


### An Issue of Updates

Welcome to the Fall edition of the *Legal Observer*. The theme for this edition is updates! We are updating you on changes to auto insurance legislation, punitive damages, some cases that our firm has been involved with, as well as our expanding roster of lawyers.

Prior to the recent Ontario election, the Eves government had introduced changes with respect to auto insurance. We provide you with an overview of some of the more significant changes. For those of you not familiar with the current scheme, we have also put together a summary of how auto insurance works.

We also update you on two cases that our firm has been involved with as well as the area of punitive damages.

We continue our series of profiles by casting the spotlight on Chris Reil, our newest lawyer, who joined us in June.

Finally, we welcome our articling student, Timothy Burke. Tim started with us on a full-time basis in September. Tim, who hails from the nation's capital, attended law school at the University of Ottawa. Prior to that he earned both a BA and a Masters in English from Carleton University. 

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## The Changing Auto Insurance Scheme

As premiums for auto insurance continue to escalate, the various provincial governments have begun to discuss legislative reform. In Ontario, newly elected Premier, Dalton McGuinty, has instructed his finance minister to freeze auto insurance rates effective immediately. And this past summer, the Eves Government introduced a number of changes to Ontario's auto insurance scheme. Most of these changes took effect on October 1, 2003 and therefore it is still too early to tell what the real impact will be.

### Historical Background

Ontario drivers have been required to carry auto insurance since 1979. At that time a modest benefits schedule was available for auto accident victims, regardless of who was at fault. In order to receive any sort of significant compensation, victims generally had to resort to the courts. Since those early days, there has been an increase in no-fault benefits along with a corresponding decrease in the right to go to court.

In 1996, the *Insurance Rate Stability Act* was passed and premiums began to drop. However, since 2002, premiums have been on an upward swing for a variety of reasons including:

- the higher cost to repair vehicles,
- higher health care costs associated with insurance claims and
- lower returns on the insurance companies' investments.

### The Changes

In order to address the rising costs of auto insurance and with a view to reducing premiums, changes have been made to the relevant regulations. What follows are some of the more significant changes.

Some changes, which came into force on October 1, 2003, will apply to all accidents that occurred on or after November 1, 1996. They include the following:

- The introduction of an assessment and treatment program of care for whiplash and related minor injuries called a **Pre-Approved Framework (PAF)**. The object is to provide quicker access to treatment while still allowing health care providers to provide individualized care to meet the specific needs of the claimant.
- Restrictions on the use of **medical examinations** by insurers have been put in place.
- The process for section 24 assessments has been completely rewritten and prior approval will now be the general rule.
- Cash settlements for **accident benefits** will be prohibited until one year from the date



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of the accident; allowing injured people to continue to have access to treatment and income replacement and thereby avoiding the possibility that the settlement proceeds would be used for other purposes.

Other changes, will come into force on November 1, 2003 and include the following:


- The definition of **unfair or deceptive acts or practices** has been broadened to apply to health care providers and paralegals in the auto insurance system. Claimants will now be required to sign treatment plans and insurers will be permitted to request a claimant be examined under oath where there is reasonable concern about accident circumstances.
- A code of conduct for paralegals has been introduced to protect consumers from unqualified representatives.

The following changes, which came into force on October 1, 2003, will apply only to accidents that occurred on or after October 1, 2003.

- The definition of **catastrophic impairment** has been amended to cover more serious injuries. Measures, analogous to those in place for adults, have been introduced so that medical persons can properly assess seriously injured children.
- The deductible, which applies to awards for pain and suffering (general damages), has been increased from \$15,000 to \$30,000 for the injured party claimants and from \$7,500 to \$15,000 for *Family Law Act* claimants.
- Amendments to the threshold, which must be met before an injured person can recover tort damages, have been introduced.

On January 1, 2004 the rules with respect to income replacement will change for those who purchase or renew an auto insurance policy on or after January 1, 2004. Specifically the maximum weekly amount of income replacement will be lowered to \$300.

We will continue to keep you apprised of the status of this important legislation. In addition, we will review some of the various changes in more detail in upcoming issues of the *Legal Observer*.

Over the years, our firm has developed an expertise in the area of auto insurance and in particular in the area of accident benefits. If you have questions about either the existing system or the proposed changes please contact us. 

## Auto Insurance Coverage for Injured Parties

Auto insurance is a hot topic these days as premiums continue to rise. And if you drive in Ontario the law requires you to have auto insurance.

If you are involved in a motor vehicle accident, auto insurance covers not only any damage to your vehicle, but it also provides coverage for your medical expenses and replacement income until you are able to return to work. The following is an overview of the coverage available to injured parties.

Although Ontario's current system provides for no-fault benefits, in some cases it also allows an injured party to commence legal action. Therefore, if you are injured in an auto accident there are two different streams that you can potentially claim under: *liability coverage* and *accident benefits*. You have access to at least some of this coverage regardless of whether you are a driver, passenger, cyclist or pedestrian and regardless of whether you were at fault.

*Liability coverage*, which is the fault based system of compensation, compensates for pain and suffering as well as certain other losses. However, Ontario law limits who can make such a claim to those who have suffered a serious and permanent disfigurement or impairment. In addition, claims arising from accidents which occurred prior to October 1, 2003 are subject to a \$15,000 deductible and claims after that date are subject to a \$30,000 deductible.

*Accident benefits*, which is the no-fault portion of the system, are intended to lessen but not completely compensate for economic losses resulting from your injuries. The benefits include:

- Income replacement;
- Payments to non-earners who suffer complete inability to carry on a normal life;
- Payment of care expenses to persons who cannot continue to act as a primary caregiver for a member of their household;
- Payment of medical, rehabilitation and attendant care benefits.

Accident benefits are mandated by legislation and therefore are standard under all insurance policies. You may also purchase optional benefits to increase the basic level of benefits provided.

If you require further information please contact our firm. 

### Did you know . . .

According to the Insurance Bureau of Canada, medical and rehabilitation claims costs are rising at about 15% per year, despite the fact that the number of accidents has fallen.

## Case Update

### **Childs et. al. v. Desormeaux et. al. (2001) 217 D.L.R. (4th) 217**

In the Fall 2002 *Legal Observer*, we told you about an important case that our firm was involved with, *Childs et. al. v. Desormeaux et. al.* The issue in that case was whether a person hosting a party in their home should be held responsible for damage caused by a guest's decision to drink and drive.

Zimmerman and Courier hosted a New Year's Eve party attended by Desormeaux. At about 1:30 a.m., shortly after leaving the party, Desormeaux's vehicle was involved in a head on collision with another vehicle. There were four passengers in the second vehicle. One of the passengers was killed, one (Childs) was left a paraplegic and the other two were seriously injured. A blood sample, taken from Desormeaux about 4:00 a.m., showed a blood alcohol concentration of 183mg/100ml, more than double the legal limit.

The trial judge found a duty of care on the social hosts, Courier and Zimmerman, based on the facts of the case but would not expand the tort law for policy reasons. As such he dismissed the claim.

On November 4, 2003, the Court will hear the appeal in this case. M.A.D.D. was recently granted limited intervener status in the case. We were involved in this trial and the appeal as our firm acts for the social hosts through their home owner's insurance.

### **Herbison v. Wolfe**

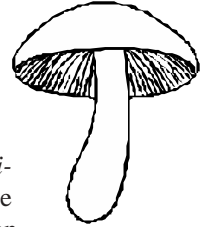
Our firm was involved in another interesting case that we first told you about in the Fall 2001 issue of the newsletter.

Wolfe and Herbison went deer hunting. Wolfe accidentally shot Herbison. Herbison sued, alleging that Wolfe had been negligent in the use, ownership and operation of his vehicle. Although Wolfe denied that he fired the gunshot from his car, he did argue that the use and ownership of the car played a key role in the alleged shooting. Wolfe's insurance company (our client) advised him that it would not defend him. The Court agreed with the insurer since the incident did not arise from the ordinary and well-known activities to which automobiles are put.

Herbison continued with his action to trial where he was awarded \$840,000. Wolfe had no homeowners insurance that would pay the judgement, so Herbison sued their auto insurance company to enforce the judgment. His claim was dismissed. The court concluded that Wolfe's negligence was in firing a shot toward a target that he could not see and that the use and operation of the vehicle did not contribute to the injuries sustained by the victim. We will provide you with a more detailed summary of this case in the next issue of the *Legal Observer*. ☞

## Punitive Damages - Sprouting Up Like Mushrooms

In the last issue of the *Legal Observer*, we canvassed the topic of punitive damages in Canada. In this country, punitive damages are considered as a way to punish a defendant's reprehensible conduct, as opposed to providing compensation to the plaintiff. Punitive damages, when they are awarded, are fairly modest, particularly when compared to similar awards south of the border.



In *The so-called "evolution" of punitive damages* we told you about the Supreme Court of Canada's decision in *Whiten v. Pilot Insurance Co.* to reinstate the jury's decision to award the insured \$1 million for punitive damages. You will recall that the *Whiten* case involved an insurance company that alleged that the insured had burned her own home, despite much evidence to the contrary. That evidence came from the local fire chief, Pilot's own expert investigator as well as Pilot's initial expert.

Well it has happened again! In July, an Ontario jury awarded punitive damages in the amount of \$2.5 million dollars to a farmer and his tenant.

On August 13, 1993, a fire destroyed the insured's mushroom farm operation as well as his family and tenant's homes. The insurance company rejected the claim, alleging that the fire had been deliberately set. Despite this position, the insurer's files confirmed that the assertions of arson and fraud were baseless. And midway through the trial, it refused the insured's offer to settle for \$450,000.



In addition, to the punitive damages, the jury also awarded the insured more than \$300,000 in general damages, and \$1.2 million for business interruption.

This case does not necessarily signal that the floodgates have been opened. However, it does re-emphasize an insurer's obligation to act honourably by not persisting in an opinion that the insured's claim has no merit without a credible basis for that opinion, or to act without concern for the plaintiff's rights and well being. ☞

## Chris Reil


Chris Reil is the newest member of the Williams McEnery team, having joined the firm this past June.

Chris graduated from Ottawa University's law school in 1979 and has been practising law since 1981. Chris spent three years in Sudbury before moving to the nation's capital. Prior to joining Williams McEnery, Chris worked as litigation counsel for a major insurance company.

Over the years, Chris has developed extensive litigation experience particularly in the area of insurance defence. His practice has included personal injury, motor vehicle, arson and fraud and professional liability. Chris believes in "no surprises service". Clients can expect and receive results that are predictable, understandable and effective.

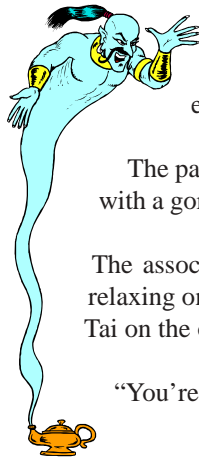
In addition to his experience with all levels of court in Ontario, Chris has practical hands-on experience with Case Management and alternative dispute resolution.

He is a regular guest speaker on insurance and litigation issues for the Canadian Risk Insurance Managers Society, the Canadian Association of Fire Investigators, the local claims managers group and the Law Society's Continuing Legal Education programs.

To relax and re-energize, Chris enjoys the "occasional" round of golf, a lazy day on the river fishing or a long walk with his wife and their pooch. 

## Now that's a good one!

A paralegal, an associate and a partner of a law firm are walking through a park, when they spotted an antique oil lamp. The paralegal picked it up, but both the associate and partner grabbed for it, arguing that they found it first. Their tussling had the effect of rubbing the lamp, and to their shock a Genie emerged in a great cloud of smoke.



The Genie announced, "In gratitude of your freeing me from the lamp, I grant you three wishes. As there are three of you, you each get one wish."

The paralegal blurts out, "I want to be in the Barbados, sipping cocktails with a gorgeous movie star." Poof! The paralegal was gone.

The associate, excited by the events, stammers, "I want to be in Hawaii, relaxing on the beach with a professional hula dancer on one side and a Mai Tai on the other." Poof! The associate was gone.

"You're last," the Genie says to the partner, "What is your wish?"

The partner replied, "I want those two back in the office after lunch."



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