C.A. No. 107683

NOVA SCOTIA COURT OF APPEAL

Cite as: Co-Operators General Insurance Company v. Boucher, 1995 NSCA 94
Chipman, Jones and Pugsley, JJ.A.

BETWEEN:

THE CO-OPERATORS GENERAL INS. CO. Appellant - and - **JEAN PAUL BOUCHER** Respondent	S. Raymond Morse, Esq. for the appellant Scott Gillis, Esq. for the respondent Appeal Heard: January 25, 1995 Judgment Delivered: January 25, 1995

Revised Decision: The text of the original decision has been corrected according to the erratum dated February 1, 1995. The text of the erratum is appended to this decision.

THE COURT: Appeal is allowed, award of damages and costs of trial judge set aside, per oral reasons for judgment of Pugsley, J.A.; Chipman and Jones, JJ.A. concurring.

PUGSLEY, J.A.:

The Co-operators General Insurance Company (Co-op) appeals from the decision of a Supreme Court Justice delivered on July 12, 1994, requiring it to pay to Jean Boucher, a holder of Co-op's standard auto insurance policy, expenses incurred, or to be incurred, by Mr. Boucher for occupational retraining or rehabilitation.

Mr. Boucher, aged 34, suffered severe injury to his left knee, resulting in a degree of permanent physical impairment, while operating his motorcycle, which was struck by a car on August 17, 1990.

Settlement of Mr. Boucher's claim with the insurers of the third party motorist was reached prior to August 1993, upon terms reserving to Mr. Boucher, the right to pursue Co-op with respect to claims arising under Section B of his policy.

Subsection 1 of Section B of the Co-op policy entitled "Medical, Rehabilitation and Funeral Expenses" provided:

> "1 All reasonable expenses incurred within four years from the date of the accident as a result of such injury for necessary medical, surgical, dental, chiropractic, hospital, professional nursing and ambulance service and for any other services within the meaning of insured services under the **Health Services and Insurance Act** and for such other services and supplies which are, in the opinion of the physician of the insured person's choice and that of the insurer's medical advisor, essential for the treatment, occupational retraining or rehabilitation of said person, to the limit of $25,000 per person." (emphasis added)

Mr. Boucher, prior to the accident, was employed as a truck driver and labourer, on a seasonal basis. He had a Grade Three education.

While emphasizing that the policy did not require Co-op to make Mr. Boucher literate, and further stipulating that an improvement in his literacy level was not essential to enable him to return to employment, Co-op retained Deborah Aker, described as an Adult Upgrading Instructor, on January 30, 1992 to provide tutoring to improve his literacy level. Co-op continued to pay for her services until September 18, 1992, but stopped at that time on the ground that suitable employment opportunities were available for Mr. Boucher.

Mr. Boucher had also been referred, by his family physician, to Dr. J. J. Patil, a specialist in physical medicine.

In a meeting in April 1992, Dr. Patil advised Co-op's representative that Mr. Boucher could not return to his previous occupation but recommended that he engage in sedentary or light occupation.

Co-op's representative, in a letter of April 30, 1992, to Co-op, the contents of which were approved by Dr. Patil, reported:

> "Although tutoring is supported in assisting the client with obtaining a higher grade level, Dr. Patil advises that psychological testing would be beneficial to determine whether the client has learning disabilities and to determine his abilities in general. As the client had only obtained a Grade 3 at age fifteen, Dr. Patil questions whether the client can improve in an academic situation."

Co-op then retained Jack Bearden, a career counsellor with the Nova Scotia Department of Education. He reported on August 21, 1992 in part as follows:

> "Occupational opportunities for [Mr. Boucher] are going to be very limited without academic upgrading with special emphasis on reading skills. [Mr. Boucher] is most likely to enjoy success in this endeavour as he has the help of a tutor in conjunction with a structured classroom program such as Level 1 upgrading. Indications are that [Mr. Boucher] is capable of progressing through upgrading with help to the point of receiving a level of vocational training that will equip him to work within the limitations of his injury. Obviously physical recovery and rehabilitation in conjunction with upgrading and training will further broaden his vocational options."

Mr. Boucher obtained a proposal from Ms. Aker to continue to provide tutoring services at an estimated cost of $11,655.00, of which amount $5,205.31 had been paid at the date of trial. Co-op having paid approximately $17,300.00 to Mr. Boucher, the remaining amount available under the policy from which payment for a tutor could be made was approximately $7,600.00. Mr. Boucher claimed, therefor, the sum of $7,600.00 from Co-op.

The parties at the commencement of trial on May 7, 1994, filed an agreed statement of facts, tendered a book of agreed documents, and Co-op filed selections from a pre-trial discovery examination of Mr. Boucher conducted in August 1992. No *viva voce* evidence was called on behalf of either party.

The only medical evidence tendered on behalf of or by any physician treating Mr. Boucher was that contained in the April 30, 1992, letter to Co-op summarizing the meeting held in April 1992 between the Co-op representative and Dr. Patil.

It was argued on behalf of Mr. Boucher that although Dr. Patil did not "precisely recommend retraining" he did recommend that psychological testing be carried out, which led to Mr. Bearden's recommendation that Mr. Boucher have the "help of a tutor".

The trial judge accepted that submission, and determined:

> "Although I am of the view that normally the failure of an insured to provide a supportive opinion of his or her position would be fatal to a claim under Subsection B 1(1) in this instance I have come to the conclusion that such is not required. In this case I have found that the defendant's consultant, Mr. Bearden, provided the necessary support to establish that the requested services are essential for the occupational retraining or rehabilitation of the plaintiff. In these circumstances, in my view, it would be unjust, unfair and unreasonable to permit the defendant to succeed on the objection that the plaintiff had failed to meet the formal requirement of supporting his claim with the opinion of his physician. This is particularly so in this case because the main issue only peripherally involved the medical aspect

> as indicated by Dr. Patil's recommendation that the plaintiff be referred for psychological testing, which in the end was the determining factor."

The trial judge accordingly allowed Mr. Boucher's claim.

Co-op's principal ground of appeal is that a necessary prerequisite to the payment of costs of educational upgrading or rehabilitation, is the provision of concurring opinions from a physician of Mr. Boucher's choice, and Co-op's medical advisor, confirming that such expenses are essential for Mr. Boucher's occupational training or rehabilitation. There being no such concurred opinion, it is submitted on behalf of Co-op, the appeal should be allowed.

We adopt the words of Southey J. on behalf of the majority in the Divisional Court in **Masson v. Scottish and York Insurance Company** (1989-90), I.L.R. 1-2605 at p. 10,148 where, in dealing with Subsection 1(1) of Section B, he stated:

> "The first type of expenses is limited to what might be described as professional services, and is recoverable if reasonable and necessary. There is no requirement that the expenses be verified by any medical opinion. The second type of expenses is limited to services falling within the definition of 'insured services' under the **Health Insurance Act**. These services are restricted by the terms of the definition. The third type of expenses is more general in nature. It is for such other services and supplies as are essential for the treatment, occupational retraining or rehabilitation of the injured person. This could include the provision of services by such non-professional persons as homemakers or a wide variety of services and facilities, but only if such services and supplies are essential in the opinion of the physician of the insured person's choice and that of the insurer's medical advisor. It is apparent that the Legislature considered such verification to be necessary in the case of the third type of expense, because of the unlimited range of services and supplies which otherwise would be covered. It was no doubt considered that such verification was not necessary to ensure the genuineness of expenses falling within the first two categories."

It is of interest that the issue in **Masson** arose from a difference of opinion between the medical advisors for the two parties. The physician of the insured person's choice had stated that a Vitapulse unit was necessary with respect to the

treatment of the plaintiff's injuries. The insurer's medical advisor disagreed. Counsel for the claimant quite naturally submitted that the insurer's position that the unit was not "essential" in the opinion of its medical advisor gave to the insurer an absolute veto with respect to the recovery of the expense and that such result was unjust because it could be determined by a medical advisor not a specialist in the field who may never have examined the injured person. The majority, however, rejected this submission. The decision of the majority was upheld by the Ontario Court of Appeal at (1993), D.L.R. (4th) 768.

Co-op also submits that Mr. Bearden did not act as Co-op's medical advisor as contemplated by subsection 1(1) of section B.

In our opinion, Co-op was not required to seek an opinion from its medical advisor because Mr. Boucher had not first obtained an opinion from his physician that occupational retraining was essential. Mr. Bearden, who has no medical qualifications, did not, in our opinion, fulfil the role of Co-op's medical advisor.

We agree that a broad and liberal approach should be adopted in interpreting Section B (see comments of Hart, J.A. on behalf of this Court in **MacKay v. Rovers** (1987), 79 N.S.R. (2d) 237) but not one that distorts the meaning of the words (Nunn J. in **Morrow v. Barnhill Contracting Limited** (1988), 82 N.S.R. (2d) 141 at 153, appeal dismissed (1989), 86 N.S.R. (2d) 444).

The trial judge has concluded that Dr. Patil has not provided an opinion that Ms. Aker's tutoring is essential for Mr. Boucher's retraining. This determination is fully supported by the material before the court. It is, in our opinion, a conclusion that is fatal to Mr. Boucher's claim.

The appeal is allowed, the award of damages and costs emanating from the decision of the trial judge are set aside.

Mr. Boucher's action is dismissed with costs both here and below in the aggregate amount of $1,000.00 plus disbursements.

Pugsley, J.A.

Concurring:

Chipman, J.A.

Jones, J.A.

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- and -	)	
	)	Scott Gillis, Esq. for the respondent
JEAN PAUL BOUCHER	)	
Respondent	)	
	)	Appeal Heard: January 25, 1995
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ERRATUM

On page 3, fifth paragraph, the sentence should read: "The only medical evidence tendered on behalf of or by any physician..."