

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION (GENERAL)**

Citation: *Brewer v. Metro General Insurance Corporation Ltd.*, 2010 NLTD(G)
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Date: 20101112

Docket: 200501T9399

BETWEEN:

JOHN BREWER

PLAINTIFF

AND:

**METRO GENERAL INSURANCE
CORPORATION LTD.**

DEFENDANT

Before: The Honourable Chief Justice David B. Orsborn

Place of Hearing:

St. John's, Newfoundland and Labrador

Date(s) of Hearing:

October 28, 2010

Summary:

John Brewer sued his automobile insurer for failure to pay or continue to pay Section B Accident Benefits pursuant to his insurance policy. He claimed compensatory and punitive damages. Brewer applied to amend his statement of claim to include references to the insurer's position that, by settling with and releasing a third party involved in the accident in question, Brewer had caused the insurer to lose its right of subrogation against the third party. The fact that the insurer took this position, and, according to Brewer, used the loss of the right of subrogation to discontinue payments to Brewer, is alleged by Brewer to support the claim for punitive damages. Brewer also applied to strike out those portions of the insurer's defence that raised the loss of subrogation rights, claiming that the facts in the pleadings could not support

such a defence. Finally, Brewer applied for his claim to be heard before a judge and jury.

Held:

The application to amend the statement of claim was allowed; the application to strike portions of the defence and for a civil jury trial were dismissed. It was not plain and obvious that a defence of loss of subrogation rights could not be established given that as of the date of settlement with the third party, the insurer had not yet been reimbursed for Section B payments made to Brewer. The case as presently framed focused on the subrogation issue – a legal issue – and did not identify other conduct of the insurer that would benefit from examination by a civil jury against standards of community morality and reasonableness. The defendant insurer was entitled to its party and party costs of the application.

Appearances:

Chesley F. Crosbie, Q.C.
Peter D. Shea

Counsel for John Brewer
Counsel for Metro General Insurance Corp.

Authorities Cited:

CASES CONSIDERED: *Brewer v. Hewitt*, 2005 NLCA 30; *Sweeney v. Insurance Corporation of Newfoundland*, 2002 NLCA 75.

REASONS FOR JUDGMENT

ORSBORN, C.J.:

INTRODUCTION

[1] The plaintiff Brewer has sued his automobile insurer Metro General seeking compensatory and punitive damages for an alleged failure to pay or continue to pay Section B accident benefits pursuant to his automobile insurance policy. Brewer has now applied to amend his statement of claim, to strike out portions of the defence, and to have the trial heard by a judge sitting with a jury.

THE CLAIM – AS SET OUT IN THE STATEMENT OF CLAIM

[2] Brewer was injured in an automobile accident in 2003. At the time, he carried automobile insurance purchased from Metro General; this coverage included Section B – “Accident Benefits” coverage. Following the accident, Brewer received some Section B payments for loss of income and medical and rehabilitation expenses. These payments stopped in November 2004.

[3] Brewer commenced an action against the at fault party (Scaplan); Scaplan counterclaimed against Brewer. Brewer’s action was settled on or about March 7, 2005 by the payment to Brewer of \$130,500, including approximately \$50,000 on account of future earning capacity and by the discontinuance of the claim and counterclaim. Counsel for Metro General, in the capacity of defending Brewer against the counterclaim, consented to the discontinuance of the proceeding. The insurer of the at fault party also agreed to reimburse Brewer’s insurer (Metro General) for \$3317.51, the total of Section B benefits received by Brewer to that date. As part of the settlement, Brewer agreed to provide a release to Scaplan.

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[4] Shortly after the settlement, on March 24, 2005, Brewer’s counsel sent a letter to counsel for Metro General, Brewer’s insurer, advising of the settlement and of Brewer’s intention to maintain his right to make further claims pursuant to his Section B coverage.

[5] Brewer asserts that he has provided all medical information requested by Metro General and that Metro General has not to date requested an independent medical examination. As noted, the statement of claim indicates that Metro General has made no Section B payments since late 2004. However, there is no indication in the statement of claim that, after advising Metro General in March 2005 of his intention “to maintain his right to claim under his Section B coverage”, Brewer actually made any such claim. The pleading asserts (para. 24) that in terminating the payments – presumably in 2004 – Metro General thereupon assumed the burden of establishing that Brewer was no longer entitled to benefits, at least up until the end of the 104 week ‘his or any occupation’ provision in the Section B coverage.

[6] These are the essential facts from the statement of claim. Without setting out additional facts, the pleading continues:

22. The Plaintiff states that the Defendant is in breach of the following duties owed to the Plaintiff in tort of negligence:
- (a) adequate investigation;
 - (b) proper evaluation of the claim;
 - (c) fair interpretation of the policy and the governing law;
 - (d) timely handling, decision, and payment of the claim;
 - (e) avoidance of abusive or coercive practices;
 - (f) submission of correct information to the insured;
 - (g) due process and reasonable procedures and criteria in deciding whether to pay the claim;
 - (h) consideration of the insured's interest equally with the insurer's in deciding whether to pay the claim.
23. The Plaintiff also has failed in its duty of care to develop and apply written policy guidelines, procedures and manuals, which embody the above duties, and to train employees and agents in their use and application.
- ...
27. The Plaintiff says the Defendant is in breach of contract of insurance, to pay benefits for loss of income and to pay benefits for medical and rehabilitative expenses.
28. The Plaintiff states that he is entitled to be paid the maximum weekly amount of \$140, on the basis that he fits the policy definition of incapability from employment in any occupation, and up to the limits of \$25,000 as expenses are incurred less benefit amounts paid, on the basis that he has a known continuing requirement for medical and rehabilitative services.

Aggravated Damages

29. The Plaintiff states that his contract of insurance with the Defendant is a "peace of mind" contract. The Plaintiff has suffered aggravated mental distress damages, which damages were in reasonable contemplation of the

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parties at time of formation of contract, and include anxiety, frustration, humiliation, and worry caused by the Defendant's breach and manner of breach of contract.

Bad Faith

30. Additionally, the Plaintiff finds his claim for aggravated or mental distress damages on the Defendant's independently actionable wrong of breach of duty of good faith and fair dealing. The Defendant, in all its acts and omissions, has placed its own interests ahead of those of its insured, the Plaintiff, instead of considering the Plaintiff's interests on a basis at least equal to its own.

Punitive Damages

31. The Plaintiff repeats paragraphs 22 and 23, and pleads that an award of compensatory damages is inadequate to the goals of retribution, denunciation and deterrence, as is indicated by the following factors:

- (a) the conduct of the Defendant is planned and deliberate;
- (b) the intent and motive is to profit from discouraging claims by hardball tactics;
- (c) the outrageous conduct has persisted;
- (d) the interest violated by the Defendant is deeply personal to the Plaintiff, namely his security and peace of mind;
- (e) the Plaintiff is entirely vulnerable to abuse of power by the Defendant, owing to the fact that he is unable to work;
- (f) the manner of claims handling is a product of deliberate corporate policy or strategy intended to discourage insureds generally from making or pursuing claims, and is not an isolated case;
- (g) there have been no other penalties at law or alternatively, the penalties are inadequate to the objectives;
- (h) the Defendant must not financially profit from its outrageous conduct;
- (i) the Defendant has been unimpressed by the size of previous awards, whether compensatory or punitive, and has made a rational decision to continue in its misconduct.

32. And the Plaintiff claims:

- (a) Special damages, to be ascertained, including arrears of payments;
- (b) General damages;
- (c) Aggravated damages;
- (d) Punitive or exemplary damages;
- (e) A declaration that the Plaintiff is entitled to benefits under Section B – Accident Benefits, including Subsection 1 – Medical and Rehabilitative Expenses, and Subsection 2 – Loss of Income Payments, Part II – Loss of Income, and that the loss of income payments shall be payable during the life of the Plaintiff; ...

METRO GENERAL'S DEFENCE

[7] Metro General's defence confirms that Section B payments were made up until November 2004 and goes on to assert that since then, no further payment has been requested, nor has Brewer offered "medical proof of continued disability". Metro General says that it had no knowledge of the settlement negotiated and completed on March 7, 2005, and that it was advised of the settlement only on March 8, 2005, the day after it had been finalized. The defence goes on to assert the position that since, in settling with the tortfeasor Scaplan, Brewer released Scaplan from any and all future claims in respect of the accidents, Brewer thereby acted in disregard of Metro General's subrogation rights and caused the insurer to lose any right it may have to claim against Scaplan any future Section B benefits made to Brewer.

[8] Accordingly, says Metro General, it is relieved from any present or future liability it may have to Brewer in respect of any Section B claim. I note however that nowhere in the defence is there any mention of a specific Section B payment made to Brewer which can no longer be recovered in a subrogated claim. Neither is there any assertion that Scaplan's insurer has formally refused to reimburse Metro General should a future claim be made for reimbursement of Section B payments.

THE REQUESTED AMENDMENTS TO THE STATEMENT OF CLAIM

[9] Counsel for Brewer asks for certain deletions, including any reference to a claim based on a breach of the *Trade Practices Act*, R.S.N.L. 1990 c.T-7. That request is non-contentious. Other than inconsequential changes, the following additions are requested: (Where necessary the full paragraph is set out, with the requested amendment underlined.)

9. On rare occasions, the Section B insurer requests that counsel who represent its insured in the plaintiff claim against the at fault party, also represent its interest in recovering its outlay. Counsel is ordinarily entitled to a fee from the Section B insurer for so acting. However the practice of the Defendant Metro General as Section B insurer in the foregoing situation is to instruct its own legal counsel to represent its interest in recovering its outlay, and it so instructed its own counsel in the case under present litigation.
12. The Defendant subsequently sought and obtained an Order of Mr. Justice Orsborn dated December 16, 2004 granting leave to amend the Defence and add a counterclaim. The Defendant Scaplan amended on December 16, 2004 and counterclaimed against John Brewer, the Plaintiff in the present action, alleging that the Defendant by Counterclaim, John Brewer, was wholly at fault for the accident. The Defendant Metro General, acting as third party liability insurer for the Plaintiffs in the tort claim, retained their won counsel, namely Reginald Brown, Q.C., of the firm Cox Hanson O'Reilly Matheson, and caused him to file a defence to the counterclaim.
15. On or about March 9, 2005, and after receiving legal advice as to their options, the present Defendant Metro General made an election not to ask the Plaintiff and his counsel to protest and enforce their subrogation rights, and elected instead to instruct and did instruct their own counsel Reginald Brown, Q.C., to issue a statement of claim to preserve Metro's subrogation rights against Scaplan (or his insurer). Their counsel failed to issue the said Statement of Claim.
18. In November 2005 Mr. Brown, as counsel for the present Defendant Metro General, provided an executed consent to a Notice of Discontinuance of the tort claim, including the counterclaim for which he had filed defence as described in paragraph 12 above.
19. The Plaintiff pleads the *Automobile Insurance Act*, R.S.N.L. 1990, c. A-22, s. 45 and in particular s. 45(6), and says that the Defendant had the option of signifying non-concurrence in any settlement or release between the

Plaintiff and Scaplan (or Scaplan's insurer). The issue of the Defendant's concurrence remains unresolved.

20. The Plaintiff pleads that the Defendant Metro General formed the opinion that they lost the ability to enforce their rights of subrogation because of the acts or omissions of their legal counsel, Mr. Brown. Alternatively, they chose to blame the Plaintiff as the most expedient way to responding not caring about rights and duties and expecting the Plaintiff would not pursue his claim. The Defendant chose to subordinate the legitimate interests of their insured, the Plaintiff, to their own interests, by leaving him with no alternative but to seek to enforce his rights through this litigation, without consideration of the merits of his claim under their contract of insurance with the Plaintiff.
21. The Plaintiff additionally says that the conduct of the Defendant in pleading as a defence to this claim through their counsel Mr. Brown, that the Plaintiff failed to look out for and protect their subrogation rights, while knowing that they had made an election not to ask him to do so but to ask their own counsel Mr. Brown to look out for and protect their subrogation rights, constitutes an abuse of the Plaintiff's rights and of the litigation process.

[10] These amendments serve to raise, as part of the plaintiff's claim, the insurer's position on the loss of its right of subrogation; the pleading asserts that this position, said to be wrongfully taken, was the basis for the insurer's denial of further Section B benefits and that, in denying benefits for this reason, the insurer's conduct is such as to warrant an award of punitive damages. y

THE REQUEST TO STRIKE OUT PORTIONS OF THE DEFENCE

[11] Counsel for Brewer seeks to strike out the following portions of the defence asserting, generally, that they disclose no defence and/or otherwise offend rule 14.24(1) of the *Rules of the Supreme Court 1986* in that the challenged pleading:

- (b) is false, scandalous, frivolous or vexatious;
- (c) may prejudice, embarrass or delay the fair trial of the proceeding; or
- (d) is otherwise an abuse of the process of the Court; ...

[12] The challenged portions of the defence:

5. As to paragraphs 8 and 9 of the Statement of Claim the Defendant admits only that the at fault driver, Gerard Scaplan, did not carry Section B insurance. As to the remaining allegations in paragraph 8 and 9 the Defendant denies that the practice among insurance companies is for the Section A insurer to notify the Section B insurer that the at fault party did not carry Section B insurance who then enters into an agreement to reimburse the Section B outlay. The Defendant further denies that on rare occasions the Section B insurer requests counsel representing the insured to also represent its interest in recovering this outlay. The Defendant states that pursuant to the provisions of the *Automobile Insurance Act* an insurer who makes a payment or assumes liability for a payment under a contract is subrogated to all rights of recovery of the insured and the insured at law has a legal obligation to look out for and protect the subrogated interest of his insurer. The Defendant states that in settlement of the Plaintiff's claim against the at fault party the Plaintiff acted in complete disregard of the Defendant's subrogated rights and failed to consider, look out for and protect those rights.

6. The Defendant denies paragraph 10 of the Statement of Claim. The Defendant states that Gerard Scaplan, the party at fault, was insured by Royal Insurance Company of Canada.

7. As to paragraph 13 of the Statement of Claim the Defendant states that it had no knowledge of the settlement negotiations being carried out by the Plaintiff and the representatives of the Defendant, Gerard Scaplan. The Defendant was only advised of the settlement on March 8, 2005 the day following the settlement had been finalized. Upon becoming aware of the settlement the Plaintiff's solicitors were immediately informed by the Defendant that in reaching settlement the Plaintiff had acted in complete disregard of the Defendant's subrogated rights and that the Plaintiff had failed to look out and protect the rights and interests of the Defendant.

8. As to paragraph 14 of the Statement of Claim the Defendant admits paragraph 14 but states that such payment was only made after the Defendant advised the Plaintiff that the Plaintiff has failed to protect the Defendant's subrogated rights as outlined in the proceeding paragraph herein.

9. As to paragraph 15 of the Statement of Claim the Defendant admits that on or about March 24, 2005 the Plaintiff's solicitor wrote counsel for the Defendant which letter informed the Defendant's counsel that settlement of the Plaintiff's claim had been concluded. The letter did not refer to a "proposed settlement" as alleged in paragraph 15 and in fact such settlement had been reached on March 7, 2005. The Defendant admits that while a written response was not provided to this letter, in a telephone conversation on the same date, March 24, 2005, followed by a meeting with Plaintiff's counsel and others on April 19, 2005, Plaintiff's counsel was advised that in reaching settlement with the at fault party the Plaintiff

had done so in complete disregard of the Defendant's subrogated rights and that the Plaintiff had failed to consider, look out for and protect those rights.

...

15. As to the remainder of the Statement of Claim and in particular paragraphs 22, 23, 24, 25, 26, 27, 28, 29, 30, 31 and 32 the Defendant denies those allegations and in particular denies that the Defendant acted in breach of its contractual obligations under Section B coverage or otherwise states that all material times hereto the Plaintiff in negotiating his settlement of his personal injury claim with the at fault party, Gerard Scaplan, acted in complete disregard of the Defendant's subrogated rights and failed to consider, look out for and protect those subrogated rights. [Request to strike underlined portions only.]

[13] The gist of the plaintiff's argument, as I appreciate it, is that since Metro General has made no Section B payments since 2004 and has been fully reimbursed for such payments as it did make, there is no remaining factual basis upon which a right of subrogation can be founded; that is, since there is no assertion of an unreimbursed Section B payment to Brewer there is no loss of Metro General's which can support what is said to be a repudiation of Metro General's liability under the policy. Further, says counsel, Metro General does not even know, even now, and has made no assertion to the effect that, if it were to make a further Section B payment to Brewer, Scaplan's insurer would in fact raise the release executed by Brewer as a defence and refuse to reimburse Metro General.

[14] Counsel for Brewer filed affidavits from an associate counsel setting out, from counsel's files, the exchange of correspondence concerning the settlement and release, and confirming the absence of any document having been made available to the plaintiff which establishes that a request was made by Metro General to Scaplan's insurer to honour a request for reimbursement of Section B payments.

[15] The thrust of counsel's argument, pursued at length during the hearing, is, as he put it – "no harm no foul". In other words, in the absence of a claim by Metro General, supported by factual assertions, that it has lost any money because of a presumed loss of subrogation rights, there can be no defence available to Metro General based on the loss of such subrogation rights. Accordingly, argues counsel,

those portions of the defence which raise the issue of loss of subrogation should be struck.

DISCUSSION ON THE APPLICATIONS TO AMEND AND TO STRIKE OUT

[16] These applications essentially invite the court, on the basis of the pleadings and the affidavit material, to make a ruling on the availability of the 'loss of subrogation rights' defence. Whether one considers the affidavit evidence or not, it is not plain and obvious to me that, in the circumstances of this case, a defence of loss of subrogation rights would fail.

[17] Counsel says that, if indeed Metro General has suffered any loss of subrogation rights and any consequent loss – neither of which is acknowledged – then Metro General's remedy is by way of counterclaim and not by way of defence to the plaintiff's disability claim. However, there is in **Sweeney v. Insurance Corporation of Newfoundland**, 2002 NLCA 75, a reference to *MacGillivray on Insurance Law*, 9th ed. (London: Sweet and Maxwell, 1997) which refers to the availability of repudiation by the insurer in certain circumstances when the right of subrogation has been lost. At para. 39 of **Sweeney**:

The editor summarizes the respective positions of the parties, in circumstances where there has been a release or settlement, in the following excerpts from comments on pages 552-53:

Release or settlement of claims. So far as third parties are concerned the insurer and the assured are a single entity, and an unconditional settlement or abandonment of a claim by the assured will prima facie bind the insurer. But, as between the insurer and the assured, that is not the end of the matter. The assured is under an obligation not to deal with any claim he possesses, or will possess, against a third party in such a manner as to prejudice the insurer's rights of subrogation in relation to it. The insurer's remedy will be to repudiate liability on the policy, or to counterclaim for damages for the loss of, or diminution of, their rights, depending on the circumstances. The position varies slightly depending on whether the insurer has paid for the loss.

Release before payment. After a loss has occurred but before the insurer has made payment, any release or settlement made by the assured with third parties to the prejudice of the insurer will entitle the insurer to set up, in answer to the assured's claim, a counterclaim for damages in the amount of the loss thereby suffered by the insurer.

The insurers will, of course, be prejudiced by the assured's unconditional release of a third party, since it binds them indirectly just as it binds the assured. (my underlining)

[18] Such a statement of the law suggests to me that it is by no means plain and obvious that, in the circumstances of this case and in particular the circumstances existing at the time of the settlement and release on March 7, 2005, Metro General could not take the position that it was entitled to repudiate liability under the policy and thus be relieved of its liability to pay any future claim that Brewer may make in respect of Section B benefits.

[19] The statement of claim discloses that, before the date of settlement, Metro General made Section B payments to Brewer; it also appears from the statement of claim that the reimbursement to Metro General of its Section B payments was done by Scaplan's insurer after Brewer had released or had agreed to release Scaplan. There is at least an argument that, as of the date of settlement, Metro General had an existing right of subrogation against Scaplan in respect of then unreimbursed payments, that the release of Brewer bound Metro General and that, as a result, Brewer breached the express or implied terms of his contract with Metro General in such a manner so as to give Metro General the right to repudiate the insurance contract. X

[20] The amended statement of claim itself goes at some length into the issue of the loss of subrogation rights and uses the insurer's alleged reliance on the loss of subrogated rights to support the claim for punitive damages. In such circumstances, it cannot be considered to be scandalous or an abuse of process for the insurer, in its defence, to assert that the loss of its rights of subrogation is a good defence to any claim that Brewer may make under the policy.

[21] In the circumstances, the grounds put forward do not support striking out the portions of the defence as set out above.

[22] The application to amend the statement of claim is allowed to the extent of the amendments particularized in the application and as identified on the draft statement of claim appended to the application; the application to strike identified portions of the defence is dismissed.

APPLICATION FOR A CIVIL JURY

[23] The plaintiff says that this is a bad faith breach of insurance contract case in which punitive damages are available and sought against an insurer who entered into what the plaintiff claims is a 'peace of mind' contract.

[24] In considering whether to exercise my discretion to order a civil jury trial, I am governed by the decision of the Court of Appeal in **Brewer v. Hewitt**, 2005 NLCA 30. There, Mercer, J.A. concluded his judgment with a summary of the relevant considerations. At para. 85:

To summarize:

- (1) Except for the causes of action specified in s. 32(1), the **Jury Act** directs that the granting of a civil jury is subject to the discretion of the court. That discretion is not fettered by any presumption of law in favour of or against a civil jury.
- (2) There is an onus upon an applicant under s. 32(3) of the **Jury Act** to persuade the court that there is sound reason to believe that there is benefit in having the cause or issue determined by a civil jury.
- (3) In exercising the discretionary power under the **Jury Act** the court should consider typological, functional and trial management factors, without designating certain as primary and others as secondary.
- (4a) The court should first address the typological factor, i.e., that pertaining to the nature of the subject matter and issues, and determine if a civil jury is of benefit in that regard.

- (4b) Certain cases, or issues, generally favour adjudication by a civil jury, including those where standards of community morality or reasonableness are involved.
- (4c) Other issues are generally better resolved by judge alone. Those include the determination and application of the standard of care where there is conflicting expert evidence and the determination of the quantum of non-pecuniary general damages.
- (5) Consideration of the functional factor focuses on whether the issues at trial are those of fact or of law or whether there are interwoven issues of fact and law.
- (6) Trial management concerns include the anticipated length of trial, the likely continuity thereof, and whether there is a clear need for calm and unhurried consideration of the issues without the time pressures inherent in jury deliberations.
- (7) All relevant factors should be weighed by the court upon a s. 32(3) application. There is no *prima facie* entitlement arising if the typological factor favours the granting of a civil jury.

[25] I have considered these factors.

[26] Other than the fact that Section B benefits have not been paid since November 2004, and other than the competing assertions on the loss of the right of subrogation, there are no particulars in the statement of claim which identify the conduct of the insurer which could be said to engage standards of community morality or reasonableness.

[27] Brewer simply says that “he fits the policy definition of incapacity from employment in any occupation” and therefore seeks arrears of payment, damages, and a declaration that he is entitled to Section B benefits for life. There are no particulars of any ignored requests, refusals, failure to assess medical information, or other conduct that may be said to constitute bad faith on the part of the insurer. In short, other than conduct relating to the putting forward of a defence based on loss of subrogation, there is no specific conduct by the insurer that could be identified as benefiting from an assessment by a civil jury.

[28] It became apparent during argument that much of counsel's argument in support of a jury trial was premised on the success of the application to strike the 'loss of subrogation rights' defence. Indeed, the final paragraph of counsel's written argument suggests:

The Defendant insurer has not suffered loss or damage, and cannot point to any express terms of the contract of insurance as breached by the insured. Particularity was requested and even after given, is fatally lacking. An order striking out should go, and leave to amend should be refused. However, if the Defence is not struck out for either failure to disclose a defence, or for abuse of process, then the Applicant submits that the subrogation issue should be excluded and tried in a separate proceeding, because the insured is ready for trial and access to justice would otherwise be denied. The case satisfies the test for civil jury trial.

[29] In argument counsel suggested that if the defence was not struck, the proceeding could be bifurcated, with the issues of disability and damages first being dealt with by a jury, and the more 'legal' issue of subrogation being dealt with subsequently by a judge. Counsel was not able to satisfactorily address my concern over the possibility of having a jury trial and an award of damages only to have a judge later decide that there was no liability in the first place.

[30] The fact is that both the statement of claim and the defence focus on the issue of the asserted loss of subrogation rights and the effect of any such loss on the insurer's liability to pay Section B benefits to which Brewer may otherwise be entitled, now or in the future. The primary issue that is joined is the legal issue of subrogation; the determination of this issue may require time for considered reflection and in any event does not engage consideration of standards of community morality and reasonableness. The nature of the primary issue, coupled with the absence of particulars of conduct on the part of the insurer which may be said to offend standards of community morality and reasonableness – a mere allegation not being sufficient – does not support the contention that this matter should be heard by a jury.

[31] The plaintiff has not satisfied the onus on him to persuade me that there is sound reason that this case as framed should be determined by a civil jury.

CASE MANAGEMENT

[32] Brewer's application also asks for an order for case management pursuant to rule 38.01(d). The case as framed, and as a judge alone trial, does not require case management. There are only two parties, and while the legal issue of loss of subrogation rights – and perhaps any factual issue of disability – may have some complexities, they are, in the circumstances of this case, complexities which go to the adjudicative function rather than to the trial management function. At this stage of the proceedings, there is nothing that calls out for management by a judge.

CONCLUSION AND SUMMARY

1. The application to amend the statement of claim as particularized in the application and in the draft statement of claim appended to the application is allowed.
2. The application to strike out certain identified portions of the defence is dismissed.
3. The application for a civil jury trial is dismissed.
4. The application that this proceeding be case managed is dismissed.

[33] The application and the argument on the application focused largely on the issue of striking out the defence of loss of subrogation rights and on the request for a jury trial. The plaintiff did not succeed on either point. In the circumstances, the defendant is entitled to its costs on a party and party basis.

A handwritten signature in black ink, appearing to read 'D. Orsborn', written over a horizontal line.

DAVID B. ORSBORN

Chief Justice