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WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For decisions released the week of April 21-25, 2008

Court of Appeal comments on declaratory relief, the meaning of "incurred" and causation in accident benefits cases

Monks v. ING Insurance Company of Canada, 2008 ONCA 269 (Ontario Court of Appeal, April 14, 2008)

Insured was in three motor vehicle collisions in the span of six years, the last being 1998. She was rendered an incomplete quadriplegic following the last crash. At that time she was insured by ING. Insurer paid benefits for 3.5 years then terminated payments on the basis that insured was not catastrophically impaired. At trial, insurer did not dispute catastrophic impairment, but claimed that the impairment was caused by the first and second collisions, rather than the third. Trial judge held she had suffered a catastrophic impairment and granted declarations regarding her entitlement to various benefits, including medical and rehabilitation benefits and attendant care benefits "as incurred" on an ongoing basis as set out in spreadsheets created by a certified rehabilitation and life care planning expert. Insurer appealed.

Insurer argued that the trial judge erred in making declarations for ongoing benefits because they undermined the insurer's ability to challenge a benefit claim and failed to recognize that an insurer's liability for benefits only arises in respect of benefits "incurred" by an insured. Justice Cronk held that the declarations did not relieve the insured from substantiating specific expense claims, but insured would not have to again establish that the expenses were "reasonable and necessary". It would be up to the insurer to prove that they are not.

Justice Cronk followed the line of court and arbitration decisions rejecting a narrow definition of "incurred" and holding that the insured need not actually receive the items or services, or spend money or become legally obliged to do so, in order to have "incurred" an expense. Insurance coverage provisions are to be interpreted broadly, while coverage exclusions and restrictions are to be construed narrowly, in favour of the insured. A broad interpretation of "incurred" is consistent with the policy objectives of the SABS that aim to ensure accident victims promptly receive benefits to which they are entitled and to prevent an insurer from benefiting from an insured's lack of financial resources. See paragraphs 47 to 52 for this discussion.

The Court also confirmed that the material contribution test, as set out in *Athey v. Leonati*, applies to statutory accident benefits cases. There is no room for a "crumbling skull" theory, as there is no indication in the SABS of a legislative intent that an insurer's liability for accident benefits should be subject to discount due to pre-existing injuries caused by an unrelated accident. Justice Cronk states:

> Accordingly, where – as here – a benefits claimant's impairment is shown on the "but for" or material contribution tests to have resulted from an accident in respect of which the claimant is insured, the insurer's liability for accident benefits is engaged in accordance with the provisions of the SABS (para. 96).

In addition, the Court upheld the trial judge's award of aggravated damages, based on a failure to look after the insured's needs, even when her cognitive powers were diminished and she was in a depressive state, not carrying forward care recommendations, delaying in implementing care measures and a sudden termination of benefits.

Implications:

1. This decision confirms what the lower courts and arbitrators have held with respect to the meaning of "incurred". The Court has sent a clear signal that when the choice is between an insurer and an insured, it would rather err on the side of overpaying insured persons rather than depriving them of benefits.
2. An insurer who deprives an insured of benefits risks aggravated damages being awarded against them.
3. Declaratory relief is available in the accident benefits context with respect to ongoing benefits. Declarations do not relieve insured persons from substantiating the claim, but do relieve them from proving they are reasonable and necessary.
4. If the injuries in their totality pass the "but for test" then the insurer is liable to pay the benefits that are reasonable and necessary as a result.

This decision can be accessed on the Court of Appeal website at:
http://www.ontariocourts.on.ca/decisions/search/en/OntarioCourtsSearch_VOpenFile.cfm?serverFilePath=D%3A%5CUsers%5COntario%20Courts%5Cwww%5Cdecisions%5C2008%5Capril%5C2008ONCA0269%2Ehtm