

# Canadian Insurance Law Reporter

May 2021  
Number 845

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## UPCOMING CHANGES TO ONTARIO'S AUTO INSURANCE REGIME

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The ways in which Ontario's auto insurance market is regulated may soon undergo several key changes to enhance consumer protection and foster greater competition and innovation.

### Recommendations from the Residents' Reference Panel on Automotive Insurance

In March 2021, the Financial Services Regulatory Authority of Ontario ("FSRA") received the *Final Report of the Residents' Reference Panel on Automotive Insurance in Ontario*. The mandate of the Residents' Reference Panel on Automotive Insurance (the "Panel") is to provide an "everyday citizen's" perspective on how to make the Ontario auto insurance system clearer, easier to understand and more transparent. Specifically, panelists were asked to provide recommendations about how FSRA can improve auto insurance regulation in Ontario to enhance consumer experience and choice.

The Panel's six main recommendations are as follows:

1. Address low confidence in the system by reducing systemic drivers of cost, including streamlining care for personal injury claimants, creating publically available fee schedules, finding ways to decrease operating costs of insurance companies, and limiting the need to turn to lengthy processes in the tort system to receive access to additional care or support following an accident.
2. Enhance transparency across all elements of the auto insurance system (purchasing, renewing, making a claim, escalating a complaint, understanding premium calculations, and difference between mandatory and optional coverage). Greater clarity is required with respect to auto insurance products for consumers.
3. Provide access to timely recovery-focused care through the creation of standardized and easy-to-use claims processes for personal injury claimants, remove barriers to accessing care, and increase visibility of external dispute resolution mechanisms that are accessible and resolve complaints quickly.
4. Develop a more user-friendly automotive insurance system for consumers by convening various stakeholders, creating minimum standards, and ensuring the impartiality of the tools developed by the industry.
5. Increase opportunities for Ontario drivers to reduce their premiums by ensuring they understand the key variables that contribute to the cost of their automotive insurance premiums. This will enable consumers to take action to positively influence their insurance premiums, including the adoption of safe driving habits.

6. Adopt innovations that lower costs, enhance choice and allow consumers to develop safer driving behaviours, and encourage the use of digital technologies to streamline the purchasing, renewing, and claims processes.

The Panel was convened as a result of FSRA's ongoing commitment to include consumers in the policymaking process. So far, there is no indication of how or when these recommendations will be implemented.

## "Take-All-Comers" Consultation

In March 2020, FSRA released a consultation related to the "Take-All-Comers" requirements. The purpose of the "Take-All-Comers" rule is to ensure that no driver is denied coverage, prohibiting insurers from declining to issue, terminating or refusing to renew an auto policy or endorsement, except on grounds filed with FSRA.<sup>1</sup> In the consultation, FSRA requested responses to questions from licensed individuals and entities focusing on: (i) the reporting and oversight mechanisms in place to support compliance with the rule; (ii) the way in which instances of non-compliance with the rule are addressed and (iii) changes to the rule that would reduce the risk of consumer harm and/or sector instability. In particular, consumers were asked whether they had been denied auto insurance coverage despite believing they were qualified to receive a quote, whether they had ever had their auto insurance coverage cancelled without understanding why and whether they had experienced not receiving a quote after making a request for one with an insurer or intermediary.

FSRA noted in the consultation that it is reviewing various activities and practices by insurers and/or brokers that may be contravening the "Take-All-Comers" rule and will be conducting supervisory reviews of insurance companies to identify risks or instances of consumer harm. This enhanced monitoring was also described in FSRA's proposed statement of priorities for 2021-2022.

Based on feedback received from the "Take-All-Comers" consultation, FSRA completed a review of the current Unfair or Deceptive Acts or Practices regime in the *Insurance Act* (Ontario) and the *Unfair or Deceptive Acts or Practices* regulation thereunder and published a proposed Unfair or Deceptive Acts or Practices Rule (the "**UDAP Rule**"). The UDAP Rule is designed to improve the existing framework by removing provisions that are unnecessarily prescriptive or inconsistent with desired regulatory outcomes and to allow for increased innovation. For example, insurers may be able to offer their customer a rebate on their auto policy premium for good driving behaviour or a gift card for behavior that reduces insured risk in addition to discounts on premiums that auto insurers can already offer to customers enrolled in Usage-Based Insurance Programs.

Besides the examples set out above, it is unclear how FSRA is using or intends to use the information obtained from the "Take-All-Comers" consultation.

## Usage-Based Insurance

In November 2020, FSRA announced the removal of Guidance No. A-16/16 and No. A-05/13, which set out considerations and requirements for auto insurance filings containing a Usage Based Insurance ("**UBI**") component. UBI programs collect detailed telematics information about where, how and when vehicles are driven. These types of programs give drivers more control over the price of their auto insurance and promote good driving behaviours among participating drivers. The removal of the prescriptive guidance enables the introduction of more flexible and innovative UBI programs going forward that may benefit consumers and encourage competition.

## Ending Discrimination in Automobile Insurance

Another pending change in Ontario is the coming into force of Bill 42, *Ending Discrimination in Automobile Insurance Act*, 2019. The purpose of Bill 42 is to enhance the marketplace and encourage more consumer choice in automobile insurance by prohibiting insurers from using factors primarily related to a person's postal code or telephone area code in their risk classification system for auto insurance. Bill 42 aims to ensure fairness in rate setting and promote personal driver responsibility and will, once in force, require FSRA to rescind Bulletin A-01/05 dealing with territorial ratings.

## Connected and Autonomous Vehicles

Further changes to Ontario's auto insurance framework may also be forthcoming based on the recent work of the Canadian Council of Insurance Regulators ("CCIR") to engage stakeholders in supporting the safe and swift deployment of connected and autonomous vehicles. To that end, the CCIR recently published an issues paper exploring the potential impacts of connected and autonomous vehicles on the automobile insurance market in Canada. The paper reviews the existing regulation and regulatory requirements and describes certain items that will need to be addressed, including liability and fault determination, claims resolution, pricing, cyber security and data privacy. The CCIR concludes that a shift in focus from a driver's fault or negligence-based personal liability to product liability will need to be considered by policymakers and regulators to ensure the risks associated with connected and autonomous vehicles are managed appropriately. To start preparing for this potential shift, the Ontario government launched a pilot project in 2016 that allows the testing of automated vehicles on public roads under specific conditions. The objectives of the pilot project are to establish rules, monitor industry developments and evaluate the safety of autonomous vehicles. At the end of 2020, there were twelve such automated vehicle pilot projects in Ontario, all without incident.

## Regulatory Sandbox

Industry groups are also encouraging FSRA to create a "regulatory sandbox" that may pave the way for insurers, fintechs and other entities to introduce innovative initiatives in a controlled environment with the ultimate goal of allowing new consumer-focused products and services to enter the market more quickly.

## Conclusion

The above-mentioned legislative and regulatory initiatives highlight a trend in the auto insurance sector towards a more consumer-focused, innovative and flexible approach. In particular, the initiatives led by FSRA support its ongoing mandate to draw from consumer and industry recommendations to inform how FSRA sets and delivers on its priorities, which includes the protection and empowerment of consumers, enhancement of consumer choice, promotion of innovation and the fostering a more competitive and stable auto insurance marketplace.

## A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

<sup>1</sup> See sections 237 and 238 of the Ontario *Insurance Act* and section 2(1)(8) of Regulation 7/00 *Unfair or Deceptive Acts or Practices*.

## Quantum of Damages

Injury	Non-Pecuniary	Total	Paragraph
Anxiety	\$97,500	\$356,735	[2021] I.L.R. ¶ M-3305
Chronic pain	\$130,000	\$514,125	[2021] I.L.R. ¶ M-3304
Chronic pain	\$135,000	\$638,350	[2021] I.L.R. ¶ M-3306
Neck pain	\$130,000	\$406,938	[2021] I.L.R. ¶ M-3302
Soft tissue injuries	\$140,000	\$477,550	[2021] I.L.R. ¶ M-3307
Somatic symptom disorder	\$190,000	\$998,644	[2021] I.L.R. ¶ M-3303

## RECENT CASES

### Insurance Decisions

#### **Insureds Did Not Bring Action Against Homeowner's Policy Insurer Within Limitation Period**

Manitoba Court of Queen's Bench, October 26, 2020

The applicants' house was insured by the respondent insurer under a homeowner's policy. On October 27, 2017, the applicants' kitchen suffered a fire that caused extensive damage. The insurer provided coverage and carried out repairs to the house. The parties then disagreed as to whether certain items of personal property were adequately restored and about the compensation amount. The insurer did not provide the applicants with the proof of loss forms within the time required by subsection 126(1) of *The Insurance Act* (the "Act"), being within 60 days from receipt of the notice of loss. The applicants submitted their completed schedule of loss ("SOL") in early October 2019, and, in mid-October, the insurer advised the applicants that the items in the SOL would not be reimbursed, referring also to the limitation period of October 27, 2019 to make a claim under the policy. On October 28, 2019, the applicants gave written notice to the insurer that they wished to use the dispute resolution process under section 121. The insurer advised the applicants that the limitation period had expired and that it would not participate in the dispute resolution process. The applicants brought an application seeking an order appointing a dispute resolution representative under paragraph 121(9)(a) of the Act.

The application was dismissed. Under subsection 136.2(2) of the Act, an action against an insurer must be commenced not later than two years after the date the insured knew or ought to have known that the loss or damage occurred. The Court found that according to subsection 136.2(2), the limitation period expired on October 28, 2019, being two years after the fire. The applicants' position that the limitation period did not start running until after they learned of the extent of the loss or damage was not consistent with the language of the Act. Such an approach would also result in more than one limitation period for different parts of a claim, which would be a practically and legally untenable result, the Court found.

The Court dismissed the argument that under section 121, a discreet and independent dispute resolution process was created that took the dispute outside the scope of the Act, and thus rendered the Act's limitation period inoperable. Under subsection 123(2) of the Act, an insurer is not deemed to have waived any term or condition of the contract by participating in the dispute resolution process. The limitation period was both a term of the contract by operation of law and a stated condition of the contract. The Court concluded that the two-year limitation period under subsection 136.2(2) applied to all claims under a contract of insurance, even where the dispute process under section 121 was engaged. As the applicants did not bring an action by October 28, 2019, they were foreclosed from using the dispute resolution process.

*Vincent et al. v. Red River Mutual*, [2021] 1.L.R. ¶1-6271

#### **Punitive Damages Not Appropriate in Automobile Insurance Fraud Action**

Ontario Superior Court of Justice, October 2, 2020

In 2009, the defendant Mohammed Kayes ("MK"), who was 17 years old and did not have a driver's licence, took his father's car without permission and was involved in an accident with another driver. The vehicle was insured by the plaintiff insurer. After the accident, MH phoned his father, the defendant Louay Kayes ("LK"), and LK attended at the accident scene with his brother, the defendant Hassan Nazir Kaiss ("HK"), prior to the police arriving. When the police attended, LK reported to them that he had been the driver. The other driver did not correct LK's story. LK then submitted benefit claims to the insurer, including for medical and rehabilitation benefits for alleged injuries sustained in the accident. The insurer paid out approximately \$100,000, as well as \$8,000 for property damage to the insured vehicle. In 2011, HK and his children commenced a tort action against LK seeking \$1 million in damages for injuries he falsely claimed he suffered while a passenger. LK falsely maintained that his brother was indeed in the vehicle with him. During the insurer's pre-trial investigation in 2014, the second vehicle's driver revealed the truth about the accident. The insurer brought an action against the defendants for fraud and conspiracy. It sought damages for what it lost and also claimed

punitive damages. The insurer brought a motion for summary judgment. MK denied wrongdoing and implicated his father and uncle as participants in the fraudulent scheme. During the motion, LK and HK acknowledged the fraud and primarily defended against the punitive damages award.

The motion was granted in part. The uncontradicted evidence demonstrated that LK and HK participated in a scheme to defraud the insurer. Damages occasioned by the fraud and conspiracy were readily quantifiable, the Court stated. Accordingly, the insurer was entitled to judgment for the amounts it paid in benefits and the costs of investigating the fraudulent scheme, at \$118,109. LK's lies to the insurer also vitiated his entitlement to the vehicle repair costs, and the insurer was entitled to the return of \$8,278 in that regard. The Court found that the evidence on the motion did not support that MK was a participant in the fraudulent scheme. MK's family relationship to LK and HK and the fact that MK signed a "will say" statement that was later used in HK's fraudulent tort action was not enough to support the inference of his involvement in the fraud. The action against MK was dismissed.

Punitive damages are awarded in exceptional circumstances for "malicious, oppressive and high-handed misconduct" that "offends the court's sense of decency". The Court noted that LK and HK were involved in a "calculated and prolonged scheme to defraud" the insurer. Their behaviour was deliberate and reprehensible. Insurance fraud affects all Canadians in that it leads to increased premiums, and Courts must deter such behaviour. Despite the fraud, LK and HK were not criminally charged, and the objectives of denunciation, deterrence, and retribution were, therefore, not already served. The Court noted, however, that the general damages award required LK and HK to pay sums that went beyond any financial benefit they received, as the insurer had paid out \$43,000 directly to two service providers, and LK and HK were also required to pay for investigation costs for costs for the discontinued tort action, at \$80,000. Having regard to the damages that were already ordered against them, the Court concluded that an award of punitive damages was not necessary to serve the objectives of denunciation, deterrence, or retribution for LK and HK.

*Traders General Insurance Co. v. Kayes et al.*, [2021] I.L.R. ¶1-6272

## **No Error in Dismissing Judgment-Creditor's Application to Recover from Commercial General Liability Insurer**

Ontario Court of Appeal, October 29, 2020

The appellant developed a townhouse project and hired 1390348 Ontario Limited ("139") to install the sewer system. The sewer system experienced problems and, in 2008, the appellant commenced an action against 139 and others claiming damages. 139 was insured under a commercial general liability policy with the respondent insurer and had liability coverage for sums 139 became obligated to pay because of property damage. In 2013, 139 was noted in default in the action. The insurer was not provided with notice of the action until 2017. The notice was provided by the appellant, pursuant to Statutory Condition 8. The insurer denied coverage for the action, relying on the lack of timely notice. In 2018, the appellant obtained default judgment against 139 for \$1.8 million. The appellant was unable to collect the judgment from 139 and applied to recover it from the insurer pursuant to subsection 132(1) of the *Insurance Act* (the "Act"), which permits the holder of an unsatisfied judgment against an insured to recover the amount of the judgment from that insured's insurer, "subject to the same equities as the insurer would have if the judgment had been satisfied".

The application judge held that 139 had breached the insurance policy in failing to give the insurer timely notice, resulting in forfeiture of 139's right to claim indemnity from the insurer (see [2020] I.L.R. ¶1-6214 (Ont. Sup. Ct.)). As the appellant stood in no higher position than 139 under section 132 of the Act, the appellant's claim against the insurer for payment of the judgment failed. The judge refused to grant relief from forfeiture. The appellant appealed the refusal to grant relief from forfeiture.

The appeal was dismissed. Under subsection 132(1) of the Act, the central question is whether the insured would have had a valid claim to coverage if it had satisfied the judgment. Under the policy's Liability Condition 5, 139 was required to give the insurer timely notice. The language of Statutory Condition 8, which allows parties other than the insured to give notice, did not override or displace Liability Condition 5 and its requirement that notice be timely. Statutory Condition 8 merely expands the category of persons who can give notice to the insurer if the insured is unable or unwilling to do so. The Court rejected the appellant's argument that this reading of Statutory Condition 8 rendered it meaningless. Statutory Condition 8 deprived the insurer of a right to complain of a failure of its insured to provide timely



notice where another party provided a timely notice. If 139 had satisfied the appellant's judgment, the insurer would have had a defence to 139's claim for indemnity under the policy, as the notice from the appellant was not timely. The appellant could not stand in a higher position than 139.

The application judge's findings of fact supported the conclusion that the insurer was prejudiced by the late notice. The notice arrived well after 139's defence was struck out, discoveries had been conducted, and 139 was noted in default. The judge's findings that the insurer would be prejudiced was open to him and was supported by the record. The Court also dismissed the appellant's argument that the application judge should have considered relief from forfeiture only from the perspective of the appellant, not 139, and based on the appellant's conduct. Under section 132, courts are to apply the same equities as would apply if the insured had satisfied the judgment and was itself claiming the insurance moneys from the insurer. The judge, therefore, was required to consider the conduct of 139 in determining whether to grant relief from forfeiture.

*Svia Homes Limited v. Northbridge General Insurance Corporation*, [2021] I.L.R. ¶1-6273

## Other Insurance Decisions

**No Error in Refusal to Award Lump Sum Award Representing Present Value of All Future Benefits** — *Gascoigne v. Desjardins Financial Security Life Assurance Company (Desjardins Insurance)*, [2021] I.L.R. ¶1-6274, British Columbia Court of Appeal (November 3, 2020)

**Labour and Material Payment Bond Was Found to Be Insurance Contract** — *Wesco Distribution Canada GP Inc. v. Fenchurch General Insurance Company*, [2021] I.L.R. ¶1-6275, Manitoba Court of Queen's Bench (November 17, 2020)

**Title Insurer Owed Duty to Defend Where Insured No Longer Owned Property** — *1152729 BC Ltd. v. Chicago Title Insurance*, [2021] I.L.R. ¶1-6276, Ontario Superior Court of Justice (November 10, 2020)

## Torts — Motor Vehicle

### Plaintiff with Chronic Neck, Back, and Shoulder Pain Awarded \$130,000 in Non-Pecuniary Damages

British Columbia Supreme Court, October 28, 2020

The plaintiff was involved in a motor vehicle accident in September 2013. The defendant admitted liability. At the time of the accident, the plaintiff was 53 years old. She had worked minimum-wage manual jobs, including at a berry picking farm, a fish cannery, and a tea packing plant and had earned an annual income of \$8,134 in 2012. The plaintiff did not return to work post-accident. She had limited English skills and had a grade-eight education. The plaintiff claimed that pre-accident, she had no health issues that affected her ability to work or perform household and garden duties, which she spent four hours per day on. Post-accident, the plaintiff ceased preparing meals for family parties. She claimed that she could no longer provide volunteer services at her temple or take her grandchildren to the playground. The plaintiff claimed she experienced pain in her chest, knees, shoulder, neck, and back. She claimed that her arm trembled and that she had mood and sleep issues. The plaintiff brought an action for damages related to her personal injuries.

The action was allowed. The medical expert evidence indicated that the plaintiff suffered from principally soft tissue injuries to her neck, upper and lower back, torso, and left shoulder. She suffered significant bruising to her left-chest and to both knees and a broken rib. The Court accepted that the plaintiff's physical and psychological injuries were severe, leading to a significantly reduced capacity to enjoy most of the activities she had enjoyed pre-accident. The plaintiff suffered from chronic pain and remained disabled from performing any work-related activities or any activities around the home, other than light tasks. The plaintiff's condition affected her family and social relationships. She had not experienced any significant recovery or cessation of pain since the accident. The Court found that a non-pecuniary award of \$130,000 was appropriate. There was no evidence of the source of the plaintiff's numbness, tingling, and pain in her hands.

Based on minimum wage earnings, the Court found that the plaintiff's past wage loss to trial was \$77,000. The Court was satisfied that the plaintiff would suffer a future income loss due to her accident-related injuries. The pain in the

plaintiff's hands was not the pain that was established as being what prevented the plaintiff from working. It was therefore not relevant that the evidence did not establish that the hand pain was accident-related. Using minimum wage earnings and considering that the plaintiff may have stopped working before age 70, the Court calculated \$125,000 in loss of future earning capacity. The Court further awarded \$52,500 for loss of housekeeping capacity, for two hours per week of housework, up to the time the plaintiff turned 75. The Court awarded costs of future care of \$15,795 and special damages of \$6,642. The total award was \$406,938.

*Bahia v. Norton*, [2021] I.L.R. ¶ M-3302

### **Plaintiff with Somatic Symptom Disorder, Major Depressive Disorder, and Generalized Anxiety Disorder Awarded Non-Pecuniary Damages of \$190,000**

British Columbia Supreme Court, October 28, 2020

The plaintiff was involved in a motor vehicle accident in January 2014. The defendants admitted liability. The plaintiff was 51 years old at the time of the accident and had immigrated to Canada in 2012. She enrolled in ESL classes and planned on obtaining early childhood education ("ECE") certification in order to open a home-based daycare. Post-accident, the plaintiff displayed symptoms of claustrophobia, anxiety, and depression. She could not ride in a car or bus and found it hard to cross intersections as a pedestrian. She had issues with concentration, memory, and motivation. She did not resume her ESL classes and ceased social activities. The plaintiff also sought treatment for neck pain. She began seeing a psychiatrist, engaged in cognitive behaviour therapy, and was prescribed anxiety medication. She stopped seeing the psychiatrist after three months, in May 2017, citing difficulties in commuting to him and not "clicking" with him. The plaintiff was diagnosed with somatic symptom disorder ("SSD"), major depressive disorder ("MDD"), and generalized anxiety disorder ("GAD"). She brought an action for damages in relation to her personal injuries.

The action was allowed. While the plaintiff's musculoskeletal injuries were relatively minor and resolved, she developed severe psychological and psychiatric injuries. There was a consensus among the medical experts that the plaintiff suffered from SSD, MDD, and GAD. The accident resulted in the plaintiff losing her sense of self-worth. She ceased performing almost all of the activities that had previously given her joy. The plaintiff's condition was chronic and there was only guarded hope for improvement. The Court found that a non-pecuniary damages award of \$190,000 was appropriate. The evidence did not support that the plaintiff failed to mitigate in not seeing a psychiatrist sooner. Even if the plaintiff had seen a psychiatrist when it was recommended, her condition by that time had become chronic. The evidence also did not support that the plaintiff's family doctor had recommended directly to her that she see a psychiatrist. The plaintiff's reasons for stopping the psychiatrist visits were legitimate and there was no other psychiatrist in the area that spoke the plaintiff's native language. The Court also did not find that the plaintiff failed to mitigate her losses by discontinuing ESL classes. The evidence supported that the plaintiff's disorders impaired her concentration and memory.

The Court found that there was a real and substantial possibility that the plaintiff would have accomplished the goal of opening her own in-home daycare. The plaintiff had been on her way to completing the ESL course in the summer of 2014 and would have enrolled in the ECE program around fall 2014. The Court found she would have worked in another daycare for a year and would have likely been licensed and ready to open her own daycare in April 2016. The Court found that the loss of past wages was \$189,462. Applying the capital asset approach, the Court found that the plaintiff would have earned \$54,000 annually for 13 years until she turned 70. The Court considered negative contingencies such as the time it would take the plaintiff to acquire English language skills and the possibility of her working part-time. It awarded \$500,000 in loss of future earning capacity. The Court further awarded costs of future care of \$112,700 and special damages of \$6,476. The total award was \$998,644.

*Niescierowicz v. Brookes*, [2021] I.L.R. ¶ M-3303

### **Plaintiff with Chronic Neck and Shoulder Pain Awarded \$130,000 in Non-Pecuniary Damages**

British Columbia Supreme Court, November 4, 2020

The plaintiff was involved in a motor vehicle accident in April 2015. The defendants admitted liability. At the time of the accident, the plaintiff was 44 years old and had worked as a bedside nurse since 2000. The plaintiff had suffered a

workplace low back injury in December 2014, submitted a claim to WorkSafeBC, and was participating in a gradual return to work program, being on light duties at work, at the time of the accident. There were three pre-accident clinical records relating to the plaintiff's neck and shoulder pain in March 2015. Post-accident, the plaintiff did not return to work until May 2017. She had three interim accommodated positions. In February 2018, she obtained a new full-time accommodated job as a specialized senior's clinic nurse. The plaintiff claimed that her back returned to its pre-accident condition and that her remaining ongoing physical limitations related to chronic neck and shoulder pain. She also claimed mood issues including depression, general anxiety, and driving anxiety. She brought an action for damages in relation to her personal injuries.

The action was allowed. The Court accepted that the plaintiff's neck and shoulder pain were caused by the accident. While the plaintiff had complained of neck, upper back, and shoulder pain in early March 2015, the clinical records between March 16 and the date of the accident disclosed no further complaints of neck or shoulder pain, despite continued treatment of her low back during those six weeks. On the day after the accident, the clinical records again indicated complaints of neck and shoulder pain. The Court concluded that the accident caused the chronic pain in the neck and right shoulder. The Court further accepted that the accident caused chronic headaches, which improved over time, materially contributed to two episodes of major depressive disorder, which were in remission at time of trial, and aggravated a pre-existing anxiety disorder. As a result of the accident, the plaintiff experienced daily chronic pain, was unable to work for two years, was forced to take on accommodated employment, and became more socially isolated. The Court awarded non-pecuniary damages of \$130,000.

The Court found that the plaintiff's past loss of income earning capacity included lost income of \$175,000, extended premiums for health benefits of \$4,767, and a sick bank repayment of \$33,864. The Court accepted that the plaintiff would be unable to return to her position of a bedside nurse but found she would continue to be employable on a full-time basis in her accommodated position. The Court found that if the accident had not occurred, the plaintiff's salary would have been higher by approximately \$10,000 per year from shift differential and holiday pay. The Court assessed loss of capacity to earn future income at \$100,000. It further awarded \$59,000 for future care costs and special damages of \$11,497. The total award was \$514,125.

*Gurung v. Trampleasure*, [2021] I.L.R. ¶ M-3304

## **Plaintiff with Generalized Anxiety Disorder Awarded \$97,500 in Non-Pecuniary Damages**

British Columbia Supreme Court, November 6, 2020

The plaintiff was involved in a motor vehicle accident in June 2015. The defendant admitted liability. At the time of the accident, the plaintiff was 50 years old. She had no post-secondary education and worked in retail for most of her adult life. In 2006, the plaintiff sustained a workplace injury to her lower back while working at the Costco garden centre. The plaintiff's lower back pain became chronic and she was unable to work until 2008, when she returned to Costco on an accommodated basis. She underwent a discectomy in 2007. In 2010, the plaintiff developed severe depression and stopped working from April 2010 to September 2012. By April 2015, the plaintiff was consuming opioids for pain control at a level several times the recommended maximum dosage. The plaintiff continued to work on light duties at Costco until the accident, claiming that her pain was manageable and her mood was good. The plaintiff claimed that throughout 2016, her symptoms worsened. As she had not returned to work post-accident, her job at Costco was terminated in 2018. She claimed she had difficulty leaving the house, had not seen her grandchildren for several years, and no longer held a driver's license. She brought an action for damages related to her personal injuries.

The action was allowed. The Court found that the accident resulted in a soft tissue injury to the plaintiff's mid and upper back, with the injury being chronic but intermittent, and with the mid back pain not being functionally limiting. The evidence did not establish that the accident caused a serious aggravation of the plaintiff's pre-existing lower back pain symptoms. Pre-accident, the plaintiff's low back pain was not getting better, she continued to take high doses of opioids, and missed many days from work. In the absence of the accident, the low back pain would likely have continued to increase. The Court also found that the plaintiff's depression was pre-existing and not caused or exacerbated by the accident. The accident contributed to the escalation of the plaintiff's pre-existing anxiety, as pre-accident, she had been able to carry out social activities and to work and drive. The plaintiff's anxiety was the most significant impact resulting from the accident. The Court awarded \$97,500 in non-pecuniary damages, which included a \$7,500 loss of housekeeping capacity award.



There was a real and substantial possibility that if the accident had not occurred the plaintiff would have experienced a further reduction in work capacity, due to opioid withdrawal, new stressors in her life, and a further increase in her pre-accident symptoms. The Court awarded past loss of income earning capacity of \$93,000. The Court found that absent the accident there was a real and substantial possibility that the plaintiff would have continued to work at Costco 20 hours per week until age 65. There was a real and substantial possibility that absent the accident, due to her pre-existing symptoms, the plaintiff would not have been able to work as much or for as long as she wished. The Court awarded \$133,000 in loss of future income earning capacity. The Court further awarded \$25,700 in costs of future care and special damages of \$7,239. The total award was \$356,735.

*McColl v. Dushenko*, [2021] I.L.R. ¶ M-3305

## Other Motor Vehicle Tort Decisions

**Plaintiff with Chronic Knee, Back, and Neck Pain Awarded Non-Pecuniary Damages of \$135,000** — *Kirwan v. Roberts*, [2021] I.L.R. ¶ M-3306, British Columbia Supreme Court (November 9, 2020)

**Plaintiff with Chronic Arm, Elbow, and Shoulder Pain Awarded \$130,000 in Non-Pecuniary Damages** — *Grant v. Ditmarsia Holdings Ltd.*, [2021] I.L.R. ¶ M-3307, British Columbia Supreme Court (November 12, 2020)

**Plaintiff in Motor Vehicle Action Ordered to Attend Neurological Assessment** — *Debruyn v. Kim*, [2021] I.L.R. ¶ M-3308, British Columbia Supreme Court (November 4, 2020)

## Torts — General

### No Error in Rejecting Incapacity Argument Where Negligence Action Commenced After Expiry of Limitation Period

Ontario Court of Appeal, November 4, 2020

In May 2013, the appellant fell off his bicycle after travelling across a pedestrian bridge in the respondent city. He suffered a broken finger and superficial facial abrasions. Eight days later, the appellant sought compensation and recommended remediation of the hazard that led to his fall. He completed a form that stated that there was a 10-day notice for providing the city with notice of certain types of claims and a two-year limitation period for bringing an action. The city assigned an adjuster and the appellant refused to cooperate with them. After the appellant did not respond to the city's claim analyst, the file was closed in June 2014.

In 2017, the appellant issued a claim against the city, seeking damages. The city moved for summary judgment, taking the position that the limitation period had expired under the *Limitations Act, 2002* (the "Act"). The appellant argued that he did not discover the extent of his injuries until years after the accident and he lacked the capacity to commence litigation within the limitation period due to a disability and a compromised mental state. The motion judge found there was no genuine issue for trial and dismissed the appellant's action. The appellant appealed.

The appeal was dismissed. The appellant had alleged that between late 2016 and early 2019, he discovered certain injuries that arose from his accident, including a laceration to his lip that would not improve with surgery, osteoarthritis in his broken finger, carpal tunnel syndrome, moderate-severe depression, post-concussion syndrome, and osteoarthritis in his neck. The Court found no error in the motion judge's holding that the subsequent discovery of the severity of the appellant's injuries did not extend the limitation period. Pursuant to case law, the limitation period is triggered by knowledge of the material facts necessary to support the cause of action, not knowledge of the extent of the damages. The Court found that the appellant was aware of the necessary facts to support a claim against the city almost immediately after his fall, and this was confirmed by the submission of his claim for compensation from the city eight days post-fall.

The Court also dismissed the appellant's capacity argument. Pursuant to subsection 7(2), a plaintiff is presumed to have been capable of commencing a proceeding, unless the contrary is proved on a balance of probabilities. While the motion judge accepted that the appellant had proffered evidence of a mental illness, there was no evidence that it rose to the level of incapacity for the purposes of section 7 of the Act. The motion judge had found a complete absence of any

evidence to show that the appellant's mental illness rendered him incapable of commencing litigation within the limitation period. Evidence of cognitive defects from 2017 and 2018 did not establish that he was incapable of doing so.

*Baig v. Mississauga*, [2021] I.L.R. ¶ G-2878

## SCC Upheld Decision Finding Food Supplier Did Not Owe Duty of Care to Franchisees

Supreme Court of Canada, November 6, 2020

In 2008, the respondents Maple Leaf Foods Inc. and Maple Leaf Consumer Foods Inc. ("Maple Leaf") suffered a listeria outbreak that resulted in their ready-to-eat meats becoming contaminated. Maple Leaf issued a recall that included two meats it supplied to Mr. Sub franchisees pursuant to the exclusive supplier contract between Maple Leaf and Mr. Sub. Mr. Sub franchisees brought a class action against Maple Leaf, with the appellant as the representative plaintiff. The appellant alleged that the franchisees suffered an economic loss due to the reputational harm resulting from their association with Maple Leaf and claimed damages on the basis that Maple Leaf negligently manufactured and supplied potentially contaminated meat and negligently represented that the supplied meats were fit for human consumption. Maple Leaf's motion for summary judgment was dismissed. The motion judge held that Maple Leaf owed the franchisees a duty to supply a product fit for human consumption, and that the contaminated meat products posed a real and substantial danger so as to ground a duty of care. The Court of Appeal allowed Maple Leaf's appeal, finding no duty of care was owed to the franchisees (see [2018] I.L.R. ¶ G-2815 (Ont. CA)). The appellant appealed.

The appeal was dismissed. The majority of the Court noted that there is no general right in tort protecting against the negligent or intentional infliction of pure economic loss, which is economic loss that is unconnected to a physical or mental injury to the plaintiff's person or physical damage to property. In determining duty of care, proximity remains the controlling concept. Pursuant to *Deloitte & Touche v. Livent Inc. (Receiver of)*, 2017 SCC 63, in cases of negligent misrepresentation or performance of a service, proximity is established by determining the defendant's undertaking of a responsibility that invites the plaintiff's reasonable and detrimental reliance. Any reliance on the part of the plaintiff that falls outside of the scope of the defendant's undertaking falls outside the scope of the proximate relationship. Maple Leaf's undertaking to provide ready to eat meats fit for human consumption was made to consumers to assure them that their interests were being kept in mind, not to commercial intermediaries such as the franchisees. Accordingly, the business interests of the franchisees lay outside the scope and purpose of the undertaking. The franchisees also had not relied on the undertaking.

While case law recognizes the recovery for economic loss in cases of negligent supply of shoddy goods or structures, founded on the defendant's negligent interference with a right to be free from injury to one's person or property, any danger posed by the supply of ready to eat meats could be a danger only to the ultimate consumer, not to the franchisees. The Court noted also that while the meats could have posed a real and substantial danger to consumers when manufactured, any danger was removed when the meats were recalled and destroyed.

The Court found that the appellant's claim did not fit into a recognized analogous category of proximate relationships. In applying a full proximity analysis, the Court noted that the franchisees were not consumers, but commercial actors whose choice to enter into the arrangement substantially informed the expectations of their relationship with Maple Leaf. The franchisees could have protected their interests by entering into a direct contract with Maple Leaf. While the franchise agreement worked a vulnerability upon the franchisees, this did not establish a proximate relationship. As there was no relationship of proximity between Maple Leaf and the franchisees, there was no proximity for the purposes of recognizing a novel duty of care.

*1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, [2021] I.L.R. ¶ G-2879

## Other General Tort Decisions

**Plaintiff Not Permitted to Add New Cause of Action in Scaffolding Fall Negligence Matter** — *McConnell v. Fraser*, [2021] I.L.R. ¶ G-2877, Ontario Superior Court of Justice (October 30, 2020)

**CANADIAN INSURANCE LAW REPORTER**

Published monthly as the newsletter complement to the *Canadian Insurance Law Reporter* by LexisNexis Canada Inc. For subscription information, contact your Account Manager or 1-800-387-0899.

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