ACCIDENT BENEFIT CASE LAW UPDATE

Introduction

It has been approximately one year since we provided the last update with respect to accident benefits case law. In that time, there have been several interesting cases, although it appears that the volume of precedent setting jurisprudence is slowing. In any event, we provide you with the following recent decision from the Financial Services Commission and the Courts of Ontario.

Unborn Children

*Willard ats Zurich Insurance Company 2004 Can Lii 34777 (Ont S.C.)*

Leonard Willard died in a motor vehicle accident on August 31, 1999. Heidi Willard, Leonard’s wife, was pregnant and gave birth to Skeet Willard on September 23, 1999. Heidi Willard claimed that Skeet Willard (who was an unborn child), was a “dependent” of Leonard Willard within the meaning of the Statutory Accident Benefits Schedule (SABS) (thus entitling him to a death benefit). In order to resolve this question, Justice Gauthier relied upon the legal principle known as “en ventre sa mere”. Justice Gauthier noted that this legal fiction was previously discussed and applied by the Supreme Court of Canada. In *Montreal Tramways Company v. Leveille*, the Supreme Court of Canada found that a child who had suffered an injury while “en ventre sa mere”, (in his/her mother’s womb) has the right, after birth, to recover damages for injuries sustained in its prenatal state. The child must be born alive in order to realize the rights which began while in his mother’s womb.

In the case of *Willard v. Zurich*, Justice Gauthier found that Skeet Willard was to be considered a dependent of his father, Leonard Willard and thus entitled to death benefits under the Statutory Accident Benefits Schedule.

*Burk v.Liberty (FSCO) AO3-B000023*

 In this case, an unborn child was injured in an accident. The child was born one day after the accident and subsequently died from accident related injuries. The issue was whether or not the child’s mother was entitled to death benefits. Both the Arbitrator and the Directors Delegate (on appeal) found that the child’s mother was entitled to the death benefits. Although the child was not “a person” at the time of the accident, the child acquired all legal rights upon birth and was clearly dependent on its mother at the time of death. It should also be noted that on appeal, the Arbitrator awarded interest starting 30 days after receipt of the initial application (December 27, 1995).

Crumbling Skull Theory/Payment of Future Medical and Rehabilitation Benefits

*Munk ats ING Insurance Company, 2005 Can L11 21889*

 The Plaintiff had been involved in three accidents. The first accident was on February 16, 1993. In this accident, the Plaintiff suffered a whiplash injury and was diagnosed with degenerative disc disease. The Plaintiff returned to work after three months and continued to work 70 hours a week until her second accident of July 21, 1995.

On July 21, 1995, the Plaintiff was rear-ended in a motor vehicle accident collision and began to suffer pain and numbness in both of her arms. It was noted that she had narrowing in her spinal canal. Surgery was an option although it was not recommended as necessary at that point. The Plaintiff was, however, warned by her doctors following the second accident that if she suffered any further sudden extensions of her neck, she could be rendered a quadriplegic because of the spinal canal narrowing. They eventually settled the accident benefits from the second accident as follows:

 I Loss of Income Benefits

1. past IRBs - $100,000.00;
2. future loss of earning capacity benefits - $500,000.00;

II Supplementary medical and rehabilitation benefits

1. past benefits - $40,000.00;
2. future medical benefits - $150,000.00;
3. future rehabilitation benefits for home renovations - $75,000; for housekeeping - $110,000.00;
4. future attendant care benefits - $300,000.00;

The Plaintiff had returned to work following the second motor vehicle accident working 40 hours per week.

Unfortunately, on December 23, 1998, the Plaintiff was involved in a third motor vehicle accident where she lost control of her car and hit a bridge abutment. She began to suffer increased pain and numbness in her arms. The doctors told her that she had to have surgery on her neck in order to avoid becoming a quadriplegic. She eventually underwent two surgeries on her neck. These surgeries did prevent her from becoming a complete quadriplegic, however, after each surgery her paralysis worsened and eventually affected all four limbs. Following these surgeries, she could no longer work.

As a result of the evidence provided at Trial, Justice Lalonde found that the 1998 accident had “immediate and lasting impact on Mrs. Munk”.

The claims at Trial dealt only with Mrs. Munk’s entitlement to accident benefits following the third motor vehicle accident, specifically income replacement benefits, a catastrophic impairment, medical, rehabilitative and attendant care benefits.

Causation was a major focal point of the Defence case. Justice Lalonde recognized that a long line of accident benefit cases starting with *Levy and Traders General* had accepted the definition of the “material contribution test” as described in *Athey v.Leoneti*. Justice Lalonde found that the third motor vehicle accident was at least partly to blame for the symptoms suffered by Mrs. Munk and thus ING was responsible for paying 100% of benefits to which she was entitled.

 Justice Lalonde also went on to find that there was no place within the first party accident benefits system for the “crumbling skull” principal. Justice Lalonde found that this principal should only apply in tort cases.

 As well, Justice Lalonde found that the Plaintiff was not entitled to an award for the present value of the benefits outlined in the future cost of care report. Rather, Justice Lalonde gave the Plaintiff a declaration stating that in the future the insurer must continue to pay rehabilitation costs as outlined in the future cost of care assessment.

 This case is under appeal.

Collateral Benefits

*Diane Scott v. State Farm* (P03-00021)

 The Applicant, Diane Scott, was involved in a motor vehicle accident on March 20, 1999. Following the accident, the Applicant was entitled to income replacement benefits. The Applicant also began to receive long-term disability benefits approximately one year post accident. These long-term disability benefits were deducted from the income replacement benefits. At approximately two years post accident, the Applicant applied for a HOOPP disability pension. Ms. Scott was accepted for the HOOPP disability pension which was deducted from the LTD benefits as per her contract of employment. Thus, the long-term disability benefits payable to Ms. Scott were negligible.

 The insurer claimed that the HOOPP disability pension ought to be deducted from the IRBs.

On appeal, Director’s Delegate David Evans found that the HOOPP disability pension was not deductible. Thus, State Farm could not obtain the benefit of collateral income source.

 It should be noted that the Ontario Teachers Pension Plan has a very similar disability pension and thus any case involving hospital workers or teachers should be examined closely for these issues.

Catastrophic Impairment

*McMichael v.Belair (A02-001081)*

 The Applicant, David McMichael, was injured in a motor vehicle accident June of 1998. The Applicant suffered significant injuries including: a skull fracture; open fracture of the femur; broken ribs; fractured scapula; hemothorax as well as cuts and abrasions requiring the services of a plastic surgeon; post traumatic confusion; amnesia; mild traumatic brain injury; TMJ injury, as well as crushed T9 vertebrae with a 25% loss of vertebral height. While recuperating from his injuries, Mr. McMichael became a crack cocaine addict. Prior to the accident, he had engaged in intermittent use of cocaine which did not affect his performance of his work or family responsibilities.

 Mr. McMichael claimed to be catastrophically impaired as a result of the accident. The Applicant relied upon the following section of the Statutory Accident Benefits Schedule:

Catastrophic impairment means:

“(g) subject to subsections (2) and (3), an impairment or combination of impairments that, in accordance with the American Medical Association’s *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, results in a class 4 impairment (marked impairment) or class 5 impairment (extreme impairment) due to mental or behavioural disorder.”

 Arbitrator Muir determined that the crack cocaine addiction was a consequence of the injuries suffered in the motor vehicle accident.

 Arbitrator Muir also found that the definition of a “catastrophic impairment” should be broad and inclusive.

 In order to analyze whether or not the Applicant is catastrophically impaired in accordance with Section 2 (1.1) (g), one must examine the AMA Guideliness (4th Edition, Chapter 14). That chapter directs the assessor to identify functional limitations within four areas of the injured person’s capacities which include: activities of daily living; social functioning; concentration; persistent and pace and deterioration at work (or equivalent). Arbitrator Muir went on to find that if an injured person suffers either a marked impairment (Class IV) or an extreme impairment (Class V) in any one of the areas of capacity, then they ought to be considered catastrophically disabled.

Applicant’s Counsel in this case did a tremendous job laying a foundation with a combination of medical experts, treating physicians and lay witnesses. This case highlights the need to review and re-review our files carefully to determine whether or not a catastrophic claim can be made.

 This case is under appeal to the director.

Pay Pending Dispute

*Sivaloganathan v. Liberty Mutual (P03-00035)*

 Mr. Sivaloganathan was injured on April 3, 2001. He received income replacement benefits until December 10, 2001 when he received a notice of stoppage from Liberty. A Disability DAC report dated March 1, 2002 found the Applicant was disabled and thus he was entitled to ongoing income replacement benefits. Five months later, the insurer attempted to terminate income replacement benefits again. A dispute arose over what process the insurer could take to dispute entitlement to income replacement benefits. On appeal, the Director of Arbitration, David Draper, found that the pay pending dispute provision (Section 37 (5)) was ambiguous and as such should be interpreted in a manner that provided stronger consumer protection. Director Draper found that once the DAC had determined that the Applicant was entitled to pre-104 income replacement benefits, the insurer could not stop payment of the benefits by simply sending a notice and request for a DAC under Section 37. Rather, the insurer ought to be forced to mediate the issue and file a Statement of Claim for a declaration to cease payment of the benefits. While the insurer followed this process they were still obliged to pay the benefit.

 It should be noted that the decision did not prevent the insurer from stopping benefits at two years post accident when the test for entitlement to income replacement benefits changes. However, once the insurer has received a DAC advising of the Applicant’s going entitlement to benefits post 104, the insurer’s only recourse is mediation and issue a claim for a declaration ceasing payment of the income replacement benefits.

 Judicial review pending.

Special Award

*Thangarasa v.Gore (FSCO A02-001360)*

 The Applicant, Rueben Thangarasa, was involved in a motor vehicle accident on March 31, 1998. His income replacement benefits were terminated February 5, 2001. As a result of the accident, Mr. Thangarasa suffered serious injuries including a closed head injury; fractured ribs; lacerated liver; ruptured right globe of his eye and he lost consciousness in the accident. He was in Sunnybrook Hospital for 12 days. He was discharged to home care and enrolled in a brain injury program. An overwhelming amount of evidence from the treating physicians indicated that Mr. Thangarasa was disabled on an ongoing basis. However, the insurer obtained an IE report from Drs. Freeman and Reznek (psychiatrist) suggesting the Applicant was not disabled.

 Following the IE’s the insurance company sent Mr. Thangarasa to a Disability DAC. The DAC concluded that Mr. Thangarasa was not entitled to ongoing income replacement benefits. Following review of the evidence, Arbitrator Wilson found as follows:

“A DAC report, however official, is just that – a report. Its conclusions are not interim orders shielding parties from all and any claims of interest, nor, indeed, claims for special awards.

…

The decision to rely on the apparent conclusions of the DAC report itself, in the face of the consistent, contrary, evidence of disability given by treatment providers, and the internal inconsistencies in the DAC report itself was both beyond the limits of what is reasonable or equitable and not guided by or listening to reason.

…

While the presence of a DAC which, on the surface, validates the insurer might serve to minimize the special award given, I am not satisfied that such a response would be appropriate to this case. Given the length and breadth of the information available to the Insurer and the nature of its close involvement in the file both directly and through Crawford staff such as Laurel Smith, its actions in terminating and withholding benefits without careful consideration of the validity of the reports it purported to rely upon could be constructed as beyond unreasonable, or perhaps, even beyond patently unreasonable.”

 Thus, the Arbitrator fixed a special award at 40% of the outstanding benefits (maximum special award allowable is 50%).

*Kanareitsev v.TTC Insurance (FSCO) A02-001225.*

 This is a similar case to the one noted above where the insurance company unreasonably relied upon a DAC assessment in the face of extensive contrary evidence, and thus subjected to a special award.

Income Replacement Benefits Post 104 weeks

*Shubrook v. Lombard General Insurance Company of Canada (FSCO) A03-00361*

 Mr. Shubrook was involved in a motor vehicle accident on November 27, 1997. Before the accident, Mr. Shubrook had been working as a telephone/cable installer where 60% of his work was spent carrying and climbing ladders, and climbing telephone polls in order to install telephone cable. Much of the rest of his working life had been spent in heavy labouring positions.

 Following the accident, Mr. Shubrook suffered neck and shoulder injuries and headaches. He continued to work while receiving constant treatment including steroid injections into his neck. Driving was a major function of his job and this became increasingly difficult. Mr. Shubrook stopped working in October of 1998 because of the headaches and neck pain. He did try to return to work in December 1998 for two weeks because he didn’t have any money for Christmas but, his headache pain was debilitating. In 1999, he had surgery on the neck and following surgery there was complications and a collapsed disc ensued. As a result, in September 1999, he had a disc fusion. After the fusion, his neck pain decreased by 30-40% but he continued to have regular headaches. He attempted a course of work hardening and could not continue. After that point, Mr. Shubrook felt that he could not drive safely for long distances. Mr. Shubrook continued to have pain during regular every day activities.

 Following review of the evidence, Arbitrator Robert Kominar found that:

“The Regulation talks about an ability to ‘engage in employment’ not simply to perform discrete job tasks. In my view, to ‘engage in employment’ is to participate actively in the work relationship over some reasonable period of time. In addition, the employee must be able to meet normal employer expectations. This has nothing to do with the issue of workplace accommodations which can often facilitate a disabled person’s return to employment. Rather, I am referring to basic, common sense expectations, such as, that an employee will reliably show up for and remain at work, as well as be able to concentrate and focus sufficiently on the tasks at hand to do his or her work with some acceptable level of competence. No reasonable employer would expect anything less and no employee should expect to do any less.”

 Arbitrator Kominar also referred to *Martin v. Nova Scotia* as follows:

“The implication of the Supreme Court’s decision is that it is not morally appropriate or legally justifiable to stereotype individuals whose disabilities happen to be ‘less visible’ than others. Even though pain is subjective, not directly perceivable by outside observers, or difficult to verify or quantify, it is nonetheless real. No one in pain doubts this; and at some point in our lives most of us will come to lean this lesson. In some cases, as Justice Gonthier notes, pain can be so real and pervasive that it can destroy one’s ability to be self supporting. When responses to these situations trade on dismissiveness, stereotypes, and unwarranted generalizations, then we only compound the suffering of people and rob them of their human dignity. In Canada, *The Charter of Rights and Freedoms* as well as the provincial *Human Rights Codes* mandate that we not allow this to happen.”

 Following examination of the jurisprudence, Arbitrator Kominar found that Mr. Shubrook was entitled to income replacement benefits (post 104 weeks).

*Dicerbo v.The Citadel (FSCO) A04-000594*

 In this case, the insurer had paid the Applicant income replacement benefits following a motor vehicle accident. Payments were made such that the post-104 test was triggered. The insurer did not believe that the Applicant suffered a complete inability to perform employment and terminated his income replacement benefits. The Applicant requested a DAC which the insurer arranged. However, the DAC assessment was arranged at an inappropriate facility. The facility in question was not authorized to perform an assessment of income replacement benefits post 104 weeks.

 Upon reviewing this case, Arbitrator Renahan determined that The Citadel Insurance did not comply with the rules outlined in Section 37 of the SABS in order to stop income replacement benefits. Thus, Arbitrator Renahan ordered that The Citadel was to repay the Applicant income replacement benefits from the date of termination to date and onward until they did comply with Section 37 of the SABS.

Definition of an “insured person”

*Arreal v. Liberty Mutual Insurance Co. of Canada (FSCO) A03-001271*

 On September 17, 2000, Jeffrey Areal was involved in a motor vehicle accident and suffered catastrophic injuries. Following rehabilitation, Jeffrey was under the care of his mother, Chantal Areal. In the course of caring for her son, Mrs. Areal suffered a lower back injury. Mrs. Areal applied in her own capacity for Statutory Accident Benefits from Liberty Mutual with respect to her low back injury. Section 2 (1) (ii) states as follows:

“Insured person in respect of a particular motor vehicle liability policy means (a person) not involved in an accident but suffers psychological or mental injury as a result of an accident in or outside of Ontario that results in physical injury to his or her spouse, same sex partner, child, grandchild, parent, grandparent, brother, sister, dependent or spouse’s dependent or same sex partner’s dependent.”

 At first instance, Arbitrator Blackman found that Mrs. Areal’s coverage under the policy included payment for injuries arising from the care of her son and thus ordered Liberty Mutual pay rehabilitation expenses.

On appeal, the Director’s Delegate Makepeace determined that Mrs. Areal was not an insured person for the purposes of claiming benefits in relation to a physical injury she sustained in the care of her son. Based on her reading of Section 2 (1) (ii), Director’s Delegate Makepeace determined that no ambiguity existed to allow for the payment of these increased benefits over and above what was clearly stated in the legislation.

A few other notable cases:

*Travellers Casualty & Surety Company of Canada v. Scanlan* 74 O.R. (3rd), 682

The insured always maintains the right to choose the jurisdiction in which to dispute a claim for benefits.

# Ramalingam v. State Farm (FSCO) A02-001646

Applicant not required to attend s. 42 medical assessment.

# Vidinopulos v. Liberty Insurance (FSCO) A04-002365

Insured not required to attend s. 42 assessment.

# Hejnowicz v. Coachman (FSCO) – A03-000780

Insurer relying upon positive DAC. Arbitrator finding DAC incorrect and insured entitled to medical and rehabilitation benefits. Arbitrator also finding that the insured is entitled to interest at 2% compound monthly from the date of the Application onward.

*Lowe v. Guarantee* (O.C.A.)

Insured can sue a DAC.

*Gipson v. Pilot (Can Lii 1495 (On. S.C.)*

G2 driver with blood alcohol concentration greater than zero still entitled to all Statutory Accident Benefits (Bill 59).