IF THE CAP FITS…

Strategies for Representing Injured Victims Under The New Tort Regime.

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Introduction:

I have been asked to provide the plaintiff's perspective on strategies for representing injured victim's under the new automobile insurance tort regime. As of the date of this paper, there has been no judicial consideration of the new legislation. My suggestions therefore, will be based primarily on a review of how the courts in Ontario have interpreted the various incarnations of that province's automobile insurance threshold legislation.

The Nova Scotia Legislation

It has been over two years since the Nova Scotia legislature passed the Automobile Insurance Reform Act (AIRA). By now plaintiff and defence counsel and those in the insurance industry are familiar with the provisions of the legislation (and regulations) that limit the rights of innocent injured victims to fully recover compensation for injuries suffered in a motor vehicle accident.

Insurance Act

113B (1) In this Section,

(a) "minor injury" means a personal injury that

(i) does not result in a permanent serious disfigurement,

(ii) does not result in a permanent serious impairment of an important bodily function caused by a continuing injury which is physical in nature, and

(iii) resolves within twelve months following the accident;

(b) "serious impairment" means an impairment that causes substantial interference with a person's ability to perform their usual daily activities or their regular employment.

Automobile Insurance Tort Recovery Limitation Regulations

(f) "resolves" means

(i) does not cause or ceases to cause a serious impairment of an important bodily function which results from a continuing injury of a physical nature to produce substantial interference with the person's ability to perform their usual daily activities or their regular employment…

(g) "substantial interference" means, with respect to a person's ability to perform their regular employment, that the person is unable to perform, after reasonable accommodation by the person or the person's employer for the personal injury and reasonable efforts by the injured person to adjust to the accommodation, the essential elements of the activities required by the person's pre-accident employment;

(h) "usual daily activities" means the essential elements of the activities that are necessary for the person's provision of their own care and are important to people who are similarly situated considering, among other things, the injured person's age.

So what does it mean?

The threshold definition in section 113B and the underlying regulations are not a shining example of clarity in drafting.

There are serious questions about the constitutionality of the legislation and regulations. An examination of these issues is beyond the scope of this paper (but will be addressed in an upcoming challenge to the legislation that is currently before the courts).

The Threshold Trilogy

The terminology found in section 113B and the regulations mirrors in most respects the automobile insurance legislation first introduced in Ontario in 1990 (which has gone through four different regimes). Nova Scotia's legislation most resembles the provisions of the Ontario Motorists Protection Plan (OMPP) which was in effect from June 1990 to January 1994.

It would be safe to assume that when the courts in Nova Scotia are eventually called upon to interpret the provisions of the AIRA legislation, they will give some consideration to how the courts in Ontario have interpreted similar provisions of the OMPP.

The starting point for any examination of the provisions of the OMPP are three cases decided by the Ontario Court of Appeal now commonly referred to as The Trilogy. These decisions considered most of the important issues that commonly arise in threshold litigation.

Meyer v. Bright (1992), 9 O.R. (3d) 225 (Ont. C.A.)

Mr. Meyer was a 68 year old retired mechanic. He fractured his patella. He had ongoing complaints of pain and decreased leg strength and occasional instability.

Mrs. Meyer was a 66 year old housewife. She fractured her left patella, her wrist, and suffered soft tissue injuries to her ankle and shoulder.

Both plaintiffs failed to meet the threshold of having a serious impairment of an important bodily function.

Dalgliesh v. Greene (1993), 12 O.R. (3d) 40 (Ont. C.A.)

Mrs. Dalgleish was a 74 year old widow who had to undergo a spleenectomy leaving her with a 15 inch scar from her breasts to her navel.

While she was found to have suffered a permanent disfigurement, it was not found to be serious.

Lento v. Castaldo (1993), 12 O.R. (3d) 225 (Ont. C.A.)

Mr. Lento was an 18 year old auto mechanic. He suffered fractures and dislocations of his left hand and foot. The muscles that controlled fine motor control were affected and his foot was permanently stiff causing restrictions in his ability to kneel and squat.

His injuries were determined to be a permanent serious impairment of an important bodily function.

Key Elements:

The Trilogy, and the cases decided since, have identified a number of key elements in the legislation. In order to successfully pass the threshold Plaintiff counsel are going to have to lead evidence that the injury is:

- Permanent (or has not “resolved” within twelve months);
- Serious;
- Important;
- Physical; and
- Continuing

Permanent or twelve months?

The threshold definition found in section 113B (1) (a) is conjunctive. All three requirements must be met in order for injury to be minor. If the injury has not "resolved" (as defined in the regulations) within twelve months, it is not a minor injury.

If any injury that doesn't resolve within twelve months is not minor, then what is the relevance of the "permanent" requirement in subsections (i) and (ii) of the definition? The requirement is either meaningless or contradictory.

One thing about the definition is clear. If the injured person is completely better **within** twelve months, the injury is "minor" and certain (but not all) non-monetary losses are limited to a maximum of $2500.00.

Since many serious injuries may not manifest themselves or be diagnosed within twelve months of the injury (for example M.T.B.I. or T.M.J. injuries) it would appear to be imprudent for counsel representing injured victims to settle a claim for non-pecuniary damages within twelve months of the injury.

Assume it has been more than **twelve months** since the accident and the injured victim isn't better yet. Now what?

Is it "Permanent"?

If the twelve month resolution threshold has passed, I would submit that this part of the definition may be irrelevant. Plaintiff counsel will want to argue vigorously that an injury that lasts longer than twelve months prima facie meets the requirement of subsection (iii) of the AIRA threshold definition.

Reference to Hansard and the debates that took place in the legislature when the legislation was passed may be of assistance.

Does “permanent” mean forever? In some cases (amputations) it may be obvious that the impairment will last forever. However, the test applied by the courts in not nearly that onerous.

Plaintiff’s injuries will be found to be permanent where there is a “substantial possibility” of continuing into the future: **Skinner v. Goulet,** [1999] O.J. No. 3209, 1999(Ont. S.C.J.).

"Permanent" means lasting into indefinite future without any end limit: **Bos v. James** (1995), 22 O.R. (3d) 424 (Gen.Div.).

How long the impairment has persisted may be considered to determine how long it will last. An impairment was found to be “permanent” where it had lasted five years to the date of trial and there was no evidence when the pain and impairment would cease: **Valladolid v. Collu** (1996), 16 O.T.C. 272 (Ont. Gen. Div.).

Is it “Serious”?

Disfigurement

Serious disfigurement is not defined in the Nova Scotia legislation or regulations. The Ontario courts have ruled that seriousness is to be determined on a **case by case basis** and involves a consideration of the subjective effect of the disfigurement on the plaintiff.

In **Dalgleish** the plaintiff had to have her spleen removed, leaving her with an unsightly scar from her breasts to her navel. However, she testified the scar did not cause her to change her style of clothing or lifestyle and did not cause her any embarrassment. The Court of Appeal confirmed that her disfigurement was permanent but not serious.

On the other hand, a plaintiff who worked as a make-up artist fractured her elbow and was left with a 4 inch scar over the bend in her elbow. The scar was plainly visible and the Ontario Court of Appeal considered it to be a "permanent serious disfigurement" given the nature of her work in an industry where beauty and physical appearance were important: **Carreiro v. Ontario (Superintendent of Insurance)** (1997), 34 M.V.R. (3d) 219 (Ont. C.A.).

A disfigurement may be considered serious if it effects how others view the plaintiff. For example, a plaintiff suffered abdominal injuries and was left with a 6 inch scar. He testified he couldn't see the scar and it had no real effect on his life, but his wife testified that she was affected by the scar and it had an adverse effect on their marriage. The court held that the plaintiff met the threshold for a serious disfigurement: **Briggs v. Maybee** (2001), 29 C.C.L.I. (3d) 104 (Ont. S.C.J.).

Counsel representing plaintiffs will want to lead evidence as to how the plaintiff's scars have changed their lives, caused them embarrassment or affected their career prospects or their inter-personal relationships.

Impairment

It is not the injury that is important, it is the impairment!

Serious impairment is defined in Section 113B (1) (b) of the statute.

Seriousness is to be determined on a case by case basis and involves a consideration of the subjective effect of the impairment (not the injury) on the plaintiff.

An individual can be significantly injured with only limited impairment. For example, a wheel-chair bound paraplegic may have a successful career as a lawyer.

On the other hand, a relatively insignificant injury may give rise to a significant impairment. A concert pianist who injures a digital nerve that limits his/her ability to play difficult piano concertos would have a serious impairment.

The Court of Appeal stated in **Meyer:**

> There is no justification in the statute for qualifying "serious" as significant or approaching the catastrophic.

In the Trilogy cases, in assessing seriousness, the Court appeared to focus on the effect of the injury upon the plaintiff's usual daily activities or their ability to continue their employment or career path.

This test was expanded by the Ontario Court of Appeal in **May v. Casola**, [1998] O.J. No. 2475 (Ont. C.A.). The Court held that a person who can carry on daily activities, but is subject to permanent symptoms which have a "significant effect on their enjoyment of life" must be considered to have a serious impairment.

This line of argument appears to have been expressly ruled out by Section 113B (1) (b) of the statute which states that a serious impairment is one that limits a victims "usual daily activities" or "regular employment".

The regulations further limit "usual daily activities" to those activities "necessary for the person's provision of their own care". This is clearly an attempt to eliminate the line of Ontario cases where plaintiffs were found to have suffered a serious impairment of their usual daily activities when it interfered with their hobbies like Latin dancing: **Frankfurter v. Gibbons**, [2003] O.J. No. 762 (Ont. S.C.J.), carpentry and fishing: **Knudsen v. Tyckyj,** [1994] O.J. No. 2763 (Ont. Gen. Div.), and playing Bridge: **Snider v. Salerno**, [2001] O.J. No. 2752 (Ont. S.C.J.).

Any impairment that affects the injured person's earning capacity or frustrates their career path is considered to be serious. The impairment does not have to result in an income loss to be considered serious:

> …we are of the opinion that the frustration of an injured person's chosen career path generally should be considered to be a serious matter. One can contemplate a permanent impairment of an important bodily function which might force an injured person into a career path, different from the chosen one, but which turns out to be economically more advantageous. It might not however, give the same personal satisfaction. (**Lento** supra)

A change in career path that leads to an increase in income may still be considered to be a serious impairment. For example, a plaintiff suffered a knee injury which prevented her from being able to be a stay-at-home mother and care for her children. She hired a nanny, which forced her to work full-time to pay for the nanny. Her impairment of bodily function was found to be serious (even though her salary increased from $36,000.00 to $100,000.00 over several years): **Newall v. Flora** (2000), 26 C.C.L.I. (4th) 136 (Ont. S.C.J.).

Is it "Important"?

Court in the Meyer trilogy did **not** define what is important.

> We are reluctant indeed to use examples lest in other cases they may be seen as precedents.

Each case turns on its own facts and depends on what is important to the particular plaintiff.

The courts in Ontario have considered a variety of bodily functions to be "important" (for example, kneeling, bending, weight bearing, lifting, sleeping, chewing, and sensing temperature). From a plaintiff's perspective, it is difficult to think of a body function that would not be important in some way.

What is NOT important?

In **Dalgleish** the plaintiff lost her spleen. Yet her claim did not pass the threshold. Presumably the court felt that the spleen did not provide an important bodily function (defence counsel in medical malpractice cases may want to take note).

Is it "Physical"?

The requirement for an injury that is "physical in nature" is intended to eliminate claims by persons who have suffered psychiatric or psychological injuries such as depression and post traumatic stress disorder and diagnoses like fibromyalgia.

Plaintiff counsel can expect insurers to refer to **Chilman v. Dimitrijevic** (1996), 28 O.R. (3d) 536 (Ont. C.A.) for the proposition that fibromyalgia or chronic pain are not injures that are physical in nature. In fact, the Court of Appeal merely accepted the evidence lead by the defence at trial that the plaintiff's impairment was due to ongoing psychiatric, cognitive and behavioural factors.

Supportive judicial recognition for the physical nature of chronic pain and fibromyalgia can be found in the Supreme Court of Canada's decision in **Nova Scotia (Workers' Compensation Board) v. Martin** [2003] S.C.J. 54**.**

A continuing injury that is "physical in nature" does not require an ongoing physical/somatic injury. Continuing myofascial pain that was caused by an initial physical trauma was found to be a continuing injury: **Bos** (supra).

The physical injury does not have to be the exclusive cause of the impairment. It is sufficient that a physical injury contributes to the continuing impairment: **Dickson v. Canada Life Casualty Life Insurance Company** (1996), 32 O.R. (3d) 175 (Gen. Div.).

Plaintiff counsel will want to lead expert medical evidence that the injured person's ongoing psychological or psychiatric impairment was caused or contributed to by an initial physical injury.

Is it "Continuing"?

It came as some surprise that I could not find any specific judicial commentary on what constitutes a "continuing" injury. Since the Ontario legislation requires a permanent injury, it appears to be taken as a given that the plaintiff's injury will continue into the indefinite future. If the plaintiff's injury wasn't going to continue into the future there would be no claim under the Ontario legislation.

I would argue that the twelve month threshold in Section 113B (1) (a) (iii) only requires that the plaintiff show an injury of a physical nature that continued past twelve months (but does not have to continue into the future).

Valuable Services

The Regulations exclude certain "non-monetary" losses from the cap:

> **(c)** "non-monetary loss" means any loss for which compensation would be payable, but for the *Insurance Act*, that is not an award for
>
> (i) lost past or future income,
>
> (ii) diminution or loss of earning capacity, and
>
> (iii) past or future expenses incurred or that may be incurred
>
> as a result of an incident, and for greater certainty excludes valuable services **such as** housekeeping services;

It is clear that the use of words "such as" opens the door to claims beyond loss of housekeeping services.

Plaintiff counsel will want to be creative in pursuing claims for losses that might have previously been included by an award for general damages.

For example LOIR claims (Lost Opportunity for Interdependent Relationships): **Reekie v. Messervey** (1986) 4 B.C.L.R. (2d) 194 (C.A.) and Loss of Insurability: **Nicolls v. B.C. Cancer Agency** [1999] B.C.J. No. 1475 (B.C.T.D.).

Future Income Loss:

Section 113B (2) limits income loss before trial and future loss of earning capacity to the plaintiff's "net income loss". Loss of earning capacity is a separate head of damages from future income loss: **Gaudet v. Doucette** (1991) N.S.R. (2d) 309 (N.S.T.D.).

Therefore the legislation and regulations do not limit a plaintiff's ability to recover **future** income losses. Where they can be proven, the plaintiff will continue to be entitled to recover his or her gross income loss (as well as any appropriate tax gross up).

Collateral Benefits:

> 113A In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, the damages to which a plaintiff is entitled for income loss and loss of earning capacity shall be reduced by all payments in respect of the incident that the plaintiff has received or that were available before the trial of the action for income loss or loss of earning capacity under the laws of any jurisdiction or under an income-continuation benefit plan if, under the law or the plan, the provider of the benefit **retains no right of subrogation.**

A careful reading of the legislation indicates that the deduction for collateral benefits only applied to benefits the plaintiff "has received"… "before the trial", and then only where the collateral insurer retains no right of subrogation. Unless the insurer has specifically waived their right of subrogation, there will rarely be a case where an insurer does not have some right of subrogation, either contractual or at common law.

Conclusion:

A year from now, after the Courts here in Nova Scotia have struck out the Automobile Insurance Reform Act as unconstitutional, this discussion may be moot. Until then I encourage plaintiff counsel to vigorously and creatively defend the rights of innocent victims to obtain fair compensation for their injuries.

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