

Highlights

Injured Workers Want Equal Rights!

For the first time in Canadian history, Injured Workers Groups are taking joint action on a legal challenge at the Supreme Court of Canada. The issue is our ability to hold doctors accountable for their medical treatment of injured and disabled workers.

Normal citizens have recourse to the courts if their treating physician does malpractice. Injured workers are denied that right. Under most provincial compensation acts, the worker would not be allowed to sue their treating physician.

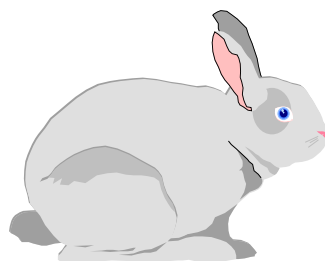
This ability to sue for medical wrong doing has been used successfully to bring about improvements to medical treatment. One recent example is the tainted blood/Aids scandal. People with HIV sued the government & the Red Cross and we now have a new safer blood system.

Well, if you're an injured worker, you don't have this right. And what do we see? In Saskatchewan, they have a doctor using injured workers as guinea pigs as he does "Deep Brain Implants" as a pain treatment. Maybe if they fry your brain, your pain will disappear.

This issue focuses on this court case and what the future looks like with new court rulings. We also have our regular features so please, "Read On".

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**Spring
1999
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Thanks for Your SUPPORT

Editor's Note

This newsletter is for sharing and exchanging information. The views and opinions expressed here are those of the individuals or groups making submissions. We take no responsibility for their accuracy or opinions.

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CANADIAN INJURED WORKERS ALLIANCE

L'ALLIANCE CANADIENNE DES VICTIMES D'ACCIDENTS ET DE MALADIES DU TRAVAIL

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CIWA/ACVAMT Projects

For more information on any of our projects, give us a call at: 807-345-3429

"SPREADING THE WORD" Project Update

Does your local / injured worker group need help with:

- strengthening the skills of its board members?
- peer support models?
- leadership skill development?
- building community partnerships?

CIWA/ACVAMT is training facilitators to deliver workshops at "Train the Trainer" sessions. The first session was held in Edmonton, AB in March 1999 with participants from the western provinces & the Yukon.

Training sessions are also planned for Moncton, New Brunswick in April, 1999 for the eastern provinces and for Quebec City in May, 1999 (French).

Participants of our "Train the Trainer" sessions will soon be available to facilitate workshops near you. Workshops may include a number of topics such as:

- The Survivors Forum
- Managing Meetings
- Roles & Responsibilities of Board Members
- Public Speaking
- and more !

Once the training sessions have been completed, we will send a list of workshop facilitators to all injured worker groups in Canada.

If you are interested in participating or for more information, contact your provincial rep or phone the CIWA/ACVAMT office at 807-345-3429

SPEAKERS BUREAU

Returning to Work

We now have 53 trained presenters from local injured workers groups all across the country. They are prepared to come out to any local meeting to give a 15 - 30 minute talk on the experiences of injured and disabled workers. A complete list of these presenters is available from the CIWA/ACVAMT office (phone 807-345-3429)

The presentation is accompanied by a series of illustrated overheads and slides, a handout on "How you can help", and a display table of additional information and resource materials.

The response so far has been enthusiastic. Presentations have been made to local union meetings, health and safety committee meetings, the WCB's in Nova Scotia, Saskatchewan & Alberta, WCB committees, the Manitoba Federation of Labour, community meetings and injured workers group meetings, to name a few.

This project has been made possible by a partnership between the Canadian Labour Congress and local injured workers groups.

Arrange for one of our presenters to deliver a presentation at your next local meeting !

Thanks to the Human Resources Development Canada for supporting this project.

"Survivors"

Did you get your copy yet?

The **Survivors** manual is a guide for organizing community forums, using a 17-minute video (included with the manual) and the round table discussion technique. CIWA/ACVAMT has used these tools to build support in local communities, to recruit new members to injured workers groups, and to start new groups.

Call our office at 807-345-3429 and order yours today !

Price:

- \$30.00 (Corporations and Institutions)
- \$22.50 (Unions and Non-Profits)
- \$15.00 (Injured Workers and Unemployed)

CIWA/ACVAMT Projects

For more information on any of our projects, give us a call at: 807-345-3429

TOGETHER **WE CAN WIN**

Our most popular resource tool is a video and workbook to help injured workers deal with a workplace injury or disease and the changes that take place in their lives.

The workbook covers such areas as:

- Surviving the system
- Financial planning
- Setting priorities
- Going back to your job
- Finding a new job
- Keeping your head on straight

The workbook includes information and exercises that take the injured worker from injury to rehabilitation to return to work. Injured workers can find out how to keep records to help maintain entitlement and rights to Workers Compensation benefits.

The video is being shown on Community TV stations, at union meetings, in training sessions at the WCB and at injured workers meetings.

ATTENTION INJURED WORKERS

Is your Injured Worker Group interested in developing a web site for your group?
Need some help?

Two injured workers in B.C. have offered to provide that help - free of charge.

Contact

Craig MacLachlan-componet@smartrt.com
Or Dann Buss busstop@busstop.net

We received this wonderful congratulatory letter and would like to share it with you.

*I would like to congratulate you on your video "**TOGETHER WE CAN WIN**". The response and reaction from our members was to say the least, remarkable. Many Injured Workers have now realized that they are not alone in our fight for Justice and Dignity.*

The video displayed a true real life drama that is taking place across the country. After we showed the video, we spent 3 hours discussing and commenting on the various aspects of the video and the effect it left on our group.

I was personally stunned by the reaction and the message that has been implanted in the minds of our own Injured Workers, in addition to the educational value of the video.

Please accept my sincere congratulations to C.I.W.A. and to all involved in producing such a dynamic piece of material.

*John Sweeney, President
K.W.C.I.W.G. Inc.*

KITCHENER - WATERLOO - CAMBRIDGE **INJURED WORKERS GROUP**

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EMAIL kwciwg@golden.net TEL/FAX 519-570-0781

**Copies of the video and workbook are available at the
CIWA/ACVAMT office.**

Background on the Supreme Court Case

The Community Legal Assistance Society has received permission from the Supreme Court of Canada to intervene on behalf of participating B.C. injured workers' groups and the Ontario Network of Injured Workers Groups (ONWIG) in an appeal by the B.C. Workers' Compensation Board to the Supreme Court of Canada.

The case is *Kovach v. Singh*. It arises from a malpractice lawsuit, the actual merits of which have never been tried. Ms. Kovach injured her back at work, and underwent surgery by Dr. Singh, who was "employed" by a holding company at the time. He owned the company, which was registered with the W.C.B. as an employer. Mrs. Kovach felt that the doctor was negligent. When she filed suit in 1989, Dr. Singh asked the Board to rule under s. 10 and s. 11 of the Act that both he and Ms. Kovach were "workers" at the time, and she was therefore prohibited from suing him. The Appeal Division agreed with Dr. Singh, and the Supreme Court of B.C. upheld its decision. The B.C. Court of Appeal has twice ruled in favour of Mrs. Kovach's right to sue. The Court's reasons, however, threaten the right of workers to be compensated for the consequences of negligent medical treatment (even if they haven't sued and don't want to do so).

The Purpose of Intervening

As explained below, none of the existing parties are speaking for the rights and interests of injured workers who don't want to go to court. The Supreme Court of Canada often permits non-parties to an appeal to intervene and make written and oral arguments to ensure that it hears all relevant perspectives on the issues before it. Several B.C. injured workers' groups and ONWIG will join together in the intervention, which also has implications for workers in other provinces. Other provincial injured workers groups are considering joining the intervention.

As presently planned, the goals of the intervention will be twofold:

- (1) to persuade the Supreme Court to affirm the right to full benefits even if negligent treatment has caused the worker to suffer an additional disability; and
- (2) to establish the right of workers such as Mrs. Kovach to sue for malpractice if they choose, and to keep most of the proceeds if they are successful.

None of the current parties to the appeal - Mrs. Kovach, Dr. Singh, the W.C.B., and the Health Employers' Association (which intervened before the Court of Appeal) - are arguing for such a result.

Ms. Kovach will probably pursue the argument that was successful in the Court of Appeal, which is that a negligent operation must be regarded as a "second injury" occurring off the job. While this leaves the worker free to sue the doctor, hospital, and other responsible parties, it also suggests that the harm done by the second injury is non-compensable. The intervention will agree with much of Ms. Kovach's arguments, but will urge the court to confirm that the WCB must pay full compensation in all such cases (part of which the WCB can recover if the court awards damages for the same losses).

The WCB will defend its broad jurisdiction to decide the status of the worker and doctor in such circumstances. It will argue that its decision denying Mrs. Kovach's right to sue was not "patently unreasonable" (the legal test which must be met before a court can overrule a W.C.B. decision).

Dr. Singh (and the Health Employers) will argue that the WCB was right, and that workers should not be able to sue for malpractice.

What the Courts Decided

The Judge of the Supreme Court of British Columbia who first heard the case, Justice Huddart., reluctantly upheld the Board's decision barring the lawsuit in March, 1995, stating in her Reasons that:

"To Mrs. Kovach and undoubtedly to many residents of this province, the combined effect of section 10(1) and the Board's determination under section 11 will seem clearly wrong. They ask why a surgeon or other professional person should be protected by legislation clearly designed to ensure compensation in the workplace for injuries suffered in accidents or as the result of the negligence of an employer or co-worker? Why employers should pay for such negligence rather than the professional person who can insure himself from the substantial fees he is paid for his services?"

"If an unpalatable result flows from the Board's reasoned interpretation of its governing legislation and the facts of a case, that is a matter for the legislature. It seems clear that the court's task on judicial review of a determination is not to look at its ultimate consequences and arrive at a policy decision that the Board is a spider-like creature that has pulled into its web one unwilling victim too many. Or read the other way, given succor to an undeserving bug. The court's task is simply to enquire whether a rational basis exists for the decision. The emphasis should not be so much on what result the tribunal has arrived at, but on how the tribunal arrived at the result."

The Court of Appeal overturned this decision in December 1996, primarily on the basis that the W.C.B. has no jurisdiction (legal authority) to decide a case where an issue of medical negligence has been raised. This left even workers who had not sued at all in limbo if there was an allegation of malpractice, as the Court seemed to be saying that all the Board should do in such cases was to await a court's ruling on the causes of the worker's condition.

The Supreme Court of Canada was about to hear an appeal from the Pasiechnyk decision of the Saskatchewan courts, which the B.C. Court of

Appeal had followed. The Pasiechnyk case concerned a claim by the dependants of several workers killed in a crane accident that the employer, the Saskatchewan government, negligently failed to inspect the crane properly. The Supreme Court upheld the power of workers' compensation boards to decide such issues. After deciding the Pasiechnyk case, the Supreme Court sent Kovach back to the B.C. Court of Appeal for reconsideration.

The appeal was again heard by the same three justices of the Court of Appeal, and two of them still refused to agree that an "undeserving bug" (a doctor whose treatment of an injured worker has been negligent) should be shielded from a lawsuit by the Act. The majority found that the decision of the W.C.B.'s Appeal Division was "patently unreasonable" because it failed to distinguish between Mrs. Kovach's status as a worker when she originally hurt her back, and her status as a patient when she underwent surgery.

Establishing the Right to Sue

The main argument in the intervention will be that the W.C.B. decides two very different questions in cases like this, and acts illegally if it fails to examine each issue according to the standards contained in the Act. The first question is whether workers should receive compensation for the adverse consequences of medical treatment, whether it is negligent or simply unfortunate. It will be argued that they should, on the basis of the Board's current policy that a condition caused by medical treatment is a compensable consequence of the work injury that led to the treatment.

The second question is whether the worker should be prevented from suing a negligent doctor for malpractice, if the doctor happens to be a worker or employer covered by the Board. It will be argued that an injured worker is not acting in the course of employment when undergoing an operation or other treatment. Accordingly, the worker is free to decide whether to sue or not. If a suit were successful, the Board would be entitled to recover those benefits which duplicate the damages awarded by the court. The worker could keep the damages awarded for losses for which

the Board doesn't compensate, such as pain and suffering.

Participation and Feedback Requested

Organized groups of injured workers which want to participate in the intervention should contact Jim Sayre at the Community Legal Assistance Society (604) 685 3425, or Craig McLachlan at 990 9009 for details about the process and an outline of the information needed for the Court.

The Community Legal Assistance Society will also try to answer any questions or concerns of injured workers about the position described above.

Given the short time available, comments should be put in writing and sent to the Society

by fax to: (604) 685 7611

by mail to: #800, 1281 West Georgia St.,
Vancouver, B.C. V6E 3J7

by email to: clas@vancouver.net.

KOVACH v. SINGH...at the Supreme Court

The Kovach appeal arises from a malpractice lawsuit, the merits of which have never been tried. Ms. Kovach injured her back at work, and underwent surgery by Dr. Singh. He was "employed" by a holding company that he also owned, and which was registered with WCB as an employer. Mrs. Kovach felt that the surgery was negligent, and sued in 1989. Dr. Singh asked the Board to bar the suit under s. 10 of the Act, on the basis that both he and Ms. Kovach were "workers" at the time.

The central legal issue is the jurisdiction of the Board and/or Court in such circumstances. The reasoning of the B.C. Court of Appeal, however, threatens the right of a worker to be compensated for the consequences of negligent treatment even if he or she hasn't sued or threatened to sue. Ideally, an intervention would help persuade the Supreme Court to remove that threat and assure the worker's right to full benefits even if negligent treatment has caused additional disability. Workers should also be given the option of suing for damages if they choose to do so.

L'appel de Kovach découle d'une action en négligence professionnelle, dont les mérites n'ont jamais été mis à l'essai. M^{me} Kovach s'est blessée au dos au travail et a subi une intervention chirurgicale aux mains du D^r Singh. Celui-ci était « employé » par un holding dont il était propriétaire et qui était inscrit auprès du WCB comme employeur. M^{me} Kovach estimait que la chirurgie avait été exécutée avec négligence et elle a entamé une action en 1989. Le D^r Singh a demandé au WCB de faire obstacle à la poursuite en vertu de l'article 10 de la loi, en invoquant que lui et M^{me} Kovach étaient des « travailleurs » à l'époque.

Le nœud du problème juridique est la juridiction du WCB et/ou de la Cour en pareilles circonstances. Le raisonnement de la Cour d'appel de la Colombie-Britannique menace par contre le droit d'un travailleur ou d'une travailleuse d'être indemnisé(e) pour les conséquences d'un traitement négligent, même si cette personne a ou n'a pas entamé une action ou menacé d'en entamer une. Idéalement, une intervention aiderait à persuader la Cour Suprême de retirer cette menace et à assurer le droit du travailleur ou de la travailleuse aux prestations complètes même si un traitement négligent a causé une incapacité supplémentaire, tout en accordant à ces personnes l'option de poursuivre en justice pour des dommages si cela est leur choix.

Le jugement de la Cour d'appel déclare que la décision du WCB était « manifestement déraisonnable » en ne distinguant pas entre le statut de M^{me} Kovach comme travailleuse

The Court of Appeal's decision says that the decision of WCB was "patently unreasonable" in failing to distinguish between Mrs. Kovach's status as a worker when she originally hurt her back, and her status as a patient when she underwent surgery. The reasons for the decision are confusing, but appear to mean that the Board cannot pay compensation for the portion of a worker's disability resulting from negligent medical treatment. That, at least, is the understanding of the dissenting justice, Donald J.A., who wrote:

"The Board was not bound to apply common law principles of causation ... What works for a tort based system may be unsuitable for a no fault scheme... The Board may decide that in order to encourage workers to undergo treatment for their industrial injuries, it must cover mistakes made during treatment. It may decide that it is unfair to deny coverage in such circumstances or inconsistent with a broadly inclusive policy of worker protection."

For example, assume that the WCB ruled that the chain of causation was broken by medical negligence and a court later found that all or most of the worker's problems were caused by the industrial injury. Neither the Board nor the court is bound by the findings of the other. The worker falls between two systems.

One of the earliest published policy decisions of the B.C. WCB found that the consequences of medical treatment should be treated as compensable, however the treatment turned out, so long as the worker was reasonable in undergoing the treatment. The latest Court of Appeal decision has the potential to overturn that very reasonable policy, and cause the worker either to forego compensation for the negligent treatment, or incur the expenses and risks of court proceedings which still could leave him

lorsqu'elle s'est blessée au dos et son statut de patiente lorsqu'elle fut opérée. Les motifs de la décision sont confus, mais ils semblent indiquer que le WCB ne peut pas verser une indemnité pour la portion d'une incapacité d'un travailleur ou d'une travailleuse qui résulte de négligence dans un traitement médical. C'est du moins la compréhension du juge dissident Donald de la Cour d'appel, qui a écrit :

« Le conseil (WCB) n'était pas lié d'appliquer des principes de causalité de la common law... Ce qui marche pour un système fondé sur la responsabilité civile délictuelle ou quasi-délictuelle peut ne pas convenir pour un système d'indemnisation sans égard à la responsabilité. Le conseil peut décider que pour encourager les travailleurs et travailleuses à subir un traitement pour leurs lésions professionnelles, il doit couvrir les erreurs commises pendant le traitement.

Il peut décider qu'il est injuste de refuser cette couverture en pareilles circonstances ou que cela est incohérent avec une politique de protection des travailleurs et travailleuses à grande échelle. »

Par exemple, supposons que le WCB a déterminé que la chaîne causale a été rompue par la négligence médicale et qu'un tribunal a déterminé plus tard que tous les problèmes du travailleur ou de la travailleuse, ou une partie de ces problèmes, ont été causés par la lésion professionnelle. Ni le WCB ni le tribunal ne sont liés par les conclusions de l'autre. Le travailleur ou la travailleuse tombe entre deux systèmes.

Une des premières décisions publiées du WCB de la Colombie-Britannique au sujet des politiques d'indemnisation était à l'effet que les conséquences d'un traitement médical devaient être traitées comme indemnissables — peu importe le résultat du traitement — aussi longtemps que le travailleur ou la travailleuse était raisonnable en subissant le traitement. Le dernier jugement de la Cour d'appel a le potentiel de renverser cette même politique raisonnable et d'obliger le travailleur ou la travailleuse à renoncer à l'indemnisation pour le traitement négligent ou à encourir les dépenses et les risques des procédures judiciaires, ce qui pourrait encore laisser cette personne coincée « entre deux systèmes », comme le laisse entendre le juge Donald.

Bien que la principale raison d'intervenir soit de défendre le droit des travailleurs et travailleuses aux prestations pour les conséquences d'un traitement, l'appel offre aussi l'occasion

trapped “between the two systems”, as Donald J.A. suggests.

While the main reason to intervene is to defend workers’ rights to benefits for the consequences of treatment, the appeal also offers an opportunity to gain a right of choice for workers which they did not have under the previous jurisprudence and policy. Injured workers’ groups in B.C. generally want much greater access to the courts than the Act now allows. It certainly isn’t in workers’ interests to be denied compensation for the results of medical negligence, forcing them to sue privately in every such case. But it seems to us that workers such as Ms. Kovach should have that option if they want to exercise it.

The bar to lawsuits seems especially unwarranted in cases where the injury is caused by a “stranger” who simply happens to be an employer or worker [but not the worker’s own employer or co-worker]. The injuries would otherwise be insured by motor vehicle insurance or the doctors’ liability fund, which would pay general damages and compensate for the full loss of earnings of the worker, including earnings above the maximum level insured by WCB.

d’obtenir un droit de choix pour ces personnes, ce qu’elles n’avaient pas avec la jurisprudence et la politique antérieures.

Les groupes de victimes d’accidents et de maladies du travail en Colombie-Britannique désirent en général un plus grand accès aux tribunaux que ne leur permet la loi en ce moment. Même si ce n’est certes pas dans l’intérêt des travailleurs et travailleuses en général de se voir refuser l’indemnisation pour les conséquences de la négligence médicale — ce qui les oblige à poursuivre en justice sur une base privée dans chacun des cas —, il nous appert que les travailleurs et travailleuses comme M^{me} Kovach devraient avoir cette option s’ils veulent l’exercer.

L’obstacle aux poursuites judiciaires nous paraît particulièrement injustifié dans les cas où la lésion est causée par un « étranger ou une étrangère » qui se trouve être un employeur ou un travailleur ou une travailleuse (mais non pas le propre employeur ou le ou la collègue du travailleur ou de la travailleuse), et dans les cas où les lésions seraient autrement assurées par l’assurance automobile ou le fonds de protection des médecins, ce qui paierait les dommages généraux et indemniserait la perte complète de revenu du travailleur ou de la travailleuse, y compris le revenu au-dessus du niveau maximal assuré par le WCB.

BASIC QUESTIONS AND ANSWERS REGARDING THE INTERVENTION IN KOVACH V. SINGH

1. Q. *Bill 63, enacted in 1994, made medical offices (as well as legal and financial institutions and other "white collar" job sites) subject to the W.C. Act for the first time. Mrs. Kovach is suing for an operation that took place before that amendment. Would the intervention only benefit claimants such as her, or could it also apply to workers whose negligent treatment happened since 1994?*

A. The 1994 amendments are only relevant indirectly. Bill 63 made it mandatory for certain types of workplaces to be covered by workers' compensation, including doctor's offices. This means that most doctors are now

"employers" under the Act, but even before Bill 63 a doctor could take out "personal optional protection" for his own earnings like other "independent contractors".

In a decision by the Appeal Division, made a few months before the Kovach certificate, the panel (Tom Kemsley, who was also part of the panel in Kovach) decided that a doctor who was sued for malpractice was NOT protected by S. 10, even though he was an employer of his private office staff. The main reasons were (1) he treated the worker in the hospital, not his office, and his staff had nothing to do with the treatment, and (2) he did not take out

personal optional protection to cover his own work (and earnings).

In the next such decision, the appeal division (Connie Munro, Tom Kemsley, and Micheal O'Brien, now chair of the review board) found that a doctor employed by WCB itself was shielded from a lawsuit by S. 10 because he was a worker acting in the course of his employment. Then, in Kovach, the same panel of the appeal division found that Dr. Singh was shielded by the act because he had incorporated a holding company to carry on his practice and was "employed" by it when he operated on Mrs. Kovach. The approach in these three decisions makes a worker's right to sue depend on how a doctor is paid or structures his practice, and whether his own earnings are covered by WCB or not. In my view, it makes no sense to deprive a worker of the right to seek damages for negligence because of factors such as this which have nothing to do with the worker.

We will be approaching the issue from the worker's perspective, not the doctor's. I.e., we will argue that it doesn't matter whether the doctor is an employer or worker under the Act or not, because the worker is not "in the course of employment" when undergoing treatment. The worker should still receive full compensation if the treatment goes wrong, whether he can prove negligence or not, but can also sue the doctor **WITHOUT THE BOARD'S PERMISSION OR THE NEED TO MAKE AN "ELECTION"**. According to this rationale, the only effect of a lawsuit on the compensation claim is that the Board would have an equitable claim to be reimbursed for any wage-loss benefits it has paid that are duplicated by damages awarded by the Court. If the Supreme Court of Canada upholds the Board's right to assume that a worker is in the course of employment whenever he is receiving treatment, as the Appeal Division decided in all three of the recent decisions, such a result is impossible, and the right to sue will depend on the doctor's status.

2. Q. *Will the statute of limitation regarding filing of a lawsuit apply to malpractice claims by workers, if the intervention is successful?*

A. Yes, the usual rules would still apply, as they do now. A worker would have to sue within two years of having the information that would lead a reasonable person to seek professional advice about a possible malpractice claim. [The two year period is suspended if a worker is so disabled that he cannot exercise his rights, but this means much more than just being unable to work. A severe mental disability (or a very severe physical disability, such as a coma) is needed to suspend a limitation period.]

3. Q. *Some claimants believe that they have been caused further injury due to negligence by a WCB Doctor, physiotherapist, or other Board employee while undergoing treatment at the Board. If successful, would the intervention enable such Board employees to be sued as well?*

A. Yes and no. If the WORKER is not 'in the course of employment' when receiving the negligent treatment, the employer and status of the doctor and other defendants shouldn't matter. There is another problem, though. The 1994 amendment also added "employee of the board" to the list of people in S. 96(1) who cannot be sued "in respect of act, omission, or decision done or made in the belief that it was within the jurisdiction of the board..." A Board doctor, physiotherapist, etc. who injures a worker during treatment at the Rehab Centre, for example, may well be protected by that clause, entirely apart from S. 10 and S. 11. (When this clause was added in 1994, a few of us complained about it, but couldn't arouse much interest.)

4. Q. *Would the intervention have any bearing on a worker's right to sue other professionals and service providers (and/or the licensing and regulatory bodies that control them), or would it be limited to medical malpractice claims?*

A. S. 10(1) doesn't apply just to malpractice claims. It bars all actions "in respect of any personal injury, disablement or death arising out of and in the course of employment..."if the defendant is an employer or worker under the Act and was also acting in the course of employment. Under current Board policy, an injury occurring during treatment that is not caused by malpractice (for example, a worker falling down a poorly lit flight of stairs at a hospital) would also be treated as having happened "in the course of employment". Even some motor vehicle accidents related to treatment can be covered. If so, and if the responsible party is also a worker or employer, the worker cannot sue. The intervention could change this, and give workers in those situations the right to sue and to receive ongoing compensation under their original claims for their new injuries.

In the case of non-medical professions, S. 10(1) would only affect a lawsuit if a worker claims to have suffered "disablement" as well as economic losses due to the negligence. In such cases, the intervention position would also protect workers' rights. If the claim is for lost benefits or other financial losses (e.g., against a negligent lawyer, accountant, etc.), the case should be unaffected by S. 10 no matter how the Kovach appeal turns out.

It would take a rare fact pattern to give rise to a lawsuit against a licensing or regulatory body. As noted, S. 10 only bars a claim for injury, disablement, or death, not economic loss. Hypothetically, if the College was aware that a non-doctor was purporting to practice medicine, or was engaging in dangerous experimentation (such as one B.C. doctor who was found negligent by the courts for inserting experimental artificial discs in his patient's backs), and the College neglected to do anything to stop him, a worker who was harmed in a later operation might claim that the College was also at fault for its failure to take action. In such (rare) circumstances, the intervention could protect the right to sue.

5. Q. *A doctor who is sued will have powerful legal interests to defend him, while the patient probably will not. Are there legal aid or other organizations to represent injured workers and other patients in such cases? Would WCB provide representation?*

A. WCB would not be subrogated to the worker's rights, as it would if the worker had been injured in the course of employment by someone other than an employer or worker and then elected to claim compensation instead of suing. The Board could be empowered (perhaps requiring an amendment to the Act) to provide representation at the worker's option, since the Board would also benefit by recovering part of the compensation if the lawsuit were successful.

The Legal Services Society (and CLAS) do not take on personal injury lawsuits (malpractice or otherwise). Many private lawyers do take motor vehicle injury cases on a percentage fee basis. Far fewer lawyers will sue a doctor on a percentage basis because the doctors' liability insurance fund has a policy to fight all claims, usually to a full trial, and sometimes appeals. Because it is so hard to sue doctors successfully, Canadian doctors pay a small fraction of what liability insurance costs US doctors. Still, there are lawyers who will take a malpractice claim on such a basis if there is strong evidence, and LSS may cover some of the expenses of the lawsuit if the worker is financially eligible. Finding a lawyer willing to act and making a fair arrangement for legal fees is one of the biggest hurdles facing anyone who wants to sue a doctor. It's no different for injured workers.

6. Q. *Isn't there a risk that the intervention would give WCB an excuse to deny or reduce the workers' compensation benefits a worker receives, by claiming that the doctor is responsible for much of the disability?*

A. It is exactly this factor that makes an intervention so important. As of now, the decision of the Court of Appeal (according to the dissenting judge, anyway) leaves an injured worker who has received negligent treatment at risk of "falling between the cracks". I.e., the Board may decide it's all the doctor's fault, while the Courts don't find any negligence. Because the Board is an independent decision-maker whose decisions are protected by the privative clause in S. 96, it usually cannot be forced to accept the Court's decision about the causes of the disability, nor does the Court have to agree with the Board.

If workers had to choose between the right to sue a negligent doctor and the right to full compensation, they would have to pick compensation to avoid this risk. Otherwise, a worker who doesn't want to sue or can't find a lawyer would simply be left in the cold. But workers shouldn't have to make that choice.

Instead, they should receive full compensation because treatment for a work injury does arise out of employment (i.e., it's caused by the original work injury) even though it doesn't occur in the course of employment. If that analysis is accepted by the Supreme Court, the worker would still receive compensation for the overall disability, while also having the right to sue.

7. Q. *If the intervention is unsuccessful, is there anything that can be done?*

A. Absolutely. There are amendments proposed to the W.C. Act. Workers could press for a provision which deals expressly with injuries suffered in the course of treatment, and guarantees both the right to sue and the right to full compensation.

WHAT CAN WE DO?

It was the consensus of CIWA's Steering Committee that if this case ruled against Mrs. Kovach, the injured worker, the impact will have a far reaching effect to all injured workers, and their families, in Canada.

We trust that all concerned will consider this issue to be of great importance. We therefore ask for your support. Consider that, if this case were ruled in favour of WCB and Dr. Singh, your name could appear on a similar document in the very near future.

1. Make this a provincial issue of any organization you belong to or have contact with; and or
2. Send a letter of support to Jim Sayre; counsel for injured workers, and or
3. Ask for intervener status.

Views from the Provinces on

The Right to Sue the Treating Physician for Malpractice

SASKATCHEWAN

In the Province of Saskatchewan the Workers Compensation Board will bar an injured worker from taking legal action against a treating physician in the case of mal-practice or negligence. Our act states that an injured worker cannot sue an employer. WCB interpretation of this is, as the doctor is treating the workers injury, he is the employer of said injured worker in his WCB case. WCB is saying the injured worker is still in the course of his employment even when he/she is laying on the operating table.

The Western Injured Workers Society (Sask) fully supports the Kovach case of British Columbia in regards to going to the Supreme Court of Canada. We also give 100% support to the Lindsay case of Saskatchewan, which has now been accepted leave in the Supreme Court of Canada. The Lindsay case and the Kovach case are identical, however there lies a confusion in the law as British Columbia's Court System was in favor of the injured worker and the Saskatchewan's Court System was in favor of WCB.

These two cases are of the outmost importance to all injured workers, workers, unions, to all Provincial Labor groups and the CLC of Canada. The Western Injured Workers Society (Sask) are asking for letters of support from all injured workers groups across the country, these letters may be sent to CIWA so they can be forwarded to the lawyers handling each case. We know that WCBs across Canada have asked for intervenor status on the Kovach case and will likely ask the same for the Lindsay case. We must support injured workers to protect their rights. The Western Injured Workers Society (Sask) will request intervenor status.

The Western Injured Workers Society (Sask) are in the process of sending out letters asking for the support of all injured workers groups, unions and the SFL in Saskatchewan. For more information or letters of support contact us at Western Injured Workers Society (Sask), 1015 McCarthy Blvd., Regina, Saskatchewan, S4T 7M7. E-mail xeastman@dlcwest.com or call 1-(306)-775-0513. All letters will be forwarded to the appropriate persons.

ONTARIO

In Ontario you can sue a treating physician for negligence, even though the injured worker is collecting WCB benefits.

There are provisions in Ontario, either Section 9 or 10 of the Act, that deal with this issue. You cannot sue any Schedule One (1) employer, and hospitals are Schedule One, but you can sue a doctor if they are negligent.

The Ontario Network of Injured Workers Groups has put in for and been granted intervenor status in the Kovach v Singh case.

Any negative ruling by the courts in B.C. in this case could mean that medical providers, covered under the Provincial Act, would not be held accountable for any negligence on their part. Injured workers receiving medical treatment would have the right to sue for negligence abolished.

NEWFOUNDLAND

In the province of Newfoundland and Labrador there are conflicting reports on whether or not an injured worker can sue the treating physician if further

injury arises during the course of treating the original injury.

If the treating physician is considered an employee of the hospital or clinic, there is no right of action. If the treating physician has personal coverage under the Workers Compensation system, there is no right of action. On the other hand if the treating physician doesn't fall under any of the above mentioned categories, there is a right to sue, providing action is taken within two years.

The Workers Compensation Act for this province is silent on this issue, however the new injury would be considered compensable, and benefits would flow from the second injury fund. The second injury fund allows payment of benefits without increasing the assessment rate of the injury employer.

At this moment there is a Supreme Court of Canada case (Kovach vs. Singh, and the W.C.B. of British Columbia) dealing with the right to sue the treating

physician. This case is of national importance to all injured workers. If the S.C.C. rules in favor of Singh and the W.C.B., it may have a major impact on how all Workers Compensation Boards in Canada re-write their policies on the right to sue.

As an association dedicated to seeking the rights and entitlements under the Workers Compensation Act for injured workers in this province, we will be offering our support to Mrs. Kovach by way of writing a letter to her legal counsel.

At present it is our understanding that some six Workers Compensation Boards in Canada have applied and have been granted intervenor status in this case, with possibility of more to follow. After checking with the Workers Compensation Commission of Newfoundland and Labrador we are told that they are aware of this case, but they have no plans of asking for intervenor status.

Dear Andy

Dear Andy,

We have been getting an injured workers group started in our community and some of the people have different opinions about how to structure our group. Some people want to do peer support and others want to represent injured workers at the WCB. With your years of experience, what would you recommend?

Bob in New Brunswick

Dear Bob,

As I indicated in my previous reply to yourself, there are different approaches that groups take in organizing. They range from a tight structural arrangement to a loose support mechanism.

It may be of some benefit to yourself and fellow injured workers if your group determines how it wishes to structure itself, whether it wishes to become incorporated, now, or in the future. These decisions will help your organization's future growth. One of the pieces of advice

that I wish to give is that you will find your group continually evolving and what seems good for now may need to be changed in the future.

The programs that can be developed or modified for your group can be many. One of the best things that you can do is start at the beginning and look for models that fit your needs. You may want to talk to other injured worker groups in New Brunswick. CIWA has training programs for member groups. The ThunderBay & District Injured Workers Support Group have developed training programs for injured workers, including Peer Support, and Making Legislation Work for You.

I hope that you will find success, and by working with injured workers you will find that you are not alone.
Take Care

Andy

ORGANIZING ON THE NET

Check out these sites:

<http://www.injuredworkers.org>

www.wcb.pei.ca

<http://www.mediaring.com/zdnet/pcmag/front.html>

www.prairiela.com

www.oniwig.on.ca

www.tbiw.on.ca

www.smartt.com/~componet

www.socialjustice.org

www.fedupfeds.org

Want to get involved ?

**TO CONNECT WITH THE INJURED WORKERS
GROUP NEAREST YOU**

**CHECK OUT OUR WEB SITE AT:
WWW.CIWA.CA AND CLICK ON PEOPLE
AND ORGANIZATIONS
OR**

CALL THE OFFICE AT (807) 345-3429.

Once upon a time, in a province called Ontario, the people lived high on the hog. When someone got hurt

working, or fell ill, or was left alone to raise children, then the well-off folks shared the wealth, and helped them out. Well, the rich didn't share a whole lot, but it seemed to work out, more or less. And the guys in charge, they always wanted to know what the people were thinking. Especially when it came time to choose new leaders.

You see, the guys in charge collected money from all the people. Well, not all the people. Some of the people didn't have any money to give. And some of the people who had a lot of money didn't want to give it away, and hid it. And then the guys in charge spent the money - right left and centre. They even spend money they didn't have. They ended up in hock up to their necks.

It was decided by the leaders that the way to stop spending money, was to stop helping people who were ill or hurt or alone. The leaders also told the people they would collect less money from them. This was only common sense. Times were tough; there wasn't as much to go around; everyone had to tighten their belts. But then people began to worry. Who would give them a helping hand, if they were ever caught in a jam? But they were even more scared they would lose their jobs.

The people who were hurt or poor or hungry or alone; they were angry too. But the guys in charge didn't

The Vision

want to know what the people were thinking any more. They wanted to shut them up, which was pretty

easy to do. Down and out people are a pushover. If you don't want to see them, they become invisible. If you don't want to hear them they mumble. This was very convenient for the leaders.

Now the odd person might get desperate and start screaming, but this just turned people off. Who needed to hear that when you didn't know where the next payment on your snow blower/cellphone/..., was coming from? Boy, some people*!^. Ontario became a people-eat-dog province.

Most people stuck to themselves and tried to shore up their own fort. They refused to sally forth with the same bonhomie. They didn't even enjoy the big musicals in the theatres any more. The whole province caught year round cabin fever. Sigh.

And then along came a lively group of warm-hearted survivors who shared their stories. In the telling, they became stronger ... and hopeful. They found help to make their stories more compelling, more riveting, and more fascinating. People were drawn to listen to them ... and saw themselves. Even the guys in charge found something familiar about these stories ... rough laugh ... a mother's tear ...

We would like to help this group of survivors tell their stories.

SPECIAL THANKS TO: *Our Supporters*

(USWA) United Steelworkers of America National Director, Lawrence McBrearty and the National Health & Safety Committee for your continuing support and recent donation of \$5,000.

(CLC) Canadian Labour Congress Dick Martin & the Health & Safety Committee for their help in building links between injured workers and labour groups across the country.

(CAW) National Automobile, Aerospace, Transportation and General Workers Union of Canada **President, Buzz Hargrove** for forging strong working relationships with injured workers groups and the purchase of 300 copies of "**TOGETHER WE CAN WIN**"

HRDC Canada for their commitment to Disability rights and for the financial support that allows us to move forward.

CIWA/ACVAMT Steering Committee that contributes their time and energy to ensure our work supports local injured workers groups.

City of Thunder Bay Printers for their timely and cost efficient printing of our newsletters, and more.

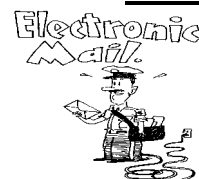
The many legal clinics, community and union organizations which have supported our cause over these past years. These include Federations of Labour, National & International Unions, local labour councils and many local unions. The list would just be too long.

Norlink Communications for connecting us up to the world.

From the bottom of our hearts, Thank You !

VISIT OUR WEB SITE:
www.ciwa.ca

Send your email to ciwa@norlink.net.



Your ideas & input are always