OTLA Ontario Trial Lawyers Association

Ontario Trial Lawyers Update

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CASE SUMMARIES

June 9, 2014

Savage v. CGU Insurance Company of Canada, 2014 ONSC 3234

This is a defendant's motion for an order compelling the plaintiff to attend an independent psychological examination in an action for statutory accident benefits. The plaintiff submitted two treatment and assessment plans in March 2011 seeking funding for vocational retraining and rehabilitation. The defendant denied the claim requesting an insurer's examination. Pursuant to that request, the plaintiff underwent a vocational assessment with a vocational and rehabilitation specialist on May 12, 2011 and with a psychologist on May 13, 2011. Both reports concluded that the plan was not reasonable or necessary and the claim was denied. Karam J. noted that the relief claimed in the Statement of Claim is essentially the same as provided by the treatment plans of March 2011 and that there is no evidence of any significant change in the plaintiff's health or circumstances since the assessments were completed. The defendant argued that this would in effect be the first medical exam, as entitled to, and that the earlier assessments may not qualify for use because they fail to meet the requirements of Rules 53.03 and 4.1. Karam J. concluded that although the assessments were performed within a different proceeding than this action, there is simply no practical difference. The earlier assessments are

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UPCOMING EVENTS

OTLA Fall Conference
Building Blocks of Practice Excellence: A New Look Through Old Windows
October 20 & 21, 2014
Chairs: Bill Elkin, Ronald Bohm, Claire Wilkinson & Maia Bent
Location Change:
Metro Toronto Convention Centre North Building, Level 100, 255

not of questionable value, dealing as they do with precisely the same issues which the defendant faces in this action; the proceeding before and after the commencement of this action remains the same; and assessments were obtained on behalf of the same parties. Karam J. was satisfied that a further psychological examination was not necessary to fairly litigate this matter. The motion was dismissed.

Madhai v. Cox, 2014 ONSC 3274 (CanLII)

The Ahmed defendants bring this summary judgment motion for a dismissal of the action against them. The action arose from a motor vehicle accident where Ms. Madhai, a passenger in a vehicle driven by Ms. Cox was killed. Evidence in the record establishes that Ms. Cox lost control of her vehicle and collided with the Ahmed defendants' vehicle, which was travelling in the same direction two lanes over from Ms. Cox's vehicle. Ms. Cox was charged with careless driving and pleaded guilty pursuant to an agreed statement of facts. At the sentencing hearing, the judge found that her alcohol consumption was a contributing factor to the collision. The plaintiffs submitted that it is still unknown whether there was anything Mr. Ahmed could have done to avoid the accident. Morgan J. held that the question on this motion is whether the Ahmed defendants have established on a balance of probabilities that they are not liable for this accident. Morgan J. noted that it is unlikely that Ms. Cox will have any evidence to contradict her agreed statement of facts and conclusions drawn by the sentencing judge. Based on witness statements and reconstruction reports, Morgan J. found that the evidence is uncontroverted that the Ahmed vehicle was travelling just below the speed limit, when it was without warning struck on the side by the Cox vehicle. To the extent that the plaintiffs have not been able to put forward any direct evidence from Ms. Cox, that is not something that weighs against the Ahmed defendants. In this case, to the extent that there is an incomplete evidentiary record, it is not the type of thing that will improve with trial. Rather, it is simply a sign that the plaintiffs have not put their "best foot forward" on the motion. Morgan J. granted summary judgment and ordered $16,960.51 in costs against the plaintiffs. Read more on CanLII.

Khelifa v. Sunrise Property, 2014 ONSC 3218 (CanLII)

The plaintiff sues for damages arising from a fall on the fire

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escape of her apartment building. The trial commenced on May 12, 2014. The defendants did not dispute Dr. Feinstein's qualifications to opine in the area of psychiatry and neuro-psychiatry. They objected to Dr. Feinstein providing an opinion on the mechanism of what caused the plaintiff's head injury, as well as the introduction of animated video depicting a fall down steps and what occurs to a person's brain when a coup-contrecoup injury is sustained. The plaintiff retained Dr. Feinstein on November 3, 2009, to provide an opinion on the nature and extent of the plaintiff's injuries from a neuro-psychiatric perspective, as well as subsequent supplementary reports. The disputed report is dated April 29, 2014, where Dr. Feinstein opines on the mechanism of injury. Wilson J. noted that the 2010 amendments to Rule 53 underscore the requirement that the expert be properly qualified to offer opinion evidence and that the opinion be clearly set out in a written report served within the time limits specified. Wilson J. commented on the role of the trial judge as gatekeeper and declined to take the route of admitting evidence on the basis that proper weight can be attributed an the jury instructed in this regard, preferring to consider the preferred evidence and determining admissibility at the present time.

Wilson J. held that Dr. Feinstein was not allowed to testify on the disputed issue because of late service of the report. She said that it would be unfair and prejudicial to opposing counsel to allow this evidence in the middle of trial. Even if the report had been served in time, Wilson J. would not have allowed the testimony because Dr. Feinstein is not qualified to express an opinion on the type of fall that most likely produced the plaintiff's injuries. She found that his opinions are not based on any scientific data or studies, and that they are based on his experience as a trauma doctor. Furthermore, to allow Dr. Feinstein to testify on the issue comes very close to usurping one of her functions as a trial judge. Finally, his opinion is not necessary because the engineer will testify on this area. Wilson J. also held that the demonstrative evidence is not admissible because it is not based on facts elicited in evidence in this case. Read more on CanLII.

*Summaries provided by **Nga Dang**, a lawyer practising with Singer Kwinter Personal Injury Lawyers in Toronto, Ont.*

Know of a case you think should be included here? Please submit it by email, along with a link to the decision on

CanLII if appropriate, to Maria McDonald at mmcdonald@otla.com.

OTLA MEMBER NEWS

OTLA Election Updates

Did you read the latest bulletin about OTLA's Election Strategy? OTLA is developing a series of briefings on key issues facing the plaintiff bar and their clients, in order to educate and inform candidates in the June 12 provincial election. In addition, we are developing key facts, talking points and questions you can raise with your local candidates. Watch for these to come by email over the coming weeks. You can also read past editions on the website here:

- Election Updates - for candidates
- Election Updates - for OTLA members (login required)

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