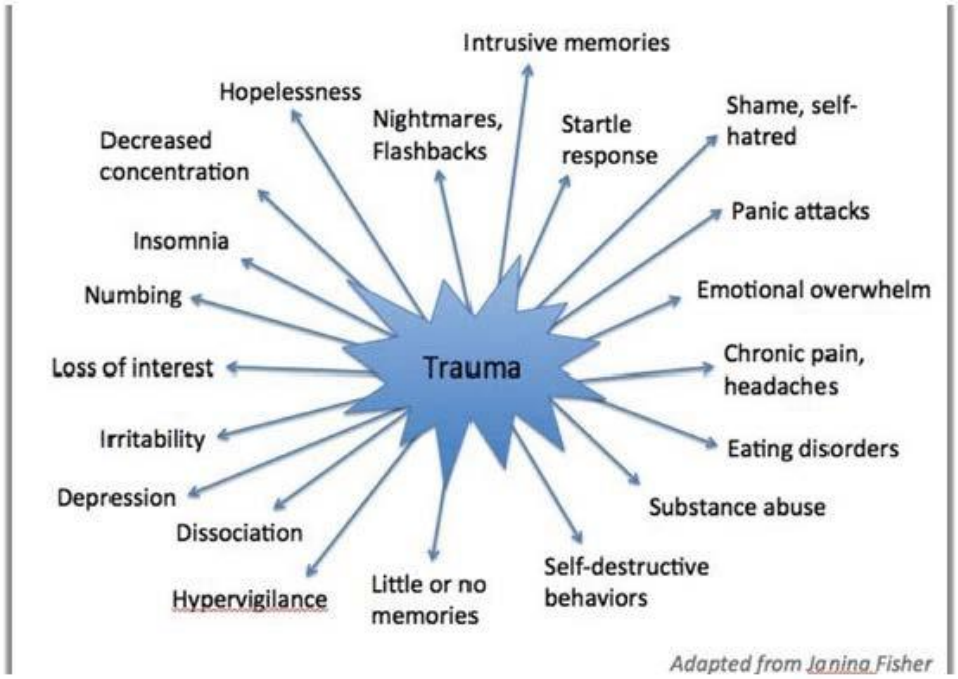

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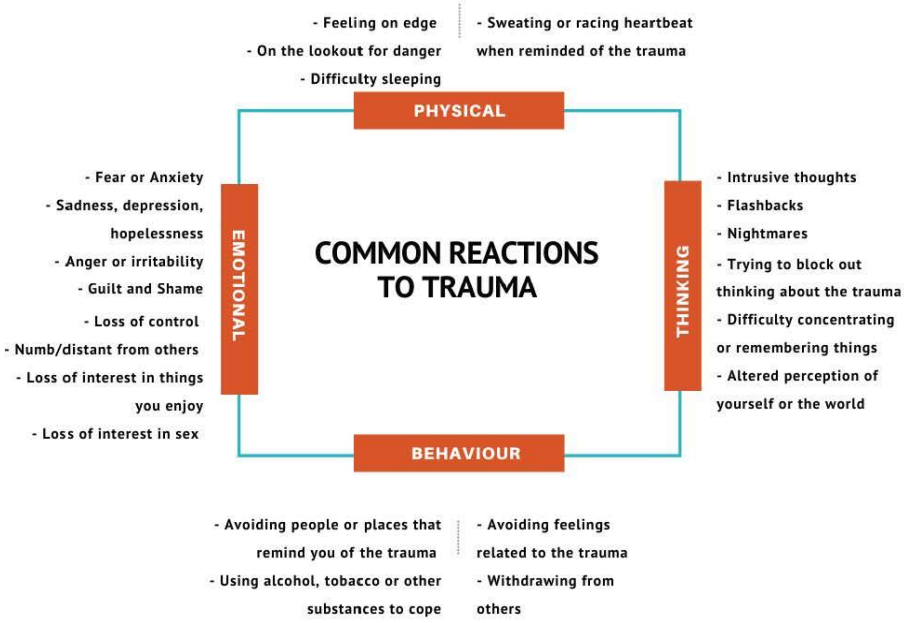

Exhibit GG
Eden Dales Social Work
A Trauma Informed Guide to Reduce Risk of Re-Traumatization
November 17th, 2023
F280

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Exhibit GG
Eden Dales Social Work
A Trauma Informed Guide to Reduce Risk of Re-Traumatization
November 17th, 2023
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Our 5 Basic Needs

@the.love.therapist

Survival	Health, shelter, nourishment, reproduction, safety, security
Love & Belonging	Drive for connection with friends, family, intimate partners, pets, etc.
Power	Desire to achieve, be recognized & respected, feel worthwhile, feel in control of your life, be competent, make a difference, & have confidence
Freedom	Having choices, being independent & autonomous, ability to move freely & be in charge of your own time
Fun	Pleasure, play, humor, relaxation, inspired learning

*5 Basic Needs is based on Choice Theory

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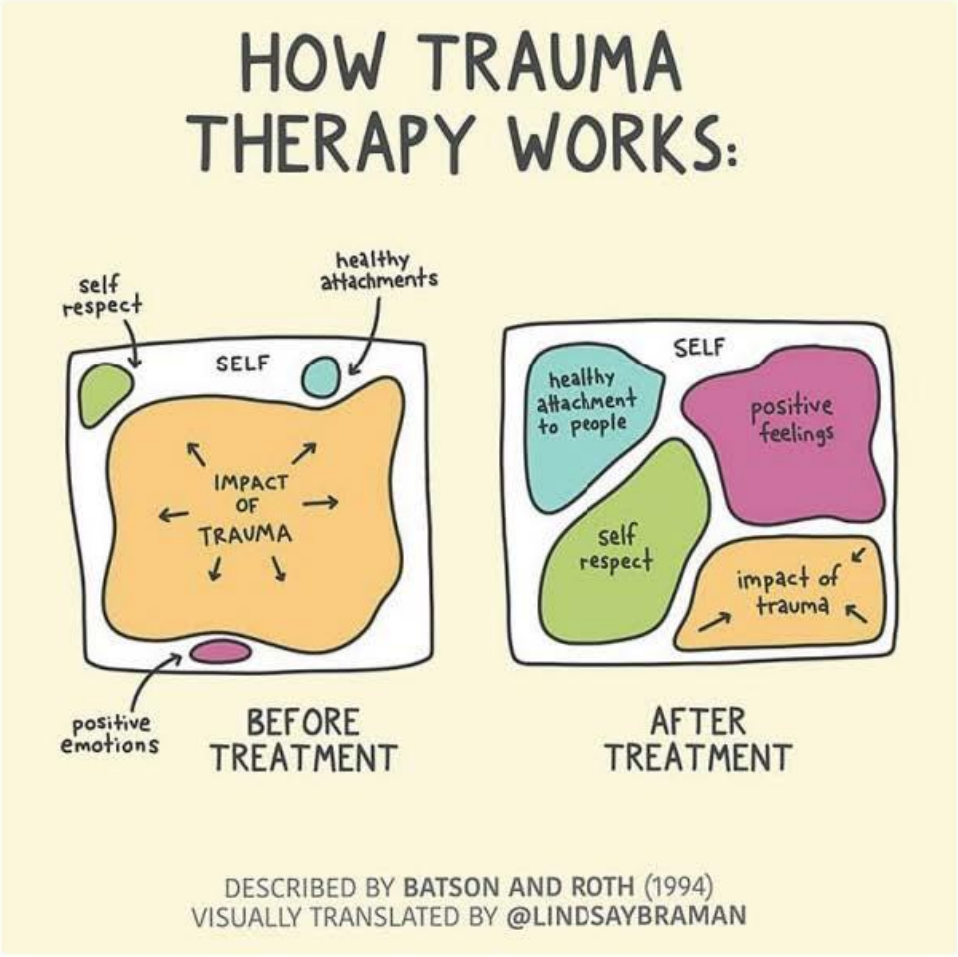

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S. v. Ukraine International Airlines JSC, 2024 ONSC 3303

2024 ONSC 3303 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

N.S. in her personal capacity and as Trustee of the Estate of H.A., deceased, and as Litigation Representative of the Estate of K.A., deceased

Plaintiff

– and –

Ukraine International Airlines JSC

Defendant

REASONS FOR JUDGMENT

J.T. Akbarali J.

Released: June 10, 2024

Law Society of Ontario | Barreau de l'Ontario

TAB 17

7th Motor Vehicle Litigation Summit

The Video Guide to Written Advocacy (PPT)

Gavin MacKenzie
MacKenzie Barristers Professional Corporation

Materials Prepared by:
Ellen Vandergrift
Vandergrift Legal

September 18-19, 2024

cpd

THE VIDEO GUIDE TO WRITTEN ADVOCACY

To watch the videos, visit: https://www.vandergriftlegal.com/video-guide-to-written-advocacy

1

THE VIDEO GUIDE TO WRITTEN ADVOCACY

PART 1: THINK LIKE A GUIDE ON A JOURNEY

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2

VIDEO GUIDE TO WRITTEN ADVOCACY
Part 1: Think like a guide on a journey

You should think like a guide on a journey.

Your job is to guide the judge along the path you want them to follow…

Pointing out highlights and hazards…

and ending at an irresistible destination.

Your focus is on making the journey and the end point as appealing as possible.

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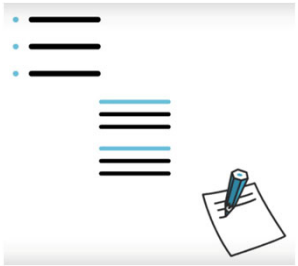
VIDEO GUIDE TO WRITTEN ADVOCACY
Part 1: Think like a guide on a journey

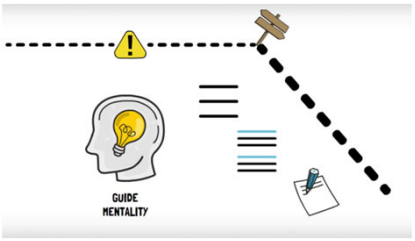
I am convinced that if you can get into this headspace, your briefs will be infinitely better.

It will encourage you – at all times – to make the journey through your arguments a positive one for the judge.



You will choose a route that is as smooth and direct as possible – from section to section, from paragraph to paragraph and from sentence to sentence – and you won't take on unnecessary side routes.

If there are bumps in the road or hazards that must be crossed, you will prepare the judge for them and see them safely through



You will anticipate and dominate crossroads to ensure the judge prefers your route to that of the opposing counsel. If you are heading into unexplored territory, you will lay a well-grounded path.

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VIDEO GUIDE TO WRITTEN ADVOCACY
Part 1: Think like a guide on a journey

Judges are busy and they often don't have enough reading time. In a recent CPD on legal writing, one judge stated that when she picks up a factum, her frame of mind is "How painful is this going to be?"

You give your clients an incalculable advantage, no matter the inherent strength of their case, if you present the judge with an argument that is easy sailing. One that grabs the judge's attention with an overview of the journey to come, and then fulfills that expectation by carefully taking the judge through each argument set out in the overview

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VIDEO GUIDE TO WRITTEN ADVOCACY
Part 1: Think like a guide on a journey

Most judges do not work in specialized areas of the law and are thrown from criminal to family to corporate matters.

They may know something about the area of the law in your brief but they know nothing of the facts.

If you have prepared properly, you are the expert in both!

Your brief should exhibit the confidence of an expert who knows just what is important in the law and the facts and draws the judge's attention to the details just when they are necessary as you are guiding them through the argument.

YOU ARE THE EXPERT!

And when are they necessary? They are necessary just when you have caused the need for them to arise in the judge's mind. And how do you do this? By establishing the importance of details and why they are being provided before your provide them.

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VIDEO GUIDE TO WRITTEN ADVOCACY
Part 1: Think like a guide on a journey

Mr. Justice John Laskin, formerly of the Ontario Court of Appeal, and a noted writer on legal writing, calls this "point first" writing. As he states: "readers read faster and absorb and retain details better when they first know why they matter and how they are relevant; in other words, when they have a context for them or know the point of the detail.

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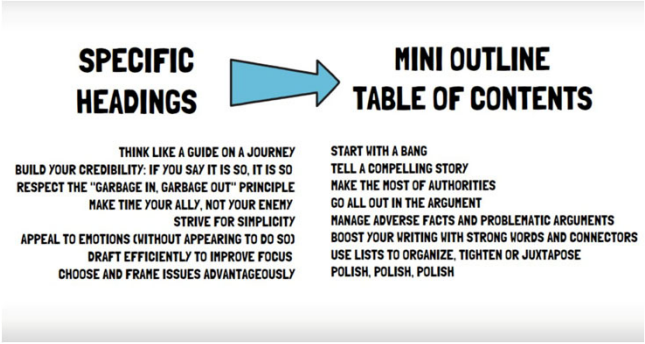
VIDEO GUIDE TO WRITTEN ADVOCACY
Part 1: Think like a guide on a journey

You should write point first at all levels in your argument: Your headings are signposts that constantly situate the judge on the journey through your argument. They should be drafted in short statements that, when pulled together in your Table of Contents, act as a mini-outline of your entire argument that can be seen in a single glance.

Using the Table of Contents for these videos as an example, they are specific and browsing them gives an idea of the structure of this video series.

Once you have watched the videos, just a glance at the headings can act as a reminder of the details in each section. If you need to revisit something, it is easy to locate the necessary section.



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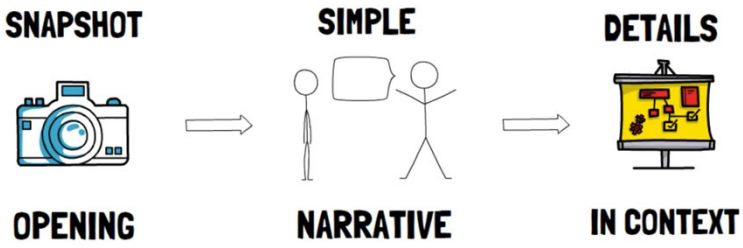
Part 1: Think like a guide on a journey



In your argument, this Table of Contents snapshot will assure the judge from the very first page that they are in good hands for the journey to come.

The next thing the judge sees, the overview, will outline the argument in simple narrative terms, ideally simple enough that a next door neighbour could understand the thrust of the argument.

Here I have tried to give tips that are actionable even within time constraints.

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THE VIDEO GUIDE TO WRITTEN ADVOCACY

PART 2: BUILD *YOUR* CREDIBILITY: IF *YOU* SAY IT IS SO, IT IS SO

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VIDEO GUIDE TO WRITTEN ADVOCACY
Part 2: Build your Credibility, If you say it is so, it is so

In the first clip, I compared a good written argument to a guidebook that leads a judge to an irresistible destination. Having trust in a guide is essential to undertaking and completing the journey to that destination, especially if the journey is uphill!!

THIS IS NOT WHERE YOU TOLD ME I WOULD BE

What happens when a guidebook gives you inaccurate information on a stop along the way to the final destination?

You become uncertain about whether you can trust the next bit of information. And if you encounter another error? You might ditch the guidebook entirely and go it alone or reach for another one (your opponent's argument, in this context).

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VIDEO GUIDE TO WRITTEN ADVOCACY
Part 2: Build your Credibility: If you say it is so, it is so

Your credibility is your most important asset as an advocate, It is the foundation on which your argument is built.

You want the judge to believe that if you say it is so, it is so.

Establishing credibility leads the judge to accept your characterizations of the facts and argue the "right"ness of your requested outcome, you are more likely to hit your target

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VIDEO GUIDE TO WRITTEN ADVOCACY
Part 2: Build your Credibility: If you say it is so, it is so

Here are some easy ways to establish and maintain your credibility

- provide precise location of facts in evidentiary record
- use pinpoint citations for your legal authorities
- don't overstate the evidence
- don't misstate the law
- deal with adverse facts and authorities

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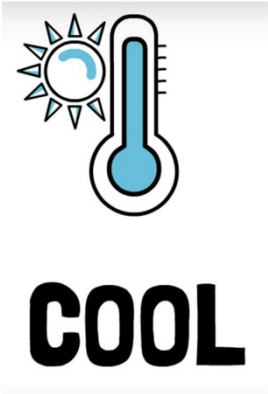
VIDEO GUIDE TO WRITTEN ADVOCACY
Part 2: Build your Credibility: If you say it is so, it is so

Some more subtle ways to establish and maintain your credibility involve your use of tone, and your characterization of the case.

While your writing should be lively, in that it contains vivid descriptions and punchy words, in tone it should have a confident calmness to it.



Judges are not persuaded by irate language or categorical statements of fairness or justice. If you can cool the temperature raised by the other side's accusations or tone with a calm exposition of the facts and law, even better!

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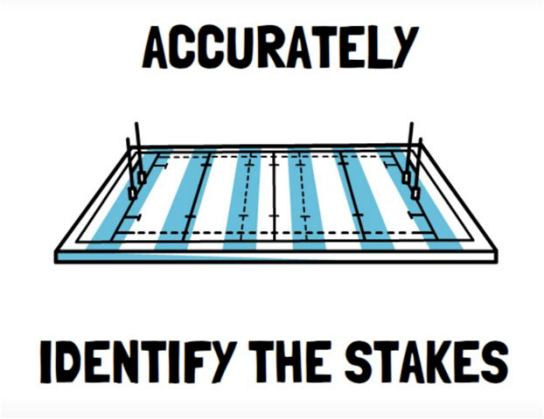
VIDEO GUIDE TO WRITTEN ADVOCACY
Part 2: Build your Credibility: If you say it is so, it is so

You can also demonstrate your credibility by accurately representing the stakes of the case.

Most cases are simply the application of established law to a new set of facts.

If yours is one of those cases, pretending your argument has some higher significance to the administration of justice in Canada to somehow gain the upper hand for you client is likely to backfire.



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THE VIDEO GUIDE TO WRITTEN ADVOCACY

PART 3: RESPECT THE "GARBAGE IN, GARBAGE OUT" PRINCIPLE

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VIDEO GUIDE TO WRITTEN ADVOCACY
Part 3: Respect the ”Garbage in, Garbage out” principle

In computer science, garbage in, garbage out is the concept that incorrect or poor quality input will always produce faulty output.

The same is obviously true for legal arguments.

You can have the most beautifully crafted paragraphs and sentences, but if the ideas behind them are muddled or wrong, they will not leave to a good result.

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VIDEO GUIDE TO WRITTEN ADVOCACY
Part 3: Respect the ”Garbage in, Garbage out” principle

When the evidence is in, and the record is complete, take a step back: Are the issues still what you thought they were?

Assuming that you knew the legal framework before the evidentiary record was built (and I certainly hope you did!), do you need to take another look?

Think broadly about issue. If there is a shortage of caselaw on point, have you looked at other jurisdictions? What analogous situations might inform the issues

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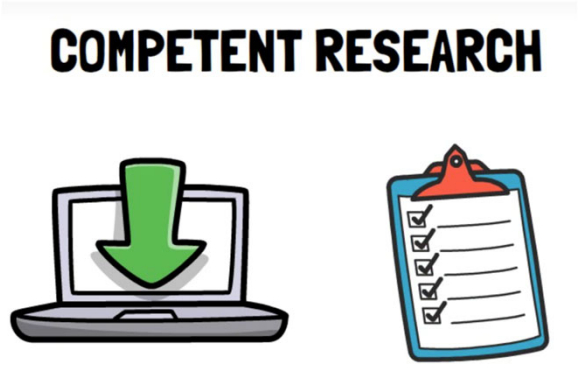
Part 3: Respect the ”Garbage in, Garbage out” principle

There is no substitute for competent legal research. You have a duty to the court to cite all binding authorities, and your duty to your client is higher, and extends to finding persuasive authorities from other jurisdictions.



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Part 3: Respect the ”Garbage in, Garbage out” principle

Of course, ask yourself how do I win this case? But, even more importantly, ask yourself how you might lose it?

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THE VIDEO GUIDE TO WRITTEN ADVOCACY

PART 4: MAKE TIME YOUR ALLY, NOT YOUR ENEMY

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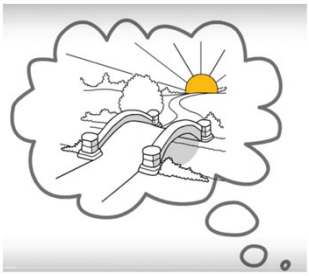
VIDEO GUIDE TO WRITTEN ADVOCACY
Part 4: Make time your ally, not your enemy

Writing a persuasive argument, if you are striving to make the route the best it can be for the judge, is an inherently creative endeavor.



If you start writing early, you can enlist the back parts of your brain to work on the argument while you are occupied with other things

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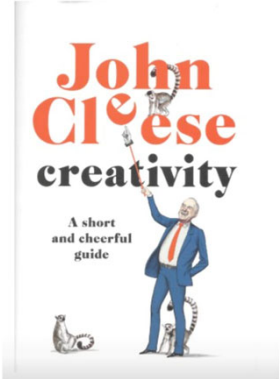
Part 4: Make time your ally, not your enemy

John Cleese talks about this in his book ”Creativity”, how he would be writing a script before bed and be stumped on a section, and would wake in the morning with the solution.



But I have discovered that his trick – of working on a stubborn point just before bed, in hope of waking to a solution in the morning – also works for legal arguments

Cleese, trained as a lawyer, declares in the same book that there was no room for creativity in the law, a point on which I obviously disagree.

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Part 4: Make time your ally, not your enemy

This can be at the sentence level, where your mind will not be as familiar and therefore not as adept at unconsciously correcting without noticing, but also at the argument level, where, with a little distance, you might see gaps in reasoning.

This appeal raises the following question of public importance:

In addition, getting distance from your own argument allows you to come at it fresh and see holes or bumps in the path that you didn’t see before.

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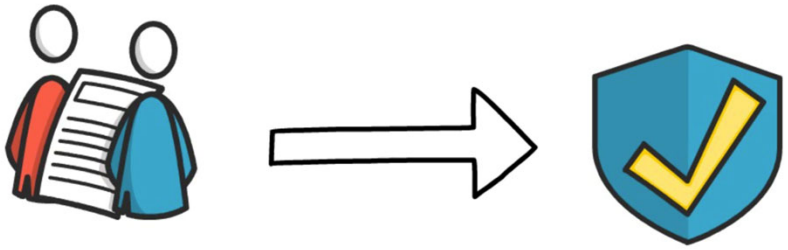
Part 4: Make time your ally, not your enemy



When you finish early you also have a chance to enlist the help of others – not just to edit—but to contribute ideas. Sometimes just articulating a problem you are having to someone else can help you see your way through.

I am still embarrassed by errors that others catch in my writing, no matter how careful I am. Better to be embarrassed in front of a member of your team then being embarrassed in front of a judge. Keep in mind: every single error is a bump in the path to your destination and is prejudicial to your client.

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PART 5: STRIVE FOR SIMPLICITY

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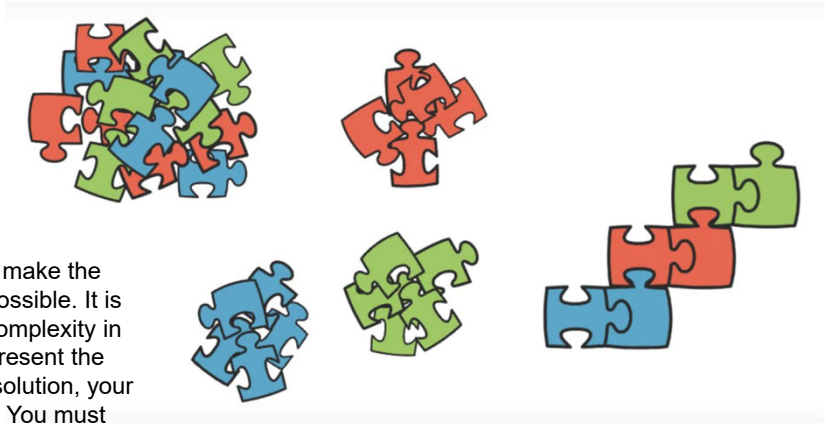
VIDEO GUIDE TO WRITTEN ADVOCACY
Part 5: Strive for simplicity



As a guide, it is your job to make the judge's journey as easy as possible. It is your job to break down the complexity in the facts and the law and present the components so that the right solution, your solution, becomes evident. You must simplify, but never over-simplify.

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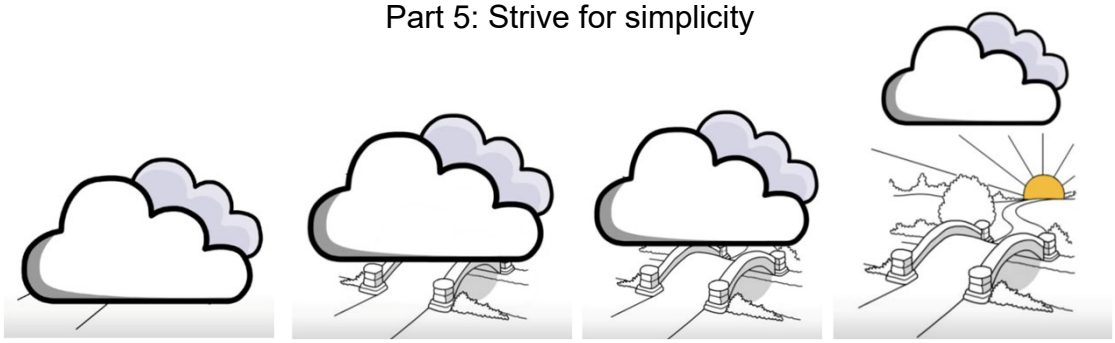
VIDEO GUIDE TO WRITTEN ADVOCACY
Part 5: Strive for simplicity



Cloudy writing reflects cloudy thinking. You must see the path clearly to be able to show it to someone else. If you can't see the path clearly, get help before you start writing because the writing will not be good. Sometimes you just need a bit of help to see your way through. Just articulating the problem to a colleague can help you clarify your thinking. Some of my best sentences have come out of discussions, where the lawyer I am working with hears an idea I have spoken out loud and says "Write that! Write it exactly like that!" and I scramble to get it down before I lose it.

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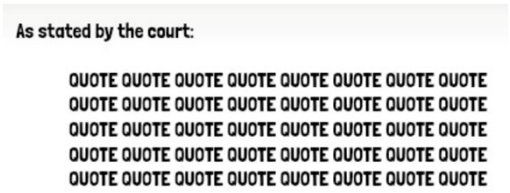
VIDEO GUIDE TO WRITTEN ADVOCACY

Part 5: Strive for simplicity

When you write simply, it can be uncomfortable, because it is your clear voice and you can't hide.

That is perhaps why legal writing is filled with so much bloat. This can be seen in overuse of quotations, which is hiding behind someone else's words…



and throat clearing words, like "it should be noted that…" or "a key aspect of the case is…".

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29

THE VIDEO GUIDE TO WRITTEN ADVOCACY

PART 6: APPEAL TO EMOTIONS (WITHOUT APPEARING TO DO SO)

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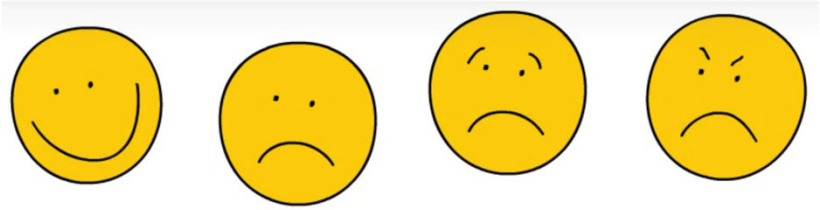
30

VIDEO GUIDE TO WRITTEN ADVOCACY
Part 6: Appeal to emotions (without appearing to do so)



Emotion plays a huge role in human decision making, more so than most of us, particularly as lawyers, would like to admit. Because judges are human, emotion also plays a role in their decision making..

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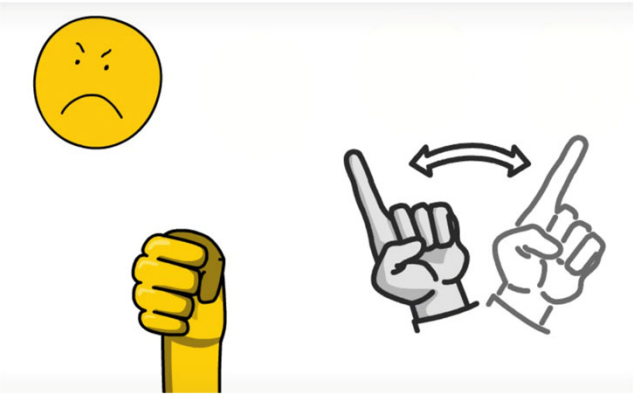
Part 6: Appeal to emotions (without appearing to do so)



Outright appeals to the emotions of a judge are likely to fall flat. This kind of persuasion works best when it is invisible. Telling a judge to feel outraged because you say a situation is outrageous is not likely to invoke outrage, and is more likely to turn a judge off your argument. But demonstrating the outrageousness of a situation in a persuasive presentation of the facts just might succeed.

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Part 6: Appeal to emotions (without appearing to do so)

The facts matter far more than the law in most cases and even in most appeals. And so, the best advocates are the ones who are the best storytellers. We also know that the best stories follow a theme. The theme is not explicitly stated – for example, a story doesn't generally begin by saying "this is a story about betrayal" – but rather, the theme is brought out in flow and focus.

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Part 6: Appeal to emotions (without appearing to do so)

So tell the judge the story of what happened, guided by the theme that fits your case. Marshall the facts necessary to do the work for you. Use specific details to evoke the emotion in the judge rather than telling the judge what to think of a situation.

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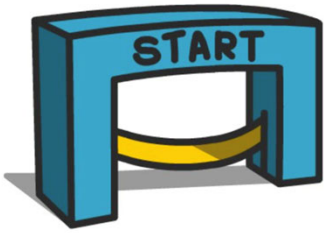
Part 7: Draft efficiently to improve focus



The advice often given is to not start writing until you have a detailed outline and know exactly how the argument will be structured. That may be good advice if you have a long timeline and a large budget that accommodates a lot of pre-factum investigation and writing. Where the budget is tighter, I often find it is most cost-efficient to start writing, but write fast, and plug holes as they arise. In this form of writing it is important not to number headings or become too attached to structure as everything should remain in flux until you determine the most effective way to order your arguments.

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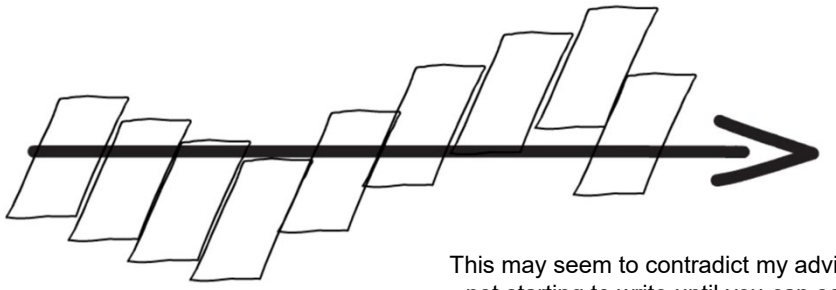
Part 7: Draft efficiently to improve focus



This may seem to contradict my advice in an earlier clip to not starting to write until you can see the path clearly. It doesn't. You need to know the basic path through to start writing, but you don't need to have envisioned every step along the way. When you are writing, you can make adjustments to the route.

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Part 7: Draft efficiently to improve focus

ISSUES

This is my recommendation: Start with the issues first…

↓

LAW

then write up the law for each issue…

↓

FACTS

then set out the facts in a framework dictated by the legal requirements.

↓

ARGUMENT

Finally, develop your argument which explicitly applies the law to the facts.

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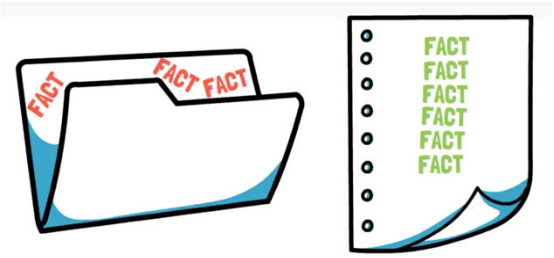
Part 7: Draft efficiently to improve focus

The benefit of this approach is that it will help you include all the facts that are necessary, but no more facts than are necessary.



Including insignificant facts can be a problem if you jump in with facts first, and particularly if you are simply trying to incorporate facts from affidavits or transcripts.

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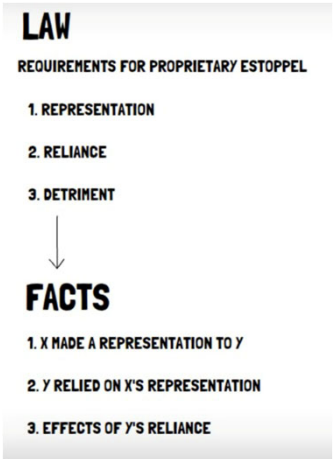
Part 7: Draft efficiently to improve focus

Starting with the law shows you the hooks to set in the facts, that you can use to pull the judge along in the argument.



Organizing the facts under headings that anticipate application of the law gives you a head start on your argument, because the judge can already see how the facts fit into the legal framework. Don't worry about repetition of facts in the argument section, you can get creative about how to include them a second time.

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PART 8: CHOOSE AND FRAME ISSUES ADVANTAGEOUSLY

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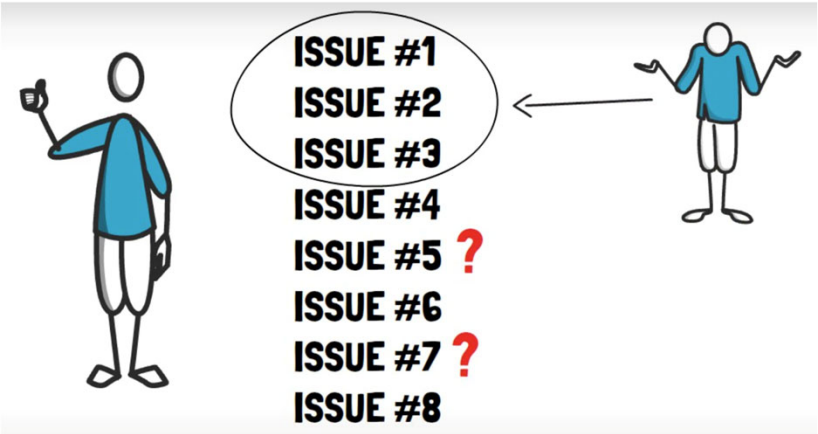
Part 8: Choose and frame issues and advantageously

The selection of issues is where you must demonstrate your confidence in your case. Particularly on an appeal, nothing suggests a loser case or a lack of analysis more than a litany of issues.



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Part 8: Choose and frame issues and advantageously

The common advice is to have 3 issues at maximum, and fewer is even better.

ISSUE #1
ISSUE #2
ISSUE #3

But it is this lack of confidence in your first three issues that is telegraphed to the judge.

There is an instinctive reluctance to let go of an issue that just might be a winner.

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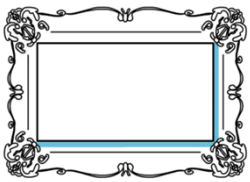
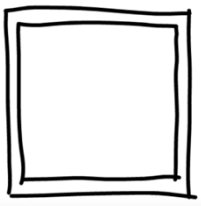
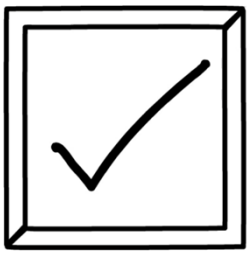
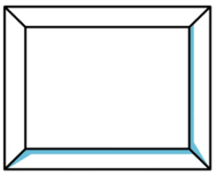
Part 8: Choose and frame issues and advantageously







Take time in framing the issues. It is often a challenge to avoid being too general while at the same time avoiding being too convoluted.



Play around with it until you hit on a formulation that best captures what must be decided to win your case. Sometimes, you need to revisit the issues to refine them after you have completed the argument section.

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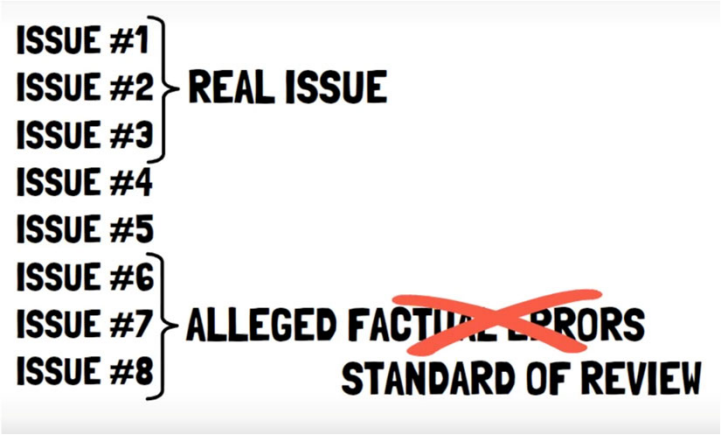
Part 8: Choose and frame issues and advantageously

If you are the responding party and you don't like the way the issues are framed by the opposing party…reframe them!

As long as you are sure to address all of the arguments, you can do that in a structure and order that benefits your client.

If you face a factum with many issues, assist the court by analyzing and amalgamating them – drill down and identify the real issues raised by the opposing party.

If a number of the issues can be answered the same way, collect them together and eliminate them as a group.



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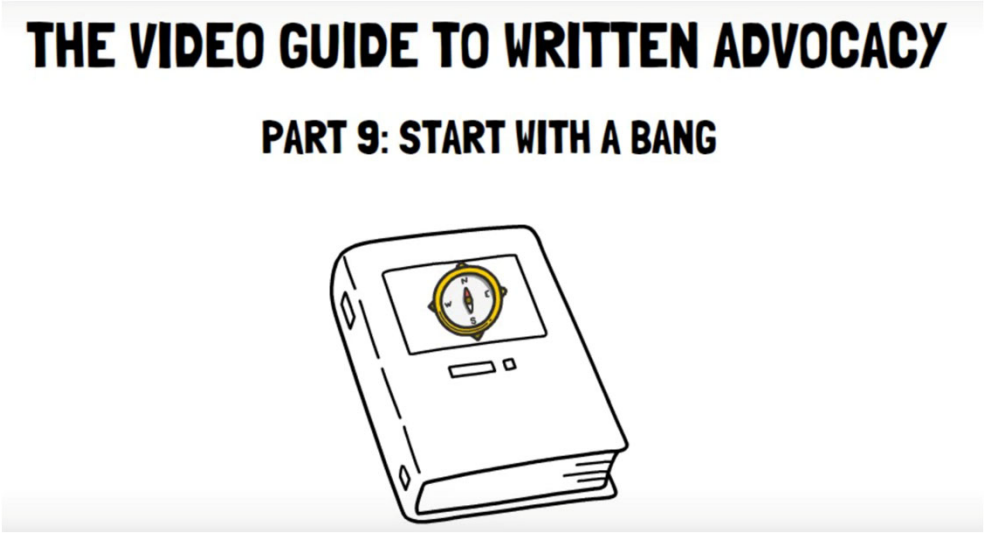

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VIDEO GUIDE TO WRITTEN ADVOCACY
Part 9: Start with a bang

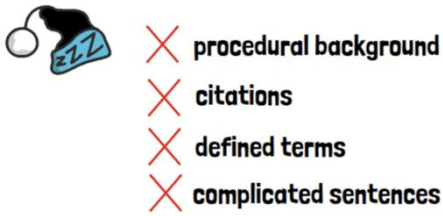
You should always do an overview or opening statement!

This is not an introduction where you lay out the procedural background (yawn!).

This is an overview of your entire argument, in the plainest of English that any person could understand.

There should be no citations, no defined terms, no complicated sentences.

This is the place where you show the path and the reason why the judge should end at your destination.



I like to include something about implications – what it ultimately means for the court to reach one result over another – for the parties, of course, and if applicable, for the area of law.

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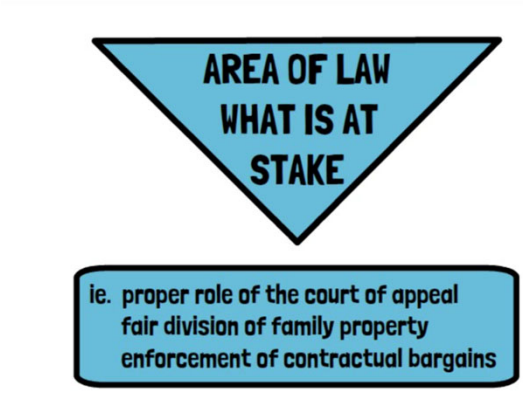
Part 9: Start with a bang



Start with a snappy paragraph that orients the judge to the area of law and what is at stake.

This is not the same thing as ”the issues” but more a super high level statement on what intervention is being requested of the court or opposed, as the case may be. But snappy with a hint of thrust of the argument.

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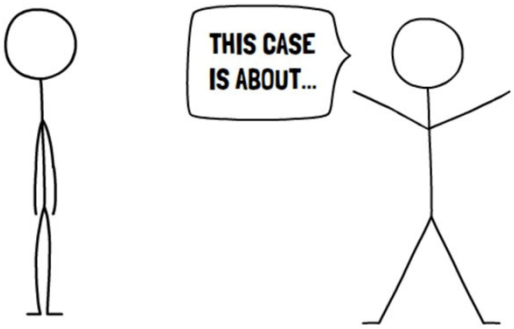
VIDEO GUIDE TO WRITTEN ADVOCACY
Part 9: Start with a bang

One challenge for the overview is to state enough of the facts to frame the issues, without getting bogged down in them.



It is that version that should find its way into your overview. Again, procedural recitations, technical details, and defined terms have no home here.

One way to achieve clarity on the essential facts is to say them out loud, as if you were explaining to a new door neighbour.

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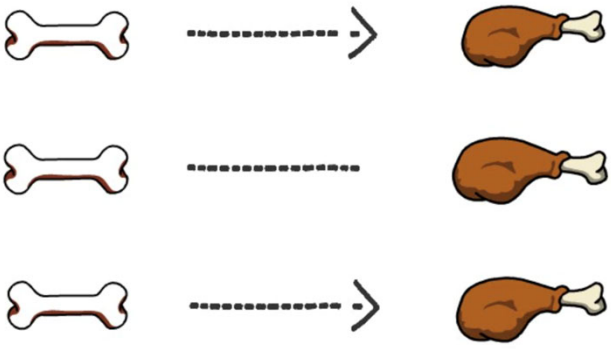
Part 9: Start with a bang

Address one issue per paragraph, giving the most basic version of the law and how it should apply in this case to get to the just result.

This overview should whet the judge's appetite to see these issues fleshed out in the argument.



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THE VIDEO GUIDE TO WRITTEN ADVOCACY

PART 10: TELL A COMPELLING STORY

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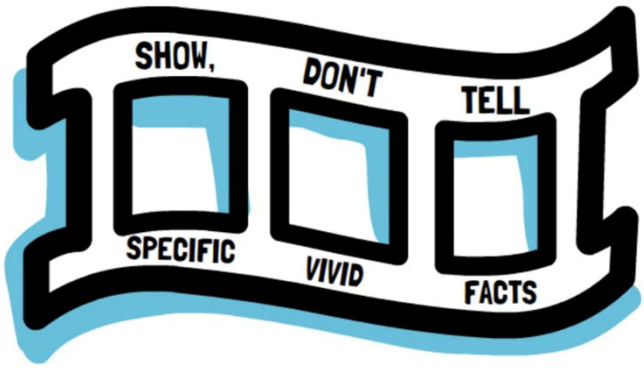
VIDEO GUIDE TO WRITTEN ADVOCACY
Part 10: Tell a compelling story

Most cases are won or lost on the facts. You must win the judge over to your side even before you set out the law that compels the judge to do so.

Write clearly so that the judge can draw the conclusion – the argument version of "show, don't tell."

Paint pictures using specific, vivid facts and succinct and lively words. Try to tease out the human element, even in commercial cases where that may not be as obvious.



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Part 10: Tell a compelling story

To the extent you can, rely on undisputed facts.

UNDISPUTED FACTS

SUPPORTIVE FACT

DISPUTED

SUPPORTIVE FACT

FACT

SUPPORTIVE FACT

SUPPORTIVE FACT

Where a fact that is dispute is essential to your case, identify the fact as one in dispute, and surround it with supportive evidence which casts doubt on the opposing version.

But beware, the statement of facts is not the place to be argumentative, save that for later.

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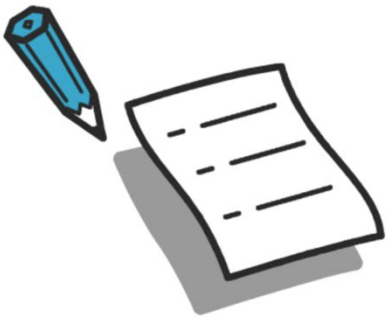
Part 10: Tell a compelling story

The facts should be organized in a way that anticipates the application of the law with descriptive headings that line up with the legal framework. Exactly how this is best done depends on each individual case.



ORGANIZED UNDER HEADINGS

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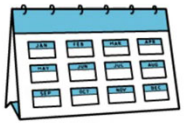
Part 10: Tell a compelling story

Often, a chronological approach is easiest to follow, at least when it comes to the basic facts of the case.

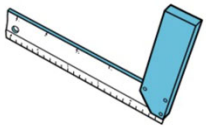


The next day...

Two weeks later...

After a year...

However, only include dates if they are crucially important – better to use one date to anchor the story and then use other terms to establish a timeline:



Production decreased by 20%...

A quarter of the participants...

The price nearly tripled...

Don't make the judge do the math…do it for them. In dates and times, as in other things, only include the facts that are necessary.

Don't ask a busy judge to keep track of things that don't matter, this saps their attention and causes them to lose focus on the facts that matter to win the case.

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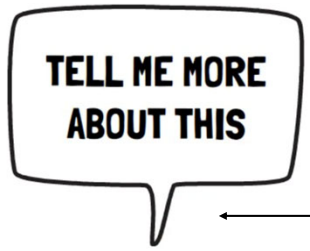
Part 10: Tell a compelling story



If you don't have a solid answer, don't include it!

For every single thing you include in your facts, imagine the judge asking: "why are you telling me this?"

If you do have an answer, organize that section of the facts so that the answer to the question "why are you telling me this?" is evident in that section.

A judge should always know the point of a detail before you draw the judge's attention to it. This changes the judge's thinking from "why are you telling me this?" to "okay, you've told me X is an important factor, tell me all about X."

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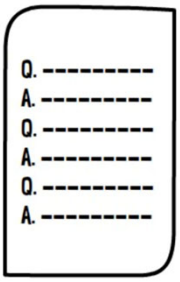
Part 10: Tell a compelling story

Some suggest that you should not include excerpts from transcripts, but I think it can be very effective to include portions of the transcript exactly as they appear in the transcript, to give the judge a flavour of the evidence "from the horse's mouth" as it were.

X's answers on discovery demonstrate....



However, just like with authorities, there is a tendency to skip over long block quotes. To avoid this, set up the excerpt by explaining exactly why you think it is worth the judge's time and then include just the most salient bits.

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Part 10: Tell a compelling story

Where it would be effective, present complicated facts in graphs or tables. Get creative!

I once captured the circularity of regulatory previsions in a diagram that saved a lot of explaining in words.

As a bonus, it made it easy to see how the provisions should be interpreted to select our recommended exit point from the circle – that of the most specific provision.

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THE VIDEO GUIDE TO WRITTEN ADVOCACY

PART 11: MAKE THE MOST OF AUTHORITIES

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VIDEO GUIDE TO WRITTEN ADVOCACY
Part 11: Make the most of authorities

FRAMEWORK OF LAW

APPLICATION TO FACTS

The framework of the law should be set out first, then the law should be applied to the facts.

1. *Y* has established all the requirements for proprietary estoppel
   a. Introduction on proprietary estoppel
   b. Requirements for proprietary estoppel
      i) Representation creating an expectation relating to land
      ii) Reasonable reliance on the representation
      iii) Detriment resulting from reliance
   c. The requirements of propriety estoppel are met in this case
      i) X made a representation that led *Y* to expect an interest in the home
      ii) *Y* reasonably relied on X's representation
      iii) *Y* suffered a detriment as a result of this reliance on X's representation

Do this on an issue by issue basis, starting with a heading that is a declarative statement of the desired result on that issue, followed by a short introduction.

Then, under a descriptive heading of the law, build the framework of the law in preparation for application to the facts. Then under relevant headings taken from the framework apply the framework of the law to the facts.

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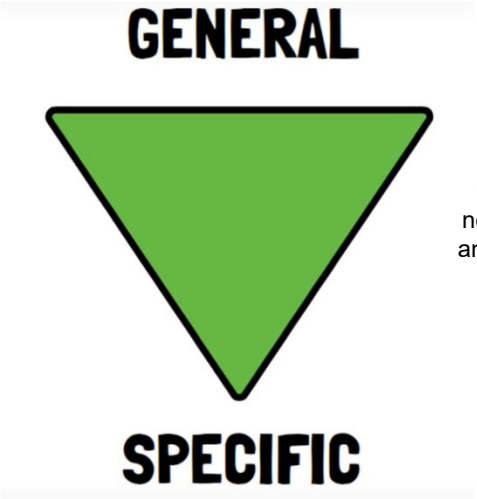
Part 11: Make the most of authorities

When setting out the framework of the law, start with the broadest proposition that is necessary and then keep drilling down to the particular issue at hand.



Only site as many cases are needed. Most cases are simply an application of existing cases. If this is so, cite the leading authority, and if it is dated a recent application of it

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Part 11: Make the most of authorities

SIMILAR FACT CASES

When you move from the broader "framework" cases down to similar cases that you argue should lead to a similar result in your case, you must show that the cases are similar enough in critical ways.

If a case you heavily rely upon is easily distinguished by the other side, it make your arguments look weak.

For your part, you should anticipate and distinguish the cases your opponent rely on. It is particularly helpful if you can find something in your opponent's cases that support your arguments!

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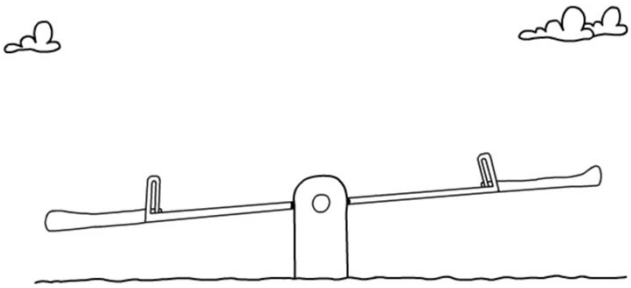
Part 11: Make the most of authorities



You should be strategic in selection and presentation of your authorities, but you must ensure that neither the selection nor the presentation is misleading.

You have a duty to the court to cite binding authorities on point, including those not in your favour. And you must be fair in your use of those authorities as well.

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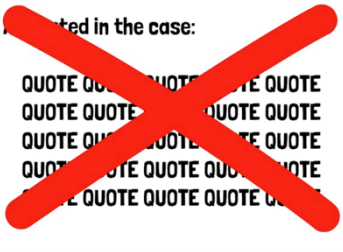
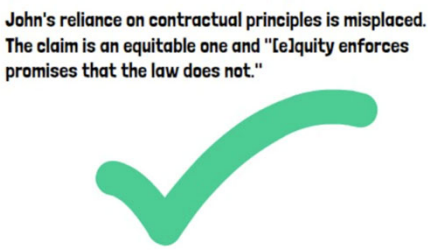
Part 11: Make the most of authorities



When it comes to quoting from case law, you should avoid block quotes!

Readers generally skip over them, and they break up the flow of the argument.



However, there is value to verbatim quoting when you find words that are so good you don't want to paraphrase them.

It also boosts your credibility when you are able to support you characterization of a case with on point words from the case.

The best way to do this is through embedded quotes, where you include just the choicest words in a sentence that frames them for easy reading

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Part 11: Make the most of authorities

Where space permits, citations following the paragraph are better than footnotes.

I prefer citations in the body of the argument, because the citations themselves contain important information about the value of your authorities (binding, persuasive, or recent)

If you use footnotes, you need to put that information into the text.

I find that information in the body of the paragraphs is more disruptive than the citations following the paragraphs

John's reliance on contractual principles is misplaced. The claim is an equitable one and "[e]quity enforces promises that the law does not."

Cowper-Smith v. Morgan, 2017 SCC 61, at para. 1.

KEEP IN MIND: NOT ALL AUTHORITIES ARE EQUAL.
(an obvious point but one that some lawyers apparently forget)

Including citations following the paragraphs also keeps paragraphs shorter and more contained to a single idea, and adds white space to the page which is pleasing to the eye.

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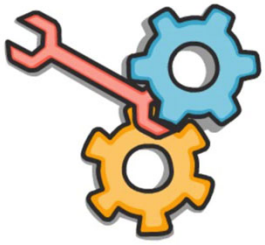
VIDEO GUIDE TO WRITTEN ADVOCACY
Part 11: Make the most of authorities

Keep citations simple and neutral.

Follow guidelines where provided.



Use only one citation for each case, neutral if available, if it is not available, there may be local preferences for certain reporters.

Choose the first official report first (supreme court reports, federal reporter) but otherwise use your best judgement. Be aware that some courts have specific practice guidelines for the citation of authorities that you should follow

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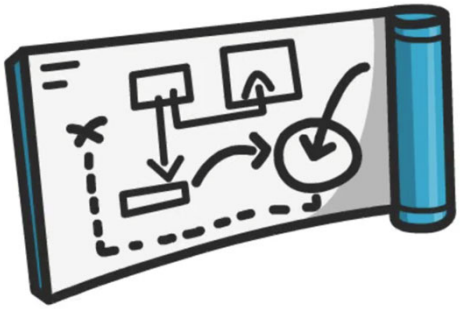
Part 11: Make the most of authorities



If your case is truly one of changing or expanding the law, then a lot more may be necessary, such as a historic review of the development of the case law or the enactment of legislation.

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PART 12: GO ALL OUT IN THE ARGUMENT

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Part 12: Go all out in the argument

I recommend proceeding on an issue by issue basis, setting out the framework of the law first, and then developing the argument that shows how the facts fit into the legal framework.

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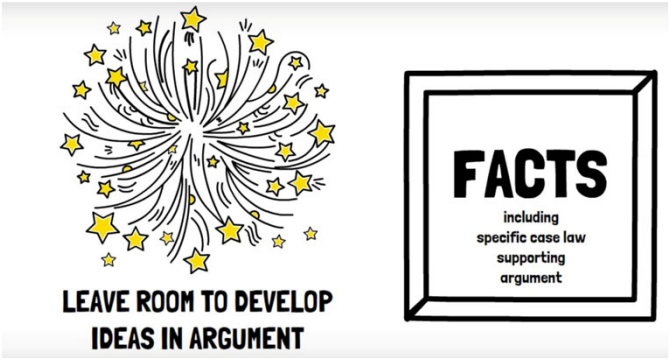
Part 12: Go all out in the argument



In the Statement of Facts and Summary of the Law, the structure and choices are yours, but when you get to the argument, you've built the foundation and you can really shine. This is where you truly persuade! My goal is to always leave as much room as possible to do that. As a result, I keep both the statement of facts and summary of law on each issue as trim as possible.

It is not that I don't cite law in what I am now referring to as the argument – I do – but the framework of the law is set out in a distinct section prior to the argument. The law in the argument section is more particular – for instance arguing that a similar fact case dictates a similar result, or using a case to address a particular problem in the facts.

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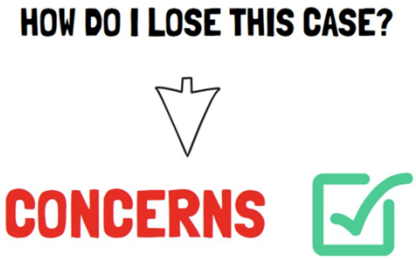
Part 12: Go all out in the argument

It has been said that the win goes to the party who deals best with all the concerns raised by the circumstances and the argument section is where you should be certain to address these concerns. These concerns do not need to be huge policy concerns, and can simply be a matter of fairness between the parties.



In an earlier clip I recommended asking yourself "how do I lose this case?" The things that come up in answering that question are the things you need to address here. You need to demonstrate that the result you are seeking is either the only just result, or simply the result that is more just than the result sought by the opposing side.

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Part 12: Go all out in the argument

TOO MUCH LAW & TOO LITTLE ARGUMENT

In a recent CPD on factum writing, one judge complained that she is often presented with too much law and too little argument.

It is your job to apply the law to the facts and persuade the judge of the fairness of your desired result.

This is the why…this is the because.

Try starting with a sentence with the word "Because…" (which despite possible belief is not an incorrect way to start a sentence)

For example, "Because the tribunal has no jurisdiction to award punitive damages, this court should exercise it's inherent jurisdiction to provide a remedy."

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Part 12: Go all out in the argument

PLACEMENT OF ARGUMENTS?

A frequent question asked is first whether you should place your best argument first or last, and I would say it all depends. I would advise you to determine whether there is a logical progression to the arguments. If so, that trumps anything else.

If the final argument in the logical progression is so weak that it will drag down your argument, you should probably drop it. Otherwise, if logical progression is not a concern, I would structure the argument to ensure you do not end with a weaker spot. If you can wedge it in the middle of two strong arguments, that can be beneficial.

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Part 12: Go all out in the argument

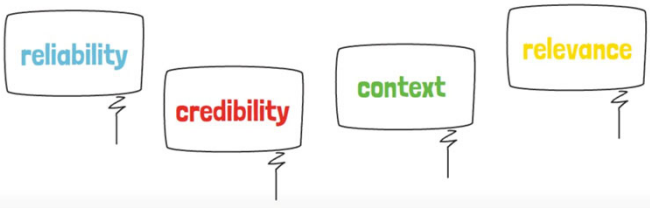
The argument section is also where you can get argumentative about the facts.

This is where you can persuade the judge to accept your version of the facts where the facts are disputed.

This may involve explicitly arguing the reliability of evidence and credibility of witnesses.

While you can set out conflicting evidence in the Statement of Facts, in the argument you can be explicit about why the conflicting evidence, should lead a judge to accept your version of the facts.

GET ARGUMENTATIVE ABOUT THE FACTS



You can assert the greater relevance of facts favourable to you, and irrelevance of facts favourable to the other side

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Part 12: Go all out in the argument

CONCLUSION

Don't repeat arguments multiple times in an attempt to make them stick. Make your point memorably the first time, and then respect your reader by moving on to other points.

most difficult because point first writing leaves nothing to the end!

It is appropriate, however, to revisit things in your conclusion. I find writing the conclusion the most difficult part of the argument, and I usually leave it to the very end, after polishing the argument, and perfecting the opening.

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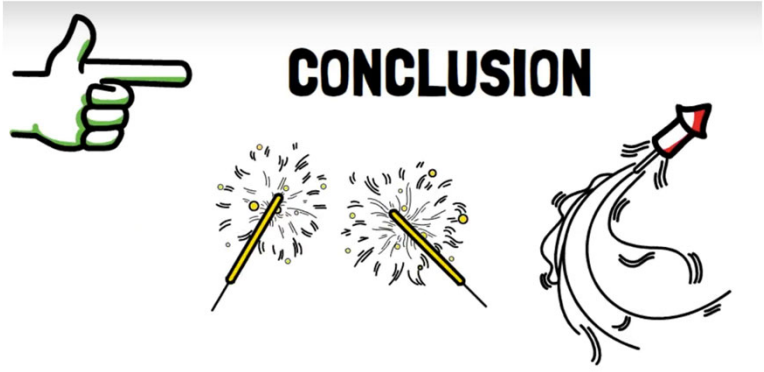
Part 12: Go all out in the argument

My goal is always to find a way to hit the highlights without being repetitive and then add some final spin to end with impact.



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PART 13: MANAGE ADVERSE FACTS AND PROBLEMATIC ARGUMENTS

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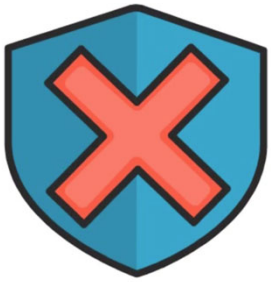
77

VIDEO GUIDE TO WRITTEN ADVOCACY
Part 13: Manage adverse facts and problematic arguments

candour
(noun)

the quality of being honest and telling the truth, especially about a difficult or embarrassing subject

I like the definition of the word candour in the Cambridge dictionary which defines it as the quality of being honest and telling the truth, especially about a difficult or embarrassing subject.



candour
(noun)

the quality of being honest and telling the truth, especially about a difficult or embarrassing subject

Often our clients have done something very much not to their credit, or we are faced with an unfortunate authority that seems like a roadblock.

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VIDEO GUIDE TO WRITTEN ADVOCACY
Part 13: Manage adverse facts and problematic arguments

So frequently I see lawyer try to hide weaknesses rather than face them head on. It may work on occasion, but countless times I have seen this approach backfire. It is interesting to note how often the judge then unquestioningly adopts and follows the other side's brief, even to the point of ignoring weaknesses in the other brief and making errors in doing so.

You must focus on your strong points, yes, but it is even more important to acknowledge your weak points, either in the facts or the law, and show how you still win despite those weak points.

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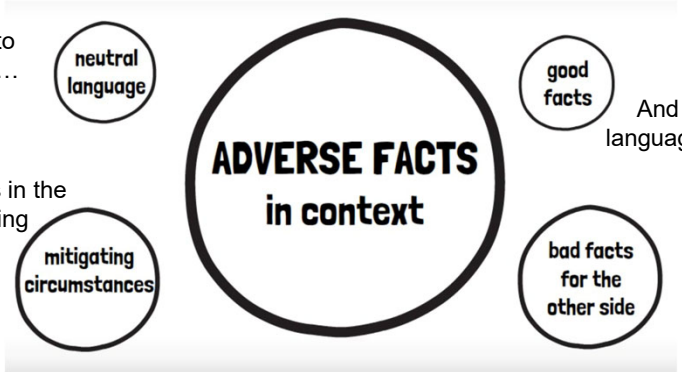
Part 13: Manage adverse facts and problematic arguments

For facts, put adverse facts in context to mitigate any harm they might do to your position.

Use neutral words to relate the bad facts…



And use more powerful language when relating good facts

Try framing bad facts in the context of mitigating circumstances

Or couch them with other facts that paint your client in a more favourable light.

You can tuck your bad facts in with bad facts for the opposing side.

However you do it, make sure they are in there but don't hold the attention of the judge in the same way as the facts that work in your favour.

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Part 13: Manage adverse facts and problematic arguments

For authorities, find ways to distinguish them either on the facts or on a change in the legal context since the decision was made. Show that the law favouring your position is binding or more persuasive due to the level or reputation of the court, or on the basis that it is more recent or more considered decision.

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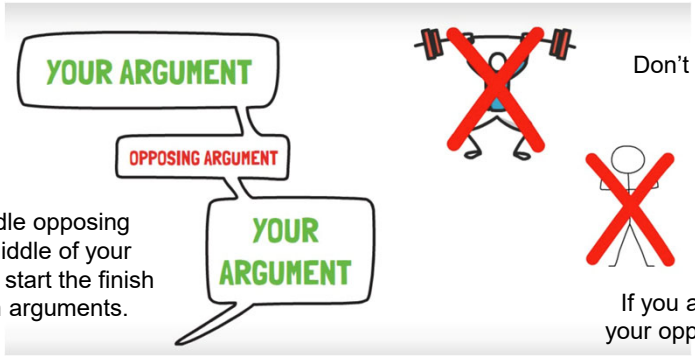
Part 13: Manage adverse facts and problematic arguments



For argument, handle opposing arguments in the middle of your argument so that you start the finish strong on your own arguments.

Set up the argument for your position, then quickly set out your opponent's arguments and deal with them!

Don't give them too much juice…

but also don't set up strawman arguments.

If you are not fair in presenting your opponent's arguments, it will show.

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Part 13: Manage adverse facts and problematic arguments

Subordinate conjunctions such as “although” “while” “whereas” and “despite” are useful to place the argument against you in the subordinate clause, so that the dominating idea of the sentence is your own. Here are a few examples…

ALTHOUGH WHILE WHEREAS DESPITE

Although it could be argued that…
…this argument fails because…

While some concern arises from…
…this can be addressed by…

Despite the authorities that hold…
…the legislation governs and dictates that…

Make sure to never end on your back foot. You want to end with a powerful summary of your strongest arguments and a picture of the destination you want the judge to choose.

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PART 14: BOOST YOUR WRITING WITH STRONG WORDS AND CONNECTORS

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Part 14: Boost your writing with strong words and connectors

Watch video for detailed pointers.

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PART 15: USE LISTS TO ORGANIZE, TIGHTEN OR JUXTAPOSE

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VIDEO GUIDE TO WRITTEN ADVOCACY
Part 15: Use lists to organize, tighten or juxtapose

If you have any doubt about whether judges love numbered lists or bullet points, look at their judgments! Which lower court cases tend to be cited most frequently? Often they are the ones that have condensed material into numbered or bulleted lists.

When I start writing sentences that all seem to begin the same way, so that they are becoming repetitive, this is my cue to organize these sentences into a list.

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VIDEO GUIDE TO WRITTEN ADVOCACY
Part 15: Use lists to organize, tighten or juxtapose

Here is a bulleted list of reasons to use bulleted lists.

Bulleted and numbered lists:

- clarify your thinking
- increase white space on the page
- reduce repetition
- enable you to start each point with a power word

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Part 15: Use lists to organize, tighten or juxtapose

Bulleted lists are a great way to summarize the application of a principle to different circumstances in previous cases. Another way to use them is to enumerate the ways in which a case is distinguishable. Here is an example of how I used bulleted lists to contrast a crucial authority relied upon by the trial judge:

The trial judge erred in relying on White because it is distinguishable on its facts. In White:

1. the temporal delay was almost a year and a half;
2. the plaintiff engaged in new activities (lifting a new baby); and
3. there was expert evidence tying the new activities to the symptoms.

In this case:

1. the temporal delay was only six weeks;
2. the plaintiff engaged in his usual work activities; and
3. there was no expert evidence to tie the symptoms to any activity or incident other than the accident.

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Part 15: Use lists to organize, tighten or juxtapose

Be careful to structure bulleted lists to be as trim as possible, with proper parallel construction. A quick way to check this is to make sure each bullet reads properly, and the same way, from the introduction to the list.

Bulleted and numbered lists:

- clarify your thinking
- increase white space on the page
- reduce repetition
- enable you to start each point with a power word

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Part 15: Use lists to organize, tighten or juxtapose

INTRODUCE NUMBERED LISTS EXPLICITLY

The court must consider three factors in exercising this discretion:

1.

2.

3.

SINGLE SPACED, BLANK LINE BETWEEN

Where appropriate, introduce lists of points or ideas explicitly – how many items and how they are related – before enumerating. It can be helpful to place in the judge's mind that there are three factors to consider in the exercise of discretion, for example.

Single space the list points, with a blank line between them. Don't make the list items too long to prevent any suspicion that you are circumventing page limits.

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PART 16: POLISH, POLISH, POLISH!

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Part 16: Polish, polish, polish!

AT LEAST FOUR EDITS

1. For soundness and organization (to catch thinking problems)
2. For readability (to catch grammar problems)
3. For consistency (to catch reference problems)
4. For accuracy (to catch citation problems)

Watch video for tips for each edit.

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93

J UR X Q GV I R U O

1. Error of law
2. Error of mixed fact and law
3. Palpable and overriding error in finding of fact
4. Unreasonable exercise of discretion
5. Failure to provide adequate reasons
6. Failure to decide issues independently (demonstrated by copying from submissions)

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94