



WITHIN REACH SUMMER 2007

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MESSAGE FROM THE AUCTION & COMEDY NIGHT CHAIRPERSON

Reach Canada Auction & Comedy Night

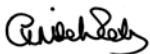
On behalf of the Auction & Comedy Night Committee, please be sure to reserve the date for our **27th Annual Reach Auction & Comedy Night – October 25, 2007**. Your attendance at this event is, as always, an affirmation of your support for the excellent work that is being done by Reach Canada to provide equality and justice for people with disabilities.

Since our format of the past two years has proven to be successful, we are repeating it this year. Our entertainment comes from **David Roche** who is an outstanding Canadian-American making his first appearance in Central Canada. Our venue this year is **St. Anthony's Banquet Centre on Preston Street**, hosted & catered by **Vittoria Trattoria** who is a great friend of Reach Canada.

If anyone is interested in volunteering their time to make this evening its usual success or would be willing to help our committee, please contact me (613-729-0011) or the Reach office. We are also looking for donated items for both the live and the silent auctions as well as sales for corporate tables. Each table seats 8 and can be reserved at a cost of \$1,000. Individual tickets can be purchased for \$99.00.

If you would like to make a donation for the auction or purchase a table / ticket, again, please contact me or the Reach office.

Thank you for your support.



Ottawa Public Library receives community award

Ottawa (June 1, 2007) - The Ottawa Public Library (OPL) was recognized for its contribution to the community with the presentation of the *People with Disabilities Award* at the United Way's annual *Community Builder Awards Ceremony* on Thursday, May 31. The OPL's Homebound Services was singled out for delivering library materials to the homes of those who cannot get out on their own to enjoy the library.

“At a time when the city is holding discussions about transformation and renewal, the services that the Ottawa Public Library offers for individuals who are either unable to come to the library or who are unable to read traditional books are an example of a city service that is fulfilling its mission,” said Michael Allen, President, United Way/Centraide Ottawa. “As the recipient of this year’s Community Builder of the Year Award - People with Disabilities, the Ottawa Public Library is being honoured for their leadership and dedication to ensuring that all of the residents of Ottawa have equal access to the books and resources that the library has to offer.”

The OPL was nominated by Homebound Services client Penny Leclair, “I am not able to go to the library myself, but having books delivered means I can keep myself up-to-date on several issues and I can be connected to my community through contact with the library.” Ms. Leclair is one of more than 700 Ottawa residents who benefit from the services provided by the Homebound Delivery Program, which provides access to library materials including large print books, audio-books on tape and CD, audio-descriptive videos; also available are audio books and players in a fully digital format called DAISY. These items are available to anyone who cannot easily visit an OPL branch or bookmobile stop. “A library is an important part of the community and the way our library works with various residents shows that the OPL cares about reaching out to everyone in the community,” adds Ms. Leclair.

City Librarian Barbara Clubb accepted the award on behalf of the OPL, “This award is a well deserved tribute to the dedicated staff and volunteers who deliver this service. It is as well, a welcome affirmation of the OPL’s success in delivering on the core values of freedom of access and building community.” The Homebound Services office at the Main Library is supported by staff at branches in Kanata and Stittsville as well as a team of dedicated volunteers in rural and suburban areas.

The Ottawa Public Library also participates in the CNIB's Visunet Canada Partners Program, which provides easy access to the CNIB collections of audio-visual and Braille materials, offers Zoom Text magnification software at most library branches and will be introducing new technology in seven branches this year including optical character recognition software for persons with physical and perceptual disabilities, screen reading software, and speech recognition software that allows users to compose text with a microphone rather than a keyboard.

The Homebound Service and other services for people with special needs are indicative of the Ottawa Public Library's commitment to free basic library services for every citizen of Ottawa.

“OPL READERS PUT THEIR NOSE IN A GOOD....DAISY?”

By April Duffy

The following article originally appeared in the Ottawa Public Library Foundation's Newsletter "Foundation Focus" dated April 5, 2007

What's the best way to make a great library system even better?

Get more people to enjoy it!

By way of two large grants from the Crabtree Foundation, the Ottawa Public Library Foundation is doing just that.

This summer the Ottawa Public Library will be equipped with new Daisy readers and Kurzweil readers, that will allow persons with physical and perceptual disabilities to enjoy the library in new and stimulating ways.

“A Daisy reader is like a CD player,” said Marcia Aronson, the library manager of adult readers advisory service.

The Daisy reader books, called Daisy books are also unique and far more user friendly than regular audio books.

“For example if you were to take out the book Paris 1919 or one of the Harry Potter's that's about a 20 to 22 CD (audio book) on Daisy it's one disk. So for the user, especially for one that has any kind of impairment this is a boon, because it's so much easier,” said Aronson

The readers play the discs in a variety of voices and adjustable tones, can skip among chapters, can be book-marked for future chapter reference and have a sleep timer.

The OPL will now have 38 Daisy readers with the 18 bought by the grant as well as close to 400 Daisy Reader books currently available for loan on top of borrowing capabilities at the Canadian National Institute for the Blind. Aronson explained

And it's a good thing the library has so many as their popularity is growing.

“We're lending out close to 150 Daisy books a month,” Aronson said. “We know the demand is going to increase because we've only been doing this for not even a year now and they're this popular already.”

The Daisy readers are so popular that the OPL has even begun facilitating the loan of Daisy books for a local Daisy reader book club.

But Daisy readers aren't the only adaptive technology library goers will find available to them; the grant has also bought seven Kurzweil readers that will be available this summer at Beverbrook, Cumberland, Greenboro, Main, Nepean Centerpointe, North Gloucester and Sunnyside.

Kurzweil readers unlike the portable Daisy readers are software programs that read aloud pages of text.

“So you’ve got a scanner, you would scan your information into the Kurzweil reader it would then read it back to you, and you can edit that document,” Aronson said.

The OPL will have both Kurzweil 1000’s and Kurzweil 3000’s. The Kurzweil 3000’s like the 1000’s are optical character recognition programs, but they also have enhanced features that help users organize their thoughts and improve their language skills said Aronson.

“So it’s also useful for people who are ESL students, or literacy students who have difficulty just composing their thoughts and knowing whether their grammar is right, if they’ve got the right word, things like that,” Aronson said.

Also with the Kurzweil 3000 systems the OPL will have Dragon Naturally Speaking, which is speech recognition software that enables the user to compose their text with a microphone rather than a keyboard Aronson explained.

Will these new adaptive technologies bring people into the libraries?

The answer is yes, and in the case of the Daisy readers, they already have.

“The people who are using them just love them,” said Aronson.

For more information on how to use the new adaptive technologies please visit the library website at: <http://www.biblioottawalibrary.ca> or visit your local branch.

“VIA RAIL ORDERED BY TOP COURT TO PROVIDE ACCESSIBLE TRAINS”

by Thomas Claridge

This article originally appeared in the April 6, 2007, issue of *The Lawyers Weekly* published by LexisNexis Canada Inc.



Sarah Godwin and David Baker represented the Council of Canadians with Disabilities; Photo by Paul Lawrence

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In the absence of any consensus as to the cost involved, the Supreme Court of Canada has ruled 5-4 to uphold a regulator’s requirement that VIA Rail provide full wheelchair accessibility on its new Renaissance passenger trains.

Overtaking a unanimous Federal Court of Appeal decision to remit the case to the Canadian Transportation Agency for reconsideration, the court’s majority held that the agency, “following its multi-year dealings with the parties, was in the best position to control its own process with a view to the *bona fides* and strategic choices of the parties,” adding: “There are no grounds for a reviewing court to interfere with the Agency’s discretion to release its final decision without waiting for VIA to produce the cost estimates it had repeatedly and explicitly refused to provide.”

In the absence of any current evidence as to the cost, the judges were far apart in their own estimates.

Writing for the majority, Justice Rosalie Abella suggested that the cost would be far below the estimate of anywhere from \$48 million to \$92 million that Bombardier expert Peter Schrum had given VIA, which the rail service had submitted to the Federal Court of Appeal.

Citing the CTA's determination that the net cost to VIA of addressing safety concerns in a way that would make 13 coach cars accessible for personal wheelchairs at no more than \$673,400 in direct costs plus \$16,988 in lost passenger revenue, Justice Abella said that was "the most significant remedial measure the Agency ordered" and was comparable to what VIA was prepared to incur to accommodate passengers wearing overcoats.

For the minority, Justices Marie Deschamps and Marshall Rothstein noted that Schrum had been cross-examined on his affidavit. "Moreover, the Federal Court of Appeal used the Schrum evidence not to make a decision with respect to the merits, but only as a basis for remitting the matter to the Agency for its reconsideration."

Noting that the Schrum affidavit predicted costs that would be between 37 and 71 per cent of the \$130-million outlay for purchasing and retrofitting the entire 139-coach Renaissance fleet, the minority judges applauded the approach taken by the appeal court.

"Where the cost is potentially significant and where the Agency adopted a dismissive approach to cost and funding of corrective measures, it is apparent that relevant considerations were not taken into account.

"It should be for the Agency, on the basis of new evidence adduced before it (or if it considers it adequate, the evidence filed in the Federal Court of Appeal) to determine the cost of corrective measures and VIA's ability to fund them and to carry out the balancing exercise required of it" in determining whether financial constraints prevented removing obstacles to full accessibility.

In service since 2002, the Renaissance fleet was originally intended for overnight trains using the Channel Tunnel. When that service was deemed unnecessary, the partially completed fleet was sold to VIA in late 2000 for \$29.8 million. The passenger service used a special \$140-million federal grant for the purchase and the funds needed to bring the new coaches into service based on using on-board narrow wheelchairs and staff assistance for washroom use by disabled passengers.

In 2001, the Council of Canadians with Disabilities (CCD) applied to the CTA complaining that many of the coaches' features constituted undue obstacles to the mobility of those with disabilities.

Agreeing, the CTA required VIA to retrofit 13 "service" and 30 coach-class coaches to make them fully accessible for passengers using personal wheelchairs, which under the 1998 Rail Code, meant provision of a minimum clear floor area of 75 by 120 cm to accommodate the wheelchair and its occupant and a minimum clear turning space 1.5 metres in diameter.

In finding that VIA should have to comply with the CTA requirements, Justice Abella said the rail service "cannot now argue that it was entitled to resile from these norms because it had found a better bargain for its able-bodied customers."

Her reasoning was supported by Chief Justice Beverley McLachlin and Justices Michel Bastarache, Louise LeBel and Louise Charron, while the dissent by Justices Deschamps and Rothstein was concurred in by Justices Ian Binnie and Morris Fish.

Although the main disagreement was over whether the CTA erred in law in its test for the "undueness" of the obstacles to mobility, the two sides also differed in the appropriate standard of appellate review. The majority found that the standard for the CTA decision as a whole was patent unreasonableness, while the minority held that on pure questions of law, such as the Agency's jurisdiction to entertain the CCD application and the application of human rights law principles in the context of transportation, the standard was one of correctness.

Sarah Godwin of Toronto's Bakerlaw, who with David Baker represented CCD, termed the ruling "a landmark decision for persons with disabilities."

She told *The Lawyers Weekly* the decision "leaves no doubt but that Canada's equality rights provisions within human rights codes, the *Charter* and other human rights legislation ensure the full and equal citizenship of persons with disabilities."

Godwin said the ruling affirmed:

- VIA's duty to prevent new barriers to mobility;
- The full inclusion of persons with disabilities, "including within all aspects of our federal transportation network";
- "Independence, comfort, dignity, safety and security" for the disabled;

- That “undueness” of remedies was VIA’s burden (i.e., failure to provide the requisite evidence would result in a respondent being found not to have discharged this burden);
- Costs “are not based on the dead weight cost of the accommodations, but are ‘net’ of costs that can be shifted, attributed to factors other than accommodation, other sources of funding, including tax credits and deductions and income that will be generated as a result of having been more accessible,” and
- “Undueness” is reached only “when all reasonable means of accommodation are exhausted and costs would threaten the survival or essential character of the enterprise.”

Godwin predicted the decision will have a huge impact on new buildings and facilities, “which will now be bound to ensure equal access to those persons who use a ‘standard wheelchair’, as set out in the Canadian Standards Association, Barrier-Free Design Standard. “

Adding a political note, she observed that without the help of the recently disbanded Court Challenges Program, “this appeal, and the important human rights principles established, would not have been possible.”

VIA’s counsel, John Champion of Fasken Martineau DuMoulin LLP in Toronto, who two years ago gave the then-current cost estimate for implementing the CTA ruling as “between \$60 million and \$110 million,” said no new figure has been developed.

He told *The Lawyers Weekly* that VIA has decided against two courses that are technically available — an appeal of the ruling to the federal cabinet or asking the CTA to reconsider its ruling in view of the Schrum affidavit.

He said the decision could lead to VIA, which is already heavily subsidized by the taxpayer. facing “very difficult circumstances.”Reasons: Council of Canadians with Disabilities v. Via Rail Canada Inc., [2007] S.C.J. No. 15.

“DISABILITY DIVERSITY CONTINUES TO TAKE A BACK SEAT – ESPECIALLY IN THE PRIVATE SECTOR”

By Jennifer Allen

This article originally appeared in the December 8, 2006, issue of The Lawyers Weekly published by LexisNexis Canada Inc.



Scott Simser, photo by Roy Grogan

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Researching this article was indicative of what many disabled lawyers experience when applying for law firm jobs: lots of queries and mostly no responses, with one “can’t be of any help”. Access to the legal profession for lawyers with disabilities is still a topic that the profession has not successfully addressed.

Although in recent years, the *Charter of Rights and Freedoms* and amendments to the *Human Rights Act* have opened up new legal avenues to the nearly four million Canadians living with disabilities who face barriers to equality, disabled lawyers continue to face significant barriers to entering the legal profession and practising law. For this group, the everyday struggle hasn’t changed much at all.

Getting through the door

Although the studies conducted to ascertain exactly how many disabled persons in Canada are attending law schools and going on to practise is meager at best, the general consensus among research groups and disabled lawyers is that law schools are ahead of the private legal sector when it comes to accessibility. A recent report issued by the Law Society of British Columbia's Disability Research Working Group entitled "Lawyers with Disabilities: Overcoming Barriers to Equality" states that although a higher number of persons with disabilities are entering law schools, which have made strides in ensuring that education is accessible, law firms have yet to catch up. When it comes to actually landing a law firm gig, disabled lawyers by and large "face discrimination, prejudice and access barriers that make it very difficult to practise law ... lawyers with disabilities are seldom kept on after articling."

In the case of disabled persons, the cost of accessibility technology is raised as a bar. Convincing employers that their contribution to a firm warrants extra expenses (when there are few financial incentives or tax breaks available) is, for lawyers starting out, an uphill battle. If the disability seems as though it will "interfere with the economic bottom line", it's unlikely that the lawyer will be considered at all.

This sentiment is echoed by lawyers such as Scott Simser, a deaf lawyer who was formerly with the Department of Justice and who's now a solo practitioner in Ottawa. "I would think it is difficult [for new lawyers] due to the fact that no deaf lawyers now practise in private law firms, and the fact that there have been deaf lawyers in private law firms in the past but they have all left the private law firms," he said, adding, "There are two deaf solo practitioners in Canada" but, as the name suggests, they operate on an independent basis.

And for the small number of disabled lawyers who are admitted to the private legal sector, many are faced with discrimination when they get there. The Law Society of B.C.'s report goes on to say that "discriminatory practices not only prevent career advancement, but produce such stress that a frequent result is overwork, burn-out and failure." And more than half of the lawyers who participated in the Law Society's study commented on how discrimination eventually resulted in loss of employment, marginalization into solo practice or early retirement.

Mary Louise Dickson, like many disabled lawyers, made the transition to solo practitioner about 15 years ago. She now practises on a cost-sharing basis with the Toronto firm of Dickson MacGregor Appell LLP for the same reasons many do – stress relief and a

reduced workload. Dickson, whose disability derives from having polio as a child, said that although she thinks firms are open to hiring lawyers with disabilities they are, at the same time “very competitive and they want people who are very able to do the work.”

This brings us back to the economic bottom line. “The large firms”, said Dickson, “want lawyers who are no trouble and can work endlessly.” This usually means working late into the night and starting it all over again early the next morning. But for many disabled lawyers who would excel in an environment that embraced flexible work schedules and part-time hours in addition to physical accommodations such as ergonomic workstations and automatic door openers that just aren’t in place, this situation just isn’t ideal.

Going elsewhere: solo practice and government gigs

Facing a struggle for access in big firms, lawyers are turning to working as solo practitioners or for government agencies.

Take the case of Ontario lawyer David Lepofsky. Lepofsky – who’s blind – has been practising law since he was called to the Bar in 1981 and for 24 years has worked in various capacities for the government and is now with the Crown Law Office (Criminal) of the Ontario Ministry of the Attorney General. Equipped with a computer system with voice software and added staff support, Lepofsky (who is also the founding president of the Canadian Association for Visually Impaired Lawyers) is one of the lucky ones who has the tools he needs to properly do his job.

“The fact is,” said Lepofsky, “that the ability for us to be accommodated is easier now than ever.” And, he added, although “government has funds that are set aside for workplace accommodation, big firms would have the capacity for [accommodating those with disabilities].”

But, although the capacity might be there, it’s clearly not being taken advantage of. “I have personally known of more than three deaf or hard of hearing lawyers in Canada who started in private firms but have told me that they left the firms because of their deafness,” remarked Simser. “Some of them have quit altogether or have transferred to employers who are much more accommodating of their deafness, such as governments.”

Governments, he added, have a greater likelihood to provide the tools for accessibility, such as sign language interpreters or specialized keyboards, than are private firms.

The business case

Although firms south of the border seem to be much more advanced in their marketing of diversity policies, which probably stems from the passing of the 1990 *Americans with Disabilities Act* that prompted a wave of improvements in accessibility across the country, trying to find that same sort of commitment to diversity here in Canada is akin to finding a needle in a haystack. But, said Lepofsky, those firms that can provide a barrier-free workplace and accessibility have the opportunity to build their client base. Why? “Because the same barriers that impede access for lawyers with disabilities impede clients with disabilities.”

And, since the Canadian population is aging and the primary cause of disability is aging, firms stand to lose an increasing number of clients if they don't start to make concerted efforts to improve accessibility. “They're hurting themselves doubly,” remarked Lepofsky. Not only are they decreasing the pool of qualified practitioners from which they can draw but they're losing out on marketing gains that can be made with a potential client base that is aging and more prone to various disabilities.

But, until firms see the business case for disability diversity, lawyers with disabilities will, as Dickson put it, “have to be a bit better. You can't be average.”

“PSYCHIATRIC INJURY AND THE LAW: A BRIEF LOOK AT SOME OF THE ISSUES PLAGUING THE NEGLIGENT INFLICTION OF NERVOUS SHOCK”

By Joshua Goldberg, Pro Bono Students Canada

Psychiatric injuries have long been treated by common law courts with suspicion. One hundred years ago, claims sought for compensation of psychiatric damage were often quickly dismissed. Only recently have courts begun to give these claims the attention they need. Unfortunately, the law in this area has continued to be very messy- particularly in Canada, where the Supreme Court has yet to lay the ground work for how to deal with such a claim. Moreover, while psychiatric injuries inflicted intentionally have gained a relatively high degree of legitimacy, those inflicted negligently are still highly stigmatized in the legal system. Victims of such damage may be able to walk into court and command a greater degree of respect than they could fifty years ago, but they are still often greeted with distrust and hostility.

One of the clearest examples of the law’s treatment of psychiatric injury is the name it has been given by the courts: nervous shock. This outdated term demonstrates tort law’s traditional ignorance and misunderstanding of mental disability. The first problem with this term is that, to a degree, it represents a gender-biased stereotype of psychiatric injury. It was once thought that women were more likely to suffer such an injury because women were believed to be more emotionally fragile than men. As a consequence, women were more prone to becoming a hysterical or nervous wreck. The continued use of this term is an illustration of the law’s failure to evolve in this area. Moreover, ‘nervous shock’ does not accurately describe either the cause of the damage or the damage itself, which again demonstrates that the law does not fully understand this type of harm and how to best address it. The word is still widely used today in negligence and intentional torts, although, it has begun to receive a great deal of criticism.¹ Many continue to use it only because it has developed a unique legal meaning as a term of art. Nonetheless, it is one of the most obvious examples of the law’s misunderstanding of mental versus physical damage.

A recent decision in the Ontario Court of Appeal, *Mustapha v. Culligan*, shed further light on how this area of the law is uncertain, unclear and often treats victims callously. The case is known among many as the ‘fly in the water case’ because, as one can probably

¹ Nicholas J. Mullany and Peter R. Handford, *Tort Liability for Psychiatric Damage: the Law of ‘Nervous Shock’* (Sydney : Law Book Co. ; London : Sweet & Maxwell,) 2000.

imagine, it involved a fly in some water. The co-plaintiff, a man of Middle Eastern origin, because of particular cultural sensitivities, experienced serious Post-Traumatic Stress Disorder induced by seeing his wife almost drink bottled water that contained a dead fly. Mustapha sued the supplier of the water for negligently causing his illness. The Ontario Court of Appeal overturned the Superior Court's decision and held that the supplier owed no duty of care to Mr. Mustapha.

Before continuing, it is important to explain how the law distinguishes different types of victims in nervous shock claims. In the United Kingdom, a distinction was drawn between victims who were at risk of physical harm but suffered some type of psychiatric injury, and victims who were bystanders to an incident and suffered a psychiatric injury. Although Mr. Mustapha was somewhere in between a primary and a secondary victim, the judge quickly dismissed the possibility that Mr. Mustapha could have been a primary victim given that he was in danger, albeit the danger was less immediate to him and more immediate to his wife. He also dismissed the distinction as the current law in Canada, which is an arguable conclusion, and, one that conveniently made it easier to rule in favour of Culligan.

In rendering its judgment, the court also concluded that Mr. Mustapha could not succeed because he was not a man of 'reasonable fortitude and robustness,' and took a dim view of his particular sensitivities. I believe the judge's reasoning exemplifies and perpetuates the hostility the law sometimes takes with regard to psychiatric harm. Perhaps Mr. Mustapha was more sensitive to this type of harm than other Canadians, but, had the injury been physical, the plaintiff's fortitude and robustness would not have been addressed. Taking into account an individual's particular mental susceptibility ultimately treats those pre-disposed to mental illness or psychiatric injury differently than those who sustain physical injuries.

The law has advanced a number of partially valid reasons for this attitude. There is concern over 'the opening of the floodgates' and being faced with an overwhelming number of these claims. There is also concern because of the inability of a victim to provide absolute proof of an illness. As a consequence of the lack of indisputable proof, courts fear that victims will fake psychiatric injuries in order to bring a suit. These objections are sound arguments and present valid explanations for why the law might want to stay apprehensive towards psychiatric injury. However, it shows a clear prejudice towards disabilities that are as serious and debilitating as physical ones.

The unfortunate reality is that psychiatric illnesses are invisible to the human eye- they cannot be detected by an x-ray or other means. Even when diagnosed, psychiatric disorders

are discovered with a relative lack of certainty. As an illustration of this problem, a friend recently underwent a battery of tests to assess whether he had a mood disorder. The assessment involved four hours of questions by various mental health professionals such as a psychiatrist, a psychologist, a social worker and an occupational therapist. The conclusion ultimately was that my friend was *probably* suffering from Bipolar Disorder. Sadly, they could not say with medical certainty what was wrong with my friend because there are no current ways to extract concrete proof of many disorders. This example may lend further credibility to our legal system's hesitance to recognize and treat psychiatric and physical injuries alike. It is nonetheless unfair and stigmatizing to individuals who suffer from these disabilities.

Given the progress the law has made up to this point in the treatment of psychiatric injury, Mustapha seems like a retreat back to the days when nervous shock was viewed as a frivolous and easy-to-fake cause of action. How the law approaches psychiatric illness is unfortunately not that surprising given that it has long been “[marching] with medicine, but in the rear and limping a little.”² It is simply unfortunate that the law continues to misunderstand psychiatric injuries and acts as if psychiatric injuries as less crippling than physical ones. The Supreme Court of Canada now, more than ever, needs to address how best to resolve this complex area of the law, and in a manner that will grant victims of psychiatric harm the same respect commanded by victims of physical harm.

² *Mount Isa Mines Ltd v. Pusey* (1970), 125 C.L.R. 383 at 395 (Australia H.C.)

“REFLECTIONS ON REACH CANADA”

By: Suzie Kotzer, Pro Bono Students Canada

Tuesday morning, nine am for a legal intern: I hurry into the office, grab a glass of water, and open my file folder bursting with client calls to return. I leaf through the messages, carefully reading the details of each legal issue: a divorce, a dispute over a will, a property problem between neighbours, and on and on. As always, today I will return these missed calls, listen to clients’ legal problems, and help them locate a lawyer who will advocate for their rights and interests. I am a first-year law student, and my volunteer placement is almost identical to working in any typical law firm or legal organization, and yet there is one small difference that makes my placement so incredibly important and unique in the Ottawa community- Reach Canada specifically serves the legal needs of people with disabilities.

When I was first placed with Reach Canada, my initial belief was that I would be dealing with calls solely addressing the constitutional rights of disabled Canadians, such as fighting to achieve equal employment benefits, education or physical accessibility. It was not until I sat down to read through client calls that I realized the extent of Reach’s helping hand in the community of persons with disabilities, dealing with everyday issues that touch all Canadians, from insurance law to family law to estate law and beyond. Throughout the years, Reach has succeeded at collecting the services of hundreds of lawyers from practically any specialty to address the wide range of issues that affect the special needs community. Not only does this organization help solve everyday issues, but they also work towards larger goals of educating the legal community about current and practical issues through organizing seminars, workshops and conferences on an ongoing basis.

Although I was quite surprised to learn how comprehensive Reach Canada is, I soon realized that quite often it is dealing with the average, everyday problems that actually bring about the most visible changes in the lives of people in the community. While constitutional issues brought before the Supreme Court of Canada have the potential to incite press coverage and strong changes in disability law, the less prestigious and “normal” cases Reach deals with also deserve recognition for their role in achieving equality and integration of persons with disabilities in Canadian society. By specifically serving the needs of the special needs community, Reach is ensuring this community obtains the same quality of attention and legal services as all Canadians, regardless of ability, should enjoy. By assisting clients with problems in every area of the law, and with

all kinds of cases, whether precedent-setting or not, Reach is working towards attaining its pledge of securing equality in practice.

My time as a student volunteer at Reach Canada has been an incredibly enlightening experience that has given me the opportunity to observe, understand and even have a small role in achieving justice in Canadian society. Working with the dedicated Reach staff has inspired my fellow student volunteers and I to strive towards the same goals of inclusion and justice in our own future legal practices.

**“INTERVIEW WITH UNIVERSITY OF OTTAWA, FACULTY OF LAW
PROFESSOR RAVI MALHOTRA”**

By Joshua Clarke, Pro Bono Students Canada

When I was asked to interview a remarkable scholar, Professor Ravi Malhotra from the University of Ottawa’s Faculty of Law, I was immediately curious to learn more about the man who graduated from Harvard. The following is a brief interview that I conducted with Professor Malhotra.

JC: *Where were you born?*

RM: I was born in Ottawa and attended Lisgar Collegiate Institute. There are at least two other colleagues here at the University of Ottawa who attended Lisgar (one at the same time as me) and perhaps there are more. Alere Flammam (feed the flame, Lisgar’s slogan)!

JC: *Why did you go to law school?*

RM: I went to law school because I wanted to make some kind of contribution in the area of disability rights. That said, I don’t know that I had a crystal clear idea of exactly what I wanted to do with my life. I enrolled in the joint program that Ottawa U. offers with Carleton’s Norman Paterson School of International Affairs (NPSIA) because I found the opportunities exciting and challenging. Attending NPSIA opened up new opportunities and allowed me to interact with very different sorts of people.

JC: *What persuaded you to continue studies and become a law professor?*

RM: I have always wanted to be a professor since I was a very small child; I just didn’t know it would be as a law professor. I applied for my LLM on a whim and was very pleasantly surprised to be admitted to Harvard. I was lucky to have supportive mentors like Don McRae (at Ottawa U) and Michael Lynk (now a prof at Western Ontario’s Faculty of Law but a former part-time prof at Ottawa U).

JC: *What was Harvard like?*

RM: It really is a magical place where up is down and reality seems to be suspended. Some of the stereotypes one hears about Harvard are untrue. Many people are friendly but it is true that it does have this ultra-competitive edge that one does not really encounter at most

Canadian law schools. A very high number of Type A personalities. The highlight was probably taking Constitutional Law with Prof. Laurence Tribe, who was of course counsel to Vice President Gore in *Bush v. Gore*. My supervisor, Sam Bagenstos, is one of the leading scholars of disability law in the United States. I then went on to do doctoral studies at the U of Toronto.

JC: *What is the nature of your disability?*

RM: I use crutches and leg braces to get around.

JC: *What are some of the challenges that you face as a person with a disability?*

RM: I think that the biggest problem is attitudes. Most people either don't think about disability rights issues or still harbour negative attitudes toward the capabilities of people with disabilities.

JC: *What are some of the challenges that you face as a professor of law with a disability?*

RM: Given that I have only been here a few months, it is hard to say. What I think is clear is that the University of Ottawa is a very accommodating employer. Legal academia in general I think is a good place for people with physical disabilities to work. Many of the intense deadline issues that would arise in, say, a Bay Street firm just don't arise here. If I were at a Bay St. firm, I certainly wouldn't have the time to be answering this survey!

JC: *What would you tell an aspiring young person who has a disability and wants to study law?*

RM: Well I tend to think in terms of rights rather than inspiration as my operative paradigm. But essentially law schools are now more open to students with disabilities than at any time in the past. For instance, we now have a hooyer lift in one of the washrooms here at U of Ottawa Law School for those students who require assistance to transfer from a wheelchair to the toilet. Law school is a challenging experience for anyone and requires time and serious commitment. But it can be done and a growing number of students with disabilities of all kinds are graduating every year. The challenge now is to retain them in practice but frankly the same challenge is true with many other equity seeking groups including mothers of young children. The key is to research your school of choice in advance and make your accommodation needs known as soon as you receive your offer of admission.

JC: *What area of legal research would you like to be remembered as helping develop?*

RM: I am proud of the work I have done and am doing in disability rights law. But I would also like to make a contribution in labour law...when I get a moment.

JC: *How do you think you can best raise awareness about disability?*

RM: Disability is a vast topic so I will try to be brief. Get involved as best you can. If you're a law student, donate your time *pro bono* to a disability organization such as Reach Canada or another organization. Too many people have only encountered disabled people in the context of pity and charity: as a counsellor at a "crippled children's camp" or on the street with homeless people asking for money. Take the time to meet disabled people as equals.

JC: *What steps can we as a society take to make life for a person with a disability more enjoyable?*

RM: Make accessibility your business everywhere you go. This includes not just courthouses and museums but washrooms in dance clubs and when you're travelling and especially when you are parking.

JC: *What is the biggest impediment to success for the average person with a disability?*

RM: One word: attitudes. And I think this is slowly starting to change.

JC: *Professor Malhotra, thank you so much for your time.*

“PRO BONO STUDENTS CANADA AND UNIVERSITY OF OTTAWA FACULTY OF LAW RECEIVES RAMON J. HNATYSHYN AWARD”

By Joshua Clarke, Pro Bono Students Canada

In acknowledgement of the hard work that law students through Pro Bono Students Canada (PBSC) have contributed to Reach Canada in the lawyer referral and educational services, Reach Canada has awarded PBSC and the University of Ottawa’s Faculty of Law with the Ramon J. Hnatyshyn award for legal volunteerism.

Beginning in 2004 and continually since then, Pro Bono Students Canada and the University of Ottawa’s Faculty of Law have provided Reach Canada with student volunteers who assist in referring lawyers to clients and helping coordinate and promote Reach’s educational programs.

On hand to accept the award were Renee Smith, PBSC National Coordinator in Toronto, Jackie Huston Student Services Co-Manager, Stacy Keehn, Co-Manager, Relationship Manager, Martha Jackman, Professor, Melissa Charles, PBSC Coordinator Civil Law.



From left to right: Renee Smith, Melissa Charles, Martha Jackman, Joshua Clarke, Nicolas Brunet-D’Souza, Stacy Keehn, and Jackie Huston.

“WEST NILE VIRUS INFECTION AN ‘ACCIDENT’ ”

By John Jaffey

This article originally appeared in the May 25, 2007, issue of The Lawyers Weekly published by LexisNexis Canada Inc.



Chris Paliare

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In a stunning reversal of last year’s West Nile mosquito-bite decision, the Ontario Court of Appeal has held that the otherwise healthy appellant’s paraplegia was caused by an accident, and that he is entitled to the full \$130,000 coverage under his group accident insurance policy.

The only issue at trial and on appeal was whether the paraplegia was the result of an accident or natural causes.

In a short endorsement, an appeal panel consisting of Justices Karen Weiler, Kathryn Feldman and Harry LaForme applied the “reasonable expectation” test in *Martin v. American International Assurance Life Co.*, [2003] 1 S.C.R. 158. In that case a doctor who was addicted to Demerol inadvertently overdosed and died. Finding the death was

“accidental,” the Supreme Court of Canada held: “The pivotal question is whether the insured expected to die.”

The appeal court held that 52-year-old Ryszard Kolbuc’s infection with West Nile virus “was an unforeseen unexpected event that was caused by an external source – a mosquito – and falls within the ordinary definition of an accident. The cause of the illness was an accidental event.”

They distinguished one of the cases heavily relied on by trial judge Harriet Sachs, namely *Wang v. Metropolitan Life Insurance Co.* (2004), 72 O.R. (3d) 161. In *Wang*, a divided Ontario Court of Appeal held that a woman’s death during childbirth from an amniotic fluid embolism was caused not by an accident, but by natural causes.

“Unlike in *Wang*,” the appeal panel held, “the appellant’s paraplegia was not the result of natural causes. The plasterer had no reasonable expectation that he would get West Nile virus from the activity in which he was engaged.”

Toward the end of the summer of 2002 Kolbuc was stung by a mosquito while at work plastering stucco to the outside of a house. He started experiencing symptoms in mid-September and by September 20 could no longer walk. He spent six weeks in hospital before being transferred to the Toronto Rehabilitation Institute.

In her trial judgment, Justice Sachs found that most people with the virus show no symptoms, and that one-in-five develops non-specific fever illness that lasts about a week. Only one-in-150 people will show evidence of the virus attacking the nervous system, and less than five per cent of those will develop polio-like Acute Flaccid Paralysis.

Unfortunately, Kolbuc did not beat these one-in-3000 odds, and he is now an incurable paraplegic. His was the first human case of West Nile virus in Ontario.

Kolbuc was insured under a Group Accident Policy issued by ACE INA Insurance to the International Union of Painters and Allied Trades Province of Ontario Health and Welfare Trust Fund. The policy insured “against loss resulting directly and independently of all other causes from bodily injuries caused by an accident...” The word “accident” was not defined in the policy.

At trial, Kolbuc relied on the Ontario Court of Appeal decision in *Voisin v. Royal Insurance Co. of Canada*, (1988), 66 O.R. (2d) 45, in which the court defined accident as

“an unlooked for mishap or an untoward event which is not expected or desired; or as an event which takes place out of the usual course of events without the foresight or expectation of the person injured; or as an injury happening by chance unexpectedly, or not as expected.”

In *Voisin*, the plaintiff was installing a broom closet in his kitchen when he bent in an awkward position. As a result, he suffered an occlusion of the anterior spinal artery and was left a paraplegic. The Court found that Voisin’s injuries were accidental.

Kolbuc’s counsel went on to point out that the *Voisin* decision was endorsed by the Supreme Court of Canada in *Martin* (supra).

In contrast, the position of the insurance company at trial was that insurance law recognizes a distinction between accident and disease, the latter being a subset of “natural causes” and the very opposite of an “accident.”

Justice Sachs held, “In *Wang*, the Ontario Court of Appeal relied upon the same distinction... in concluding that the insured’s death from amniotic fluid embolism did not constitute an accident. In doing so, they found that the ‘*expectation test*’ articulated by the Supreme Court of Canada did not apply where the death or injury does not arise from the actions or conduct of the insured, but rather from natural causes....

“In my view, Mr. Kolbuc’s case is factually most similar to *Wang*. Mr. Kolbuc, like the insured in *Wang*, suffered a rare and devastating consequence that came about not as the result of anything he did, but as the result of his body’s reaction to a virus. The fact that the virus was transmitted to Mr. Kolbuc through a mosquito does not detract from the applicability of the reasoning outlined by Charron J.A. in *Wang*.”

After distinguishing *Wang*, the appeal panel analyzed the respondent insurer’s submission that a disease is not an accident. The court wrote, “That proposition standing alone is obviously correct. However, an accident can cause a disease. For example, if a sailor is shipwrecked at sea and develops an illness from exposure to the elements, his injury is caused by an accident. A shipwreck is a foreseeable but unexpected event and an external source that can trigger an illness.”

Finally, noting that the trial judge awarded no costs to the successful insurer, the appeal court awarded Kolbuc \$20,000 for his costs at trial and \$22,226 all in for his costs of the appeal.

Chris Paliare, of Paliare Roland Rosenberg Rothstein LLP, and Gregory Neinstein of Neinstein & Associates LLP, acted for Kolbuc.

Calling this “an important case,” Paliare told *The Lawyers Weekly*, “It’s so much fun to win a case as lawyer for the little guy. This poor guy’s a paraplegic and will never receive another pay cheque in his life. He came to Canada in 1990 from Poland. He doesn’t speak English. His daughter has to bathe him. It’s a tragedy.”

As for the merits of the decision, Paliare said, “Justice Sachs describes the mosquito bite as a ‘natural event.’ I would have said the injection of the pathogen into the bloodstream was an external event and to that extent couldn’t have been natural causes. The biting couldn’t be seen as a natural cause. So there’s an external event that triggers the event causing the disease that rendered him a paraplegic.”

Lloyd Hoffer and Nicole Connolly of Hoffer Adler LLP acted for the insurer.

Reasons: *Kolbuc v. ACE INA Insurance*, [2007] O.J. No. 1862.

"MENTAL HEALTH COURTS GAIN POPULARITY ACROSS CANADA"

by Donalee Moulton

This article originally appeared in the June 1, 2007, issue of The Lawyers Weekly published by LexisNexis Canada Inc.



Crown Attorney Ruth Peters Wakeham and Newfoundland Provincial Court judge David Orr in a Mental Health Court in St. John's; Photo by Joe Gibbons

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The jury is still out on the value and effectiveness of mental health courts in Canada, but provinces are pushing for a verdict as they move forward to investigate – or implement – some version of this.

A few provinces, such as Ontario and New Brunswick, have mental health courts already up and running. Some provinces, like Newfoundland and Labrador, have ongoing pilot programs in place. Now they are being joined by other jurisdictions looking for ways to decrease the criminalization of the mentally ill while at the same time decreasing the growing number of individuals cramming provincial and federal jails.

Manitoba has been seriously exploring the issue since at least 2004. That year a committee was struck to assess the feasibility of establishing a court that would focus on individuals with severe and persistent mental illness. “The committee has had considerable discussion about principles behind a court, the need for a court and what improved service to mentally ill accused would look like,” said Louis Goulet, acting executive director with the Department of Justice.

“It has also had discussions with the chief judge of the provincial court about the court taking the lead on a pilot project,” he added.

In Nova Scotia, no formal investigation into the issue is underway, but the establishment of a mental health court is clearly being bandied about. The Nova Scotia Barristers’ Society devoted the most recent issue of its monthly newsletter to the topic. In that issue, Frank Hoskins, chief Crown attorney for the Halifax Region and Special Prosecutions, noted that, “Currently, Nova Scotia has an Adult Diversion Program, which is a post-charge, pre-trial option to the criminal justice system. A pre-charge option is worthy of consideration as it would create another viable alternative to deal with minor offences.

“In cases where it’s more appropriate,” he added, “this would enable specifically trained police officers to divert an accused away from the criminal justice system. More serious offences could be directed to the mental health court where judges and lawyers qualified or trained to deal with cases of this nature (and with ready access to the appropriate health professionals, which could include psychologists, psychiatrists and case workers) could develop and implement an appropriate treatment plan.”

The provincial court of Newfoundland has a Mental Health Court up and operating on a pilot project basis. The project, a joint initiative of the provincial court of Newfoundland, the Director of Public Prosecutions, the Newfoundland Legal Aid Commission, and Eastern Health has provided a judge, a courtroom with a clerk and meeting space. The Prosecution Service has provided a prosecutor. Legal Aid has secured funding for a lawyer and paralegal. Eastern Health has provided a psychiatric social worker and case manager, who make up the Court Support Team.

“The goal of the pilot project is to identify persons whose mental illness and related lifestyle issues cause them to commit offences and to provide them with supports, both to see them through the court process and to enable them to live lawfully in the community,” said Crown Attorney Ruth Peters Wakeham.

“The court currently has features of restorative justice and adult diversion, but is first and foremost a criminal court,” she added.

Despite the obvious benefits, there are concerns about mental health courts, which are still in their infancy in Canada. “The reaction to mental health courts among consumers and advocates is mixed. Many see it as a way to end the criminalization of persons with mental

illness while others feel that it generates more stigma and forced treatment of persons with mental illnesses,” said Goulet.

“It is our hope that the process underway in Manitoba will bridge this gap and build a consensus approach,” he added.

When it comes to finding common ground, many provinces in Canada are looking south of the border to the U.S. where mental health courts have dotted the landscape for at least a decade – and have grown noticeably in that time. In 1997, there were only four mental health courts in the entire country. Today there are 120.

New research conducted by the Rand Corporation for the Council of State Governments Justice Center indicates they are working. “The Rand study confirms that mental health courts make good fiscal sense,” said Sharon Keller, co-chair of the Justice Center Charter Group and a presiding judge in Texas.

“By connecting people with mental illness who have committed low-level crimes with community-based treatment, we can make better use of our jails and tax dollars, increase public safety, and make our communities healthier,” she noted.

The study found that participants in the Allegheny County Mental Health Court program, the focus of the research, received more mental health services and spent fewer days in jail than they might otherwise have if they had been sentenced in the criminal court, and fewer days in jail than they spent related to a prior arrest.

The researchers also discovered that government costs to provide additional mental health services would be mostly offset by money saved because participants under mental health court supervision spent less time in jail in the first year after sentencing.

This trend continued into the second year after sentencing when the time mental health court participants spent in jail in Allegheny County more than offset the costs to government of their continuing mental health treatment, the study concluded.

Those costs, both financial and human, are exorbitant – and growing. Research in the U.S. has found that more than 16 per cent of adults in jail have a mental illness; roughly 20 per cent of young people in the juvenile system have a serious mental health problem; and as many as 40 per cent of Americans with a mental health problem will butt up against the U.S. justice system at some time in their life.

There is little reason to believe that Canada's situation is any less severe. "The custodial response to people with mental health problems is an historic one," said Archie Kaiser, a professor in the Faculty of Law and Department of Psychiatry at Dalhousie University.

"To incarcerate people merely because we have failed to develop appropriate supports has always been shameful," he added. "In 2007, this is totally unacceptable."