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CARRANZA LLP summer 2011 newsletter

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advocating on
behalf of migrant
live-in caregivers



**Carranza continues to
prove that our care is
making a difference**

Carranza awarded Brain Injury Association's Legal Fellowship Award

During OBIA's Annual General Meeting on June 25th, 2011 at the Miles Nadal Jewish Community Centre in Toronto Ontario, Carranza LLP was proudly named the recipient of the 2011 Ontario Brain Injury Association's Legal Fellowship Award.



motor vehicle accident benefit changes continue to hurt victims and therapists

**denial for treatment plans is now
three times higher than what it was
before the September 2010 changes.**

Since the Government of Ontario introduced changes to motor vehicle accident compensation a year ago, rehabilitation therapists, other clinicians and injured victims are struggling to cope. Amendments to the *Statutory Accident Benefits Schedule* and the reluctance of insurance companies to approve assessments and much needed treatments have served to increase the upset accident victims and their families face.

The rate of denial for treatment plans is now three times higher than what it was before the September 2010 changes. Injured victims are often unable to secure the help that they need to rehabilitate properly and to address their family duties. Expenses associated with hiring help to perform household chores and to provide care to children and aging parents are no longer covered under the new standard benefit structure. Further, clashes with insurance companies over claims are not only increasing in frequency, but it is also taking longer to dispute denials with insurers as a result of a backlog in completing mediations at the Financial Services Commission of Ontario.

Unfortunately more changes are coming. The Government is expected to release new amendments to the

law that will redefine catastrophic impairment. This change will further reduce the number of people who will have access to enhanced benefits under this definition.

Many groups have already made submissions of protest to the Financial Services Commission, but much more action is needed to prevent further detrimental changes from occurring.

Carranza LLP is an experienced personal injury law firm with a competent and successful accident benefits team. We truly believe that injured victims need an advocate now more than ever to navigate through this complex benefit structure.

We are also members of the Ontario Trial Lawyers Association. Through this organization, we are planning a publicity campaign to help persuade the Government that it is both premature and ill-advised to proceed with the recommended changes to redefine catastrophic impairment.

Please contact your local MPP to let them know your concerns. For a list of MPPs, visit www.ontla.on.ca and click on the Members (MPPs) link.



a matter of opinion

New rules regarding expert evidence came into effect January 1, 2010. For healthcare practitioners who regularly assess and/or treat injured plaintiffs, these rules have had a profound impact on which expert evidence will be admissible in court.

Expert evidence forms the crux of a personal injury case. Thus, lawyers wishing to use certain experts, whether treating or assessing, must work closely with those experts without compromising the goal of the new rules, which is to ensure the expert understands his or her duty is to the court as the court's advocate, and to assist the court on matters within his or her area of expertise.

This duty overrides any obligation an expert has to the party who retained him or her. In so doing, the expert remains fair, objective and non-partisan. The new amendments reinforce that notion.

Among the changes, the new rule on expert evidence enumerates the requirements of expert reports, including the following detailed content:

- the expert's name, address and area of expertise;
- the expert's qualifications and employment and educational experiences in his or her area of expertise;
- the instructions provided to the expert in relation to the proceeding;
- the nature of the opinion being sought and each issue in the proceeding to which the opinion relates;

- the expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range;
- the expert's reasons for his or her opinion, including, a description of the factual assumptions on which the opinion is based, a

According to Justice Turnbull, the new rule on expert evidence was designed to target "litigation opinions" rather than "treatment opinions".

- description of any research conducted by the expert that led him or her to form the opinion, and a list of every document, if any, relied on by the expert in forming the opinion; and
- an acknowledgement of the expert's duty signed by the expert.

An individual's treating healthcare provider and/or independent medical examiner should be provided with

a Form 53, Acknowledgement of Expert's Duty when requisitioned by lawyers or insurance companies for an expert report.

The first decision on expert report requirements, *Beasley v. Barrand*¹, took a rather strict approach to compliance with the new rules but noted there will be instances where compliance is not always possible.

A more recent ruling, *Grigoroff v. Wawanese Mutual Insurance Company*,² recognized that some expert reports were created prior to the 2010 rule amendments and thus were not compliant with the new rules. Nonetheless the Court admitted the proposed expert evidence based on its usefulness in understanding the nature and prognosis of the injuries sustained by the Plaintiff.

Much of the determination on whether to allow a certain expert report or testimony rests on the distinction made between "treatment opinions" (opinions formed at the time of treatment) and "litigation opinions" (opinions formed for the purpose of assisting the court at trial and not for the purpose of treatment).

In *Slaght v. Phillips*,³ Justice Turnbull outlined the following four classifications of experts:

- Treating physicians, counselors, psychologists, physiotherapists and other treating specialists who form opinions with respect to the cause of an injury, course of treatment and other things as part of their ongoing work;

1 2010 ONSC 2095 (S.C.J.).
 2 2011 ONSC 2279 (S.C.J.).
 3 Unreported (May 18, 2010) (S.C.J.).

- Experts retained by a party to an action to express opinions but who are not treating specialists;
- Experts retained by third parties (for example, accident benefits insurers and disability insurers) to provide opinions with respect to causation, proper treatment, eligibility for insurance coverage, and a multitude of other issues; and
- Experts retained by third parties but who assist the client with his or her needs and express opinions with respect to the need for treatment, recommended course of treatment, and next steps to be taken.

According to Justice Turnbull, the new rule on expert evidence was designed to target "litigation opinions"

rather than "treatment opinions". Needless to say, there currently is no hard and fast rule on which experts will be allowed to testify at trial. Can accident benefits assessors give an opinion in a tort action?

In *Anand v. State Farm*,⁴ the answer was no. There, the court held that accident benefits assessors may only be called to testify as fact witnesses. Conversely, the more recent decision of *McNeill v. Filthaut*,⁵ held that expert report requirements do not apply to individuals retained by non-parties to the litigation. None of these decisions have the final word on the admission of expert reports and Rule 53 requirements. For now, the gist of these decisions appears to support a case-by-case adjudication of the value of accident

4 Unreported (April 23, 2010) (S.C.J.).
 5 2011 ONSC 2165 (S.C.J.).

benefits assessors as expert witnesses in tort actions. It is safe to conclude however, that compliance with the new expert rules will no doubt assist the court in its determination of which medical experts may be permitted to give evidence, be it fact or opinion.

Medical and rehabilitation service providers should note there are drawbacks of being classified as a treating medical provider. Even the most well-intentioned treating physician or service provider may be seen as a "hired gun" or an advocate for the Plaintiff despite compliance with expert report requirements. What medical professionals should be aware of is their duty and obligation to assist the court in an unbiased and impartial role. Experts come to court to assist the trier of fact in the pursuit of truth. Treating or not, they are not advocates.

accident benefits update: re-election of benefits

Effective September 1, 2010, significant changes to the Ontario Auto Insurance regime took effect. These changes to the *Statutory Accident Benefits Schedule*, better known as the SABS, also brought with them practical implications in tort proceedings. One such impact is the recent decision on re-election of accident benefits.

In *Sutherland v. Gurmeet Singh*¹, the tort defendant was held entitled to deduct the value of income replacement benefits that were available, but not received, as against any income loss payable by the defendant. In this case, the plaintiff was entitled to elect one of two benefits: income replacement and caregiver. He chose to receive caregiver benefits.

The decision turned on the meaning of the term "available". In deciding that

1 2011 ONSC 391 (S.C.J.).

income replacement benefits were, in fact, available to the plaintiff, the Court allowed what plaintiff lawyers feared, a form of under-compensation for the plaintiff. Not surprisingly, the Court of Appeal² set aside the motion judge's decision, holding that once the plaintiff elected to receive caregiver benefits, income replacement benefits were no longer available to him. The Court of Appeal found that to permit otherwise would ignore the underlying purpose of the provision which is to prevent double recovery. The Court of Appeal found it inappropriate to allow the plaintiff to go under-compensated while the defendants received a windfall.

In the face of new legislation that has not been perceived as very "insured-friendly", the Court of Appeal's decision in *Sutherland* is a definite setback for

2 2011 ONCA 470 (C.A.).

the insurance industry. However, from a policy standpoint, it does adhere to the purpose of the double recovery provisions in not allowing a defendant to make double deductions.

updated application for accident benefits

The Financial Services Commission of Ontario has issued a new application for accident benefits (OCF-1) and guideline for fees. See above for instructions to obtain the new form.



Download the new form from www.fsco.gov.on.ca

Please make sure to use this new form when providing patients with an application for accident benefits.

Carranza LLP advocates on behalf of migrant live-in caregivers

Carranza LLP has worked on numerous cases involving migrant workers, some of which are exploited because of their unfamiliarity with their rights under Ontario's employment standards.

We came to this area of law to enhance our personal injury work: some of our injured clients are temporary workers, refugees, or otherwise do not yet have permanent residence status in Canada and require assistance from immigration professionals with an understanding of their unique situations.

Action Centre on specific cases that highlight public policy problems.

The Live-In Caregiver program is one such problematic program; although the program addresses a real labour market need, its current structure invites exploitation of caregivers.

Under the Live-In Caregiver program, a nanny is only legally permitted to work for one employer, and must live in that employer's home. Nannies are thus completely dependent on their employers not only for their income, but for their housing and their

number of claims by caregivers against placement agencies or employers.

One such case is that of Lilliane Namukasa, who left Uganda to work as a live-in caregiver for a family in Brampton, Ontario. After working 15 hour days for two years without a single day off, while being paid less than \$100 per month, she was fired without cause and forced into a homeless shelter.

Although her employment contract stated she was to be paid \$427.50 a week, minus \$55 weekly to cover room and board, plus \$17 an hour for overtime, she was unable to enforce that contract because she did not know anyone in Canada outside her employer's family, and her employer held her passport and did not allow her to leave the home without permission.

Moira Gracey and Maria Capulong, two lawyers at Carranza LLP, are working with Parkdale Community Legal Clinic, the Caregiver's Action Centre and the Workers Action Centre (WAC) to support these women in stepping forward to assert their rights and highlight Live-In Caregiver issues.

With Moira's experience in Superior Court litigation and representing migrant workers, she has agreed to co-counsel with Parkdale Community Legal Services and be the counsel of record.

"In personal injury, we achieve justice one person at a time against the impersonal, bottom-line priorities of insurance companies that care more about investment returns and profits than about providing the protection their clients paid for. In other kinds of cases that are embedded in community support and advocacy, we have the potential to better thousands of people's lives as well as our client's. That multiplier effect is really rewarding," says Moira.

legal status in Canada.

Carranza's immigration team and two of Carranza's lawyers have been assisting in monthly clinics organized by the Caregivers Action Centre to assist Live-In Caregivers to understand and access their rights, and have taken on a



In personal injury, we achieve justice one person at a time

Our highly experienced, skilled immigration consultants do not limit themselves to assisting our injured clients, but, as part of our commitment to social justice, we also coordinate with community organizations such as No One is Illegal and the Workers

in the community

staff profile

Joseph Campisi Jr.
Barrister & Solicitor



country of origin:

Canada, family from Italy

languages spoken

Italian, Spanish and English

specialities

Personal Injury Litigation, Motor Vehicle Accidents - Accident Benefits and Tort Claims, Long-Term Disability, Slips and Falls, Serious Brain Injuries, Quadriplegia, Paraplegia, Deaths, and Serious Orthopaedic Injuries.

Joseph's Italian upbringing taught him to work hard and work ethically. Every client he meets, every case he takes, benefits from his diligence and compassion.

As an Adjunct Professor at Osgoode Hall Law School, Joseph has taught civil litigation and insurance law. He also teaches tort law in the Internationally Trained Lawyers Program of the University of Toronto, Faculty of Law. Joseph's academic training has served him well in litigating claims and representing his clients. He has a doctoral degree (Ph.D.) in tort and Insurance Law and he has written academic literature on auto insurance law and access to justice.

Carranza Cougars

gooooooooooooal!



The "Carranza Cougars" are participating in the 4th annual GOOOOAL! Soccer Championship (GSC) which is a recreational fundraising tournament, from July 7th - September 1st in support of patient care at Toronto Rehab. This year

Carranza LLP hopes to raise over \$5,000 to directly benefit Toronto Rehab programs.

To learn more about GSC or to sponsor our participation please visit www.carranza.on.ca

Carranza awarded Legal Fellowship Award



From Left to Right: Cesar Carranza, Joseph Campisi, Juan Carranza and Ruth Wilcox of the OBIA

We at Carranza LLP are pleased to be recipients of the Ontario Brain Injury Association's (OBIA) "Legal Fellowship Award", based on our work and dedication to people living with brain injuries and our continued commitment to diversity needs.

This annual award is presented to a chosen Legal Firm that has made significant contributions over the years to help with the development of services for those survivors living with the effects of an acquired brain injury.

Carranza LLP is pleased to be a Patron Donor to the St. Michael's Hospital in Toronto.

Juan and Cesar Carranza, partners at Carranza LLP, were invited to St. Michael's Hospital on June 23rd to attend a Donor Wall Ceremony for their ongoing contributions and support. All proceeds go towards better research and education, vital state-of-the-art equipment, and to help attract medical experts to the hospital in order to provide outstanding patient care.



Carranza is Toronto's largest ethnic personal injury law firm with services in over 24 different languages*. Our experienced personal injury lawyers are committed to helping all injury survivors achieve maximum recovery and fair compensation by providing unsurpassed professional and culturally-sensitive representation. We not only help our clients overcome the language barrier, but we also assist with any cultural issues that may arise. When your patient looks for a personal injury lawyer, it is important that they find one that understands not only the ever-changing legal system, but also their unique situation and individual needs. Inspired by all you do, we believe our job is more than helping them through litigation; we go to great lengths to ensure our clients receive all the rehabilitation they need and compensation they deserve. From the outset of their claim, our clients receive immediate guidance and expertise from their Accident Benefits team. You provide the healthcare. We will provide the rest.

*Languages include: Cantonese, Mandarin, Spanish, Italian, Punjabi, Tagalog, Filipino, Portuguese, Farsi, French, Bengali, Bosnian, Gujarati, Hebrew, Hindi, Kiswahili, Malayalam, American Sign Language, Russian, Sylheti, Tamil, Telugu, Urdu, Vietnamese and English.

carranza LLP

Multiple languages. Singular focus.

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