

2005 01T 9399

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION

BETWEEN:

JOHN BREWER

PLAINTIFF

AND:

**METRO GENERAL INSURANCE
CORPORATION LTD.**

DEFENDANT

**PLAINTIFF'S BRIEF ON APPLICATION TO STRIKE
AND FOR CIVIL JURY**

SUMMARY OF CURRENT DOCUMENT

Court File Number: 2005 01T 9399

Date of Filing of Document: October 26, 2010

Name of Filing Party or Person: Plaintiff

Application to which Document
being filed relates:

Application of Plaintiff for an order amending the
Statement of Claim, striking portions of the Defence, and
placing the matter on the Fixed Date List for hearing before
a judge and jury.

Statement of purpose in filing: Plaintiff's Brief.

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Introduction

1. This is an application taken by the Plaintiff for an order striking portions of the Defence, and for an order granting trial by civil jury. The application also seeks amendments to the Statement of Claim.

2. The underlying causes of action are breach of the Plaintiff's contract with the Defendant insurer for payment of Section B accident benefits, and breach of the good faith requirement of the contract. The Plaintiff seeks either reinstatement of benefits or damages calculated by the payments prescribed by the contract. He also seeks aggravated damages, and punitive damages. This is not an action for personal injury damages.

List of Issues

Issue 1: Whether the impugned defence should be struck out as not disclosing a defence or a counterclaim, and leave to amend refused, pursuant to Rule 14.24.(1)(a).

Issue 2: Whether the impugned defence should be struck out for falsity, prejudice or abuse of process, and leave to amend refused, pursuant to Rule 14.24.(1)(b), (c) and (d).

Issue 3: If the Court refuses to strike out, or strikes out but grants leave to amend by way of counterclaim, whether the counterclaim should be excluded or tried separately.

Issue 4: Amendments to Statement of Claim.

Issue 5: Whether trial by civil jury should be ordered.

Summary of Argument

Issue 1: *Whether the impugned defence should be struck out as not disclosing a defence or a counterclaim, and leave to amend refused, pursuant to Rule 14.24.(1)(a).*

- The impugned defence is not a defence because it is not based on the breach of an obligation expressly set out in the policy.
- The Defendant has no cause of action to found a counterclaim because it has not pleaded loss or damage, or any payment which could give rise to right of subrogation.
- Leave to amend should be refused because no evidence has been placed before the Court from which the Court can conclude that new factual allegations could possibly sustain a cause of action, and no proposed particulars to fill the gap have been placed before the Court either.

Issue 2: *Whether the impugned defence should be struck out for falsity, prejudice, or abuse of process, and leave to amend refused, pursuant to Rule 14.24.(1)(b), (c) and (d).*

- The evidentiary record discloses that the Defendant has made no payment to give rise to right of subrogation, and has suffered no loss or damage, and the policy of insurance does not contain an express provision which might entitle the insurer to repudiate liability.
- The record therefore discloses that there is no basis for either a defence or a counterclaim.
- The impugned pleading suffers from a fatal disease for which there is no cure by amendment, and leave to amend should be refused.

Issue 3: *If the Court refuses to strike out, or strikes out but grants leave to amend by way of counterclaim, whether the counterclaim should be excluded or tried separately.*

- If the foregoing arguments are rejected, then any counterclaim should be excluded or tried separately.

Issue 4: *Amendments to Statement of Claim.*

- Amendments are freely allowed unless they cause prejudice not compensable in costs.

Issue 5: *Whether trial by civil jury should be ordered.*

- The case *per se* satisfies the typological issue of benefit in obtaining a cross-section or consensus of community opinion, as set out by the Court of Appeal.
- The trial will be short with no conflicting expert evidence, and functional and trial management factors are satisfied.
- Trial by civil jury should be ordered because this is a bad faith insurance case involving credibility questions and for which punitive damages are sought.

Issue 1: Whether the impugned defence should be struck out as not disclosing a defence or a counterclaim, and leave to amend refused, pursuant to Rule 14.24.(1)(a)

3. Rule 14.24 states as follows:

14.24.(1) The Court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that

- (a) it discloses no reasonable cause of action or defence;
- (b) it is false, scandalous, frivolous or vexatious;
- (c) it may prejudice, embarrass or delay the fair trial of the proceeding; or
- (d) it is otherwise an abuse of the process of the Court,

and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.

(2) Unless the Court otherwise orders, no evidence shall be admissible by affidavit or otherwise on an application under rule 14.24(1)(a).

Rule 14.24, *Rules of the Supreme Court, 1986* [Appendix B, Tab 1]

- 4. On the face of the Rule, the available remedies are that the offending document, or part of it, may be “struck out or amended”, and that the proceeding may, as a consequence, be stayed, or dismissed, or judgment may be entered.
- 5. While evidence is admissible on an application under Rule 14.24.(1)(b), (c) and (d), it is not, without leave, admissible under Rule 14.24.(1)(a). This part of Rule 14.24.(1) is concerned with sufficiency of pleadings; the remainder is concerned with abuse of process, the identification of which will usually require context.
- 6. The Applicant asks that portions of the Defence be struck out for failure to disclose either a cause of action or a defence, pursuant to Rule 14.24.(1)(a). These are as follows:

5. As to paragraphs 8 and 9 of the Statement of Claim the Defendant admits only that the at fault driver, Gerard Scaplen, 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 Scaplen, 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 Scaplen. 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. ...states that all material times hereto the Plaintiff in negotiating his settlement of his personal injury claim with the at fault party, Gerard Scaplen, acted in complete disregard of the Defendant's subrogated rights and failed to consider, look out for and protect those subrogated rights.

Statement of Defence, paras. 5-9 and 15

7. The "plain and obvious" test for striking out for insufficiency of pleadings has been described many times, most recently and authoritatively by Green, C.J. in *Brace*:

[15] Where an application is made to strike out under paragraph (a) (no reasonable cause of action) the court will not generally receive evidence to contradict the allegations in the statement of claim and in a reply to a demand for particulars. It must assume the allegations are true and determine, on the assumption that the plaintiff can prove those allegations, whether they can sustain a cause of action known to the law. The test to be applied is a stringent one: whether it is plain and obvious that the plaintiff cannot succeed: **Roberts v. Browning Ferris Industries Ltd.** 1998 CanLII 18021 (NL C.A.), (1998), 170 Nfld. & P.E.I.R. 228 (NLCA). The approach to be taken is to examine the pleading to see if the plaintiff has pleaded any factual circumstance that could found the legal right asserted that would justify the granting of the remedy sought: **LeDrew v. Conception Bay South (Town)** 2003 NLCA 56 (CanLII), 2003 NLCA 56, per Wells CJN at para. 20. As noted in **LeDrew**, the pleading of a factual basis that could support the cause of action asserted is a "fundamental requirement". Each element of the asserted cause of action must have a pleaded factual substratum.

Brace v. Watch Tower Bible and Tract Society of Pennsylvania et al., 2009 NLTD 171 (CanLII), para. 15 [Appendix A, Tab 1]

8. The Applicant says that the impugned parts of the Defence do not compose a pleading of material facts constituting a defence at law. The Statement of Claim raises breach of the contractual duty to pay benefits, and breach of the contractual duty of good faith. The

pleading that the Applicant is not disabled within the meaning of the contract and is not entitled to benefits, is a defence. But the allegation grafted into the Defence, that the Applicant disregarded the subrogation rights of the Respondent insurer, is not a defence to the contractual claim.

9. This is more than empty formalism. By making the “disregarded our subrogation rights” allegation in this way, the insurer has deprived the insured Applicant of the opportunity to plead his position by way of Defence to Counterclaim. This in turn, has deprived the Applicant of the rights of discovery which flow from proper pleading, prevented the narrowing and refining of the issues in dispute, and mired the proceeding in vagueness. Given fair opportunity, the Applicant will forcefully plead in defence.
10. The Court of Appeal emphasized the critical importance of adequate particularity in pleading in *Szeto*:

[31] ...The search for relevance becomes virtually meaningless in the context of pleadings that do little to set meaningful parameters to the dispute.

[76] Instead, the applications judge erred in not giving consideration to, amongst other things: the effect that failure by the appellants to plead their case with sufficient particularity had on the ability to narrow and refine the issues in dispute....

Szeto v. Dwyer, 2010 NLCA 36 (CanLII), paras. 31, 76 [Appendix A, Tab 2]

11. If the impugned pleading did disclose a factual basis that could support a cause of action, then case authority requires that it be pleaded as a counterclaim. The Court of Appeal cited learned text and gave emphasis to the following passage, stating at para. 41 that “Those excerpts also reflect the common law principles as they are applied in Canada today.”

[39] ...**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.

Sweeney v. Insurance Corp. of Newfoundland, 2002 NLCA 75 (CanLII), para. 39 [Appendix A, Tab 3]

12. The immediately following sentence in the paragraph from the learned text quoted by *Sweeney*, explains why the present insurer Defendant cannot graft the impugned allegations into the defence:

The insurer might be entitled to repudiate liability if express provision were made for such a contingency in the policy.

MacGillivray on Insurance Law, 9th Ed. (London: Sweet and Maxwell, 1997), para. 22-53 [Appendix A, Tab 4]

13. "Failed to look out for our subrogation rights" would be a defence at law only if based in express obligation on the insured set out in the policy. It should be common ground that no express provision is made in the governing policy to entitle the insurer to repudiate liability in the event of a release or settlement made by the insured with third parties. Therefore, the insurer's only remedy in the present case is to counterclaim for damages to the extent that it has suffered any loss.
14. The insurer actually has to plead (and prove) that it has suffered a loss. No consequence has been pleaded. This is a fatal defect. Not only must damage or loss be pleaded, it must be pleaded with reasonable particularity.

Szeto, supra, paras. 37 and 38 [Appendix A, Tab 2]

Rule 14.12, *Rules of the Supreme Court, 1986* [Appendix B, Tab 1]

15. The issue may be even more basic than failing to plead damage. It is common ground that the Defendant insurer was reimbursed for payment made up to the point of settlement of the tort claim, and that no further payment has been made to the Applicant. The right

which the Defendant complains was compromised, namely its subrogation right, does not arise until a payment has been made.

The insurer's right of subrogation cannot be exercised until he has made payment under the policy.

MacGillivray, *supra*, para. 22-27 [Appendix A, Tab 4]

16. The Plaintiff has been unable to determine what cause of action might be raised against him. Contract? Which contract and what term? Tort? Which tort? Even in providing particulars, the Defendant is unable to say. In tort, damage is the gist of the action, but damage has not been pleaded. The following Demand for Particulars was dated 12 May 2010, and the Reply was 23 June 2010:
 - (a) As to paragraph 5 of the Statement of Defence full particulars of the source and nature of the legal obligation of the Plaintiff claimed by the Defendant;
 1. As to paragraph (a) of the Demand for Particulars, the Defendant states that the source and nature of the legal obligation of the Plaintiff arises from the common law, the applicable legislative scheme, as well as the contract of insurance as between the Plaintiff and Defendant.

17. Breach of the contract of insurance is not pleaded in the Defence, and the above Reply is the first mention of the contract of insurance as a source of legal obligation. However the pleading remains bad at law, for failing to specify the provision and effect of the policy document, and for exposing the Applicant to surprise and prejudice.

Rule 14.07, *Rules of the Supreme Court, 1986* [Appendix B, Tab 1]

Rule 14.13(c)(ii), *Rules of the Supreme Court, 1986* [Appendix B, Tab 1]

18. The Defendant has neither produced the contract of insurance referred to in the Reply in its List of Documents, nor yet produced it upon subsequent request. The Applicant has served the Defendant with a Notice to Produce pursuant to Rule 32.06.

19. Where a pleading fails the “plain and obvious” test, the court must consider amendment, or order for particulars, as an alternative to striking out, but a basis for this must be present in both the impugned pleading and in materials put before the court on the application:

[16] Where the pleading does not meet the test I have just described, the court must nevertheless, before striking out the claim, consider whether the deficiency can be cured by either a realistic amendment or by an order for particulars: **Montreal Trust Co. of Canada v. Hickman** 2001 NFCA 42 (CanLII), (2001), 204 Nfld. & P.E.I.R. 58 (NLCA).

[17] To allow an amendment, however, the intent of the pleader must be apparent from the existing pleading and at least the “skeleton” of a claim must be present: **Montreal Trust**, at paras 12 and 53. There will generally have to be evidence before the court (admissible on an application to amend) from which the court can conclude that if pleaded and proven, the new factual allegations could possibly sustain a cause of action.

[18] To justify an order for particulars as an alternative to striking out, the party resisting the application to strike will be required to provide, in response to the application, the type of particulars he or she believes will fill the gap in the existing pleading and thereby demonstrate a potential cause of action.

Brace, supra, paras. 16-18 [Appendix A, Tab 1]

20. The insured requested and received particulars of the sources of the duty to “look out for” the respondent insurer’s subrogation rights. The insured submits that even if the allegations were pleaded as a counterclaim, the insurer has had a chance to put its best foot forward, and has not stated a cause known to law. Not only is it plain and obvious that the impugned allegations do not constitute a defence; they do not constitute a cause of action either. At this late stage, when the insured is seeking trial, the Defendant should not be given a third chance.

Issue 2: Whether the impugned defence should be struck out for falsity, prejudice, or abuse of process, and leave to amend refused, pursuant to Rule 14.24.(1)(b), (c) and (d)

21. The preceding submissions have been made pursuant to Rule 14.24.(1)(a), concerning failing to disclose a cause or defence. The balance of Rule 14.24.(1) concerns abuse of process in its various guises. Here an evidentiary record may be relied on.
22. Caselaw has not generated precise definitions of such terms as “frivolous”, “vexatious”, or “abuse of process”. The overarching concept is the prevention of a misuse of procedure which would produce manifest unfairness to a party. Allegations or averments are struck because they clearly have no merit.

[17] It is apparent that there is a degree of overlap in the meaning of the terms frivolous, vexatious and abuse of process. What I take from the authorities is that any action for which there is clearly no merit may qualify for classification as frivolous, vexatious or an abuse of process.

Currie v. Halton Regional Police Services Board, 2003 CanLII 7815 (ON C.A.), paras. 13-17 [Appendix A, Tab 5]

23. The Court of Appeal has provided further insight into the meaning of the various terms in a case applying Rule 57.17(d) where “the appeal is frivolous, vexatious or without merit.”

[19] A frivolous appeal is one that has no substance.

[20] A vexatious appeal is one that is brought for an improper purpose such as to harass, annoy or embarrass a party and not for the legitimate purpose of seeking the vindication of legal rights.

[21] Clearly, an appeal that is obviously unsustainable or without arguable merit will also be regarded as frivolous.

[22] [A] proceeding may conceivably also be frivolous or vexatious for reasons other than lack of arguable merit, and thereby constitute an abuse of the court’s process.

Walsh v. Johnson, 2010 NLCA 6 (CanLII), paras. 19-22 [Appendix A, Tab 6]

24. The last situation mentioned in *Walsh*, namely abuse of process arising for reasons other than lack of arguable merit, was described by Orsborn J. (not at issue on subsequent appeal):

[A]buse of process really is a situation that goes to wrongly engaging the court's process for either some ulterior motive or in bad faith, not bona fide, that the litigation itself was brought for some improper purpose, divorced really from the merits or otherwise of the claim....

Walsh v. TRA Co., 2006 CarswellNfld 376 (T.D.) [Appendix A, Tab 7]

25. As to the use of evidence under the abuse of process rule, the Court of Appeal has stated:

[21] Where an application is made to strike out under paragraphs (b) (frivolous and vexatious action) and (d) (abuse of process) of Rule 14.24(1), the court may receive evidence addressing those issues. Indeed, it often will be necessary for the court to have evidence on such matters since vexatious litigation or litigation that is an abuse of process may not be readily apparent from a perusal of the language of the claim alone. Background facts and evidence of motive may well be relevant. Context is often important.

Brace, supra, para. 21 [Appendix A, Tab 1]

26. The foregoing authorities do not discuss the meaning of 14.24(1)(c), “prejudice, embarrass or delay the fair trial of the proceeding.” The Applicant submits that these terms share the same theme of clear lack of merit and misuse of process producing unfairness, with the focus on achieving a fair and timely trial.

27. As to Rule 14.24(1)(d), “abuse of the process of the Court,” the White Book has this to say:

Para. 1(d) confers upon the Court in express terms powers which the Court has hitherto exercised under its inherent jurisdiction where there appeared to be “an abuse of process of the Court.” This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation.

The Supreme Court Practice, 1999, Vol. 1 (London: Sweet & Maxwell 1998) , p. 352 [Appendix A, Tab 8]

28. Although the Defendant denies formally that Mr. Brewer fits the policy definition of disabled and is entitled to benefits, this is not a serious issue in the litigation, and the Defendant has not even seen fit to exercise its right to a medical examination or to discover the Plaintiff's physician. The only "defence" is an allegation that Mr. Brewer failed to "look out for" the Defendant's subrogation rights against the third party tortfeasor's insurer.

29. This "defence" is erected despite the facts documented in the Fowler affidavits, including:
 - (a) the defendant put the tortfeasor's insurer on notice of its subrogation claim in December 2003, but said nothing to Mr. Brewer (para. 10) (which raises the issue of whether the Defendant in seeking to raise the subrogation issue against their insured is attempting to take advantage of information which in good faith they ought to have shared with him);

 - (b) the defendant made an express election to retain counsel of their own to protect their rights, and not to ask Mr. Brewer's counsel to protect their rights (para. 11);

 - (c) the defendant's own counsel failed to act on instructions (paras. 11 and 12, and paras. 1 and 2 of Supplementary Affidavit of Jonathan P. Fowler);

 - (d) Mr. Brewer learned of the subrogation issue only after entering a settlement agreement with the tortfeasor's insurer, and promptly wrote to counsel for the Defendant seeking suggestions as to how to avoid compromising any right of recovery (para. 13);

 - (e) the Defendant's counsel did not provide a written response to this letter (para. 14);

 - (f) the Defendant's counsel executed consent to discontinuance of the tort proceeding (para. 15);

- (g) the Defendant received reimbursement from the tortfeasor's insurer for its existing outlay of Section B benefits and this is not covered in the Release (Exhibit F);
- (h) there is no evidence that the Defendant has been told by the tortfeasor's insurer that they refuse to reimburse for future payments: para. 3 of Supplementary Affidavit of Jonathan P. Fowler (and if they did refuse, what about estoppel or waiver?).
30. Perhaps the most compelling objection to the impugned pleading is that the insurer has failed to plead loss or damage, because it has none. This is not just an omission of pleading, it is a matter of the evidentiary record. No loss or damage has occurred, and it may never occur. Moreover, no specific pleading is made of breach of express obligation contained in the policy to "look out for" the insurer's subrogation rights. This is because there is no such express contractual obligation.
31. The Plaintiff submits that the Defendant's "defence" as impugned has no merit, either as a defence or if reframed as a counterclaim, and is false, vexatious and an abuse of process. In all the circumstances, the "defence" itself is an act of bad faith. In particular, it will "prejudice, embarrass or delay the fair trial" (Rule 14.24.(1)(c)) of the Plaintiff's contractual claims for payment of benefits and for bad faith, because it raises issues which have the potential to become a monster of factual and legal complexity, for which no pleadings have been exchanged, no discovery conducted, and no expert reports produced. If not struck out, or if struck out and leave to amend is granted, there will be a shotgun marriage of two essentially different and incompatible proceedings which will delay the Plaintiff's access to trial for many years, and perhaps render justice altogether beyond his reach.

Issue 3: If the Court refuses to strike out, or strikes out but grants leave to amend by way of counterclaim, whether the counterclaim should be excluded or tried separately

32. In the alternative, should the Court decline to strike out as requested, or strike out but allow amendment, the Plaintiff says joinder of the causes of action will embarrass or delay the trial, and relies on Rule 40.15, which provides:

40.15 Where claims in respect of two or more causes of action are included in the same proceeding, or if two or more plaintiffs or defendants are parties to the same proceeding, and it appears to the Court that the joinder of the causes of action or parties may embarrass or delay the trial or is otherwise inconvenient, the Court may order separate trials or make such order as is just.

Rule 40.15, *Rules of the Supreme Court, 1986* [Appendix B, Tab 5]

33. The Plaintiff also relies on Rule 11.03(d):

11.03 A counterclaim is a separate proceeding and the Court may

(d) where a counterclaim cannot be conveniently disposed of with the original proceeding, order the counterclaim to be excluded or tried separately, or make such other order as is just;

Rule 11.03(d), *Rules of the Supreme Court, 1986* [Appendix B, Tab 3]

34. The Plaintiff submits that the main action is a relatively straightforward action on a disability contract with credibility issues. The “disregarded our subrogation rights” claim is so potentially multifaceted, complex, and as yet undeveloped, as to justify an order for separate proceedings. To do otherwise would “embarrass or delay the trial” of what is a straightforward main action, which would be brief and of modest expense.

21 The main action at bar is a straightforward action on a guarantee in writing. Under ordinary circumstances, it would be expected that such an action would be brief and of modest expense. The defendant in the action, having raised all of the complex issues necessary to convert the action into a trial of ten weeks or more in duration, should have some responsibility to

satisfy the court that those defences are raised on more than a handful of straw.

Royal Bank v. Kilmer van Nostrand Co., 1994 CarswellOnt 550 (Gen.Div.), para. 21 [Appendix A, Tab 9]

Affidavit of Jonathan Fowler dated July 13, 2010, para. 19

35. The above position is consistent with the proportionality principle expounded by the Court of Appeal in recent jurisprudence.

Szeto, supra, paras. 54-58 [Appendix A, Tab 2]

36. The Applicant submits that an order granting leave to amend by stating a counterclaim, would embarrass or delay the trial, and cannot be conveniently disposed of with the original proceeding. Therefore “such order as is just” under Rule 40.15 or Rule 11.03(d), would be an order striking out the impugned pleadings, refusing leave to amend, and “excluding” (Rule 11.03(d)) any counterclaim. This would be without prejudice to any right the Defendant may assert to commence separate proceedings under a different court file number – should a valid cause ever arise to be pleaded.
37. If the insurer were to be able to plead a valid cause of action in separate proceedings, and the cause remains unresolved at time of judgment after trial of the present matter, the trial judge will have adequate jurisdiction to prevent any prejudice to the Defendant, for example by use of a full or partial stay of execution.

Issue 4: Amendments to Statement of Claim

38. Amendments are freely allowed unless they cause prejudice not compensable in costs.

Whiten, infra, para. 86 [Appendix A, Tab 12]

Issue 5: Whether trial by civil jury should be ordered

39. The present case is not a personal injury case. The leading case setting out the discretionary test for civil jury trial in this jurisdiction was a personal injury case. The Court of Appeal defined the issue before it as follows:

[71] What is at issue on this appeal is whether it is a benefit to have lay opinion on issues arising in a personal injury case.

Brewer v. Hewitt, 2005 NLCA 30 (CanLII) [Appendix A, Tab 10]

40. *Brewer, supra*, was a non-catastrophic personal injury case.
41. In the “trilogy” cases, the Supreme Court of Canada imposed a cap on non-pecuniary damages due to policy considerations in the context of negligence, specifically malpractice and accidents resulting in catastrophic personal injuries.

65 The respondents also argue that the cap on non-pecuniary damages imposed in catastrophic personal injury cases should be imposed in cases such as this....

The respondents have not established why the policy considerations which arise from negligence causing catastrophic personal injuries, in the contexts of accident and medical malpractice, should be extended to cap a jury award in a case such as the present.

Young v. Bella, 2006 SCC 3 (CanLII), para. 65 [Appendix A, Tab 11]

42. In all contexts other than catastrophic personal injury:

Damage assessments are questions of fact for the jury.

Young, supra, para. 64 [Appendix A, Tab 11]

43. That damages are a question of fact is, moreover, enshrined in legislation.

In an action the amount of damage or loss, the fault, and the degrees of fault shall be questions of fact.

Contributory Negligence Act, R.S.N.L. 1990, c. C-33, s. 4 [Appendix B, Tab 6]

44. The Court of Appeal in *Brewer* chose, in the personal injury case then under appeal, to confine the effect of the above legislative direction by effectively defining personal injury damages in general as a question of law or policy, not of fact.

[75] The appellants submitted that the assessment of non-pecuniary damages is a question of fact upon which a consensus of lay opinion is appropriate. The classification of damages as a question of fact cannot pass without comment. Certain heads of damages, such as property damage or lost income, may properly be regarded as factual matters. Non-pecuniary general damages are quite different in nature.

Brewer v. Hewitt, supra, para. 75 [Appendix A, Tab 10]

45. It is arguable that *Brewer, supra*, made an error of law in treating all personal injury damages assessment as a policy exercise. Only the imposition of the cap can be validly so described. However, as the present case is not a personal injury case, we need not engage this issue.
46. The present case is a breach of contract case, and punitive damages are available for breach of contract.

However, in my view, a breach of the contractual duty of good faith is independent of and in addition to the breach of contractual duty to pay the loss.

Whiten v. Pilot Insurance Co., 2002 SCC 18 (CanLII), para. 79 [Appendix A, Tab 12]

47. The facts underlying the claim for punitive damages should be pleaded with reasonable particularity: *Whiten, supra*, para. 87, but pleadings may be repaired and amended:

86 It is quite usual, of course, for the complexion of a case to evolve over time, but a pleading can always be amended on terms during the proceedings, depending on the existence and extent of prejudice not compensable in costs, and the justice of the case.

Whiten, supra, para. 86 [Appendix A, Tab 12]

48. The Supreme Court in *Whiten* set out detailed guidelines for use by the trial court in assisting the jury to do its job of rationally determining whether to award punitive damages and to award a rational quantum.

49. The Supreme Court also offered the following endorsement of civil juries:

136 One of the strengths of the jury system is that it keeps the law in touch with evolving realities, including financial realities.

Whiten, supra, para. 136 [Appendix A, Tab 12]

50. *Brewer v. Hewitt*, although a personal injury claim, remains the leading case on when discretionary civil jury trial is available in this jurisdiction. The operative statutory provision is s. 32(3) of the *Jury Act*:

(3) A judge may make an order for a trial with a jury in another cause or matter where a party makes a request in a certificate of readiness filed under the *Rules of the Supreme Court, 1986*, or in manner and at those times as the court may allow.

Jury Act, 1991, S.N.L. 1991, c.16, s. 32(3) [Appendix B, Tab 7]

51. After quoting the broader statutory provisions, the Court of Appeal in *Brewer* described their effect:

[13] The **Jury Act** does not alter the basic position established by the 1916 Rules that, in the absence of any request to the contrary, a civil trial is conducted by judge alone. The position is altered when a civil jury is requested. In cases, other than those stated in s. 32(1) such as defamation or malicious prosecution, a civil jury ceases to be a *prima facie* entitlement and its availability becomes subject to the discretion of the court as

indicated by use of the word “may” in s. 32(3) in contrast to use of the word “shall” in s. 32(2). The **Jury Act** does not specify the factors which are to be considered by the court in the exercise of that discretion.

Brewer, supra, para. 13 [Appendix A, Tab 10]

52. After analysis, the Court provided the following statement:

[66] ...It is sufficient to state the conclusion that the effect of s. 32(3) of the **Jury Act** is to require an applicant to persuade the court on the basis of the court record, or such facts as are properly admitted, that a civil jury trial should be granted. Upon such application the court should weigh all relevant factors in that case without applying any “presumption” for or against a civil jury. If, upon consideration of the relevant factors, the court concludes that the applicant has not discharged that onus of persuasion then the default position prevails and trial would be by judge alone.

Brewer, supra, para. 66 [Appendix A, Tab 10]

53. The Court of Appeal recommended that the exercise of the discretion would be assisted by consideration of three categories of factors: typological, functional, and trial management. Whether there is benefit to having a consensus of lay opinion on the issues at trial is the typological issue.

Brewer, supra, paras. 68-70, 72, 81-83 [Appendix A, Tab 10]

54. The Supreme Court’s decision a year after *Brewer*, in *Young v. Bella*, constitutes an endorsement of civil jury trial. In reversing the judgment of the Court of Appeal for Newfoundland and Labrador, the Supreme Court placed the cause of action firmly on a tort of negligence footing, and reinstated a very significant damages assessment by the jury. The effect is a robust vote of confidence in the fact-finding role of civil juries and in their capacity to do substantial justice by keeping the law in step with social reality.

Young, supra [Appendix A, Tab 11]

55. The reasons in *Whiten* and *Young* were written by Binnie, J. and McLachlin, C.J., judges from Ontario and British Columbia respectively, the two jurisdictions with the greatest

experience of civil juries. The same is true of *Hill v. Church of Scientology*, extensively discussed in *Whiten* and written by Cory J., an Ontario judge. Confidence in the capacity of civil juries to do justice is maintained by the very judges most experienced with civil juries to this day:

Particularly in view of the allegations of bad faith and the claim for damages for administration of the claim, credibility questions will arise which make the case eminently suitable for a jury.

Cipparone v. Royal & SunAlliance Insurance Co. of Canada, 2010 CarswellOnt 5949 (S.C.J.), para. 4 [Appendix A, Tab 13]

56. In commenting on the discretion conferred by s. 32(3) of the *Jury Act*, the Court of Appeal stated:

[15] Where a matter is left to the discretion of the court it is established that the exercise of that discretion is subject to the guidance provided by case-law.

Brewer, supra, para. 15 [Appendix A, Tab 10]

57. *Whiten*, *Cipparone* and *Clarke* all involved bad faith claims against insurers in which punitive damages were sought. In *Clarke* no appeal of the jury order was filed, and the case settled shortly before trial.

Clarke v. Manufacturers Life Insurance Co., 2003 NLSCTD 40 (CanLII) [Appendix A, Tab 14]

58. The guidance provided by caselaw (eg. *Pilot*, *Clarke*, *Cipparone*) is that bad faith insurance cases in which punitive damages are sought, *per se* satisfy the typological issue of whether there is benefit in obtaining a cross-section or consensus of community opinion. The onus of persuasion is met by pointing to a court record which shows the nature of the cause and the remedy claimed. In *Brewer* the Court of Appeal provided the following description of the decision in favour of jury trial in *Clarke*, without any suggestion of disagreement:

[45] In **Clarke** a predominant feature of the action was the claim for punitive damages, arising from alleged bad faith administration, on which it was found to be appropriate to obtain a consensus of lay opinion. The functional and trial management concerns could be resolved in the context of a jury trial. Accordingly a civil jury was ordered, with the observation that the subsequent case management process might identify procedural or functional concerns justifying either severance of issues or a rescission of the civil jury order.

Brewer, supra, para. 45 [Appendix A, Tab 10]

59. The Court of Appeal even went further, and made a clear statement supporting jury trial in the present type of case:

[70] Issues on which lay opinion may be of benefit include those where standards of community morality are involved, where condemnation of improper conduct is sought, or where dishonesty is alleged. “When in a civil case a man’s honour or integrity is at stake ... then trial by jury has no equal” – **Ward v. James**, p. 571. Claims for punitive damages, as in **Clarke** and **Whiten** would be so classified, provided that such would likely be a dominant feature of the trial.

Brewer, supra, para. 70 [Appendix A, Tab 10]

60. Clearly, the present case satisfies the typological factor, as approved by the Court of Appeal in *Brewer*. The functional factor (*Brewer*, para. 81) is whether the issues of fact are clearly interwoven with the issues of law or whether the primary issues are issues of law. Trial management issues concern whether the trial could be subject to adjournment, complexity of the evidence, the nature and number of issues, and the length of time required for proper decision-making at the conclusion (*Brewer*, para. 83).
61. The Applicant has advanced affidavit evidence that the trial will take three days and that there are no contending expert witnesses. The detailed order of Green, CJ. in *Clarke* fits the case exactly and is reproduced in the draft order. There is no basis to find that the functions of judge and jury will be blurred, or that the trial cannot be managed so as to produce a fair result. The Applicant meets the test for civil jury trial under s. 32(3) of the *Jury Act*.

Summary

62. The impugned portions of Defence are in logic and by authority, not Defence but counterclaim. Only a breach of express contractual term could found the Defence that the insured did not “look out for” the insurer’s subrogation rights. The Defendant insurer has not pled, and cannot plead, a cause of action – a counterclaim. The rights in question cannot arise until a payment is made. 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.

All of which is respectfully submitted this 26th day of October, 2010.

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APPENDIX A – AUTHORITIES CITED

Tab

- 1 *Brace v. Watch Tower Bible and Tract Society of Pennsylvania et al.*, 2009 NLTD 171 (CanLII)
- 2 *Szeto v. Dwyer*, 2010 NLCA 36 (CanLII)
- 3 *Sweeney v. Insurance Corp. of Newfoundland*, 2002 NLCA 75 (CanLII)
- 4 MacGillivray on Insurance Law, 9th Ed. (London: Sweet and Maxwell, 1997)
- 5 *Currie v. Halton Regional Police Services Board*, 2003 CanLII 7815 (ON C.A.)
- 6 *Walsh v. Johnson*, 2010 NLCA 6 (CanLII)
- 7 *Walsh v. TRA Co.*, 2006 CarswellNfld 376 (T.D.)
- 8 The Supreme Court Practice, 1999, Vol. 1 (London: Sweet and Maxwell, 1998)
- 9 *Royal Bank v. Kilmer van Nostrand Co.*, 1994 CarswellOnt 550 (Gen. Div.)
- 10 *Brewer v. Hewitt*, 2005 NLCA 30 (CanLII)
- 11 *Young v. Bella*, 2006 SCC 3 (CanLII)
- 12 *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 (CanLII)
- 13 *Cipparone v. Royal & SunAlliance Insurance Co. of Canada*, 2010 CarswellOnt 5949 (S.C.J.)
- 14 *Clarke v. Manufacturers Life Insurance Co.*, 2003 NLSCTD 40 (CanLII)

APPENDIX B – STATUTES CITED**Tab**

- 1 Rule 14, *Rules of the Supreme Court, 1986*
- 2 Rule 10, *Rules of the Supreme Court, 1986*
- 3 Rule 11, *Rules of the Supreme Court, 1986*
- 4 Rule 15, *Rules of the Supreme Court, 1986*
- 5 Rule 40.15, *Rules of the Supreme Court, 1986*
- 6 *Contributory Negligence Act*, R.S.N.L. 1990, c. C-33
- 7 *Jury Act, 1991*, S.N.L. 1991, c. 16