BC Association of Legal Assistatants P.O. Box 4127 Main Post Office, Vancouver, BC V6B 3Z6 - Fall 1995 Edition

The Assistant

PRESIDENT'S COLUMN

What's in a name?

Western Association of Legal Assistants has recently been renamed BC Association of Legal Assistants. Ironically, this took place at a time when many other legal assistant Associations (mainly in the U.S.) are renaming themselves. However, the associations are not renaming themselves to reflect a geographical reality, such as ours, but rather to reflect the growing trend towards the increased preference of the usage of the title "paralegal" as opposed to "legal assistant".

In these days of political correctness, "assistants" are cropping up everywhere. Also, as technology increases efficiency and productivity, more and more secretaries are performing tasks which were primarily left to legal assistants. The water is becoming muddier in the description of the two jobs.

Consequently, many lawyers are now referring to their secretaries as their "assistant".

So where does this leave us "legal assistants"? We may want to reconsider the "paralegal". As one article I have read recently stated, ""Legal Assistant" losing clout". I looked up the definition of the prefix "para" in Webster's. It says "associated in a subsidiary or accessory capacity", and then refers to "paramedic" as an example. With the popularity of legal TV shows, movies and novels, the general population knows what a paralegal is. The general population doesn't know what a legal assistant is. The problem with the use of the word "assistant", is that the word more accurately describes both what a secretary and legal assistant do, they assist the lawyer with the conduct of the file.

I have always personally felt that "paralegal" bestowed a more professional image in non-legal minds. We cannot request that the title "assistant" be reserved for "legal assistants".

Food for thought. I would like to hear from the members on this topic.

I step into the President's role with both excitement and trepidation. I look forward to planning an exiting year in which we plan to include many educational seminars and networking sessions.

Linda Donaldson

In this Issue

1995 AGM

By Patricia Hunt

The Board of Directors was introduced as follows: Jasbir Bains, Vice-President and Public Relations, Glenis Bryson, Secretary, Dianne Bond, Treasurer, Karen Chang, Programs, Linda Donaldson, Education and Jerena Laursen, Past President. Absent: Jeanne Kennon, Membership and Lee Ann Windall, Newsletter.

An invitation for questions to any of the directors was extended.

We started the year with a full compliment of nine directors. It has been a dynamic combination of fresh energy and strong experience.

The following student representatives were in attendance for most of our meetings:

Tamra Hall (First Year Capilano), Caroline Christianson and Jennifer Beckett (both Second Year, Capilano), Michelle Robertson (Evening Capilano) and Clarice Walaska (Evening Douglas College). On behalf of the board, we thank you for your interest and support. Good luck in your studies.

In October, some members met with John Kelly, a law professor from Ontario who was gathering information and insight on legal assistants in BC. A detailed report was referenced in our winter newsletter. He encouraged legal assistants to take a leading role in self and professional promotion, increasing public awareness and opening lines of communication between legal assistants and the public.

In keeping with the tone of information exchanged during that meeting, Jerena Laursen struck a task force to assertively address major issues concerning the promotion of the legal assistant profession, including certification. Unfortunately in May, the task force delivered a report that suspended any further work and invited the Board to officially dissolve the committee. This report was published in our summer newsletter. We provided you with an opportunity to give us feedback. As a result of no feedback, the Board dissolved the task force committee.

Also in October, our delegate, Dianne Bond, attended the Legal Support Staff Expo and delivered a report to the Association which was published in our winter newsletter.

In November, we sent out our letter to Capilano College supporting its proposal to the Open Learning Agency concerning a process by which a legal assistant degree may be obtained from a university. This degree would be earned through a combination of two years of undergraduate studies from a university and the credits earned in either the Capilano College diploma or certificate program.

Following the benchers' decision to back off on certification, several members met with Maureen Fitzgerald of the Law Society in April. The purpose of the meeting was to give suggestions and options to educate the profession on the appropriate recognition and use of legal assistants. An article relating to this meeting was published in our summer newsletter.

The Association hosted two networking events that were well attended and informative.

In May, I attended the Institute of Law Clerks Conference `95 Managing Change and delivered an opinion on behalf of the Association concerning a future national association of legal assistants which was published in our summer newsletter.

The bylaw review committee continued and finalized its work on the long awaited amendments to the current bylaws which were presented and approved by the Board of Directors.

The number of members has remained fairly constant this year at 89 (56 L.A, 31 Students and 2 Honourary) partly due to the fact that we are still receiving membership dues for 1995/96 and are in the process of culling names of members whose memberships have lapsed.

The Newsletter committee has come out with some new innovative approaches that has improved the look, content and cost effectiveness of the publication. We can look forward to the next publication soon.

The Education committee is continuing to obtain program information from various educational institutions. The committee's efforts have assisted our members in providing information on extra-provincial legal assistant training programs for various governmental agencies and for members moving outside the province.

To date, the Association has committed a total of $1,000.00 to the Scholarship Fund. Our goal is to raise $2,500.00, at which point the Provincial Government will contribute an equal amount. A scholarship fund becomes effective upon a minimum contribution of $5,000.00.

All in all, it has been a busy and productive year. Although the directors have worked hard on your behalf, the Association also owes its thanks to the law firms who have supported our efforts and allowed us to host events on their premises. Specifically, Richards Buell Sutton and Russell DuMoulin have each been most generous in their support.

I personally would like to extend my thanks to all of the other directors.

We are looking forward to further growth and promotion of the legal assistant profession in the coming year.

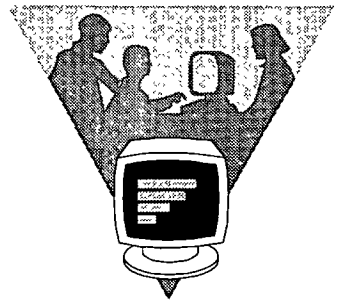
Employment Opportunity

Fox, Morgan & Company is looking for a junior legal assistant with a minimum of one year's work experience in personal injury. This is a new position available immediately. Of particular importance is someone who is self-motivated, enjoys the client contact aspect of a personal injury practice and likes to work in a team environment.

Please feel to call Christine Tough if you have any questions. Resumes can be directed to her at Fox, Morgan & Company - Suite 200 Granville Square, 200 Granville Street, Vancouver, BC, V6C 1S4. Telephone 669-3441, Fax 669-9005.

We invite any firm wishing to place an employment opportunity advertisement in our newsletter to contact Linda Donaldson at 687-0411.

Focus on Technology



CASE PREPARATION: A NEW IMAGE

By Dom Bautista

The Opening Argument

The most important objective of Case Preparation is to be able to effectively cull information from your documents and convert these into knowledge in order to protect your clients' interests. Given the trend of moving from *billable hours* to *value billing*, the speed at which Barristers and/or Solicitors acquire knowledge of a client's file becomes increasingly critical. The true value of service will be measured in terms of how, not how long. knowledge is turned to the clients' best advantage.

The Case

For an example, let's look at a generic litigation file, where the potential corporate liability is twenty million dollars. The preliminary work must be ready in 6 months, and, there are ten to fifteen thousand documents to go through. The immediate challenge is how and where to begin reading the documents. How do you convert these loose pieces of information into something cohesive and substantive that will give your client the advantage?

The current case preparation paradigm

Remember how files used to be prepared? You started with document screening, selection, and inventory. This meant that you and your staff

looked at boxes and boxes of files, and, during your extensive and costly screening exercise, you identified and tagged the documents you thought you would need. Then, you generated inventories of what documents you had and what their contents were, your opposing counsel had, or what you decided you would not need to produce but you need to keep track of because you had reasons for not producing them then. But you would need to know where those documents were so if you need them later you can access them easily. Then you need to have the tagged documents copied, tabbed, stored in binders, re-indexed and labeled. The original documents were then put back into the paper archive. You then had to card file index all your documents, hand sort your documents into evidentiary and arguments, sticky note the pages you wanted to use, and then had your secretary re-type the sections you needed to present. The card system gave way when databases became available, but then you had to text code and index the documents. And you still had to locate either the hard copy or a microfilm in order to retrieve the actual document.

While the current system of indexing and tagging documents is better than the card indexes, the technology has arrived to improve and simplify both document indexing and document retrieval.

The new case preparation paradigm

Now, let us return to that 20 million dollar case with the ten to fifteen thousand documents that you are indexing. You and three of your best legal assistants are in one room when the first boxes arrive. Out of those thousands of documents, there are probably only one or two hundred really crucial ones, and who knows which these are when you start building your case.

Your client has one other stipulation: they will not pay any photocopying for the files. The stipulation stems from their knowing that working from electronic files saves them more than just photocopy charges; it saves them a lot of billable hours allocated to shuffling paper again and again and again.

The solution is to change your work flow to include imaging as an option. The long-term strategy of being able to access information in real time needs a change in workflow of how we capture information. Workflow means binding the text with the image and facilitating the lawyer's thought process that goes with viewing the documents almost simultaneously, and this is the most important thing. If you can master the documents easily, you capture and link the information and turn it into knowledge. This is the process that allows you to win.

Instead of spending billable staff time just copying and date stamping, you are going to have those ten to fifteen thousand documents scanned; after all, a scanned image is nothing more than an electronic photocopy. You receive the "copies" on disk; now, you don't need to review the documents by physically turning pages, you have all the documents in your computer.

The amount of encoding that is needed for each document is cut down drastically to about five pieces of information. Thus you do not need to worry about having to perform laborious encoding work. The five basic pieces of information are: the document type, the date, the writer, the recipient and a short description of the content. And just as important, you do not risk having your staff having assigned different codes to these fields because the very nature of the information is pretty straightforward.. You now assume control of selecting from the mass of images, those critical items for your arguments and your evidence. And you did this without having to make a single photocopy.

The software creates three types of files for you. It creates a TIFF file, which is your image file of the document; an ASCII file which is your word processing file of your document (which was converted using OCR or Optical Character Recognition technology) and a word index file of the significant words OCRed within the ASCII files so you can search and retrieve specific words from any and all the scanned documents.

Instead of reading and marking up photocopies, you now have control and real time access to document information, and, with the software, you can keep your files electronically and you have access to them at any time. When you need paper copies of your documents, simply print the appropriate TIFF image file and make copies from this instead of the stapled, dog-eared original. Instead of re-keying the documents to prepare your case, you convert the ASCII files into word processing files where they are spell checked and redlined, and the text then edited. Under this new paradigm, the time previously spent marking the information that you want for use in your arguments, is now being spent building your arguments.

By using the indexing function of this new tool, you turn bits of scattered information into knowledge. The index file reduces your search time; simply type in a key phrase and the software provides you with a list of documents where the phrase appears. For example, if you want all memos addressed to Robert, simply type *Attn: Robert* or *To: Robert* and wait. Furthermore, you need not be concerned with the right spelling or retrieving only whole phrases; the search function makes use of fuzzy search capabilities. You can set the search parameters to be 75% accurate so that the search will include those words that vaguely resemble the word that you are searching for or just a part of your phrase. *Attn: Robert* may yield a listing of documents with *Attn: Roberta* or just *Robert*. A secondary function of the indexed search, is that the software then tells you exactly where the phrase or word you're searching for appears in each of the documents, as well as the number of times the phrase or word appears in the document. This way, you've already saved time by reducing the number of documents that you have to check.

As you go through each document you can now switch back and forth from a word processing software that you are most comfortable with, to write your notes that you will need to form your arguments. And when you are done, you can merge your notes with the rest of your scanned files. Now you will be ready to do your final arguments.

One final feature that is valuable is that you can import all your TIFF images, word processing file and the word index file into your laptop. You will also need to bring with you your SyQuest external drive that can process 270 Mb disks. A 270 Mb disk can usually contain about 4400 pages. Imagine having full access to all of your documents complete with all the search and retrieve functions during the trial. There will be a lot of situations where this becomes indispensable.

Cost Savings

On the average, file preparation charges are about 30% of the bill. The American Bar Association experience shows that about half of the file preparation charges are being saved by switching to scanned imaging and search and retrieval software. Most important of all, the lawyer's trial preparation charges are kept to a minimum because there is hardly any paper shuffling. With scanning, the most significant effect is the reduction in the number of billable hours, because you have reduced the number of hours worked by making the time worked more productive. Additionally, you've also reduced the overall materials cost. The cost of imaging is far less than what it would have cost to photocopy and manually search documents under the old paradigm. The photocopying charges are kept to a minimum because you only copy the documents that you need to display, and no copies are made for storage purposes.

Implementation

How do you implement the new case preparation paradigm? Once you are prepared to shift to the new workflow, you must now look to the software and hardware. Purchasing your own software and hardware is costly because technology gets outdated quickly. Consider outsourcing to a service bureau that dedicates itself to scanning, OCRing and indexing your legal files. You will however, need to invest in a few items. There is the software called Recollect, which will allow you to manage your electronic files. There is the external storage drive that will allow you to take your files with you. And finally, there is the training and time needed to familiarize yourself with the new process.
Once you become comfortable with your new tools, you can then concentrate on your field of expertise, protecting your clients' interests, while your service bureau can do what it does best: capturing your documents to images and word processing files.

Closing Argument

Protecting your client's interests is important, but the bottom line is also important. What would happen if, after helping your client win, they get to take home more than just the usual after your bill has been paid?

The above article was reprinted with the kind permission of Dom C. Bautista, the CEO of IDIM, Integrated Document Image Management, a division of ASAP Printing Centre in Vancouver.

Where to go - On the World Wide Web

By Linda Donaldson

Does the idea of going out into the "Web" of the Internet, make you feel like a bug trapped inside the spider's snag? Do you

avoid it because you don't know why it would be useful to you, or have been jaded by the media's concentration on all that is bad?

If your job as a legal assistant entails doing factual research, the Internet can provide a literal Mount Everest of information, depending on your subject. Even the most obscure subjects can be found. You can either participate or just "people watch" by observing conversations between persons in the same interest groups. For those of you involved in researching medical conditions, it is a vital source of the most current information available. In products liability or class action cases, you can search thousands of articles archived by various "sites" on the Web, for similar cases or articles on your subject.

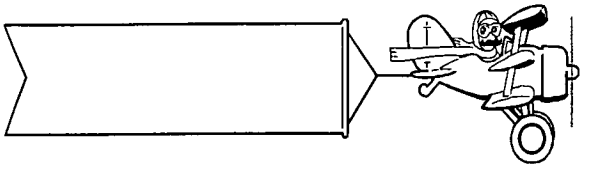
The media often portrays the Internet as a black hole of unregulated information which will expose the innocent to the corrupt opinions of the "undesirables". Does this occur? Will you be exposed to undesirable information? The answer is yes, but only if you are sloppy in your searches or don't read the descriptions of the sites to which you are linking. When you do a search on the Internet it will provide with the results of the search, being a list of sites whose keywords contain the word or phrase you are looking for. Each of these sites provide a description of what the site is "about". It is fairly easy to figure out the "theme" of the site, and if it does not seem to be along the lines of what you are looking for, then simply don't go there.

A properly worded search will evoke amazing results, opening your research up to a whole new dimension.

It can be useful in the exchange of information as well. In my firm, the librarian belongs to a law librarian user group. Someone in the firm was looking for an obscure publication. Our librarian put a message on the Internet to her user group, and by the next day not only had several responses telling her where to get it, but by the following day had actually received a copy of the publication, on loan from a firm in Washington, DC. Without the 'Net our firm would never had access to that publication - at least not without dozens of phone calls and several days later.

For starters, visit the site of the National Federation of Paralegal Associations, at "http://www.paralegals.org". It has a wealth of information which is of interest to all legal assistants.

News and Views



SECRETARY'S REPORT

APPOINTMENT OF DIRECTORS, OFFICERS & CHAIRPERSONS

At the annual general meeting of the members of the Western Association of Legal Assistants (the "Association") held on September 20, 1995 and at the Directors' meeting held on September 26, 1995, the following persons were elected as Directors, Officers and Committee Chairpersons for the ensuing year:

LINDA DONALDSON - President & Newsletter
JASBIR BAINS - Vice-President & Public Relations
PATRICIA HUNT - Past President
GLENIS BRYSON - Secretary
PATRICIA TERLECKI - Treasurer & Membership
LEE ANN WINDAL - Programs Chairperson
JENNIFER JANITS - Education Chairperson

SPECIAL RESOLUTIONS

At the aforesaid Annual General Meeting, Special Resolutions of the Members of the Association were passed to alter the Constitution and Bylaws to change the name of the Society, to ensure that the Constitution and Bylaws are gender neutral, to open the criteria for membership and qualifications in order to expand our membership, and to include several levels of membership. Certified copies of the Special Resolutions were filed with the Registrar of Companies for the Province of British Columbia so that effective October 30, 1995:

1. The name of the Association is changed from the WESTERN ASSOCIATION OF LEGAL ASSISTANTS to the BC ASSOCIATION OF LEGAL ASSISTANTS;

2. The purposes of the Association are changed to the following:

   a. The Association shall be nonprofit and its primary purpose if the promotion of the Legal Assistant profession.

b. To provide and maintain an organization for that branch of the legal profession which consists of Legal Assistants who are persons qualified through education, training, or work experience to perform substantive legal work that requires knowledge of legal concepts and is customarily, but not exclusively performed by members of the Law Society of British Columbia ("Lawyer"). This person may be retained or employed by a Lawyer, law office, corporation, department or office (whether government, public, municipal, commercial or otherwise), or authorized by administrative, statutory or court authority to perform this work.

c. To advance and protect the status and interests of Legal Assistants.

d. To promote professional unity amongst persons engaged in the said branch of the legal profession and to promote co-operation and mutual assistance between them.

e. Generally to promote the education, whether general or legal, and professional advancement of persons with a view to assisting them to become proficient in the law and to qualify as Legal Assistants and in particular either alone or jointly with the Law Society or any other body, whether public, governmental, municipal or private to arrange, establish and conduct educational schemes, conferences, lectures, seminars and examinations.

f. To establish trust funds, scholarships and bursaries and to make payments out of the funds of the Association towards or with the object of promoting the educational or professional advancement of persons who are or may become Legal Assistants.

g. To do all such other lawful things as may be incidental to or conducive to the attainment of the above objects.

3. The Bylaws of the Association are altered to include the following classes of membership:

(1) Voting members:

Voting members shall be persons who:

(a) have successfully completed all the requirements of a legal course of study approved from time to time by the Board of Directors, or have received a law degree from an educational facility approved from time to time by the Board, or

(b) have a minimum of five (5) years employment as a Legal Assistant, each year of such employment to be certified in writing by a Lawyer on a form approved from time to time by the Board.

(2) Non-voting members

Non-voting members shall be persons who:

(a) have enrolled in a Legal Assistant training program at an educational facility whose programme has been approved from time to time by the Board ("Student Members"); or

(b) have a minimum of one (1) year employment as a Legal Assistant, such employment to be certified in writing by a Lawyer on a form approved from time to time by the Board ("Associate Members"); or

(c) are members of a bar association or law society which support Legal Assistants or is involved in the promotion of the Legal

Assistant profession ("Associate Members"); or

(d) are members of the educational field endorsing Legal Assistants or involved in the promotion of the Legal Assistant profession ("Associate Members"); or

(e) are directly involved in the supervision of Legal Assistants ("Associate Members"); or

(f) are persons or corporations or groups who support the purposes of the Association ("Associate Members").

(3) Honourary members

Honourary members shall be individuals of special merit who are not members of the Association but who are recognized for their contribution to the purposes of the Association at the discretion of the Board. Honourary members shall have all the rights of a non-voting member and shall be exempt from the payment of any membership fees.

Glenis Bryson

Pacific Press Ltd. - Update

by Jerena Laursen

The Summer 1995 edition of *The L.A. Times* reported that I would send a letter to Pacific Press conceming the advertisement of legal assistant positions in the Classified section of the two city newspapers. I have indeed sent that letter and have also had a verbal response to it.

Phil Ackerman, Sales Supervisor of the Classifieds, has advised me that he intends to create a new section for legal placement only. This section will address positions for legal secretaries, legal assistants/paralegals, lawyers and any other legal support staff positions.

During his review of the Classifieds, Mr. Ackerman noted that legal placement was not the only area of the Classifieds requiring attention, and because substantial restructuring must occur, the Legal classification should not be expected for some time.

I enquired whether any specific announcement would be made to the public to introduce the new structures. Mr. Ackerman suggested that rather than a formal announcement the changes would simply be effected and the Classifieds staff would be well instructed to understand placement of ads.

For those who may be concemed that lawyer positions may continue to be advertised under "Professions, Management", Mr. Ackerman assured me that all legal positions will be advertised under the new legal section and that the "Professions, Management" section will become a catch-all column for non-specific professional and management positions.

Public Speaking and Communication

by Jerena Laursen, jl Legal Assistant Services

The mere thought of public speaking - speaking in front of others - terrifies many people.

International Training in Communication (affectionately known as "ITC") is a non-profit organization which nurtures our need to improve our communication skills. Local branches usually meet twice a month. Meetings are structured in accordance with parliamentary proceedings and often refer to Roberts Rules of Order for structure. Public speaking is the primary focus.

Joining a local branch of ITC not only provides a member with the opportunity to learn and understand parliamentary proceedings, and proper methods of public speaking and chairing meetings in a safe, supporting and positive environment, it also provides a member with a fun and interesting approach to socializing, improved inter-personal communications skills, personal confidence, and enlightenment of a wide-variety of topics chosen by designated speakers.

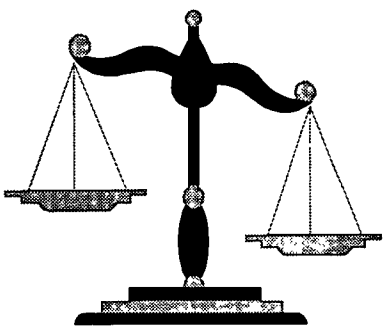
In addition, ITC offers each member an optional opportunity to participate in meetings on a competitive level. Any member who opts to formalize his or her goals and achieves those goals receives formal recognition from ITC. Upon achieving such goals, ITC will, at the member's request, notify the member's

employer of each achievement. Often these achievements contribute to the recognition and/or promotion of that member within his or her work environment.

Whether you are one of those many people who are terrified by the mere thought of public speaking, or you are just interested in your own personal development and want to have fun getting there, consider joining your local ITC branch.

Go ahead, treat yourself! (For more information, call 939-5088.)

Law Primer



Negligence

Having a Party? - Host's Liability

By David Hay

Imagine the following situations:

- A drunken bar patron is struck and injured by a car upon leaving the bar.
- A social guest at a friend's home is intoxicated. Later, while driving home, the guest is involved in a car accident.
- A business visitor to a plant slips on a spot of grease and is hurt.
- A trespasser is burned by exposed electrical wires.

Unusual Dangers

In each of these situations, the host or occupier of the premises (as distinct from the owner) where the injury occurred may be found liable for negligence. Once the court decides who was in occupation, possession or control of the premises, or at least the part of the premises where the accident occurred, it then considers whether the occupier should have known an "unusual danger" existed. An "unusual danger" is a hazard the occupier could not reasonably expect visitors to know of, discover, or protect themselves against.

Reasonable Care

If the court determines that the occupier ought to have known that the unusual danger existed, the next question is whether the occupier exercised reasonable care to prevent damage arising from it. Court decisions suggest that there are two aspects to an occupier's duty. First, the occupier has to take reasonable steps to learn about the existence of "unusual dangers" on the premises. Second, the occupier must then attempt to prevent damage to the visitor by making reasonable use of the information obtained. Thus, the occupier can be held liable for not knowing something he or she ought to have known or for failing to act on that knowledge to prevent damage to the visitor.

Statutory Obligations

The law of negligence normally makes distinction between one's failure to act and acting negligently. Broadly speaking, one person does not owe a duty to intervene and avoid harm being caused to another person. The *Occupier's Liability Act*, however, does impose such duty on hosts or occupiers.

Thus, if a drunken bar patron is turned out of a hotel situated near a busy highway and, in his drunken state, is struck by an automobile, the innkeeper can be held partly at fault for not taking steps to ensure the patron's safety.

Social Responsibility

In recent developments, the Supreme Court of Canada has reaffirmed the heavy onus on bar

owners to protect patrons who leave their establishment drunk. These developments appear to be part of a growing trend to attribute broader social responsibility for society's ills. Mr. Justice Cory of the Supreme Court of Canada recently wrote: "In terms of the deaths and serious injuries resulting in hospitalization, drunk driving is clearly the crime which causes the most significant social loss to the country."

In the most recent decision of the Supreme Court of Canada involving innkeeper's liability and alcohol-serving establishments and their patrons. In that case, however, the innkeeper escaped liability for two reasons. First, the patron was not exhibiting signs of intoxication at the time he left the inn with his friends. Second, at least some of the friends were sober, and the Court held it was not reasonably foreseeable that the intoxicated patron would be the designated driver that evening.

In terms of insurance protection, whether you are an occupier, innkeeper, home owner, or business owner, you should obtain sufficient and appropriate coverage to reflect a high duty of care toward your guests and the possibility that you will one day have to pass *the test of reasonable care.*

The above article was reprinted with the kind permission of David Hay, a lawyer with the Vancouver firm Richards Buell Sutton.

From Physician to Beautician - Professional Liability in Canada

By Bryan G. Baynham

A professional errors and omissions claim today could be anything from the faulty installation of a pacemaker by a heart surgeon to the misapplication of false eyelashes by an aesthetician. Gone are the days when professional liability claims were the sole purview of doctors, lawyers, architects, engineers and accountants. Not only are there "new professionals" (land surveyors, CGAs, CMAs, dentists, and nurses) facing claims, there are also claims against "quasi-professionals" (insurance and real estate agents, appraisers, financial planners), "allied professionals" (draughtsmen, lab. technicians, dental hygienists, legal assistants), and, for lack of a better term, "miscellaneous professionals" (beauticians, barbers, naturopaths, tax preparers, interior designers).

At one end of the spectrum are the self-governing professions, originally known as the "common callings", and at the other end, mere service providers that at most belong to some form of voluntary trade association. Their specialized knowledge and skills range from the years of training and testing required to be a brain surgeon to no more than on the job training for many "miscellaneous professional".

The common element that brings all of these "professionals" together is the provision of "professional services" to the public at large. Each profession serves a particular societal need and its members hold themselves out as possessing special skills and experience in their particular area of knowledge. It is this element of intellectual skill and its application that differentiate the "professional" and "the professional service" from those occupations that involve no more than proficiency in the performance of a particular task.

The dramatic growth in the number and type of professions in the last fifty years is in part the result of our service-oriented economy. As society becomes more complex, there is an ever increasing reliance on others, with specialized skill and knowledge, to provide services that in the past were unnecessary or unknown. The other reason for the explosive growth of "professionals" and the resultant proliferation of professional liability claims is a dramatic change in how our judges now view the provision of professional services.

This paper will examine how the professional/client relationship has evolved from one that was governed exclusively by the law of contract to one governed by a nebulous notion of a "special relationship" not necessarily predicated on contractual, negligence, or fiduciary principles, but rather on the notions of "proximity", "reasonable foreseeability" and "reliance". Given this approach, the mere holding out that one possesses "special skills and experience" may be enough for our courts to classify that individual as a "professional" with the concomitant increased risk of liability for any loss suffered.

Breach of Contract

Historically, the law of contract governed claims against professionals. In most instances, there exists a contract between the professional and his client, whereby the former agrees to provide certain services and the latter agrees to pay a specified fee.

In every contract between a professional and his client there will be express or implied terms which define the

nature of the engagement. Normally, the professional will attempt to achieve a particular result (eg. solution of engineering/architectural problem, restoration of patient to good health, etc.) or render a specific service (eg. architectural design, financial advice, etc.). Where such a contract contains an express term as to the duty of care, then it will bind the parties, even where it posits a higher standard than is usual. In the absence of an express term, there is implied by law, a term that the professional will carry out his activities with reasonable skill and care commensurate with that professional's calling. Examples of this are as follows: where an appraiser is instructed to produce a report on a certain property, there is an implied obligation to inspect that property; where a surgeon performs a particular operation, there may be an implied term that he will give the necessary supervision thereafter until the patient is discharged; and, where a lawyer is instructed to effect the grant of an option, there are implied terms that the necessary option agreement(s) will be drawn up and the registration effected.

It should be noted that, by way of exception to these general principles, there are a small number of cases in which the professional is simply required to achieve a specific result and there is no need for a contractual term defining the skill and care he must use. Engagements of this kind are certainly the most onerous undertaken by professionals. For example, where a dentist agrees to make a denture for his patient, his obligation is not to exercise reasonable skill and care, nor even exceptional skill and care, but to produce a denture which will be fit for its intended purpose. It has also been suggested that contracts with architects and engineers for design work belong in the same category, in that there exists an implied warranty as to fitness for purpose. The importance of terms such as these is that a professional will be liable in contract if the implied terms are broken, irrespective of the amount of skill and care exercised.

The Tort of Negligence

As discussed above, professionals have historically owed a duty of care only to those with whom they had privity of contract. This meant that, generally, a professional had no responsibility to anyone other than his client. But even then, the nature of a professional's undertaking was such that a breach would seldom lead to a claim for damages. For example, a negligent audit generally produces nothing more than a misdescription of a company's financial status. While the accountant conducting the audit may be responsible for any loss to the company arising from such misdescription, the company will frequently have difficulty showing that it took a specific action in reliance on the error or, where it did, that it suffered loss as a direct result. Furthermore, even where a loss can be shown, the rules of contributory negligence may apply and the accountant can reduce or even escape liability where the error in the audit was known or ought reasonably to have been known to the company's management.

However, in *Donoghue* v. *Stevenson*, [1932] A.C. 562 (H.L.), the House of Lords abandoned the strict application of the 'privity rule' in favour of the concept that relationships could give rise to a duty of care and that the existence of liability for negligence should be determined by the proximity of the victim to the perpetrator of the act. In his now famous judgment, Lord Atkin stated:

> ... You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. ...

This statement of the 'neighbour principle' allowed later courts to circumvent many of the rules that had previously existed, though the principle was never intended to be absolute. As stated by Lord Reid, in his dictum in *Donoghue,* the 'neighbour principle' should "give rise to a duty whenever harm is reasonably foreseeable unless there is some valid public policy reason to limit the imposition of such a duty". In conjunction with Lord MacMillan's dictum in that same decision, that "the categories of negligence are never closed", the 'neighbour principle' has acted as a foundation for the formation of entire fields of tortious liability. In fact, the principle has even been invoked to justify the reversal of established immunities from liability in negligence. One example of this was the abolishment of the lawyers' immunity from actions based in tort.

Donoghue v. *Stevenson*: The 'Neighbour Principle'

In *Donoghue*, the plaintiff brought suit against a manufacturer of ginger beer alleging that she had consumed a bottle of their product containing the decomposed remains of a snail, the unfortunate

presence of which had caused her severe physical distress. The preliminary issue, which was the subject of appeal was: 'Did the defendant manufacturer owe the plaintiff consumer, with whom their was no contractual relationship, a duty to take care?' Precedent would have indicated that no duty would arise outside of contract. However, legal history was made when the House of Lords, in a majority decision, held that a duty of care was indeed owed to the plaintiff. The decision established that, in general, a duty of care is owed to one who would be in reasonable contemplation of the defendant. For a tort action to be maintained, reasonable care must be taken to not injure persons to whom the duty is owed. In addition, the resulting damage must be shown to foreseeably flow from the breach.

The immediate effect of *Donoghue* on economic loss cases was limited by the existence of what was then known as the 'exclusory rule'. It had been said that under the 'exclusory rule', no duty was owed where the negligence caused pure economic loss; that is, economic loss not resulting either from personal injury or property damage. Further, the rule applied regardless of whether the economic loss resulted from negligent acts or words. However, over time, the courts saw fit to allow a more literal interpretation of Lord Atkin's 'neighbour principle' (ie. even though the decision in *Donoghue* concemed physical damage, it was eventually believed that the principle could also embrace conduct causing purely economic loss).

It was the decision in *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*, [1964] A.C. 465 (H.L.), which established that, in certain circumstances, a professional might owe a duty of care to third-parties who rely on his advice, even in the absence of privity of contract. The majority of the House of Lords in the *Hedley Byrne* decision were, however, of the view that, for the purposes of determining the scope of the liability in any given case, a distinction ought to be made between negligent acts causing physical damage and negligent words causing financial loss.

As a result, the court adopted a cautious approach to the scope of the new duty, indicating that it required a closer relationship between the parties than that established by the 'reasonable foreseeability' or 'proximity' tests. The Law Lords spoke in general terms of circumstances involving a 'special relationship' between the parties but did not attempt to define the precise circumstances under which such a 'special relationship' could be said to arise.

Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.

In the area of economic and business losses, the expansion of liability dates from the decision of the House of Lords in *Hedley Byrne*. In that decision, two inter-related problems were considered: first, the extent of liability for words as opposed to deeds; and second, the extent of liability for financial loss rather than, or not resulting from, physical injury. With respect to the first problem, the court established that a person who made a negligent statement could owe a duty of care to a person who suffered economic loss through reliance upon the statement. With respect to the second problem, the court held that it would be unacceptable to impose liability to third-parties for all financial losses foreseeably suffered as a result of a negligent misstatement. In short, the *Hedley Byrne* decision established the possibility of a duty of care in relation to a negligent misstatement resulting in economic loss and opened the way for the law of tort to provide remedies for professional negligence concurrent with, and at times extending far beyond, contractual remedies.

The plaintiffs in *Hedley Byrne* were a firm of advertising agents who were placing contracts on behalf of a client. The terms of the contract were such that the plaintiffs were to be personally liable should the client default. In order to safeguard themselves, the plaintiffs, acting through their bankers, obtained a credit reference from the client's bankers, the defendants. The reference given was favourable, although it was apparently stated that such reference was given 'without responsibility'. The defendants' confidence in their customer proved to be misplaced and the plaintiffs suffered heavy losses on the transactions they had entered in reliance on the reference. In the end, the plaintiffs' claim against the defendants for negligence failed, partly because of the presence of the disclaimer and partly because of doubt whether, in the particular circumstances of an impromptu response of an interbank inquiry, the defendant bank had failed to take the required degree of care. However, the House of Lords recognized, in principle, that a person making a statement *could* owe a duty to the recipient, with whom he has no contract, to take reasonable care and that, in the event of a breach, he could be liable for economic losses suffered by the recipient.

The significance of the *Hedley Byrne* principle is clear from the fact that it has been invoked in the Commonwealth courts to impose liability for negligent

statements made by a wide range of professional persons, regardless of whether the statement involved advice or simple information. It seems liability may also be imposed for a negligent failure to make a statement where that failure is intended to imply that certain facts exist or does simply imply that facts previously stated remain unchanged.

The obvious significance of the tort duties outlined above is that they are owed to persons who are not parties to a contract of engagement. Indeed, today, professionals may be found liable in negligence not only to their own clients but, as well, to other, adversely affected third-parties. For instance, an engineer retained to design a structure will, in addition to his contractual duties to his client, owe tort duties to any person he can reasonably foresee suffering physical damage as a result of his negligent work. This class of potential plaintiffs is wide, including those employed in building the structure, first and subsequent purchasers, and persons visiting or using the structure. Further, professionals giving advice, such as accountants, lawyers, financial advisers and appraisers, amongst others, will be liable not only to their clients but also to others with whom they have a sufficiently close relationship to found a duty. Similarly, where professional services are provided gratuitously for promotional or goodwill reasons, tort is again significant for though no contractual duty will be owed, there may well exist a tortious duty of care. Indeed, such work may present particular risks, as the scope of the service to be provided may be unclear and less attention may be paid in the provision of gratuitous services.

This being so, allegations of professional negligence resulting in pure economic loss are of very real concern to those engaged in the 'common callings': such as lawyers, physicians and accountants; as well as the more recently recognized "new professionals", "quasi-professionals", and even some "miscellaneous professionals". The tremendous expansion of the 'duty of care' concept since *Donoghue* and *Hedley Byrne* has had a profound impact as liability in negligence is no longer merely found for physical damage resulting from negligent acts but now includes liability for pure economic loss arising from negligent words and omissions.

The Professional Standard of Care

The application of the "neighbourhood principle" to the professional context takes on one additional gloss. As we have seen, the test which applies in an ordinary negligence action is that of the "reasonable man", i.e. a person must exercise the care expected of a reasonable person in similar circumstances, no more and no less, if he is to avoid liability.

In an action for "professional negligence", the standard of care is significantly higher. Because the "professional" possesses "special skills and experience", the test is that of a "reasonable and competent member of the profession" practising in accordance with the then accepted standard of practice prevailing in the particular locale.

This standard also extends to the supervision of laymen or other subservient "professionals" working with and assisting in the provision of the professional service.

Neither the higher standard of care nor vicarious liability for the negligence of others are novel concepts. What is novel is the application of these principles to a whole host of services that until recently were not considered to be "professional services". Some of these new areas of professional service includes tanning salons and interior designers of commercial space. The most humorous example I have come across recently is a report in the September 1995 Canadian Lawyer Magazine, where it was reported that the Encon Group in Ottawa is providing professional liability insurance cover for former government bureaucrats who have started consulting firms to sell services back to the very departments from which they were laid off!

This dramatic growth in the number of service providers that are now considered "professionals" is reflective of the Supreme Court of Canada's recent high degree of receptivity to novel claims. It used to be that novel claims would develop incrementally and by analogy with established categories of cases. That all changed when the Supreme Court of Canada adopted the House of Lords decision in Anns v. London Borough of Merton, which held that it was not necessary to bring the facts of any case within those of previous similar situations in which a duty of care had been held to exist. Accordingly, our courts now show a readiness to impose a duty of care in circumstances not obviously like any in which a duty has been previously imposed. It is from this decision that the twin notions of proximity and reasonable foreseeability of harm became an all encompassing test for the imposition of liability. As Lord Wilberforce put it:

> "One has to ask whether, as between the alleged wrongdoer and the person who has suffered damage, there is a sufficient relationship of proximity or neighbourhood

such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises."

In simple terms, all one needs to prove to establish a prima facie duty of care is:

(a) a wrong
(b) damage
(c) a relationship of proximity.

While the House of Lords recently abandoned the "Anns test" in favour of a general exclusionary rule, subject to a narrow range of exceptions, the Supreme Court of Canada has confirmed the "Anns test" and thereby encouraged parties to bring novel claims. Accordingly, any holding out of "special skills and experience" which is relied on by a member of the public, to his or her detriment and loss, could give rise to an errors and omission claim and the imposition of "the professional standard of care".

Breach of Fiduciary Duty

In addition to facing increased exposure in tort, "professionals" also face a new and expanding exposure for breach of fiduciary duty. Fiduciary duties defy classification. Breach of fiduciary duty is not a tort, nor is it a contract claim; rather, it is a cause of action which is rooted in equity. Plaintiffs plead breach of fiduciary duty because the limitations on the common law remedies can be avoided by application of the broader and more versatile equitable remedies.

While the courts have made some attempts to define fiduciary duties and the circumstances in which a fiduciary relationship arises, the inherent nature of the concept of equity is that it does not permit its principles to be confined. In *Lac Minerals Ltd.* v. *International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 15, the Supreme Court of Canada held there to exist three (3) different usages of the term 'fiduciary':

(1) *traditional fiduciaries* are relationships which by their very nature attract fiduciary obligations, such as solicitor and client, and trustee and beneficiary;

(2) *factual fiduciaries* are found depending upon the factual circumstances of the existing relationship between the parties; and,

(3) *constructive trust fiduciaries* are those which give rise to a restitutionary remedy.

Wilson, J. in the decision of *Frame* v. *Smith* (1987), 42 C.C.L.T. 1 (S.C.C.) provided a three step formula for identifying fiduciary obligations:

> ... [r]elationships in which a fiduciary obligation has been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
> (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power. ...

Unfortunately, these characteristics are broad and do not provide a great deal of assistance in determining if and when a fiduciary relationship may arise. Further, a strict application of the general characteristics as described would place many professionals in an impossible dilemma. For instance, lawyers and accountants are often involved in situations where they act for or provide advice to one party to a transaction which can affect a non-client third-party in the manner suggested by Madam Justice Wilson in *Frame* v. *Smith*. On one hand, in failing to disclose material facts to the non-client third-party, the professional may be faced with the risk of breaching a fiduciary obligation; on the other hand, providing full disclosure to the non-client third-party would amount to a breach of duty to the professional's own client.

In a recent decision, *Hodgkinson v. Simms*, [1994] 3 SCR 377, the Supreme Court of Canada served notice that any "advisory relationship" which includes elements such as trust, confidentiality and complexity, are almost certainly fiduciary in nature. Speaking for the majority, Mr. Justice La Forest acknowledged that there must be something more than a simple undertaking to provide information and execute orders for the relationship to be enforced as fiduciary, but, having said this, where there is "reliance" on an adviser who holds himself as having "special skills and

experience", may well import liability if there is a breach of fiduciary duty.

The facts of *Hodgkinson v. Simms* show once again the crucial importance of the concept of "reliance" in the imposition of liability.

Hodgkinson, a stockbroker with minimal knowledge of tax shelter investments, retained Simms, a chartered accountant with expertise in the area. Simms advised Hodgkinson to invest in four MURBs, but did not disclose that he (the accountant) was acting for the developers during the relevant period. He looked at Simms as an independent professional adviser, not a promoter, and would not have invested in the projects had he known the true nature and extent of Simms' relationship with the developers. When the four MURBs declined in value during a downturn in the real estate market, he sought recovery of his losses from Simms. The Supreme Court of Canada found the "nature" of the relationship between them put the accountant in a fiduciary position. The test was one of "reliance" which in the context of a fiduciary relationship does not require the wholesale substitution of decision-making power from the investor to the adviser.

The Supreme Court of Canada restored the trial judges assessment of damages, which included lost capital, all consequential losses, legal fees, and accounting fees!

The *Hodgkinson* decision illustrates how the application of the concept of "reliance" and "special relationship" are applied in the context of a fiduciary relationship. In the future, we can anticipate this extremely flexible duty to be used in new areas of the law. It will most often be successfully invoked in circumstances where an individual in a position of relative weakness and dependency has been treated dishonestly or without good will by the person on whom they were dependent. Obviously, financial advisers, stockbrokers, pension plan administrators, etc. are at risk, but so are adjusters, insurance agents, accountants and lawyers.

Where there is an opportunity to sue in contract, negligence, or breach of fiduciary duty, we can anticipate that the claim will be pressed for breach of fiduciary duty, since damages for breach are restitutionary and intended to place a party in the position they were in before the breach. By comparison, damages for breach of contract are compensatory only.

Conclusion

As the number and type of "professions" expand to provide the "professional services" deemed necessary by our service-oriented economy, the courts continually broaden the duty of care applicable to the Canadian professional. While the duty to use reasonable skill and care in the performance of professional services was originally owed exclusively to the client under the law of contract, as a result of the decisions of the House of Lords in *Donoghue* v. *Stevenson* and *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*, not only have the courts recognized the potential liability of the professional in negligence under the law of tort, but they have recognized the potential of the law of tort to permit non-contractual third-parties to recover for economic loss resulting from a professional's negligent misstatement(s) and/or omission(s). Further, as a result of the decision of the Supreme Court of Canada in *Hodgkinson v. Simms*, Canadian courts are increasingly willing to recognize a fiduciary breach, with its equitable remedies, as a third basis for professional liability in Canada.

More "professionals"; more types of "professional services"; more ways to impose liability; means only one thing - more professional liability claims, in the years ahead.

The above article was reprinted with the kind permission of Bryan G. Baynham, a partner with the law firm of Harper Grey Easton.

Personal Injury

Exaggerated Personal Inujury Claims

By Wesley D. Mussio

Where an insurer is faced with an exaggerated personal injury claim, it is quite common for the adjuster to simply deny the exaggerated portions of the claim outright and not take steps to defend the allegations or obtain documents that can attack the claimant's credibility. However, it is important to note that an aggressive approach to the file is extremely important.

In this regard, the Court works on the basic assumption that a witness is telling the truth unless the defence can raise issues of credibility. Even if

credibility is put at issue, the judge is not inclined to simply dismiss all aspects of the claim but rather, the judge attempts to wade through the "web of deceit" woven by the claimant. In so doing, it is important for the defence to elicit independent evidence to help the Court cast aside the allegations of the claimant.

The purpose of this paper is to provide the adjuster with some suggestions on how to best prepare a defence in the case of an exaggerate personal injury claim.

Mode of Trial

Recently, trial by jury has become more popular amongst some insurers, most notably the Insurance Corporation of British Columbia, in defending exaggerated claims. Historically, insurers have been reluctant to instruct defence counsel to seek trial by jury on the assumption that a jury is less predictable than a judge alone and, therefore, a jury may grant a higher damage award than a judge. While such an assumption may have some historical merit, it is the writer's view that if there is an exaggerate personal injury claim then the best mode of trial is that of judge and jury.

It is suggested that in today's economic climate, jurors are likely to be more critical than judges who are sometimes "too predictable" in their award in favour of the Plaintiff who has either been discredited or has flat-out lied to the Court about his/her injury. We have all probably read judgments which state that although a judge has found that the Plaintiff had grossly exaggerate the extent of his/her injuries or has been dishonest to the Court. Nonetheless, the judge felt obliged to make an award as there was some evidence of injury.

It is the writer's experience with jury trials that a jury is more critical and less forgiving of a witness whose credibility has been put into issue by contradictions in the witnesses own testimony or by testimony from other equally or more credible witnesses. The jury is less likely to try to untangle the "web of deceit" made by the Plaintiff than a judge. Rather, the jury is more likely to simply reject the whole of the Plaintiff's evidence concluding that if the Plaintiff is untruthful in one aspect then he/she must be untruthful in all aspects.

On this point, if the Plaintiff's description of the accident or resulting injury challenges one's "common sense", the chances are that a jury will not accept such a description of the accident or injury. Probably the best example of this is I.C.B.C.'s current "no crash, no cash" policy where I.C.B.C. has taken 32 cases before civil juries with excellent success (average of $1,7000.00 per claim with 17 dismissals).

Yet another point is that if there is an issue of causal connection because of the late onset of complaints or injury then a judge is more likely to simply say "what else could have caused this problem" and find that although the Plaintiff failed to complain about a certain injury for some time after the accident, it must be related to the accident. A jury, on the contrary, is more likely to closely scrutinize whether the accident could have possibly caused the complaints given the long duration between the accident and when the complaints first began.

In summary, it is the writer's impression that civil jury trials should be considered in all cases of exaggerated personal injury claims.

Initial Investigation

The adjuster, in taking a statement from the insured and coming to the conclusion that the insured is exaggerating his/her complaints of injury, should be very cautious to ensure that a full investigation occur in the early stages of the file. This includes obtaining a very detailed statement from the claimant on all aspects of the claim to ensure that if the claimant begins to "build his/her claim" at a later stage with new allegations then the Court can be made aware that the initial reporting of the Plaintiff did not mention the particular allegation.

If the adjuster forms the impression that the insured is grossly exaggerating the claim from the initial stages then consideration should be made as to obtaining video surveillance at a very early stage in the proceedings. If, at that time, the insured is shown on video tape to be "fine" or performing activities then the Plaintiff will be hard pressed to prove any significant injury at trial.

If there is an obvious exposure on wage loss then a very early independent medical examination with an orthopaedic surgeon should be considered. That way, there is early medical evidence on file to suggest that the Plaintiff should not be off work.

At the initial meeting with the Plaintiff, a blanket authorization for medical and wage loss information should be obtained from the Plaintiff. If there are any signs of a pre-accident injury history, a Medical Service Plan printout for the period of five years before the accident should be obtained. This provides invaluable information on the history of the claimant

that is hard to obtain after lawyers become involved in the file.

Investigation After Lawyer Retained

Your defence counsel should prepare Interrogatories which qualify pre-existing injuries, wage loss, intervening medical conditions and medical treatment (past and present). If this is done at an early stage before full discovery of documents then often times, you will receive a swom statement from the claimant which is inconsistent with the evidence that is obtained at a later date. This swom Affidavit then becomes an excellent tool to question the claimant's credibility at trial.

It is also recommended that an early Examination for Discovery occur before discovery of documents. This is because if the claimant is exaggerating the claim, he/she will have a more difficult time in giving evidence consistent with the documented evidence if that documentation is not available to him/her at the time of the Discovery.

After the Answers to the Interrogatories have been obtained and Examination for Discovery has been complete, it is then important to obtain full discovery of documents including pre-accident and post-accident clinical records. Full clinical records are necessary in order to illustrate the inconsistencies in the claimant's self-report of injury after the accident and to fully discover the pre-existing injuries of the claimant, if applicable.

Also, in cases of a lengthy disability period in the absence of objective evidence of injury, it is important to obtain the employment records and to speak with the employer to see if there are factors affecting the claimant's desire to retum to work. In this regard, often times, individuals that have an extended disability period in the absence of any objective signs of injury will have had a poor work history or there will be a reason behind their desire to remain off work (e.g. the claimant was looking for a career change). Also, the interview with the employer will help quantify the extent of wage loss which will often times be significantly less than what the allegations of the claimant have been.

This evidence will certainly help at trial in arguing a failure to mitigate and showing that the Plaintiff has consciously exaggerated the extent of his/her wage loss.

Conclusions

Although it may be the first inclination of the adjuster who is faced with an exaggerated personal injury claim to simply ignore the claim and deny it, it is necessary to fully develop the defence to counter the allegations made by the claimant. This, unfortunately, becomes quite an expensive process given the fact that surveillance, independent medical examinations and full document disclosure is necessary.

However, the expense to defend exaggerated personal injury claims is justifiable in that if the claimant is able to convince the Court that part of his/her obviously exaggerated claim is true then the quantum of damages is quite significantly increased over what would normally be expected with the type of injury the claimant should have sustained in the accident.

It is the hope of the writer that the suggestions in this paper will be of some assistance in guiding an adjuster to the early consideration of how to best defend an exaggerated personal injury claim as the early stages of the file are extremely important in the ultimate outcome of the claim.

FILIAL PIETY AND DECEASED INFANT CLAIMS

By Wesley Mussio

Filial piety is a well established tradition in the Chinese culture which establishes a duty upon children to honour, serve, care and feed their parents, particularly in old age. Under this tradition, it is customary that when a child begins to earn income, that child is obligated to make monetary contributions to his/her parents irrespective of the parents' need.

Where the parents are financially self-sufficient, a symbolic contribution of 10-20 percent of the child's gross income is expected. If the parents are not financially self-sufficient, then the children must make sufficient contribution to render the parents self-sufficient including food, housing and pocket money.

For Chinese immigrants to Canada, strict compliance with the requirements of filial piety have been affected by western ideas and practices so the expectation of compliance with filial piety varies from family to family.

The doctrine of filial piety is of importance in cases of wrongful death where the insured causes the death of an infant of Chinese descent. In these cases, the parent of the infant can bring a claim, pursuant to the Family Compensation Act, for the loss of expected filial piety payments from their deceased child.

The doctrine of filial piety has been considered in two recent cases of the B.C. Supreme Court (Lian v. Money (1994) 93 B.C.L.R. (2d) 16 and Sum v. Kan (19 June 1995) Vancouver Registry No. B9204090) and has resulted in a substantial increase in the pecuniary award that is normally expected in claims involving the wrongful death of a child.

The appeal of the Lian decision was heard in the Court of Appeal on September 5, 1995 and judgment has been reserved to date.

This paper provides a summary of recent developments in the law on the application of the doctrine of filial piety and provides recommendations on how an adjuster can best defend this sort of claim.

General Principles

It is well established that the measure of damages under the Family Compensation Act is the pecuniary loss suffered by the dependants as a consequence of the death. That pecuniary loss is the actual financial benefits of which the dependants have been deprived and includes financial benefits which might reasonably be expected to accrue in the future if the death had no occurred (Cox v. Takahashi (1978), 5 B.C.L.R. 162 (B.C.C.A.)

To quantify the pecuniary loss, the Court must use the same methodology as used in personal injury claims involving a future earning or future care component (Keizer v. Hanna (1978), 82 D.L.R. (3d) 449 (S.C.C.)). That is, the court must determine the present value of a lump sum which, if invested, would provide payments of the appropriate size over a given number of years in the future, extinguishing the fund in the process.

A strict mathematical approach to calculating damages is, however, subordinate to the overriding principle that the final award should be "fair and adequate" (Killeen v. Kline (1982), 33 B.C. L.R. 225 (B.C.C.A.).

Compensation can also flow from the loss of love, guidance and companionship. In Lian, a sum of $5,000 was awarded to the mother of the deceased daughter under this head of damages.

Quantifying the Pecuniary Loss

Until recently, the B.C. Courts have been hesitant to award a significant amount of damages to parents for the loss of financial support from their deceased child. Where parents were not financially dependent on a deceased child, and payments were expected to be made under cultural rules, the damages awarded were in the range of $20,000 (Fong Estate v. Gin Brothers Ent. Ltd. (18 May, 1990), No. B890132 Vancouver Registry (B.C.S.C.)). However, where the parents were dependent on the deceased child, the damages have ranged from $25,000 (Lai v. Fill (1978), 28 B.C.L.R. 11 (B.C.S.C.) to $50,000 (Bains v. Hansra (8 October, 1992) Vancouver Registry No. CA012603 (B.C.C.A.)).

In Fong Estate, a 16 year old Chinese girl was struck and killed while attempting to cross a street. The deceased was 16 years of age and had immigrated to Canada with her parents when she was three. The family practised filial piety and was well-off, with assets at about $750,000. The deceased was a high achiever with an excellent chance of gaining entrance to medical school and then becoming a physician.

The Court considered the concept of filial piety and awarded $20,000 as the present value of monetary benefits her parents could have expected to receive had the deceased lived.

In Lai, the deceased Chinese female was 16 years of age and had contributed her modest earnings to her mother prior to her death. Mr. Justice Berger found that if the deceased child lived, she would have taken her mother into her own home if her mother had become ill or had become unable to work and, in any event, when she reached retirement age or old age. In considering the evidence, Mr. Justice Berger awarded $25,000 and this award was upheld in the Supreme Court of Canada.

In Bains, the mother had little education, was a farm labourer, had $18,000 in savings and, pursuant to Indian tradition, was dependent on her deceased daughter for shelter. The award at the trial level was $20,000 but this was increased to $50,000 by the Court of Appeal.

The range of pecuniary damages was dramatically increased when Madam Justice Dorgan awarded $175,000 to the parents in Lian.

In Lian, the deceased daughter was 20 years of age at the time of her death and had immigrated to Canada a

year earlier. The father of the deceased was 59 years old and had been a professor at Beijing University for 30 years. He had immigrated to Canada in 1989 and was a research assistant until 1993 when he became unemployed. The deceased's mother was 56 years old and had arrived in Canada in 1990 and was unemployed.

In this case, the trial judge held that prior to her death, the deceased daughter exhibited a filial obligation to her parents by word and deed. She had contributed to their monetary support as well as their day to day needs. Furthermore, the trial judge found that the economic strategy of the family was to invest in the deceased daughter's education with the expectation that she would assume a major role in their support.

The family had another daughter who survived the deceased but the trial judge found that this daughter was unlikely to provide support given a medical condition that she had and given her fiancee's thought on filial piety.

The fact that the Lian decision had increased the range of pecuniary loss that can be awarded in deceased infant claims was illustrated in the Sum decision. In Sum, Mr. Justice Oliver considered Lian and awarded $90,000 for future loss of support on the basis that in this case, there is an expectation that the deceased son would contribute 10-20 percent of his gross salary.

The decision of Mr. Justice Oliver, in Sum, is under appeal to the B.C. Court of Appeal.

It is the writer's impression that the Court of Appeal will either uphold the trial judge's decision in Lian but will specifically say that it was a rare and exceptional case that justified the award or, more likely, will reduce the award to reflect the negative contingencies that were not considered by the trial judge. In this regard, the Court of Appeal commented, int he course of argument, that the income stream from a deceased child is more of a "notional income stream" than a claim brought under the Family Compensation Act for loss of contribution from a "breadwinner". Also, the Court considered whether or not it would be reasonable to expect that this deceased daughter would have contributed all but 24 percent of her disposable income to her parents for the rest of her parents' life in light of the expectations of marriage, child rearing and westernization.

If the Court of Appeal upholds the lower court decision in both Lian and Sum, the claim exposure for all wrongful death claims involving deceased children may well increase dramatically.

In this regard, it could be argued that in most cultures, there is a type of filial piety in the sense that there is an expectation that children will care for their parents, particularly in old age. Hence, similar awards for other cultural groups may well begin to occur.

How to Defend a Deceased Infant Claim

In any claim brought by the parents for the loss of their deceased child, it is important to determine the following information:

a. quantification of the deceased assets so they can be deducted from any award;
b. the future income stream of the deceased;
c. the extent to which filial piety is practised in the family;
d. what contributions were made to the family by the deceased prior to his/her death;
e. the financial circumstances of the parents;
f. the opportunity of the parents to receive contributions from other children or other sources; and
g. the family history when the family immigrated to Canada.

In order to address the expected contributions of the deceased had he/she lived, it is important to retain an economist to provide you with a net present value figure of the loss.

It is also necessary to retain a cultural expert at the early stages of the file in order to help identify the information necessary to defend the claim. Also, that cultural expert can provide an opinion no the cultural expectations of the family and on the negative contingencies that must be considered by the court.

Finally, the focus of the defence should be on the negative contingencies and the likely erosion of the need for filial piety in a western society. In this regard, the need for filial piety and strong family values evolved in eastern cultures where there was no "social net" to support the elderly. However, in our western culture, there is a strong "social net" for the caring of elderly and so the likelihood of a deceased practising filial piety because of the needs of the parents or for a symbolic purpose is likely to decrease the longer the deceased was in

Canada and the more westernized the deceased became.

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Practice Update

Claims for Professional Services

By Rita Scott

A recent appeal heard by Mr. Justice Shaw upheld a decision of Deputy District Registrar Dawn Grant. This decision affects claims made by lawyers, accountants, engineers or other professionals, as well as tradespeople such as plumbers, electricians and auto mechanics in both Supreme and Small Claims Courts.

The decision states that "Default Judgment should bot be entered or pre-judgment garnishing orders issued if the pleadings do not claim that there was an agreement as to the amount to be paid or the method of calculation of the fees."

Several useful questions to help identify what is a liquidated demand are...

1. Is it ascertainable by calculation or by referring to a fixed scale of charges?

2. Can the calculation be made by reference to the agreement between the parties itself, or at least, implied by the agreement?

3. Was the price or method of calculation of the price agreed upon by the parties?

4. Has the defendant obliged him/herself to pay a specific sum of money?

5. Was a reasonable estimated cost established by the parties?

Care must be taken to disclose sufficient detail in the Statement of Claim so that the Registrar can make a proper assessment of whether the claim is solely for a debt or liquidated demand.

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How to Contact BCALA

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