



the BEARD WINTER  
DEFENDER

August, 2008  
ISSUE 6

The Beard Winter Defender reports on legal issues related to the insurance industry.

The Beard Winter LLP Insurance Litigation Group acts for numerous insurers, ensuring that their claims are resolved promptly and economically, or proceed to trial quickly when necessary.

## BILL 198 THRESHOLD: HAS ANYTHING CHANGED?



*Cary N. Schneider is an associate at Beard Winter who specializes in accident benefit and tort defence claims. He focuses on being effective and efficient in his law practice with the goal of achieving excellent results for his clients in a timely matter. More about Cary at:*

<http://www.beardwinter.com/people/profile.asp?259>

*Your comments are appreciated and if there are any accident benefits or tort topics that you would be interested in reading about, please feel free to [email](#) me and I will certainly explore the possibility of writing an article.*

It is somewhat hard to believe that it has been almost five years now since Bill 198 came into effect (for accidents that occurred post October 1, 2003). The apparent tough wording set-out in legislation was designed to add some teeth to the interpretation of the threshold and limit the preponderance of questionable claims. Rumours swirled in the personal injury bar that law firms were cutting down staff/lawyers and that the amount of new claims had drastically reduced. The new threshold, combined with the increased deductible to \$30,000.00, was thought to have prompted some counsel to rethink their career plans. Yet, a close reading of the *Nissan v. McNamee* (2008) gives credence to the old adage that “the more things change, the more they stay the same”.

In *Nissan v. McNamee* (2008), the Court was asked for the first time to interpret the threshold requirements in Bill 198. To the best of my research, this is the only case so far to substantively interpret the Bill 198 threshold. In this case, Defence counsel argued aptly that the legislature

saw fit to overhaul the statutory language of the *Insurance Act* for the express purpose of making it more difficult for claimants to be awarded compensation for general damages. Otherwise, why would the legislature waste the time, energy, and resources to effect such a change?

The Court, presumably not impressed that the government always acts in an intelligent fashion, conducted a thorough analysis of the changes in the legislation and found that there is little to nil change between the threshold requirements of Bill 59 and that of Bill 198.

While not expressly defining the word “serious” in the statute, the effect of section 4.2(1)1 is to do just that as the impairment must:

(1) substantially interfere with the person’s ability to continue his or her regular or usual employment, despite reasonable efforts to accommodate the person’s impairment and the person’s reasonable efforts to use the accommodation to allow the person to continue employment,

(2) substantially interfere with the person’s ability to continue training for a career in a field in which the person was being trained before the incident, despite reasonable efforts to accommodate the person’s impairment and the person’s reasonable efforts to use the accommodation to allow the person to continue his or her career training, or

(3) substantially interfere with most of the usual activities of daily living, considering the person’s age.

(emphasis added).



BEARD WINTER LLP  
BARRISTERS & SOLICITORS

130 Adelaide Street West, Suite 701, Toronto, ON, M5H 2K4

Main: (416) 593-5555 | Fax: (416) 593-7760 | <http://www.beardwinter.com>

The Judge found that Bill 198 adds some new language to the manner in which the Bill 59 threshold has been previously interpreted by the Courts. However, the Judge also found that this new language does very little to affect any meaningful changes.

The reference to “reasonable efforts” and “accommodation” suggests a slight change in the legislation as it now requires a Plaintiff to prove that he has taken reasonable efforts to use accommodation measures at work or in school. Certainly a Plaintiff would have introduced evidence of this at trial in a Bill 59 case regardless of this new statutory language as it a vital element towards issues of mitigation and credibility.

The Judge did find that a significant change was created by the simple addition of the word “most” when used to modify usual activities of daily living. Accordingly, it is not enough for a claimant to prove that an accident has affected some or many of his activities of daily living; but rather that “most” of his activities of daily living have been affected. This is especially true for cases in which the claimant is not working and the only substantive claim is for general damages and housekeeping. If a claimant cannot prove that “most” of his usual activities of daily living have been affected, then he may not be able to prove that he has suffered a Bill 198 threshold claim. It is therefore possibly more difficult for a non-working claimant to prove he has suffered a threshold injury in a Bill 198 world as opposed to Bill 59.

Sections 4.2(1)2 and 4.2(1)3 set-out in presumably clear statutory language the definition of (1) an impairment that is an “important function” and (2) what is considered to be a “permanent” impairment. The Judge found that these definitions are clear due to the fact that they are essentially codifying the existing jurisprudence. In effect, the legislature had “cut and pasted” from the previous decisions and made it law. A Judge now has an official “check list” to tick off to determine whether the claimant has suffered a threshold type injury. Yet, this is no different from what the court was doing previously and is the fundamental basis of our system of justice.

The Judge concludes that “most of the regulation does not appear to support any significant change in the interpreta-

tion of the threshold.” There is little to no difference between the tests to assess a Bill 59 threshold injury as opposed to a Bill 198 claim. This case seems to suggest that the time spent by the government in consultations regarding changes to the threshold, the energy expended debating the legislation in government committees, and the resources incurred creating this law could have been better utilized by simply reading the Court of Appeal’s decision in *Meyer v. Bright* (1993). Once again, our tax dollars hard at work!

*P.S.: As a consolation prize, the defence won the case as they were able to prove that the claimant did not cross the Bill 198 threshold. The claimant was proven to have misled her medical assessors and was not found to be credible. So, a loss for the defence industry as a whole, but a win for this defendant individually.*

*\* This article was prepared with the research assistance of Katie McBride (articling student).*

Contact us at  
[defender@beardwinter.com](mailto:defender@beardwinter.com)



*Disclaimer: The contents of this issue are provided for interest only and are not to be considered as, in any way providing legal advice to the readers by Beard Winter LLP or the individual authors of articles contained herein. All readers are strongly advised to obtain independent legal advice on any issue of concern to them from competent legal counsel in Ontario.*