UPDATE ON PERSONAL INJURY LAW AND PRACTICE

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This paper will provide a summary of important developments in the substantive law applying to personal injury cases. It will also highlight some important developments for supporting a busy personal injury practice.

REVIEW OF IMPORTANT CASES

A. ***Cornie v. Security National, 2012 ONSC 905 (CANLII)*****;**

Nicholas Leone v. State Farm Mutual Automobile Insurance Co.

(Court and Arbitration decisions acknowledge and confirm that F.S.C.O. mediations that do not take place within 60 days of filing are deemed to be "failed")

A real hot topic in Ontario personal injury litigation is the unreasonable delays that exist within the *Financial Services Commission of Ontario* (F.S.C.O.) regime with respect to conducting mediations required under the legislation when a dispute arises between a claimant and his or her insurer.

The reality is that the current delays are simply a reflection of the fact that there are far more applications for mediation than F.S.C.O. is able to respond to given its present staffing levels and resources. We need more trained, full-time mediators. And we need them quickly.

At present, it is highly unlikely that a mediation can be heard within twelve months of the date it is filed.

Under section 19 of the *Dispute Resolution Practice Code* (D.R.P.C.), mediation must be concluded within 60 days of filing an application for mediation. Section 21 of the D.R.P.C. specifically provides that mediation is deemed to be "failed" when the time limit for the mediation has expired and no settlement has been reached.

Under the *Insurance Act*, a court action or application for arbitration filed with F.S.C.O. cannot be sustained until a mediation has been sought and failed. Insurers argue that, unless and until an actual mediation takes places, and fails, the claimant has no ability to sue or arbitrate against an insurer.

The *Cornie* and *Nicholas Leone* decisions stand for the proposition that it is not necessary to wait for an actual mediation to take place before an injured claimant can sue or arbitrate against his or her insurer.

The *Cornie* and *Nicholas Leone* decisions are clear that, once sixty days have passed since the application for mediation has been filed, the mediation is deemed failed if no settlement has otherwise been reached.

The *Cornie* and *Nicholas Leone* decisions mean that clients do not have to wait for a year or more to participate in an actual mediation before suing or arbitrating against insurers.

Note that the *Cornie* and *Nicholas Leone* decisions are being appealed. It remains to be seen whether they will be upheld.

In terms of practical advice, review your files where applications for mediation are pending. Separate those files where more than sixty days have passed since the application. If those files do not have settlements pending, consider whether launching a lawsuit or arbitration is appropriate as a solution to put pressure on the insurer and advocate aggressively on behalf of your client. The decision whether to arbitrate or litigate is beyond the scope of this paper but keep in mind that there are also significant delays in dealing with arbitrations within the F.S.C.O. regime. The recent enhancements to small claims court actions, and simplified procedure actions, may make litigation more attractive for these kinds of disputes than it ever has been in the past.

B. *Kusnierz v. Economical Insurance Company, 2011 ONCA 823 (CANLII)*

Kusnierz is the long-awaited decision from the Court of Appeal on whether physical and psychological impairments suffered by a person as a result of a motor vehicle accident can be "combined" together to reach a level of whole person impairment sufficient to qualify for a catastrophic injury designation under the *Statutory Accident Benefits Schedule* (*SABS*).

By way of background, a person can be deemed to have a catastrophic injury in several different ways following an accident. One of the options is set out in section 2.1(f) of the *SABS*, which provides that a catastrophic impairment is an impairment in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, that results in 55% or more impairment of the whole person.

In its decision, the Court of Appeal expressly approved of the conclusions reached in the 2004 *Desbiens v. Mordini* case that dealt with the same issue. In *Desbiens*, the trial court ruled that physical and psychological impairments could be combined to satisfy the definition set out in section 2.1(f) of the *SABS*.

The appeal court held that allowing a combination of physical and psychological impairments promotes fairness and the overall objectives of the *SABS*.

It is not known whether the insurer in *Kusnierz* is seeking leave to appeal to the Supreme Court of Canada.

In terms of practical advice, review your files carefully and look for cases where your client is struggling to cope with both physical and psychological symptoms as a result of a motor vehicle accident. In particular, pay especially close attention to cases where the available non-CAT medical and rehabilitation limits are drawing close to being exhausted. Consider whether it is appropriate to have your client seen by a clinical psychologist to determine whether there is a level of impairment that can be combined to existing physical impairment.

Remember that there is no limitation period, *per se*, on when a person can seek a catastrophic injury designation. Where a person's initial injury is primarily physical in nature, over time, the effects of on-going, chronic and persistent pain can give rise to significant levels of psychological and emotional distress. These kinds of cases can often be overlooked within a busy personal injury practice.

TECHNOLOGICAL DEVELOPMENTS TO SUPPORT INJURED CLIENTS

It goes without saying that there are huge advances being made in technology that is specifically designed to assist people living with the consequences of permanent injury including brain injury and spinal cord injury.

There is perhaps no area with more dramatic advances being made than with Apple apps. There are apps specifically designed to help people speak, write, use the telephone, track medications, monitor mood and participate in physiotherapy.

The apps themselves vary in cost. Many are free and most are very reasonably priced. The costs of the devices themselves vary based upon the memory size.

An excellent online resource for people with spinal cord injuries is The Christopher and Dana Reeve Foundation's *Guide to the Best Apps for People Living with Paralysis* (see: **www.christopherreeve.org**)

For people living with acquired brain injury, a very good online resource brainline.org's *27 Life Changing iPhone and iPad Apps for People with Brain Injury* (see: **www.brainline.org/content/2011/05/23-lifechanging-iphone-ipad-apps-for-people-with-brain-injury.html**)

If you work with clients who have suffered a serious injury, and you are not familiar with this kind of technology that may benefit your clients, you need to spend some time to educate and familiarize yourself with these resources. If you have rehabilitation therapists working on your files who are totally unfamiliar with this kind of technology then you need to consider whether there are other therapists who may be able to offer "more" for your clients to help them achieve the biggest recovery possible.

These kinds of expenses, including the costs of the devices, and the necessary airtime packages to support them, should be submitted to accident benefit insurers or, where the injury does not involve a motor vehicle accident, be included in a Future Care Cost report or be part of a claim for special damages.

The days of recommending a palm pilot to brain injured clients are long gone. You can only be an outstanding advocate for your clients if you know about all of the resources that are available and advocate passionately to obtain them.

TECHNOLOGICAL DEVELOPMENTS TO SUPPORT YOUR PRACTICE

We live and work in an age of multimedia. In my view, excellent advocacy for clients requires more than just writing letters or reports on paper that get filed in briefs.

If you have never used a "day in the life" video before consider doing so on certain kinds of files. They say 'a picture is worth a thousand words' and these videos can be extremely effective. Twenty-five years ago, it used to be very difficult, and prohibitively expensive, to make a video of a badly injured client; the technology and equipment to make these videos effectively on a small scale just did not exist.

Day in the life videos are especially useful in spinal cord injury cases. For example, there is a very powerful difference between reading about a client's morning bathroom routine in a report and seeing it on video.

They can also be very effective at tracking a person's physical recovery over time or lack thereof. In serious injury cases, videos taken immediately after an accident, and on a regular basis thereafter, can often underscore the fact that a person's injuries remain devastating in their consequence despite the appropriate medical care and rehabilitation efforts.

Video technology has advanced to the point that day in the life videos can be done in a very sophisticated and professional manner. Proper lighting and sound add greatly to the impression these videos make on the audience.

Day in the life videos are also effective at mediations and judicial pre-trial conferences. They help to settle cases. I see relatively few day in the life videos in the course of my practice and this usually surprises me.

Keep in mind that the cost to obtain a day in the life video forms an assessable disbursement that can be recovered in the course of the action.

CONCLUSION

As usual, there is steady change taking place to both the substantive areas of personal injury law and the manner in which it is practised.

(a) Future changes to *Statutory Accident Benefits Schedule*

On the horizon, there are major concerns about the provincial government's attempts to further change the *Statutory Accident Benefits Schedule* and, in particular, the definition of "catastrophic injury". In my opinion, there is no economic need to implement some of the proposed changes for the benefit of insurers. Good plaintiffs' advocates are monitoring these changes closely and are prepared to react on behalf of their clients.

(b) Examining potential negligence claims against insurance advisors

In a recent study, it was determined that less than 2% of the driving public renewed their annual motor vehicle premium and were actually told about the recent changes to the available coverage and, in particular, had the extended benefits explained by the sales person/agent. When you are

retained by a new client, and where you are concerned that the client's existing accident benefits coverage will be insufficient, you should explore what knowledge and information the client was given by his or her insurer regarding the availability of enhanced benefits to determine whether a claim for negligence against the insurance broker/advisor/salesperson. This may be especially important in cases where the client renews his or her policy online or by using a toll-free telephone number.

I hope this paper has been useful. Good luck in your practice and in developing your career.