DEVRY SMITH FRANK *LLP*

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"Collateral Benefits" Doesn't Mean "Double Recovery": More Like Double Trouble!

by Marc Spivak and Igor Poroger

Marc is the managing partner of DSF's personal injury group. He is a graduate of McGill University's National Programme, was called to the bar in 1992 and has frequently appeared before a number of courts and tribunals in Ontario. His direct line is 416-446-5855.

The Ontario *Insurance Act* has a provision that may potentially disadvantage plaintiffs who have been injured in motor vehicle accidents. Section 267.8 of the *Act* would seem to change the law with respect to "collateral benefits," which are, roughly speaking, the benefits received by a plaintiff outside of damages in a lawsuit.

Traditionally, in all but a limited number of cases collateral benefits did not affect the compensation a plaintiff received. However, s. 267.8 changes all that. It effectively reduces any damage award granted by a court by the amount of collateral benefit received or made available up to the date of trial. Ostensibly, this has been put in place to guard against "double recovery" situations, where plaintiffs receive compensation from both the courts and other sources. This however, punishes plaintiffs who have the foresight to hold a private insurance policy or those who qualify for income replacement, medical, or rehabilitation benefits.

A recent Ontario Superior Court case, *Sutherland v. Gurmeet,* would seem to broaden the effect of s. 267.8. In that case, the defendant was allowed to deduct one type of benefit where the plaintiff had chosen to receive another, due to the requirement to choose one. What this all means is that in plaintiff practice, where the litigants have elected to proceed to trial, plaintiffs will be better off if they thoroughly scrutinize the collateral benefits they wish to receive — so as not to diminish any potential damage award that could be granted by the court.

One caveat to this is that s. 267.8 does not apply where the litigants are open to settling outside of court. In such instances, which are in fact much more frequent than trials, all collateral benefit credits are open to negotiation and are not automatically required to be recovered by the defendant.

In this edition:

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Collaborative Lawyers Held to the Same Standard as the Rest of the Profession

by Tara Mesensky

In the collaborative family law process, the parties and their lawyers take a dignified, cooperative approach to settling the issues arising from separation. A good collaborative family lawyer ensures that her client is fully informed before reaching a settlement, something underlined by a recent decision of the Alberta court.

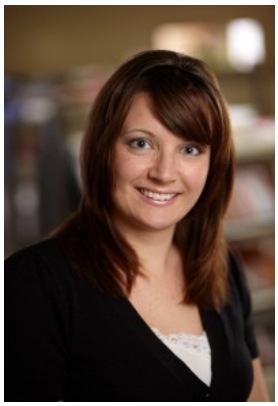
The Alberta Court of Appeal recently heard a case, *Webb v. Birkett*, in which a wife sued her collaborative lawyer for failing to get enough financial disclosure from the husband. She claimed that as a result of the lawyer's negligence, she had unwittingly settled for less money than she could have gotten in court.

Although the wife could not establish that she had suffered any loss, the Alberta Court of Appeal set out what standards apply to collaborative lawyers. The court confirmed that lawyers remain obligated to discharge their professional duties during the collaborative process, namely:

(a) obtaining sufficient reliable information to be able to ascertain what a client would likely receive or be required to pay, as well as matrimonial property division should the matter be resolved at the trial, and advising accordingly;

(b) giving the client a description of the options, and preparing them for what lies ahead;

(c) telling clients who want to settle without receiving full information from the other side that they may be accepting less or paying more than what would be required by law, and providing that client with an assessment of the impact of the risk, including estimates of the value of what might be lost or paid, to the extent possible, on the basis of available information.



Tara's practice focuses on all aspects of family law. She received her B.A. from York University and received her LL.B. in 2007 from Osgoode Hall Law School. Her direct line is 416-446-5094.

Employment Law: Rights Tribunal Calls for Sympathy for an Ailing Employee

by Igor Poroger

In a recent Human Rights Tribunal of Ontario decision, *Torrejon v. 114735 Ontario*, an employee who has been wrongfully terminated was awarded $200,000. Elsa Torrejon was fired after she told her employer she had been diagnosed with breast cancer and was to undergo surgery. The employer alleged that Ms. Torrejon had effectively resigned during the meeting.

The *Human Rights Code* protects employees in situations like the one Ms. Torrejon faced. The tribunal applied s. 10 (1) of the *Code,* which includes the diagnosis of cancer as a "disability", thus qualifying this situation as one in which an employer has a duty to accommodate an employee for a disability-related reason.

In this case, the respondent employer relied on s. 50 (1) of the *Employment Standards Act (ESA),* which sets out that only employers with more than 50 employees must provide an unpaid leave of absence for health purposes. Since the employer in this case did not meet this criteria, it assumed it was not required to accommodate Ms. Torrejon. However, the tribunal held that because of the "individualized nature of the duty to accommodate and with the primacy of the *Code* over other legislation," the respondent employer could not rely on the s. 50 (1) of the *ESA*.

Igor will join Devry Smith Frank LLP as an articling student for 2011-2012. He earned his law degree from Queen's University. His direct line is 416-446-5860.

Guidance Required by the Supreme Court of Canada in Child Custody Disputes

by Alexandra Tratnik

Should Canadian courts require warring parents to continue to work together to make decisions about their children? Should they be permitted to appoint "parenting coordinators" or other professionals with decision - making powers to take the ongoing conflict out of the family courts?

In *Young v. Young*, a trial which took place six years into acrimonious conflict over parenting, the court ordered joint custody and appointed a "parenting coordinator" who was not a judge to arbitrate parenting disputes. This was a solution which the presiding judge called "parallel parenting." Case law is divided in defining what this means, but it is to disengage the parties and to decrease conflict.

In this case, the trial judge's order accomplished neither: it forces the parties to continue to engage because they must either make decisions about their child together or "fight it out" in front of an arbitrator. The court's decision also raises a constitutional issue: can a court make an order delegating its own jurisdiction or resolve parenting conflicts to an arbitrator?

In dismissing the mother's appeal, the Court of Appeal failed to address the issue as to why joint custody was appropriate in such a high-conflict situation, something of particular concern given several court decisions which indicate that it is not. The judges of the appeal court found that "parallel parenting" in this case was a "common sense solution" given the circumstances. They did not address the constitutional issue.

John Schuman and Tara Mesensky, the lawyers who acted for the mother in the case, are seeking to have the matter considered by the Supreme Court of Canada.

Alexandra joins Devry Smith Frank LLP on her call to the bar this year. She is a graduate from the University of Western Ontario and received her JD at the University of British Columbia Faculty of Law. Her direct line is 416-446-5092.

Refusal to Mediate Could be Costly!

by Esther Cantor

In *Keam v Caddey*, the Ontario Court of Appeal ordered an insurance company to pay a $40,000 penalty for its refusal to mediate a dispute in spite of two requests and its statutory obligation to do so.

Since 1996, the *Insurance Act* has required i) a person making a claim for personal injury or death arising from a motor vehicle accident and an insurer defending the claim to participate in mediation if requested by the other side to do so (s. 258.6(1)) and ii) the insurer to attempt to settle the claim as expeditiously as possible (s. 258.5(1)). Non-compliance can be costly.

The insurer in this case – whose actions the court characterized as "hardball" – declined to participate in mediation because, in its view, the plaintiff's injuries were not serious enough to meet the statutory threshold in the *Insurance Act* which would permit him to maintain an action. Not only did the trial court find the insurer wrong on the issue of the threshold, the Court of Appeal held that it had breached the mandatory mediation requirements of the *Insurance Act*, to which there are no exceptions, in respect of which a trial judge is required to determine a penalty.

In this case, the Court of Appeal ordered the insurer to pay $40,000.00, an amount which represented a "remedial penalty," reflecting the court's disapproval of the insurer's conduct.

Madam Justice Feldman, who wrote the Court of Appeal's unanimous opinion, re-iterated the policy underlying the statutory requirement to mediate: *"participation in mediation could have a salutary effect on one or both sides, with input from an experienced and respected mediator."*

Esther is a partner in our personal injury group. She has just recently started a mediation practice. Her direct line is 416-446-5840.

More join the team!

Devry Smith Frank *LLP* is pleased to welcome three new members to its family.

Eric Herrmann joins us as Support Analyst and IT trainer. Eric earned his Network Specialist Diploma from Trios College. In his spare time, Eric enjoys scuba diving and squash.

Cassandra Priede joins DSF as a corporate lawyer. Cassandra completed an Honours Business Administration degree at the Richard Ivey School of Business and received her LL.B. (tax concentration) from the University of Western Ontario. She was called to the bar in 2003 and has experience in sale transactions, financing, tax issues and general commercial matters.

Shawna Sosnovich returns to the commercial litigation team. Shawna earned her LL.B. from Osgoode Hall Law School in 1997 and since then has been practising in the areas of commercial litigation, insolvency, debt recovery and employment law.

Nicole Lowes joins DSF as a collection clerk in our collection/recovery team. She earned her Legal Administration Diploma from Durham College and has worked as a mortgage enforcement law clerk. In her spare time, Nicole enjoys outdoor activities.

Administrative Professionals Day

Happy Administrative Professionals Day!

April 27, 2011, is the day Devry Smith Frank *LLP* celebrates and acknowledges the vital role of its outstanding administrative staff. Each year we pay tribute to our staff with lunch and gifts.

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From its genesis in 1964, Devry Smith Frank *LLP* has grown to a professional corps of 42 lawyers, 5 licensed paralegals, 27 law clerks and a complement of highly skilled and dedicated staff, offering a broad range of legal services to our individual, business and institutional clients.

To learn more, please visit our website at **www.devrylaw.ca,** our Facebook page, or call us at 416-449-1400.