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# INSURANCE

M A T T E R S

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## Punitive Damages Award Against An Impaired Driver

### Reason for Insurance Industry to Panic?

By Rita R. Tripathy and Henry Chan, Student-at-Law

#### FACTS

In February 2004, an Ontario jury granted an unprecedented award of punitive damages in the amount of \$100,000. against an impaired driver. In a recent appeal of that decision to the Ontario Court Appeal, *McIntyre v Grigg et al.*, [2006] O.J. No. 4420, the majority affirmed the punitive damages award, although reduced the quantum to \$20,000. The decision in *McIntyre v. Grigg et al.* now stands as the first in Canadian history to award punitive damages against an impaired driver, and has created concerns about its potential effect on the auto insurance industry.

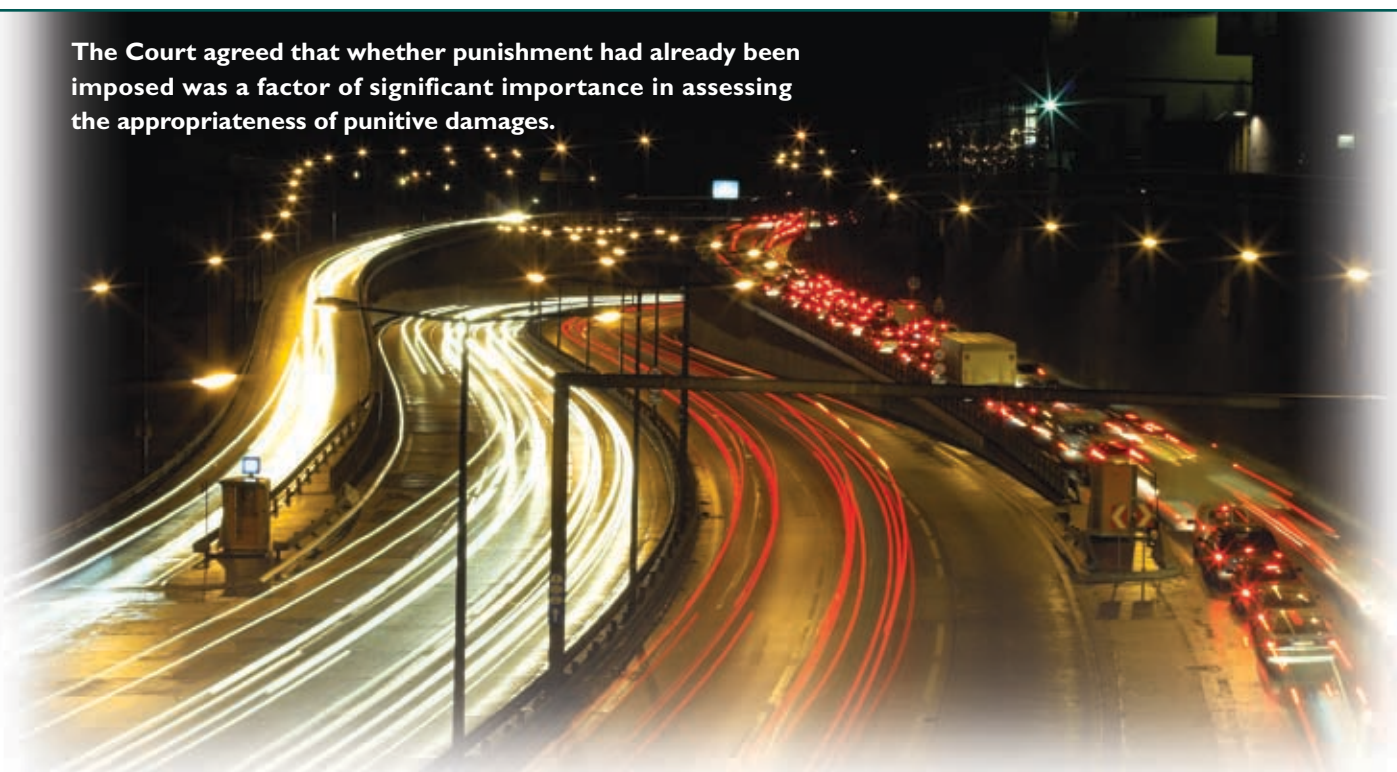
– continued on page 1



in this issue:

Punitive Damages Award Against An Impaired Driver – Reason for Insurance Industry to Panic? .....	Front Cover
Insured Failure to Sign Proof of Loss .....	2
Letters of Instruction and Other Resources of Experts – Privileged or Not? .....	3
Vehicle Owners Liable on Implied Consent .....	4
“But For” Test Affirmed as Test for Causation.....	6
Contact the BD&P Insurance Team .....	Back Cover

**The Court agreed that whether punishment had already been imposed was a factor of significant importance in assessing the appropriateness of punitive damages.**



– continued from cover

The plaintiff, Andrea McIntyre, was a first-year McMaster University student when she was struck by a vehicle driven by Andrew Grigg, a professional CFL football player. Ms McIntyre, an outstanding athlete, sustained serious physical injuries including a badly fractured femur and a closed head injury and even more serious psychological injuries causing depressive episodes and several suicide attempts. Grigg's blood alcohol had been two to three times over the legal limit, but due to the failure by the police failed to advise Grigg of his right to retain counsel, the breathalyser test results were rendered inadmissible. As a result, Grigg avoided a likely sentence of imprisonment and only paid a fine of \$500 for careless driving.

## LAW

In reviewing the jurisprudence on punitive damages, *McMurtry C.J.O.*, writing for the majority, determined it was not necessary, as asserted by the defence, that the defendant's conduct be harsh, vindictive or malicious. It was sufficient that the actions "were deliberate and intentional" and that the defendant "showed a conscious and reckless disregard for the lives and safety of others". (at para. 75)

The defence also argued that it was a requirement at law that the misconduct had to be intentionally directed at the injured party before punitive damages could result. The Court of Appeal ("the Court") disagreed, finding that it was sufficient if there was an "intention to do the act or combination of acts that eventually caused the injury" (at para.70). Otherwise, punitive damages could well be barred in product liability cases.

Lastly, the Court examined the issue of double punishment, the defendant arguing that Grigg could not be punished both criminally and civilly for the same misconduct i.e. Grigg's conviction for impaired driving and \$500. fine precluding the award of punitive damages. The Court agreed that whether punishment had already been imposed was a factor of significant importance in assessing the appropriateness of punitive damages. However, while the Court stated that "a court in a civil proceeding should generally demonstrate deference to the decision of the [criminal] court" (at para. 80), in this case, the Court was persuaded by the concept of "disproportionality" i.e. where the criminal punishment is disproportionately small in relation to the level of misconduct. Although the Court warned that this approach should be used with "considerable caution", it concluded this case was one of the rare instances where an

award of punitive damages would not amount to double punishment, as the criminal penalty was disproportionate to Grigg's behaviour.

## DISSENTING JUDGEMENT

In dissent, Justice Blair adopted a broader approach in reviewing the law of punitive damages. He determined that in order to grant punitive damages, the court must have regard to all of the principles underpinning such an award. Furthermore, he emphasized that punitive damages will only be justified if they serve a rational purpose.

He was of the view that punitive damages would not serve a rational purpose in this case and in these types of cases in general. In his view, punitive damages in this case did not meet the primary objectives of punishment and deterrence because it would be Grigg's insurer that would have to pay. Similarly, there is no deterrent effect against other impaired drivers, if they are also covered by insurance for punitive damages.

In Justice Blair's opinion, the awarding of punitive damages created the effect that "all automobile-owning members of society will effectively be 'punished' for the conduct of Mr. Grigg and comparable drivers", through increased insurance premiums.

He also underscored the importance of awarding punitive damages only in rare cases, and with restraint. In doing so, he considered how opening the door to punitive damages in cases like this would distort the core rationale of tort law, which is not to punish the wrongdoer but to compensate the injured party.

## QUANTUM

In addressing quantum, the Court clearly found an award of \$100,000 excessive. They concluded that the award of \$100,000 was not rational to meet the objectives of retribution, deterrence and denunciation. In assessing the potential exposure to an award for punitive damages, insurers should consider that the Court considered the following in determining a lesser quantum was appropriate:

- ▶ the isolated nature of the misconduct,

▶ the lack of a relationship between the parties (in comparison to a relationship of trust), and

▶ the fact that the misconduct was not specifically directed at the plaintiff.

## SIGNIFICANCE OF DECISION

What does this decision mean for auto insurance companies? Under the Ontario Standard Automobile Owner's Policy, it is possible that the insurer will be liable for punitive damages awarded against an insured. Similar language exists in the standard policies of other jurisdictions, including Alberta. Although there are strong reasons to deny coverage of punitive damages on public policy grounds, this may be overridden by statute. For example, the Alberta *Insurance Act* limits a public policy defence to acts where the defendant intentionally caused the damage or loss.

Nevertheless, in reviewing the facts of this case, the reasons cited by the majority, and the concerns outlined in dissent, this decision will not necessarily signal the beginning of punitive damage awards in all impaired driving cases. This is so given the traditional incremental advancement of the law of punitive damages and the fact that cases where punitive damages may otherwise be appropriate will be circumscribed significantly, if not completely, by the issue of double punishment. It is probably too early to panic.

It remains to be seen whether provincial governments would consider the risk of an award of punitive damage significant enough to rewrite insurance policies to clearly protect insurers from liability for punitive damages.



# Insured Failure to Sign Proof of Loss

By Perminder K. Basran

Contracts of insurance will generally include a provision requiring an insured to return a Proof of Loss to avoid forfeiture or avoidance of the insurance. In addition, the Alberta *Insurance Act* at Section 614 requires that where there is loss of the automobile an insured shall “deliver to the insurer within 90 days after the date of loss or damage a Statutory Declaration...” with respect to such information as the amount of the loss.

Section 515 of the *Insurance Act* provides relief where there has been imperfect compliance with respect to the Proof of Loss. Alberta Courts have considered this relief provision many times. The leading case is *Hogan v. Kolinsnyk*, [1983] A.J. No. 846, where the Alberta Queen's Bench held that as a “general principle”, the courts will exercise their discretion to relieve against forfeiture in favour of the insured where:

1. the claimant has not been guilty of fraud or wilful misconduct; and
2. the insurer has not been seriously prejudiced by the imperfect compliance.

The Court went on to say that courts will in general provide relief to an insured if the insured made an honest and reasonable mistake, which will not prejudice the insurer.

An interesting issue has arisen in several recent cases as to what additional information is producible to the opposing party along with an expert's report. The cases have looked at raw data, test scores, the expert's notes of behavioural observations of the opposing party and even the opposing counsel's letter of instruction to the expert.

#### RAW DATA

In the Alberta case of *Andre v. Wiebe* [2000] A.J. No. 1559 the Plaintiff applied for an order compelling the disclosure of raw data which formed the basis of two medical expert reports. The Court held that Rule 217(7), which requires the independent medical examiner to provide a written report setting out his "findings" means the expert is to provide the "factual underpinnings" that support his conclusion. The factual underpinnings would normally include the test protocols and raw data of test results arising from the examination, which in this case included test score summary sheets, questionnaires and behavioural observations. However, the Court held that the expert is not required to disclose any documents, which do not relate to the substance of his or her opinion. Hence, the Defendants were not required to produce any correspondence between themselves and the doctor, nor between their counsel and the doctor. Neither were they required to disclose any draft reports or any documents that described the defendant's trial strategy. Justice Peras emphasized that Rule 217 was intended to prevent trial by ambush and surprise which was the basis for his decision to order the production of the factual underpinnings—i.e. if the materials were withheld until trial, unnecessary cost and delay would be the result.

In *Fleming v. Laura Secord*, [2000] O.J. NO. 2116 (Master) the clinical notes of a psychologist were ordered to be produced to the opposing party in a case where the findings of the expert were not sufficiently detailed in the report.

#### LETTER OF INSTRUCTION

In a 2004 Ontario decision, *Walker v. Baskin Robbins*, [2004] O.J. No. 1930, the Defendant sought the actual letter of instruction to the Plaintiff's expert who had prepared an income loss report. This expert had specifically stated in his report that in preparing the report he had relied on various listed information including "information you (the Plaintiff's counsel) provided to me". It seemed clear this information was more than the other documentation listed in the expert's report. Master Dash ordered that where an expert report made specific reference to having relied on material in the letter of instruction from counsel, the letter had to be produced.

On the other hand, in *Calvaruso v. Nantais*, [1992] O.J. No. 345 (Gen. Div.) the Defendant lost its application for production of Plaintiff counsel's letter of instruction to its expert. The expert report had listed 16 points, which raised the suspicion that the expert was answering a series of questions put to him by Plaintiff's counsel, which could mean that the questions coloured the answers. The court declined to order production of the instructing letter, as the expert opinion did not say that it was in response to questions posed or that it was based in anyway on information provided by counsel.

## Letters of Instruction and Other Resources of Experts Privileged or Not?

by Permdier K. Basran



#### CAUTION

It seems there is room to make the argument that if an expert refers to having relied upon information or material contained in a letter of instruction, the letter should be produced as "factual underpinnings" that support the expert's conclusions or opinions.

While the litigation or solicitor/client privilege over these instructing letters to experts has not been lost by the statutory exception to the privilege as provided in Rule 217(7), there are circumstances in which the instructing letter may be producible. Accordingly it would be a prudent practice of insurers and their counsel to provide neutral and non-prejudicial letters of instruction to experts.



# Vehicle Owners Liable on Implied Consent

by Jeff B. Weidman

## INTRODUCTION

Alberta's top court has narrowly upheld findings of liability against the owners of vehicles involved in accidents while the vehicles were being driven by third parties on the basis of implied consent.

Two companion cases were heard by the Alberta Court of Appeal, Ireland (*Next Friend of) v. Perez*, [2007] A.J. No. 128 (C.A.) ("Perez") and *E.T Estate v. Tran*, [2007] A.J. No. 129(C.A.) ("Tran") in which the Court examined the test as to implied consent of the possession and use of a motor vehicle under s. 181 of the *Highway Traffic Act* of Alberta.

**...these cases should certainly serve as a warning to owners who loan out vehicles to friends or family...**

## FACTS AND OUTCOME

In *Perez*, a father, Oscar Sr., and registered owner of a vehicle, had given consent to his son, Oscar Jr. to drive it. Oscar Jr. became inebriated and was unable to drive and a friend, Perez, 18 and unlicensed, took over

the wheel at Oscar Jr.'s request. A serious single vehicle accident, including a fatality and serious injury to several passengers, resulted.

In *Tran*, the registered owner lent his vehicle to his brother to run a quick errand. The brother later instructed a third party, Tran, to drive the vehicle in what turned out to be a car chase and a shooting in a drug deal, which also resulted in a serious accident and fatality.

Subsequent lawsuits by the injured parties and estates of the deceased persons were defended on the basis that neither Perez nor Tran had been given the owners' express or implied consent to drive the respective vehicles. The Plaintiffs were successful in both cases.

On subsequent appeal by the insurers, Justice Ritter dismissed the appeal in both cases. His Court of Appeal colleague, Mr. Justice Berger, concurred in the result in the Perez matter but dissented in the Estate of E.T. decision; Mr. Justice O’Leary concurred in E.T. but dissented in Perez.

### PEREZ DECISION

At trial the Court found that while Oscar Jr. expressly gave his consent to allow Perez to drive the vehicle, Oscar Sr. gave neither express nor implied consent. However, because Oscar Jr. “did have implied authority from Oscar Sr. to allow a friend to drive... Oscar Jr. and through him Oscar Sr. gave implied consent to the possession and operation of the car by Perez”.

On appeal, Mr. Justice Ritter held that the test for implied consent requires an examination of *all* circumstances surrounding the use of the vehicle in question. In other words, when assessing the circumstances in particular case, no one circumstance by itself is determinative.

Oscar Sr.’s evidence was to the effect that he trusted his son’s judgment to allow someone else to drive the car **but only** in the event of a medical emergency. In terms of the effectiveness in limiting one’s liability exposure by providing conditional consent, the Court of Appeal relied on its earlier decision in *Mugford v. Weber* (2004), 348 A.R. 332 (“C.A.”)(“Mugford”) in which it was held there could be no conditional consent.

Mr. Justice Ritter stated that, of some significance to the Perez appeal, was the court’s rejection in *Mugford* of the ability of an owner to insulate him or herself from liability by way of conditional consent, which is simply a reflection of the owner’s attempt to avoid the foreseeable consequences of the vehicle loan. This rejection of conditional consent recognizes that the owner’s ultimate protection remains in his or her ability to not lend out the vehicle at all rather than to impose condition on its use.

Importantly, as between the owner and innocent victims of a collision involving the owner’s vehicle, the Court of Appeal concluded that risk of failure to abide by conditions rests with the owner and not with innocent members of the traveling public. Summing up this conclusion, Mr. Justice Ritter stated at para. 25:

It not only imposes an additional responsibility on the part of car owners to take greater care over the possession and use of their vehicles, but also provides access to the owner’s mandatory insurance benefits.

In addition to the finding of an inability to provide conditional consent, Mr. Justice Ritter held there was overwhelming evidence that Oscar Sr. should have been aware of his son’s use of his vehicle when he was drinking, which “circumstance favours liability, as it is foreseeable that your drunk son might request a more sober friend to drive for him.”

It was also held that the reasonableness of the driver’s belief that he or she had consent is also an important factor in the implication of consent. In this case, Oscar Jr. frequently drove his father’s vehicle and the evidence suggested that it was reasonable for Perez to conclude that Oscar Jr. could, as owner of the vehicle, provide his consent.

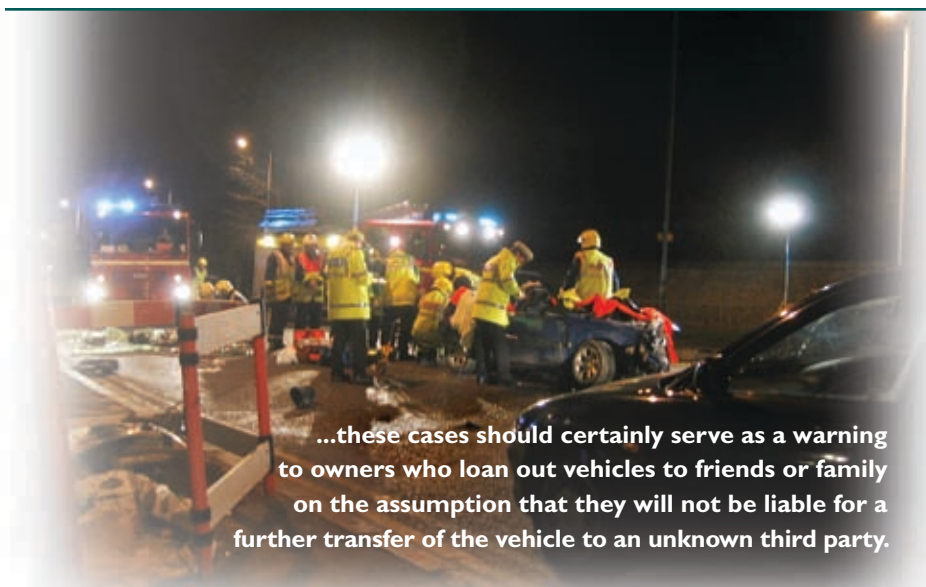
### TRAN DECISION

The trial judge in the *Tran* decision found that the owner had placed no limitation on his brother’s use of the vehicle, had made no effort to terminate the use on the night in question and that it was a reasonable assumption for the driver to assume that the brother who had given him permission to drive was the owner. On the appeal, the Defence argued the consent on the night in question had been limited to a quick and short trip—the car chase and gun fight being far from the contemplation of the owner. While the dissenting judge would have accepted this argument, Justice Ritter relied on *Mugford* once again, finding conditional consent as to the use or manner of driving a vehicle is contrary to the underlying rationale of the legislation—to protect the public.

### SUMMARY

While the result of these companion cases in favour of the injured parties are decisions of the Alberta Court of Appeal, the three judges hearing the two cases were far from agreement on the overriding principles, arguably leaving room for a different result on different facts on another day.

However, these cases should certainly serve as a warning to owners who loan out vehicles to friends or family on the assumption that they will not be liable for a further transfer of the vehicle to an unknown third party. It is also clear that reliance on conditions imposed on the original loan do so at a serious risk of liability. This is especially so for an owner who regularly permits someone to drive his or her vehicle since by doing so, the owner is leading others to believe that the regular driver is the owner. It remains the option of the owner to prevent others from driving his or her vehicle as a matter of routine. Otherwise, a borrower may be led to believe that he or she has *carte blanche* to borrow it. Similarly, a friend of the borrower could easily be led to believe that the borrower is the actual owner of the vehicle and can therefore provide consent to drive.



...these cases should certainly serve as a warning to owners who loan out vehicles to friends or family on the assumption that they will not be liable for a further transfer of the vehicle to an unknown third party.

# “But For” Test Affirmed as Test for Causation

by Susan J. Martyn

## INTRODUCTION

A recent Supreme Court of Canada (“SCC”) decision, *Resurfice Corp. v. Hanke*, [2007] S.C.J. No. 7 has laid to rest any uncertainty as to which test should be used to determine causation in the context of a claim for negligence: (a) the “but for” test; or (b) the “material contribution” test. The “but for” test involves proving that, but for a defendant’s negligence, the plaintiff’s injuries would not have occurred. The “material contribution” test is somewhat less rigid; the plaintiff must only prove that the defendant’s negligence contributed to the plaintiff’s injuries in a significant and non-trivial manner.

## FACTS OF THE CASE

This claim involved a plaintiff who accidentally poured hot water into the gasoline tank of an ice resurfacer, releasing vapourized gasoline into the atmosphere. The vapours were then ignited by an overhead heater, causing a fire and an explosion. The plaintiff was badly injured in the fire and was hospitalized for almost two years. The plaintiff subsequently sued the ice resurfacer’s manufacturer for negligent design, alleging that the gasoline and hot water tanks on this unit were similar in appearance and placed close together, making it easy to confuse them.

## DECISIONS OF THE COURTS

At trial, Justice Hawco found that the plaintiff knew precisely which tank was for gasoline and which tank was for hot water and, further, that the plaintiff was aware that hot water could not be introduced into the gasoline tank. Using the “but for” causation test, Justice Hawco concluded that the plaintiff had failed to prove that the accident had been caused by any negligence on the part of the manufacturer. The trial decision was subsequently overturned by the Alberta Court of Appeal, which held that the “material contribution” test should be used whenever a plaintiff’s injuries are attributable to more than one potential cause of injury. Accordingly, the Court of Appeal concluded that Justice Hawco had applied the incorrect test for causation.

The SCC ultimately restored the trial decision, affirming that the basic test for proving causation is the “but for” test, meaning that the plaintiff has the onus of proving that, but for the defendant’s negligence, the plaintiff’s injuries would not have occurred. It should be further noted that the SCC alluded to an important policy rationale set down in *Snell v. Farrell*, [1990] 2 SCR 311 for favouring the “but for” test over the “material contribution” test:



...The “but for” test recognizes that compensation for negligent conduct should only be made “where a substantial connection between the injury and defendant’s conduct” is present. It ensures that a defendant will not be held liable for the plaintiff’s injuries where they “may very well be due to factors unconnected to the defendant and not the fault of anyone” (at para. 23).

The SCC also stated that to accept the Alberta Court of Appeal’s suggestion that the “material contribution” test must be used where there is more than one potential cause of an injury is to do away with the “but for” test altogether, given there is more than one potential cause in virtually all litigated cases of negligence.

The SCC did affirm that the “material contribution” test can be invoked in certain narrow circumstances: (a) when it is impossible to prove that the plaintiff’s injuries are attributable to the defendant’s conduct through the “but for” test (*i.e.*, due to factors beyond the plaintiff’s control such as limits on current scientific advances); and (b) it must be clear that the defendant breached the duty of care owed to the plaintiff, exposing the plaintiff to the unreasonable risk of injury and the plaintiff must have suffered the injury. As stated by the SCC, at para. 25:

In those exceptional cases where these two requirements are satisfied, liability may be imposed, even though the “but for” test is not satisfied, because it would offend basic notions of fairness and justice to deny liability by applying a “but for” approach.

The SCC offered an example of the appropriate application of the “material contribution” test—in circumstances where it is impossible to say which of two tortious sources caused the injury, such as in the case where two persons each fire a shot carelessly at a victim and it is impossible to say which shot injured him.

## CONCLUSION

Except for the narrow circumstances described above, when the “material contribution” test may be used, the basic test for causation remains that of the “but for” test.

## Contact the BD&P Insurance Team

Perminder K. Basran	(403) 260-0261	pkb@bdplaw.com
Donald J. Chernichen, Q.C.	(403) 260-0101	djc@bdplaw.com
Bob H. Graham	(403) 260-9473	rhg@bdplaw.com
Douglas A. McGillivray, Q.C.	(403) 260-0349	dam@bdplaw.com
Robert O. Millard	(403) 260-5719	rom@bdplaw.com
Melissa D. Moulton Tennison	(403) 260-9471	mdm@bdplaw.com
James D. Murphy	(403) 260-0152	jdm@bdplaw.com
Patricia E. Olyslager	(403) 260-0367	polyslager@bdplaw.com
Gina A. Ross	(403) 260-0342	gar@bdplaw.com
Jeff E. Sharpe	(403) 260-0176	jes@bdplaw.com
Richard F. Steele	(403) 260-0151	rfs@bdplaw.com
David H. Strand	(403) 260-0259	dhs@bdplaw.com
Rita R. Tripathy	(403) 260-0235	rrt@bdplaw.com
Kevin J. Tuohy	(403) 260-0299	kjt@bdplaw.com
L. Grant Vogeli	(403) 260-0171	lgv@bdplaw.com
Jeffrey B. Weidman	(403) 260-5722	jbw@bdplaw.com
Shannon L. Wray	(403) 260-0245	slw@bdplaw.com

*If you would like any further information on any members of our team, such as a more detailed resume, please feel free to contact the team member or the writer directly. You may also refer to our website at [www.bdplaw.com](http://www.bdplaw.com).*

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*For a complete list of authorities used in drafting these articles please contact the Editor-in-Chief.*

**Insurance Matters, Editor-in-Chief**

Rita R. Tripathy, rrt@bdplaw.com.....(403)260-0235

**Insurance Matters, Managing Editor**

Rhonda G. Wishart, rwishart@bdplaw.com.....(403)260-0268

**Contributing Writers and Researchers:**

Rita R. Tripathy, Jeff B. Weidman, Perminder K. Basran,  
 Susan J. Martyn and Henry Chan.

**Contact**

For additional copies, address changes, or to suggest articles for future consideration, please contact our Catherine Leitch in our Marketing Department at (403) 260-0345 or at [cat@bdplaw.com](mailto:cat@bdplaw.com).

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