

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of June 2 to June 7, 2008

Revisiting Legal Causation in a No-Fault World

Economical Mutual Insurance Company v. Maria Onyszkiewicz, FSCO Appeal P06-00039, May 13, 2008, Director's Delegate Lawrence Blackman

MVC on July 10, 2001. Insured applied for benefits and entitlement was denied. At Arbitration before Arbitrator Ashby, the Insured was successful and was awarded pre and post 104 week benefits with interest. The Insurer appealed on grounds which included whether the proper legal causation test was applied during the Arbitration.

The Director's Delegate noted that the appeal was argued from the view that the Insured suffered from a worsening depression prior to the MVC. He noted that the question before Arbitrator Ashby was a legal causation issue rather than a medical diagnosis. He identified function rather than diagnosis as the key element in any causation analysis.

The causation test which applies in the context of the SABS is the '*as a result of test*' – which requires that the accident materially or significantly contributed to the disability or impairment that gives rise to benefits. The test does not require the accident to be a direct or sole cause of impairment. An insured's inherent vulnerability (legally called a 'thin skull' insured) allows a positive determination of benefits entitlement. Pre-existing disease (legally called a 'crumbling skull' insured) does not result in entitlement to benefits in a no fault world, *unless there is a material or significant contribution to worsening of the pre-existing disease and/or function*. In this particular case there was sufficient evidence that the contribution of the accident to the impairment of the insured's function was more than *de minimis*.

Implications:

In the tort world, there has been much-a-do about recent cases that, on some analysis changed, and on other analysis did not change, 'legal causation'. It seems that legal causation in a no-fault world is a little more black and white.

Accessing Arbitration Decisions

If you would like to read the arbitration decisions for yourself, they can be found at <http://www.fSCO.ca/english/insurance/auto/drs/decisions/default.asp>. Please contact FSCO at 1-800-517-2332 ext. 7202 to obtain a password to gain access to the site.