

## BILL 59 - What Have We Learned So Far?

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2002 OTLA Fall Conference

The tort provisions of Bill 59 were a welcome change from the overly restrictive regime of Bill 164, when they were enacted in 1996. Although the word "permanent" had made its way back into the threshold and the deductible had been increased by 50%, the rights of an innocent accident victim to recover economic losses had been partially restored. Several important Bill 59 tort issues were decided within the first few years after its inception (see, for example, *Henderson v. Parker* (1998), 42 O.R. (3d) 462), but the law in this area is still developing 6 years later.

This paper will attempt to review some of the developments in Bill 59 tort law over the past few years. It is assumed that the reader has some knowledge of the *Insurance Act* ("the *Act*"), Ontario Regulation 461/96 ("the *Regulation*") and the "Bill 59 provisions" (s. 258.2-258.6 and s. 267.3-267.11 of the *Act*). All references to section numbers are sections of the *Act*, unless otherwise stated.

### Arising Directly or Indirectly - s. 267.5

All Bill 59 tort claims start with the question of whether or not the damages result from "bodily injury or death arising directly or indirectly from the use or operation of the automobile". If the answer is "yes", the Bill 59 provisions will apply.

The case of *Hachey-Tweedle v. Trillium Funeral Service Corp.*, [1999] O.J. No. 883 (Zalev J.) involved a plaintiff who was injured in a slip and fall on ice in a parking lot, while closing the door of her pick-up truck. In order to determine whether the

injuries arose directly or indirectly from the use of the automobile, Justice Zalev applied the 2 part test set out in the leading case of *Amos v. I.C.B.C.*, 127 D.L.R. (4<sup>th</sup>) 618:

1. Did the accident result from the ordinary and well-known activities to which automobiles are put?
2. Is there some nexus or causal relationship between the plaintiff's injuries and the use or operation of the motor vehicle, or is the connection merely incidental or fortuitous?

Based on the facts of the case (and previous similar cases), Justice Zalev found that the test had been met and that the Bill 59 provisions therefore applied.

It is interesting to contrast this case with the law developing in Bill 59 accident benefits claims, where the word "indirectly" has been removed from the definition of "accident". In *Chisolm v. Liberty Mutual Group*, [2001] O.J. No. 3294 (Chapnik J.), the plaintiff was in his car when he was the victim of a "drive by shooting". Justice Chapnik held that the use or operation of the vehicle did not directly cause the injuries, and therefore the plaintiff had no recourse to his accident benefits policy. What if Mr. Chisolm had been able to identify and sue his assailant? The assailant was a "person present at the incident", and arguably the injuries were caused indirectly (but not directly) as a result of the use or operation of a motor vehicle. Under those circumstances, Mr. Chisolm would not be able to collect accident benefits, but would be subject to the Bill 59 provisions with the effect that, amongst other things, he would have no recovery for any health care expenses. There is clearly a potential hole in the Bill 59 coverage.

Pre-action Obligations – s. 258.3 and 258.5

Bill 59 created an entirely new scheme of pre-action discovery, including a 120 day notice period, the requirement of the plaintiff to provide medical information, and, if requested by the 3<sup>rd</sup> party insurer, the requirement of the plaintiff to submit to medical examinations. The remedy for failing to comply with these requirements is found in s. 258.3(9), in that the court shall consider the non-compliance in awarding costs. Can the 3<sup>rd</sup> party insurer force a plaintiff to attend a pre-action medical? In the case of *McCombie v. Cadotte* (2001), 53 O.R. (3d) 704, the Ontario Court of Appeal answered that question in the negative. After reviewing the conflicting case law in this area [*Fasken v. Iola*, *Rancourt v. Demetrios*, *Boulianne v. Donovan*, *Lodge v. Regier*, *Moons v. Maxin*], the Court concluded that the remedy (cost sanctions) for failing to comply with s. 258.3 (as well as 258.5 and 258.6) was clearly set out in the *Act*. To go beyond that sanction would be to create a scheme, “more elaborate, costly and heavy-handed than was contemplated by the legislature.”

The issue of an insurer’s non-compliance was considered in *Sadozai v. Mustakinovski*, [2000] O.J. No. 4728 (Croll J.). In addition to suing the tort defendant, the plaintiff also sued Liberty, the 3<sup>rd</sup> party insurer, for a breach of the duty of good faith for failing to attempt to settle the claim as expeditiously as possible pursuant to s. 258.5. Croll J. struck the claim against Liberty, holding that the statement of claim disclosed no reasonable cause of action. S. 258.5 was held to be a complete code, including the cost sanction set out in s. 258.5(5). Since no other remedy was provided by the legislature, no other remedy was available to the plaintiff.

Threshold - s. 267.5(5)

The threshold for general damages continues to be an issue under Bill 59, especially in those cases where the plaintiff suffers from chronic pain.

In *Ahmed v. Challenger*, [2000] O.J. No. 4188 (Jennings J.), the "modified *Meyer* test" was created for the Bill 59 threshold as follows:

1. Has the injured person sustained permanent impairment of a physical, mental or psychological function?
2. If yes, is the function which is permanently impaired an important one?
3. If yes, is the impairment of the important function serious?

In this particular case, where the plaintiff sustained soft tissue injuries, Justice Jennings commented that there was no damage to the defendant's car, and the slight damage to the plaintiff's car was never fixed. In describing the "slight to moderate" impact, Justice Jennings stated that the cars merely "came into contact". As a demonstration of the relative strength of the case, the defendant actually called one of the plaintiff's family doctors as a witness. Not surprisingly, the injuries were not considered to be permanent.

*Snider v. Salerno* (2001), 58 O.R. (3d) 209 (Killeen J.) involved a 70 year-old woman who sustained a serious "whiplash" injury. She was healthy and very active before the accident. She was involved regularly with her grandchildren, took vacations with them and often provided babysitting services. She lived alone, was in almost "perfect health", was a serious bridge player, and liked to garden. She suffered from chronic pain as a result of her injuries. It was found that the plaintiff was in the minority of whiplash victims who never fully recover from their injuries.

Justice Killeen applied the modified *Meyer* test as set out in *Ahmed*. It was found that the plaintiff's life "came crashing down" as a result of the accident, and that she met all three parts of the test. Of course, this is also the case with the infamous comments about the notorious defence doctor, Dr. Clifford.

*Morrison v. Gravina*, [2001] O.J. No. 2060 (Greer J.) is most often cited with respect to the issue of housekeeping expenses (see *infra*). However, the case also involved a threshold issue. Although the plaintiff was not working at the time of the accident, she had been looking for work. The plaintiff suffered from chronic pain, and was obviously a credible witness at the trial. Although it is not entirely clear, Justice Greer seems to rely upon *Chilman v. Dimitrijevic* (1996), 28 O.R. (3d) 536 (C.A.), for the proposition that a plaintiff must only prove future events (in this case, the permanency of the injuries) based on a "substantial possibility" test, as opposed to a balance of probabilities. The evidence of the plaintiff, the medical witnesses and especially several lay witnesses, was enough to get the plaintiff over the threshold. This case is another example of the importance of lay witnesses in chronic pain cases.

In *Altomonte v. Mathews*, [2001] O.J. No. 5756 (McDermid J.), the plaintiff continued to work full time for 2 ½ years after the accident, although she developed chronic pain during that period of time. After she gave birth to her second child, she was only able to return to self-employed work on a part-time basis, working from home. Justice McDermid found that, "the plaintiff has a limited reservoir of energy and capacity to work and perform the activities of daily living. I infer that once her second child was born, that reservoir was insufficient to permit her to remain working full time." On that basis, the plaintiff got over the threshold.

### Housekeeping and Home Maintenance - 267.5(3)

Is a plaintiff able to recover housekeeping and home maintenance expenses in a tort claim, or is the claim barred by the prohibition on recovering "health care expenses" in a non-catastrophic claim? One can only hope that this issue has now been put to bed.

In *Briggs v. Maybee* (2001), 53 O.R. (3d) 368, Justice Belch, following a thorough review of the relevant provisions, determined that housekeeping and home maintenance expenses were not covered by the definition of "health care", and were therefore recoverable.

However, Justice Greer came to the opposite conclusion in *Morrison v. Gravina*, [2001] O.J. No. 1208. The decision centered on the notion that the Bill 59 tort provisions and the *Statutory Accident Benefits Schedule (SABS)* formed a "complete package", and that essentially one could not sue in tort for an expense that was covered by the *SABS*. However, Justice Greer made no reference to the definition of "health care" in s. 224(1) of the *Act*, resulting, it is respectfully suggested, in a misunderstanding of the prohibition on suing for "health care expenses".

*Hunt v. Martin*, [2002] O.J. No. 3227 (Chapnik J.) is the latest word on this issue. Both *Briggs* and *Morrison* were reviewed (as well as another unreported decision on point, *Lodge v. Regier*, [2002]). Relying upon the definition of "health care" in s. 224(1), Justice Chapnik preferred the reasoning in *Briggs* to that in *Morrison* and therefore determined that housekeeping and home maintenance expenses were recoverable in tort.

### Unprotected Defendants and Vicarious Liability - s. 267.5 and 267.7(1)

Protected defendants, i.e. owners and occupants of an automobile and any person present at the incident, get the benefit of all of the Bill 59 provisions. Other defendants,

called unprotected defendants, should not be entitled to the same benefits. Since the first no-fault regime came into place in 1990, questions have arisen regarding the scope of vicarious liability of employers for the negligence of their "protected defendant employees", especially where the employer is also the owner of the automobile involved in the collision.

In order to really appreciate the continuing development of the law in this area under Bill 59, one would be advised to review the leading cases under the previous no-fault regimes, including *Tutton v. Pickering (Town)* (1999), 46 O.R. (3d) (C.A.), *Harroun v. Turriff* (2000), 50 O.R. (3d) 634 (C.A.) and *Derksen v. 539938 Ontario Ltd.* (1999), 123 O.A.C. 232 (C.A.). Further, one should also review *Harrison v. Toronto Motor Car*, [1945] 1 D.L.R. 286 (Ont. C.A.) and *Co-operators Insurance v. Kearney* (1964), 48 D.L.R. (2d) 1 (S.C.C.). In the latter two cases, it was determined that the old law immunizing the owner of a motor vehicle from liability to a passenger did not eliminate the passenger's cause of action against the owner based on vicarious liability for the negligence of his employee driver.

The claim in *Hechavarria v. Reale* (2000), 51 O.R. (3d) 364 (Nordheimer J.) resulted from a collision involving a bus owned by Laidlaw. Laidlaw was also the employer of the negligent driver, and was therefore vicariously liable for the negligence of the driver. The plaintiffs argued that, while Laidlaw was a protected defendant in its capacity as owner of the bus, it was not a protected defendant in its capacity as employer of the negligent driver. If the plaintiff was correct, Laidlaw would have been responsible for 100% of all of the plaintiffs' damages, not just the limited recovery available under the Bill 59 provisions. After reviewing the case law under the previous no-fault regimes,

Justice Nordheimer stated, "I have difficulty with the proposition that the same party in the same factual circumstances could be both a protected defendant as owner of the vehicle and an unprotected defendant as the employer of the driver of the vehicle". Respectfully, Justice Nordheimer did not sufficiently review *Harrison* and *Kearney*, which may have provided an answer to His Honour's concern about Laidlaw's dual role. In the result, it was determined that Laidlaw was a protected defendant. However, Justice Nordheimer went on to conclude that, had Laidlaw not been a protected defendant by virtue of its ownership of the bus, Laidlaw would have been liable for the full amount of the plaintiffs' damages.

In *Pugsley v. Rahbar*, [2002] O.J. No. 2779, Justice Molloy dealt with the issue of whether or not City Peel Taxi, the owner of the car and the employer of the taxi driver involved in the collision, was a protected defendant. After completing an analysis of all of the above noted cases, Justice Molloy concluded that she could not agree with Justice Nordheimer's reasoning in *Hechavarria*, and that she was bound by both *Harrison* and *Kearney* to conclude that City Peel Taxi was an unprotected defendant. Her Honour did, however, agree with Justice Nordheimer's conclusion that, as an unprotected defendant vicariously liable for the negligence of the driver, City Peel Taxi was liable for the full amount of the assessed damages, not subject to the Bill 59 restrictions.

Neither *Hechavarria* nor *Pugsley* have been appealed, and so we will have to wait for this issue to be finally decided by the Court of Appeal in a future case. For what it is worth, it is respectfully suggested that the reasoning in *Pugsley*, given the more thorough review of binding precedent, is to be preferred to that in *Hechavarria*.

Where there are both protected and unprotected joint tortfeasors, the calculation of who owes what to the plaintiff can be very complicated. *Sullivan Estate v. Bond* (2001), 55 O.R. (3d) 97 (C.A.) is the case that governs these calculations. One would be advised to read "The Aftermath of Sullivan Estate" by Stephen Moore, 2002 OTLA Spring Conference, which provides some helpful examples.

#### Deductibility of Collateral Benefits - s. 267.8

The deductibility of various collateral benefits was dealt with recently in *Di Girolamo v. Smolen* [2002] O.J. No. 1526 (Spiegel J.). In this fatality claim, the surviving spouse was in receipt of a CPP survivor's benefit. Justice Spiegel held that the conclusion of the Court of Appeal in *Dall Estate v. Adams* (1994), 19 O.R. (3d) 93, referencing s. 63 of the *Family Law Act*, was determinative of the issue, and that such benefits were not deductible.

The plaintiffs had also settled their *SABS* claims for \$15,000.00, broken down as \$7,500.00 for housekeeping, \$2,613.51 for costs and \$4,886.49 for "other expenses". The defendant argued that the \$4,886.49 should be deducted from the jury's award for future loss of housekeeping. Justice Spiegel, following *Bannon v. McNeely* (1998), 38 O.R. (3d) 659 (C.A.), held that the defendant had not met the burden of proving that the amount in question matched up with a head of damages awarded by the jury. As such, the defendant was not entitled to credit for the amount in question.

Finally, the defendant claimed credit for the \$25,000.00 *SABS* death benefit against the award for future pecuniary losses, including housekeeping. The defendant, relying upon case law under Bill 164, argued that the death benefit was meant to provide economic assistance following an insured person's death, and therefore was "in respect of

a pecuniary loss". However, the quantum of the death benefit under Bill 164 was based on the deceased's level on income, while the Bill 59 death benefit is not so dependant. Justice Spiegel held that the death benefit was not paid in respect of pecuniary loss, and therefore was not deductible from the damage award.

Most cases in this area deal with the deduction of collateral benefits that a plaintiff has received. There is also recent case law dealing with the deduction of benefits that the plaintiff has not received due to an, allegedly, "improvident settlement" of their *SABS* claims. We all remember the effect that an improvident settlement had on the poor worm farmer in *Collee v. Kyriacou* (1996), 31 O.R. (3d) 558. However, Bill 59 provides some protection that was not available to the worm farmer, in the form of s. 267.8(21) and (22).

Justice Greer dealt with this issue in *Morrison v. Gravina* (supra). In that case, the plaintiff had been denied non-earner benefits by her *SABS* insurer, four different times (which denial was supported by a D.A.C. report). She eventually settled her *SABS* claim for \$11,000.00, of which \$9,000.00 was allocated to medical benefits and \$2,000.00 to other expenses. Nothing was allocated to the non-earner benefits. Despite the fact that the defendant had argued at trial that the plaintiff's injuries were "minimal" and that she had sustained no economic loss, following the trial the defendant argued that the plaintiff settled her *SABS* claim in bad faith by not pursuing the non-earner benefits. Justice Greer dismissed the defendant's motion based on the Rule in *Browne v. Dunn*, as the defendant had failed to cross-examine the plaintiff on any of the relevant issues. However, Her Honour did go on to consider the merits of the motion. In the first place, she concluded that the benefits were not "available" to the plaintiff, since she had applied for the

benefits (several times, in fact) and the application was denied (s. 267.8(21)). Therefore, the defendant would have to show a "bad faith" settlement in order to be entitled to a credit for the non-earner benefits not actually received by the plaintiff. Justice Greer defined "bad faith" to mean "the conscious doing of a wrong or dishonest act and a state of mind affirmatively operating with ill will or an improper or illegal design". The onus was on the defendant to prove bad faith, and there was no evidence that the plaintiff had conducted herself in such a manner.

O.H.I.P. Subrogated Claims – s. 267.8(17) & (18)

For some time before Bill 59 was enacted there was a complete bar on O.H.I.P.'s right to subrogate in a motor vehicle claim. Bill 59 created a limited right for O.H.I.P. to pursue a subrogated claim against a defendant who is not insured under a motor vehicle liability policy.

The scope of O.H.I.P.'s rights was tested in *Georgiou v. Scarborough (City)*, [2002] O.J. No. 3335 (C.A.). The plaintiff was injured when she lost control of her car as a result of icy roads for which the City of Scarborough was responsible. Although Scarborough owned vehicles and was insured under a motor vehicle liability policy, the claim was not related in any way to Scarborough's ownership of a vehicle. Scarborough was defended by the commercial general liability insurer, not by the motor vehicle insurer. Despite these facts, the Court of Appeal found that O.H.I.P. had no right of subrogation in this case. Scarborough was clearly "a person insured under a motor vehicle liability policy" (s. 267.8(18)), even though that insurance policy had nothing to do with the claim. The Court reasoned that Scarborough indirectly contributes, through auto insurance premiums, to the annual levy paid to O.H.I.P. by the auto insurance

industry, and therefore should be exempt from O.H.I.P.'s right of subrogation. The Court found that the wording of s. 267.8(18) was unequivocal, and therefore O.H.I.P. had no right to maintain a subrogated claim in that case.

Costs - s. 267.5(9)

The \$15,000.00 deductible is bad for many reasons. One such reason is the effect that it might have on a plaintiff's entitlement to costs. Although s. 267.5(9), which states that the deductible shall not be considered in determining a party's entitlement to costs, seems to alleviate this problem, one can never be certain how a court will interpret such provisions. Two recent cases should give some comfort to lawyers who act on behalf of plaintiffs.

While Justice Killeen had no problem deciding that Ms. Snider's injuries were very significant and clearly met the threshold (*Snider v. Salerno*, supra), the jury obviously did not agree and returned an award of \$25,000.00 for general damages. The total award, after the deductible, was less than \$20,000.00. The defendant argued (*Snider v. Salerno*, [2002] O.J. No. 1004) that the award fell within the monetary jurisdiction of the simplified procedure, and as such the plaintiff should be denied her costs. Justice Killeen concluded that the \$15,000.00 deductible must be added back into the award in determining costs, and therefore the plaintiff was awarded her costs.

*Wicken v. Harssar*, [2002] O.J. No. 2843 (Stinson J.) involved a similar issue. After the deductible, the award to the plaintiff was \$9,966.67, inclusive of interest. Although the award fell within the jurisdiction of the Small Claims Court, Justice Stinson, relying upon *Snider*, would not deprive the plaintiff of his costs on that basis. However, the defendants also argued that they had made a formal offer to the plaintiff

that was more favourable than the award at trial, and that the usual cost consequences of Rule 49 should therefore follow. Justice Stinson disagreed, holding that a defendant's offer must exceed the actual recovery by at least \$15,000.00 in order to trigger the operation of Rule 49. This \$15,000.00 "cushion" provides an incentive to defendants to be slightly more generous with their offers to settle".

While I agree with the reasoning in *Wicken*, I would respectfully disagree with the math. The \$15,000.00 "cushion" would only apply where there is no contributory negligence on the part of the plaintiff. Where the award is reduced by some percentage for contributory negligence, the "cushion" would be reduced by that same percent.

#### Mandatory Structure - s. 267.10

Even after the damage award has been decided upon, the Bill 59 provisions are still not finished with plaintiffs or their lawyers. Under certain circumstances (see s. 6 of the *Regulation*) the court must order an award to be paid periodically.

The case of *Bishop v. Pinto*, [2002] O.J. No. 1866 (LaForme J.) involved a jury award in a fatal injury case of \$300,000 for future loss of support and \$30,000 for future loss of services. The defendant argued that s. 267.10 of the *Act* and s. 6 of the *Regulation* applied, and that therefore periodic payments must be ordered. Since the plaintiffs requested a gross-up, s. 116 of the Courts of Justice Act also required the consideration of a periodic award. Justice LaForme held that he must first consider whether or not periodic payments were required by the *Act*, and then whether s. 116 of the *Courts of Justice Act* applied.

According to s. 6(1) of the *Regulation*, if two of the four listed criteria are met, the court must order periodic payments. In the case at bar, the award was over \$100,000

(s. 6(1) 1.), but the plaintiff was over 18 (s. 6(1) 2.) and could manage the award in a prudent manner (s. 6(1) 4.). Therefore, s. 267.10 of the *Act* would only apply if "the plaintiff has no other means to fund his or her future care" (s. 6(1) 3.). Relying upon *Wilson v. Martinello* (1995), 23 O.R. (3d) 417 (C.A.), Justice LaForme held that in a fatality claim, the award is really for future losses, not future care as in a personal injury case. Justice LaForme also found that, while the plaintiff estimated that she could only earn \$15,000 per year, she was capable of finding and pursuing other means to fund the care should she choose to do so. Therefore, s. 6 of the *Regulation* did not apply and no structure was awarded pursuant to the *Act*.

### Conclusion

It has taken 6 years to answer some of the questions created by the Bill 59 provisions. Many questions remain unanswered. Just as the picture has started to become more clear over the past few years, Bill 59 is about to be amended. This paper should be read with those amendments in mind, as several of the cases will be inapplicable to the amended Bill 59 provisions. One can only hope that the law in this area will be more clear in 6 years than it is today, almost 6 years to the day after Bill 59 came into force. Don't bet on it.

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