

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of October 5 – 9, 2009

\$25,000 Mental Distress Damages for Denial of Benefits

McQueen v. Echelon General Insurance Company, 2009 CanLII 50865 (Ont SCJ), September 28, 2009, Justice Harris

MVC January 31, 2004. Plaintiff was injured in a rollover collision in which she sustained injuries to her arm and back as well as headaches and anxiety. Prior to the collision she was diagnosed with bi-polar disorder and experienced upper back pain and received ODSP benefits for 10 years. The insurer denied payment of housekeeping benefits, transportation expenses, and cost of medical assessments under s. 24 of the SABS. The Plaintiff sought payment of those benefits and damages for mental distress attributable to the insurer's handling of her accident benefits claim.

All benefits and expenses sought in the lawsuit were ordered to be paid by the insurer. The Disability Certificate completed by her family physician indicated that she suffered a substantial inability to perform her housekeeping tasks, that she was diagnosed with bi-polar disorder but since the MVC had no disease, condition or injury related to the MVC that could affect her disability. An OT in-home assessment indicated that the insured would have difficulty taking the bus to and from her appointments. The OT also recommended six hours per week for housekeeping assistance.

The insurer paid a one-time housekeeping benefit. The insurer had the Plaintiff assessed by a physician but did not forward the OT report to him. His opinion was limited to musculoskeletal issues. The insurer denied further payment of a housekeeping benefit based on the physician's opinion. The court found that, since the physician did not have the OT's report his opinion was flawed and was not an appropriate basis for denying payment of the benefit. Furthermore, while the OT assessed the Plaintiff for two hours, the physician conducted a superficial assessment lasting only 30 minutes.

Justice Harris found that the Plaintiff met the eligibility criteria based on the OT report and the disability certificate. The benefits and expenses were ordered to be paid.

\$25,000 was awarded to the Plaintiff for damages for mental distress. The insurer created an adversarial relationship that was likely to, and did, create mental distress. Some evidence of the insurer's adversarial approach to the claim was found in some internal insurer notes: "the claimant is expecting great things from her claim", "she has retained a lawyer" and "the lawyer is not the easiest to deal with." The Court also noted that the insurer's internal notes

documented the adjuster's communication with the Plaintiff's physicians indicating that the insured had serious injuries requiring treatment.

The insurer's handling of the claim was counterproductive to the insured's wellbeing and prevented the Plaintiff from being able to access some medical assessments. The insurer made 21 denials of 16 separate benefits over a three-year period. The medical notes recorded mental distress including stress caused by conflict and repeated denials by the insurer. Housekeeping and transportation expenses were denied despite an OT report indicating that she required those benefits. The insurer failed to submit an IME recommendation for psychological and neurological assessments to the Plaintiff's family physician or to notify the plaintiff of the recommendation. It was not sufficient that the adjuster made a request for treatment. A subsequent request for a psychological assessment was paper reviewed pursuant to section 42 and denied. The denial was made despite the opinion of three other physicians that psychological intervention was required. Finally, when medical reports conflicted, the plaintiff was not given the benefit of the doubt as to the reasonableness and necessity of housekeeping benefit.

The nature of the contract was such that a breach of its term would cause mental distress that was within reasonable contemplation of the parties. The plaintiff had a prior diagnosis of bi-polar disorder so the relationship between insurer-insured began with insured in a vulnerable state.

Implications:

This decision underscores the importance of fair dealing with an insured by an insurer, and that the adjusting process requires consideration of what may be unfavourable but consistent medical evidence from treating practitioners. Adjuster's notes are producible and can reveal an attitude of pre-judgment even for merely seeking advice about entitlement to benefits.

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.

If you have questions or comments about this edition of the newsletter, contact Karen Hulan at Legate & Associates: khulan@legate.ca.