**** English version ****

**Case Name:**
**Rolfe v. AXA Insurance Co.**

**Between**
**AXA Insurance Company, appellant, and**
**Brenda Rolfe, respondent, and**
**NB Massotherapy Association, Association of**
**New Brunswick Massage Therapists Inc., interveners**

[2004] N.B.J. No. 67
2004 NBCA 14
No. 76/02/CA

**New Brunswick Court of Appeal**
**Drapeau C.J.N.B., Turnbull and Robertson JJ.A.**

Heard: October 23, 2003.
Judgment: February 26, 2004.
(69 paras.)

THE COURT: The appeal is dismissed. No order for costs is made as neither intervener requested such an order and the respondent did not participate in the appeal.

Appeal from judgment of the New Brunswick Court of Queen's Bench, [2002] N.B.J. No. 84.

**Counsel:**

Henry J. Murphy, for the appellant.
Michael F.G. Noel, for the respondent.
Daniel R. Theriault, for the intervener, NB Massotherapy Association.
Robert B. Jackson, for the intervener, Association of New Brunswick Massage Therapists Inc.

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Reasons for judgment by: Drapeau C.J.N.B. Concurred in by: Turnbull and Robertson JJ.A.

¶ 1 **DRAPEAU C.J.N.B.**:— Massage therapy treatments consist primarily of manual manipulation of the soft tissues of the body for remedial purposes. Physicians are more and more disposed to prescribe professional massage therapy as part of the overall medical response to accident-related injuries to the soft tissues of the back. All recognize that massage therapy is not a quick fix; indeed, it typically involves numerous treatment sessions and can prove to be quite expensive. Those observations explain, at least in part, why the issue raised by the present appeal, one of first impression for this Court, is of interest to a host of stakeholders in the field of auto insurance, including coverage providers, consumers and professional massage therapists.

¶ 2 The precise issue that this Court must resolve is whether Subsection 1(1) of Section B in New Brunswick's Standard Automobile Policy excludes recovery of reasonable expenses for massage therapy treatments prescribed by the insured's physician and rendered by a professional massage therapist, if the therapy is not, in the opinion of insurer's medical advisor, essential for treatment, occupational retraining or rehabilitation.

¶ 3 While this Court's decision settles no more than the specific debate outlined above, its underlying rationale provides guideposts for the proper disposition of claims for payment of reasonable expenses for multifarious forms of medical treatment prescribed by a physician, and administered by another duly qualified health professional.

¶ 4 The pertinent part of Section B reads as follows:

> Section B - Accident Benefits
>
> The Insurer agrees to pay to or with respect to each insured person as defined in this section who sustains bodily injury or death by an accident arising out of the use or operation of an automobile:
>
> Subsection I - Medical, Rehabilitation and Funeral Expenses

(1) All reasonable expenses incurred within four years from the date of the accident as a result of such injury for necessary medical, surgical, dental, chiropractic, hospital, professional nursing and ambulance service and for any other service within the meaning of entitled services in the Hospital Services Act or the Medical Services Payment Act and for such other services and supplies which are, in the opinion of the physician of the insured person's choice and that of the Insurer's medical advisor, essential for the treatment, occupational retraining or rehabilitation of said person, to the limit of $50,000 per person.

(2) Funeral expenses incurred up to the amount of $ 2,500 in respect of the death of any one person.

> The Insurer shall not be liable under this subsection for those portions of such expenses payable or recoverable under any medical, surgical, dental, or hospitalization plan or law or, except for similar insurance provided under another automobile insurance contract, under any other insurance contract or certificate issued to or for the benefit of, any insured person.

* * *

¶ 5 Subsection 1(1) refers to three categories of insured services. The parties agree that only Category 1 and Category 3 are relevant here.

¶ 6 Category 1 services include "medical" services. Reasonable expenses for Category 1 services are recoverable if those services are "necessary", a question of fact to be determined by the courts in the event of disagreement. It is common ground among the parties that an insured may recover all reasonable expenses for Category 1 services, even if the insurer's medical advisor is of the opinion that those services are not essential for treatment, occupational retraining or rehabilitation. The situation is clearly otherwise for Category 3 services. In the case at bar, both the Small Claims Adjudicator and the Court of Queen's Bench judge, sitting on appeal by way of a trial de novo, found that the prescribed massage therapy treatments were necessary medical services.

¶ 7 Category 3 services consist of services -other than those provided for under Categories 1 and 2 -"which are, in the opinion of the physician of the insured person's choice and that of the insurer's medical advisor, essential for the treatment, occupational retraining or rehabilitation of said person ...". The appellant insurer submits that Category 1 "medical" services are restricted to services performed by a physician and that any claim for reimbursement of expenses for massage therapy stands to be determined under Category 3.

¶ 8 The respondent's physician prescribed the massage therapy that gave rise to her claim for benefits under Subsection 1(1), and the present litigation, but the appellant's medical advisor is of the opinion that the therapy does not meet the essentiality test applicable to Category 3 services. While the respondent's physician disputes that opinion, the weight of judicial authority supports the view that, if the massage therapy treatments are indeed Category 3 services, and not Category 1 "medical" services, the opinion of the insurer's medical advisor prevails (see Davis v. Wawanesa Mutual Insurance Co., [1990] O.J. No. 1075 (Dist.Ct.)(Q.L.); Lightstone v. Canadian Provincial Insurance Co. (1985), 52 O.R. (2d) 34 (H.C.J.) and Masson v. Scottish and York Insurance Co., [1990] I.L.R. 1-2605 (Ont. Div. Ct.), (1990), 69 D.L.R. (4th) 474 (Ont.Div.Ct.), affirmed (1992), 93 D.L.R (4th) 768 (C.A.)).

¶ 9 Accordingly, the outcome of the present appeal turns on whether massage therapy treatments administered in the circumstances mentioned above constitute Category 1 "medical" services. Like Justice Riordon of the Court of Queen's Bench, who authored the decision under appeal, and the Small Claims Adjudicator whose decision he upheld, I conclude that they do.

CONTEXT

1) Facts

¶ 10 On April 26, 1999, the respondent, Brenda Rolfe, suffered injuries to the soft tissues of her back in a motor vehicle accident. Her treating physician, Dr. John A. McCann, recommended that she undergo massage therapy for the treatment of those bodily injuries.

¶ 11 Between mid-1999 and May 10, 2000, Ms. Rolfe received 61 massage therapy treatments from James Hannah, a duly qualified professional massage therapist employed by Dove Massage Therapy, a private clinic. Her auto insurer, the appellant AXA Insurance Company, paid for those treatments under Subsection 1(1) of Section B.

¶ 12 In a medico-legal report dated June 28, 2000, AXA's medical advisor, Dr. D.D. Smith, makes the observation that "if [Ms. Rolfe] has had 61 massage therapy treatments and continues to have the problems she reports I don't think much will be achieved by additional treatments". The courts below inferred from that observation that it was Dr. Smith's opinion that further massage therapy treatments were not "essential [to Ms. Rolfe's] treatment, occupational retraining or rehabilitation" within the meaning of Category 3. That inference is not contested. On the strength of Dr. Smith's June 28, 2000 report, AXA refused to honor any subsequent claims for massage therapy treatments.

¶ 13 Ms. Rolfe's treating physician demurred. In a report dated September 12, 2000, Dr. McCann noted that Ms. Rolfe found massage therapy to be helpful in that it relaxed her, and thus decreased the pain in the injured muscles of her back. He strongly disagreed with Dr. Smith's observation as reported above. In Dr. McCann's opinion, his patient, Ms. Rolfe, would continue to benefit from massage therapy treatments and any related expenses should be paid by AXA.

¶ 14 On Dr. McCann's advice, Ms. Rolfe underwent seven additional massage therapy treatments at the hands of Mr. Hannah, for which she paid the sum of $966. When AXA denied payment of Ms. Rolfe's claim for reimbursement of that outlay, she sued in Small Claims Court.

2) Judicial history

¶ 15 The Small Claims Adjudicator, Geri Mahoney, agreed with Ms. Rolfe's contention that she was entitled, under Subsection 1(1), to reimbursement of her outlay, despite the negative opinion of AXA's medical advisor concerning the essentiality of massage therapy for her treatment, occupational retraining or rehabilitation.

¶ 16 In her thorough reasons for judgment, Adjudicator Mahoney noted that massage therapy is "becoming more common as a mode of treatment for muscular back injuries" and that massage therapists are typically university or college trained individuals. She found that Mr. Hannah was a duly qualified massage therapist whose services were professional in nature. Adjudicator Mahoney also found that the massage therapy treatments at issue had been performed for the purpose of remedying Ms. Rolfe's accident-related bodily injuries.

¶ 17 Adjudicator Mahoney accepted the view that Subsection 1(1) sets out three categories of services: Category 1 services include all necessary medical services that are professional in nature; as for Category 2 services, they consist of "entitled services" within the meaning of the Hospital Services Act, R.S.N.B. 1973, c. H-9 or the Medical Services Payment Act, R.S.N.B. 1973, c. M-7, other than the services covered by Category 1, and; finally, Category 3 is concerned with services rendered by non-professionals. By that interpretation of Subsection 1(1), Adjudicator Mahoney gave her imprimatur to the views expressed by Southey J., for the majority of the Divisional Court,

in Masson concerning the scheme set up by the corresponding Ontario no-fault legislative provision.

¶ 18 As Adjudicator Mahoney saw the matter, the contra proferentem rule of interpretation argued for the attribution of a broad meaning to the adjective "medical". After noting that the issue before her had been dealt with and resolved in favor of the insured in Walker v. Economical Mutual Insurance Co., [1992] A.J. No. 86 (Prov.Ct.)(Q.L.), Adjudicator Mahoney ruled that massage therapy treatments, prescribed by a physician and provided by a duly qualified professional massage therapist, constituted "medical" services within Category 1. She went on to hold that "the massage therapy treatments, prescribed by Dr. McCann for [Ms. Rolfe] fall within the so-called first category as being 'medical services'".

¶ 19 In equally thorough reasons for judgment, now reported at [2002] N.B.R. (2d) (Supp.) No. 20 (Q.B.), [2002] N.B.J. No. 84 (Q.B.)(Q.L.), Justice Riordon reviewed the cases on point and adopted an interpretation of the adjective "medical" that is even broader than the one subscribed to by Adjudicator Mahoney. At para. 26, he determined that "massage therapy ... is a medical service if it is prescribed by a medical doctor or in instances where the treating doctor refers the patient to a qualified massage therapist for treatment". He then found, as a fact, that the massage therapy treatments received by Ms. Rolfe were "necessary" and that the expenses for those services were "reasonable". AXA does not take issue with those specific findings of fact; its position is that they are not dispositive of entitlement for Category 3 purposes.

¶ 20 Justice Riordon dismissed AXA's appeal by trial de novo under the Small Claims Act, S.N.B. 1997, c. S-9.1. He allowed Ms. Rolfe's action and directed that judgment be entered in her favor for the amount of her claim ($966), together with costs of $750.

3) Parties' Submissions

¶ 21 AXA appeals, with leave. It submits that the interpretation adopted in the courts below overlooks the restricting influence that the enumeration "surgical, dental, chiropractic, hospital, professional nursing and ambulance" has on the meaning of the adjective "medical" and conflicts with the following jurisprudence: Abado v. State Farm Mutual Automobile Insurance Company, [1983] I.L.R. para. 1-1607 at 6186 (Ont. Co. Ct.), affirmed without reasons at (1983), 20 A.C.W.S. (2d) 210 (Ont. C.A.); Rees v. Pilot Insurance Co., [1987] O.J. No. 1409 (Dist.Ct.)(Q.L.), Davis and Briglio v. Faulkner, [1999] B.C.J. No. 2377 (S.C.)(Q.L.). At the hearing of the appeal, counsel for AXA summarized his client's position as follows: Category 1 "medical" services are limited to professional services performed by a physician. That reading of the adjective "medical" has it identifying not just the nature of the service but, as well, its provider.

¶ 22 Ms. Rolfe did not participate in the proceedings in this Court.

¶ 23 The interveners are provincial associations representing professional massage therapists. They rightly recognize that AXA's interpretation would invest the insurer's medical advisor - an individual who need not be independent of that insurer - with a veto power over access to Section B funding for their services. The interveners urge this Court to dismiss the appeal, contending that Justice Riordon engaged in an error-free determination of the contextual meaning of the adjective "medical" in Subsection 1(1).

They seek to buttress that contention by arguing that the impugned determination is, at bottom, a conclusion of mixed law and fact and that it ought to withstand appellate scrutiny unless it is shown to have resulted from a palpable and overriding error. The interveners submit that AXA has failed to identify any such error.

¶ 24 Indeed, it is the interveners' submission that Justice Riordon's determination reflects a judicious application of the principles governing the interpretation of Section B, including the contra proferentem rule of interpretation, as set out in Courtney v. Royal and Sun Alliance Insurance Co. (2001), 237 N.B.R. (2d) 289 (C.A.) and that the decision under appeal is fully in synch with the case-law directly on point: Walker and Lamrock v. Wellington Insurance Co. (1999), 222 N.B.R. (2d) 374 (Q.B.).

4) Relevant provisions of the Insurance Act, R.S.N.B. 1973, c. I-12.

256(1) Where in a contract an insurer provides insurance against expenses for medical, surgical, dental, ambulance, hospital, professional nursing or funeral services, the insurance applies only in respect of reasonable expenses,

a) of or incurred for any person who sustains bodily injury or death while driving or being carried in or upon or entering or getting on to or alighting from or, if not the occupant of another automobile, as a result of being struck by an automobile owned by the insured named in the contract in respect of which insurance of the class mentioned in paragraph (a) of the definition of "automobile insurance" in section 1 is provided under the contract, and

b) of the insured named in the contract and his or her spouse and any dependent relative residing in the same dwelling premises as the insured named in the contract who sustains bodily injury or death while driving or being carried in or upon or entering or getting on to or alighting from or as a result of being struck by any other automobile that is defined in the contract for the purposes of that insurance.

256(2) Where an insurer makes a payment under a contract of insurance referred to in subsection (1), the payment constitutes, to the extent of such payment, a release by the insured person or his personal representatives of any claim that the insured person or his personal representatives or any person claiming through or under him or by virtue of the Fatal Accidents Act may have against the insurer and any other person who may be liable to the insured person or his personal representatives if that other person is insured under a contract of the same type as is specified in subsection (1), but nothing in this subsection precludes an insurer from demanding, as a condition precedent to payment, a release

to the extent of the payment from the person insured or his personal representatives or any other person.

[...]

263(2) Where a claimant is entitled to the benefit of insurance referred to in section 256 or 257 this, to the extent of payments made or available to the claimant thereunder, constitutes a release by the claimant of any claim against the person liable to the claimant or the insurer of the person liable to the claimant.

264 Every contract evidenced by a motor vehicle liability policy provides

(a) Repealed: 1989, c.17, s.5.

(b) insurance described in section 256 against expenses for medical, surgical, dental, ambulance, hospital, professional nursing or funeral services, and

(c) accident insurance benefits described in section 257 in respect of death of or injury to an insured person,

as set forth in Subsections 1 and 2 of Section B, Accident Benefits, of the New Brunswick Standard Automobile Policy approved by the Superintendent under section 226.

* * *

[...]

ANALYSIS AND DECISION

¶ 25 It is axiomatic that courts are not at liberty to ascribe to contractual wording a meaning that it cannot reasonably bear. The same holds true with insurance policy wording, including no-fault auto insurance wording. That said, whenever the wording of an insuring provision, whether legislative or contractual, is open to more than a single

reasonable interpretation, courts should opt for the one that benefits the insured (see Amos v. Insurance Corp. of British Columbia, [1995] 3 S.C.R. 405). Examples abound of applications of that approach to provisions with wording similar to that of Subsection 1(1). Thus, despite the absence of explicit wording on the subject, courts have generally held that expenses incidental to the procurement of Subsection 1(1) services, such as the cost of related meals, lodging and transportation, are covered (see Carroll v. The Citadel General Assurance Company, [1983] I.L.R. para. 1-1640 at 6297 (Ont.Div.Ct.); Rovers et al. v. MacKay (1987), 41 D.L.R. (4th) 193 (N.S.C.A.), [1987] N.S.J. No. 279 (C.A.)(Q.L.); and Petersen v. Bannon (1991), 1 C.C.L.I. (2d) 232 (B.C.S.C.), [1991] B.C.J. No. 499 (S.C.)(Q.L.)).

¶ 26 To date, however, the track record of judicial interpretations is mixed insofar as the expression "medical services" is concerned (see Craig Brown, No-Fault Automobile Insurance in Canada, (Toronto: Carswell, 1988) at pp. 68-69). Thus, while Abado holds that hydrotherapy treatments are not Category 1 "medical services", Walker accepts that massage therapy treatments constitute such services and Lamrock does likewise for physiotherapy. (While one might be forgiven for thinking that massage therapy is but a particular form of physiotherapy, there may be valid technical reasons to segregate the two and to deal with each as a discrete professional service).

¶ 27 In Abado, the trial judge felt constrained by the "expressio unius exclusio alterius" rule of interpretation to conclude that a narrow meaning of the expression "medical services" was appropriate. It is undoubtedly true that the mention of specific sub-classes of a genus may be indicative of a legislative intention to atrophy the scope of an expression, whose use would otherwise be taken to describe that genus in full. It should be remembered, however, that rules of statutory interpretation "do not impose binding constraints on judges and other official interpreters" (see Ruth Sullivan, Statutory Interpretation (Concord, Ont.: Irwin Law, 1996), at p. 32). That point is most eloquently made by Lord Reid in Maunsell v. Olins and Another, [1975] A.C. 373 (H.L.) at p. 382:

> [Rules of interpretation] are not rules in the ordinary sense of having some binding force. They are our servants, not our masters. They are aids to construction, presumptions or pointers. Not infrequently one "rule" points in one direction, another in a different direction. In each case we must look at all relevant circumstances and decide as a matter of judgment what weight to attach to any particular "rule".

¶ 28 It is trite law that context-driven interpretation by implication may overwhelm and displace the ordinary meaning of words and expressions (see Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27 at para. 21). Of course, that is not necessarily the outcome in all cases.

¶ 29 Sections 256(1) and 264 of the Insurance Act are coverage provisions. One would expect that the Legislature settled upon their wording knowing full well that it would be interpreted largely and liberally in favor of the insured, if that option was reasonably open to the courts, and with an understanding of prior related judicial interpretations (see Amos at para. 15).

¶ 30 The expression "medical services" is commonly understood to describe a generic class of services whose common aim is healing (see Abado at p. 6188). Unarguably, professional massage therapy treatments prescribed by a physician come within that description. The issue that concerns us here is whether a contextual analysis of that expression as found in s. 256(1) and s. 264 of the Insurance Act compels a different conclusion.

a) The standard of review

¶ 31 As mentioned, the interveners take the position that the question to be decided by this Court is one of mixed law and fact. They submit that the decision under appeal can only be set aside if it is the product of a palpable and overriding error. With respect, I disagree.

¶ 32 When, as here, the parol evidence rule does not come into play, it is difficult, if not impossible, to imagine how the meaning and effect of contractual terms could be anything other than questions of law alone (see Yvon Sales & Service Ltd. (Trustee of) v. Grand Falls Credit Union Ltd., [1998] N.B.J. No. 41 (Q.L.)(C.A.) at para. 16; Controls & Equipment Ltd. v. Ramco Contractors Ltd. et al. (1999), 209 N.B.R. (2d) 1 (C.A.) at para. 7; and Strait Crossing Inc. et al. v. Workplace, Health, Safety and Compensation Commission (N.B.) et al. (1999), 252 N.B.R. (2d) 51 (C.A.) at para. 24). In the case at bar, none of the underlying facts are in dispute: (1) Ms. Rolfe is insured under a Standard Automobile Policy issued by AXA and, (2) the massage therapy treatments at issue in the litigation were prescribed by Dr. McCann, Ms. Rolfe's treating physician, and administered by a duly qualified professional massage therapist, Mr. Hannah. The sole unresolved question is one of statutory interpretation. That is clearly a question of law alone (see Gallant v. Workplace Health, Safety and Compensation Commission (N.B.) (2000), 228 N.B.R. (2d) 98 (C.A.) at para. 12).

b) The applicable principle of interpretation

¶ 33 Both Adjudicator Mahoney and Justice Riordon referred to the contra proferentem rule in coming to the conclusion that the massage therapy treatments performed by Mr. Hannah were Category 1 "medical services". The contra proferentem rule posits that when true ambiguity in the terms of a policy of insurance gives rise to conflicting reasonable interpretations, courts should adopt the one most favorable to the insured. This Court has held that the contra proferentem rule may assist in resolving ambiguities in the wording of Section B (see Courtney at para. 24).

¶ 34 However, as noted, the expression at issue here - "medical services" - is found both in Subsection 1(1) of Section B and its enabling legislation, namely s. 256(1) and s. 264 of the Insurance Act. The interpretative exercise required to dispose of the present appeal is therefore radically different from the one undertaken in Courtney. None of the Subsection (2) wording at issue in Courtney had been lifted from the enabling legislation, s. 257(1) of the Insurance Act; that state of affairs opened the door to the Court's application of the contra proferentem rule. While that rule may assist in the interpretation of most terms found in Section B, it cannot be invoked, as such, in the case at hand since the contractual expression is lifted verbatim from its enabling legislation.

¶ 35 In my view, the overarching interpretative principle that has application here is neatly summarized by Robertson J.A., writing for the Court, in Beaulieu v. New Brunswick, [2003] N.B.J. No. 458 (C.A.), at paras. 12-14:

> It must be remembered that the presumptive canons of statutory interpretation are residual in scope. That is to say, they do not displace the court's obligation to apply Elmer Driedger's formulation of the modern and overarching principle of statutory interpretation as found in Driedger, Construction of Statutes, 2d ed. (Toronto: Butterworths, 1983) at p. 87:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. ...
>
> Both the Supreme Court of Canada and this Court have repeatedly adopted this formulation: see Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27 at para. 21 and Hawkes v. Nolais et al. (2002), 253 N.B.R. (2d) 371 (C.A.), per Drapeau J.A. (as he then was) at para. 15. The same understanding applies to the interpretation of contracts: see Courtney v. Royal and SunAlliance Insurance (2001), 237 N.B.R. (2d) 289 (C.A.), per Drapeau J.A. (as he then was) at paras. 25-27.
>
> If the meaning of a statutory provision is ambiguous and its meaning cannot be ascertained through the application of interpretative principles, then the presumptive or residual canons of construction come into play. As well, if the court is faced with choosing between two sensible interpretations, the one favouring the party in whose favour the presumption lies is to be preferred. However, if there is no ambiguity or if one of the two possible interpretations is not sensible, the presumptive canons have no application. ...

¶ 36 In Coombe v. Constitution Insurance Co. (1980), 115 D.L.R. (3d) 499 (Ont.C.A.), leave to appeal refused at (1981), 35 N.R. 355n, Wilson J.A. (as she then was) writing for the majority, described the object of Ontario's no-fault legislation as the protection of the insured. On that basis, she urged courts to construe ambiguous provisions of that legislation in the way most favorable to the insured. Amos is an exemplar of the application of that philosophy to British Columbia's no-fault legislation.

¶ 37 In that case, a gang of six men tried to stop the van that Mr. Amos was operating. Apparently, their plan was to assault him. Mr. Amos managed to escape, but was shot in the spinal cord while driving away. To succeed in his action for no-fault benefits, Mr. Amos was required by s. 79(1) of the Revised Regulation (1984) under the B.C. Insurance (Motor Vehicle) Act, B.C. Reg. 447/83, to establish that his injury was caused by an accident that "[arose] out of the ownership, use or operation of a vehicle ...". The British Columbia courts found that he had not discharged that burden. In a unanimous judgment, the Supreme Court of Canada disagreed and allowed Mr. Amos' action.

¶ 38 In reaching its conclusion on the interpretation of the phrase "arising out of the ownership, use or operation of a vehicle" as found in s. 79(1), the Supreme Court referred to the following rules of statutory interpretation: (1) when used in legislation, common law terms and concepts are presumed to retain their common law meaning, subject to any definition supplied by the legislature; (2) prior jurisprudence interpreting those terms and expressions is useful in ascertaining legislative intention; and (3) while legislative wording must not be stretched beyond its plain and ordinary meaning, a narrow and technical interpretation that would defeat the object and insuring intent of the Legislature is not appropriate.

¶ 39 Interestingly, the Court in Amos also brought into play a rule traditionally employed to interpret contracts of insurance: clauses providing coverage are to be interpreted broadly in favor of the insured, while exclusions are to be interpreted strictly and narrowly against the insurer. I note parenthetically that in Derksen v. 539938, [2001] 3 S.C.R. 398 at paragraph 52, Major J. describes the provision interpreted in Amos as a "coverage clause". He then adds "it is [well established] that, in the construction of insurance contracts, coverage provisions should be construed broadly and exclusion clauses narrowly", implicitly accepting that the same rule applies to coverage clauses provided by legislation.

¶ 40 Applying the rules mentioned above, the Court in Amos concluded that a narrow and technical interpretation of s. 79(1) was not in order and that a motor vehicle need not be the injury-causing instrument for the causal connection requirement inherent in the phrase "in respect of death or injury caused by an accident that arises out of the ownership, use or operation of a vehicle" to be satisfied. While a bullet, rather than a motor vehicle, was the cause of Mr. Amos' spinal cord injury, it nonetheless "[arose] out of the ownership, use or operation of a motor vehicle".

c) Application to the case at bar

¶ 41 The appellant and the interveners have referred to several cases that deal with no-fault coverage for expenses incurred for services rendered by a professional health care provider other than a physician. Unfortunately, few contain a detailed analysis of the provisions at issue, whether legislative or contractual, or articulate a principled application of the rules of interpretation adumbrated above.

¶ 42 In Lamrock the New Brunswick Court of Queen's Bench found that physiotherapy was a Category 1 medical service; in Rees the Ontario District Court held that it was a Category 3 service. Neither decision features a rationale for its conclusion. In Davis the court and the parties proceeded on the assumption that professional massage therapy treatments were Category 3 services and, as a result, the decision does not address the applicability of Category 1. Briglio is likewise of no assistance: it dealt with a British Columbia statutory provision whose wording is significantly different from that of our Insurance Act's key provisions and Subsection 1(1).

¶ 43 In Walker the court held that massage therapy administered by a member of the Alberta Massage Therapists Association was a Category 1 "medical service". The court invoked the uberrima fides nature of insurance contracts to support its conclusion. With respect, that rationale is unpersuasive. The fact that a contract of insurance is one calling for good faith conduct by both the insurer and the insured sheds no light on the

meaning of its provisions. That brings me to the one decision that features a detailed rationale for its conclusion regarding the meaning of the expression "medical services" in Subsection 1(1): Abado.

¶ 44 In Abado, the trial judge acknowledged that, in its classic sense, the expression "medical services" was sufficiently broad to include any services whose objective was healing. He nonetheless concluded that a number of contextual indicators of legislative intention compelled a narrower interpretation of the quoted expression as found in Subsection 1(1) of Schedule C appended to the Insurance Act, R.S.O. 1980, c. 218. The explicit reference to surgical, chiropractic, hospital and nursing services in Subsection 1(1) of the Ontario legislative provision when initially adopted in 1971 was a first indicator of such an intention. In the judge's view, if the Ontario Legislature intended the expression "medical service" to carry its classic meaning, it would not have been necessary to include in Subsection 1(1) surgical, chiropractic, hospital and nursing services "as those would all be included in the classic definition of medical service". The second indicator of a legislative intention to narrow the classic meaning of the adjective "medical" was the 1978 legislative amendment to Subsection 1(1) adding chiropractic services to the list of Category 1 services. In the judge's view, as the expression "medical services" in its classic sense would include any and all curative services, and therefore chiropractic services, the addition of the latter to the statutory list of services "was an indication that the medical services provided for did not refer to the catch-all medical services of the classic definition". In the result, the narrowing of the classic sense of "medical services" required by those contextual indicators operated to exclude from its purview the hydrotherapy treatments undertaken by Ms. Abado on the advice of her treating physician.

¶ 45 In this Province, unlike Ontario, the Insurance Act was never amended to explicitly provide for the inclusion of chiropractic services in the list of Category 1 services set out in Subsection 1(1) of Section B of New Brunswick's Standard Auto Policy. Section 264 requires, as it has since its adoption in 1980, that every contract evidenced by a motor vehicle liability policy provide "insurance described in section 256" against expenses for "medical, surgical, dental, ambulance, hospital or professional nursing or funeral services". Thus, sections 256(1) and 264 provide the springboard for the inclusion of Subsection 1(1) in the Standard Auto Policy.

¶ 46 The Superintendent of Insurance added chiropractic services to Subsection 1(1) of Section B of the Policy in 1984. The only insurance mentioned in s. 264 that could conceivably permit the inclusion in Subsection 1(1) of insurance against expenses for chiropractic services is "insurance described in section 256 against expenses for medical [...] services". If anything, the addition of chiropractic services to the list of Category 1 services, without any amendment to s. 256(1) and s. 264, suggests that the Superintendent understood the scope of the expression "medical services" in the enabling legislation to be wider than merely professional services rendered by a physician; he clearly considered the breadth of the expression to be such that it permitted the inclusion in Subsection 1(1) of services performed by other health care professionals, such as chiropractors.

¶ 47 Prior to the 1984 modification of Subsection 1(1) of Section B of the Policy, there were two schools of thought on the question whether chiropractic services were Category 1 "medical services". Some interpreted the quoted expression in the narrow

manner championed by AXA, others in the large and liberal manner chosen by the courts below. The 1984 amendment to Subsection 1(1) was a pragmatic response to a practical problem: those struggling with the practical application of Subsection 1(1), adjusters and insured persons unschooled in the niceties of principled contractual and statutory interpretation, needed a clear and unambiguous confirmation that reasonable expenses for necessary chiropractic services were recoverable as Category 1 expenses. The word "chiropractic" was inserted after "dental" to eliminate "any argument as to whether chiropractic treatment is considered medical treatment or not" (see John NewCombe, The Standard Automobile Policy Annotated, (Toronto: Butterworths, 1986) at p. 35).

¶ 48 The outstanding question is therefore narrow: Did the Legislature intend by the use of the qualifiers "surgical, dental, ambulance, hospital [and] professional nursing" to limit "medical services" to professional services rendered by a physician? One must consider both the immediate and the "larger" context to formulate the answer (see Sullivan, Statutory Interpretation, at p. 108). In the case at hand, that larger context includes the object of s. 256(1) and s. 264, the third-party release scheme that sections 256-264 establish, prior jurisprudence interpreting the expression "medical services" and the interpretation of the quoted expression evidenced by the Superintendent's approval of the current wording of Subsection 1(1).

(i) Object of s. 256(1) and s. 264

¶ 49 The object of s. 256(1) is to provide for optional no-fault auto insurance against expenses for specified services. The object of s. 264 is to make that insurance mandatory in the Standard Automobile Policy. Both s. 256(1) and s. 264 are coverage provisions. As such, they are to be interpreted largely and liberally in a manner that favors the insured. AXA's proposed interpretation is narrow: it would deny any meaningful significance to the expression "medical services".

¶ 50 Indeed, if AXA's interpretation were accepted, the ambit of application of the expression "medical services" would be negligible, having regard to the fact that the vast majority of physician services required in connection with an accident covered by the Policy are fully paid for under Medicare. At the hearing, counsel for AXA was hard-pressed to provide a concrete example of an expense for medical services that would qualify under the interpretation urged by his client; he could do no better than suggest expenses for services rendered by physicians outside Canada. Try as I might, I cannot bring myself to believe that in referring explicitly to "surgical, dental, hospital, professional nursing and ambulance" services in s. 256(1) and s. 264, the Legislature intended to so limit the scope of the expression "medical services". The object of s. 256(1) and s. 264 clearly militates in favor of ascribing to the expression "medical services" a broader meaning than the one advocated by AXA.

(ii) Legislative scheme

¶ 51 The scheme put in place by sections 256(1), 256(2), 263(2) and 264 is straightforward. While s. 256(1), which was enacted in 1968, did not make mandatory the no-fault coverage to which it referred, like its counterpart in Ontario, it "laid down some general principles with which any insurance of the type envisaged had to comply" (see Brown, No-Fault Automobile Insurance in Canada at p. 16). As for s. 256(2), which

was also adopted in 1968, it releases the insurer and a limited class of tortfeasors insured under a contract of the same type as was specified in section 256(1).

¶ 52 Significantly, the release provided by s. 256(2) applies only to a "payment under a contract of insurance referred to in subsection (1)", that is to say, a contract of insurance providing, inter alia, no-fault benefits to statutorily specified beneficiaries for "medical, surgical, dental, ambulance, hospital, professional nursing or funeral services". A payment for services falling outside the statutory list would not trigger the application of section 256(2).

¶ 53 Subsection 1(1) of Section B of the Policy has provided insurance against expenses for chiropractic services and Category 3 services since the 1980s. If AXA's interpretation carried the day, third-party insurers would not have been entitled to the release provided by s. 256(2) and s. 263(2) for chiropractic services and Category 3 services, since those services would not be "medical services". That result is contrary to well-settled law and practice.

(iii) Prior judicial interpretations

¶ 54 Before it found its way into Canadian no-fault legislation, the expression "medical services" was commonly employed in American workers' compensation legislation as part of an enumeration identifying insured health care services. American decisions interpreting the expression in question are, therefore, of interest. In Meuse's Case, 159 N.E. 636 (Mass. S. Ct. 1928), the Court held that the expression "medical services" in a provision of the Massachusetts Workmen's Compensation Law, that required an insurer to furnish an injured employee "adequate and reasonable medical and hospital services, and medicines if needed", included the services of a nurse or trained attendant rendered under the direction and control of a physician. In a subsequent decision, Haggerty's Case, 11 N.E. (2d) 583 (Mass. S.Ct. 1937), the Court held that massage treatments prescribed by an injured employee's attending physician, and given under his supervision and control, were "medical services" within the meaning of the quoted phrase interpreted in Meuse's Case. The expression "medical services" has also attracted a broad interpretation in other legislative spheres.

¶ 55 Thus, in Honeybone v. Hambridge (1886), 18 Q.B.D. 418, the Court held that the adjective "medical" in the phrase "medical or surgical assistance" found in the Medical Relief Disqualification Removal Act, 1885 c.46 was broad enough to include the attendance of a mid-wife. In Park View Hospital Ass'n Inc. v. Peoples Bank & Trust Co., 189 S.E. 766 (N.C.S.C. 1937), it was determined that the expression "medical services", as used in a statute giving priority among other debts of the deceased to bills for "medical services", included all services prescribed by the physician of the deceased that were reasonably necessary for his care, comfort and proper treatment.

¶ 56 The case of Morris v. Fireman's Fund Insurance Company, 384 P. 2d 465 (N.M.S.C. 1963) is particularly noteworthy because it is generally contemporaneous with the adoption of s. 256(1) and it interprets a no-fault medical benefits clause whose wording bears some similarity with the part of section 256(1) at issue here. The New Mexico auto insurance provision interpreted in Morris obligated the insurer to pay all reasonable expenses incurred within one year from the date of the accident for "necessary medical, surgical and dental services, including prosthetic devices, and

necessary ambulance, hospital, professional nursing and funeral services". The insurer submitted that only services performed by professional persons in a recognized institution or in a hospital were covered. The Supreme Court of New Mexico rejected that interpretation. Justice Chavez, who delivered the Court's decision, noted that the clause in question did not contain words of limitation that might have supported the insurer's argument. He then made the following insightful observation at p. 468:

> Appellant agreed to pay all reasonable expenses incurred for necessary medical, surgical and dental services, including prosthetic devices and necessary ambulance, hospital, professional nursing and funeral services. If appellant desired to limit the coverage to "those services performed by professional persons in a recognized institution," or "while confined in a hospital," it should have been so provided in clear and unambiguous language.

¶ 57 Tellingly, when the Legislature of this Province enacted s. 256(1), it did not see fit to insert words that would have clearly and unambiguously limited the envisioned "medical services" to professional services rendered by a physician. For that matter, the Superintendent of Insurance has never approved any such words of limitation.

(iv) Administrative interpretation

¶ 58 Recall that the insurance described in s. 256(1) is insurance against expenses for "medical, surgical, dental, ambulance, hospital, professional nursing or funeral services". Needless to say, the Standard Automobile Policy approved by the Superintendent under s. 226 must conform to s. 256(1) and s. 264(b). Specifically, Subsection 1(1) of Section B must, as dictated by s. 264(b), set forth "insurance described in section 256 against expenses for medical, surgical, dental, ambulance, hospital, professional nursing or funeral services". It follows that the wording of Subsection 1(1), which must be approved by the Superintendent under s. 226, evidences his understanding of sections 256(1) and 264. Interestingly, the appellant readily acknowledges at paragraph 57 of its Submission that, since s. 264's adoption, "policies [have been] provided by the insurance industry and accepted by the Superintendent of Insurance pursuant to the Insurance Act". It would follow that the wording of Subsection 1(1) also reflects the insurance industry's understanding of sections 256(1) and 264.

¶ 59 While administrative interpretation has been brought into play primarily in connection with judicial interpretations of ambiguous provisions of the federal Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) (see Will-Kare Paving & Contracting Ltd. v. Canada, [2000] 1 S.C.R. 915, per Binnie J., dissenting, at para. 66), its relevance as an aid to interpretation extends in principle to all legislation (see Ruth Sullivan, Statutory Interpretation, at pp. 217-18, where the author lucidly explains the basis for judicial consideration of administrative interpretation and the latter's limited role).

¶ 60 In my view, the Superintendent's broad understanding of the scope of the statutory expression "medical services" as manifested through the wording of Subsection 1(1), although far from determinative, is relevant to the interpretative exercise required here and argues against the position taken by AXA.

¶ 61 I pointed out at paragraph 46 of these reasons that the Superintendent's approval of a rewrite of Subsection 1(1) expressly adding chiropractic services to the list of Category 1 services, reflected an understanding of the expression "medical services" that is broader than the interpretation put forward by AXA. There are other indicators of such an understanding.

¶ 62 Insurance against expenses for Category 3 services, which need not be provided by a physician, could only find its way into Subsection 1(1) of Section B if the Superintendent considered it "insurance described in s. 256(1) against expenses for medical [...] services" within the meaning of section 264(b). No other insurance described in s. 256(1) would enable the Superintendent to set forth in Subsection 1(1) insurance against expenses for Category 3 services. Obviously, in approving Subsection 1(1), the Superintendent did not subscribe to the narrow interpretation of "medical services" that AXA invites this Court to adopt.

¶ 63 In addition, AXA's narrow interpretation of the term "medical" in Category 1 would have to be carried over to the closing paragraph of Subsection 1, which provides, inter alia, that the insurer "shall not be liable under this subsection for those portions of such expenses payable or recoverable under any medical, surgical, dental or hospitalization plan or law except ...". The underlined part has been interpreted to mean that the insurer is not liable for any medical expenses covered by any other hospital, medical or dental plan or law (see The Canadian Encyclopedic Digest (Ont.), (Toronto: Carswell, 1995) Vol. 17 at para. 613). The expression "medical plan" refers to a plan providing for the payment of expenses for the various medical services provided for under the three categories set out in Subsection 1(1), not just expenses for services rendered by physicians.

¶ 64 Subsection 1(1) should be interpreted in a manner that, to the extent possible, gives effect to each of its terms.

¶ 65 Category 2 services include services rendered by medical practitioners that qualify as "entitled services" under the Medical Services Payment Act. It may be that Category 2 has no current practical value; indeed, I know of no judicial precedent allowing an expense under Category 2. In the reported cases, the expenses, when allowed, fall under either Category 1 or 3. That said, the inclusion within Category 2 of services within the meaning of "entitled services" in the Medical Services Payment Act suggests that, in the Superintendent's view, Category 1 "medical services" are services whose providers are not medical practitioners. After all, under s. 1 of the Medical Services Payment Act, "entitled services" means, inter alia, "all services rendered by medical practitioners ... that are medically required". If, as AXA contends, Category 1 "medical services" referred only to services rendered by medical practitioners, Category 2's reference to entitled services under the Medical Services Payment Act would be redundant.

¶ 66 As well, Subsection 1(1)'s insurance against expenses for Category 3 services nuances the meaning of the expression "medical services". In Masson Southey J. expressed the opinion that Category 1 deals with "what might be described as professional services", while Category 3 targets "services by such non-professional persons as homemakers or a wide variety of services ..., but only if such services ... are essential in the opinion of the physician of the insured person's choice and that of the

insurer's medical advisor". That characterization accords a meaningful role to both Category 1 and Category 3. In my view, it reflects a sound context-driven understanding of the difference between Category 1 and 3 services.

CONCLUSON AND DISPOSITION

¶ 67 Whatever its precise reach may be, the expression "medical services" in Category 1 of Subsection 1(1) of Section B of New Brunswick's Automobile Policy certainly includes therapeutic services prescribed by a physician and rendered by a duly qualified health professional. The trial judge found the massage therapy treatments at issue here were "necessary" and the insured's related outlay reasonable. Those findings of fact are not contested.

¶ 68 As I noted in my introductory remarks, it is common ground among the parties that an insured may recover all reasonable expenses for necessary Category 1 medical services, even if the insurer's medical advisor is of the opinion that those services are not essential for treatment, occupational retraining or rehabilitation. That being so, the respondent insured's entitlement to reimbursement under Category 1 of Subsection 1(1) is apodictic.

¶ 69 I would therefore dismiss the appeal. I would make no order of costs as neither intervener requested such an order and the respondent did not participate in the appeal.

DRAPEAU C.J.N.B.
We concur:
TURNBULL J.A.
ROBERTSON J.A.