

WHAT'S HAPPENING AT FSCO? THE LEGATE SABS UPDATE

For the week of February 15 to 19, 2010

SANITY: If the deceased Dr. W. Minor can be heard, so can L.G.

L.G. and Lombard General Insurance Company of Canada FSCO A09-000531, December 4th to 7th 2009, Arbitrator John Wilson

MVC January 20, 2003. Insured applied for and received benefits. Difficulties arose that were not resolvable at mediation. At the pre-hearing, the issue was whether L.G. had capacity to represent herself, or whether a litigation guardian be appointed. It was noted that L.G. had some frustration and difficulty in understanding information at the pre-hearing. The Insurer pointed to a diagnosis of “schizophrenic/borderline personality disorder” to support its view that a litigation guardian must be appointed there by limiting the claimant’s rights.

Arbitrator Wilson reviewed the law surrounding the limiting of a claimant’s rights. He noted that those rights should be limited on the basis of hard evidence rather than supposition. If that evidence is medical evidence, there must be an application of the medical evidence to the circumstances . . . “*the test for capacity is time and situation specific . . .*” The law surrounding capacity **presumed capacity for all citizens** and placed the burden of proving incapacity on the person who alleged incapacity. The Arbitrator noted that there was a spectrum of capacity depending on the complexity of the issues.

Wilson concluded that an alleged or definitive diagnosis of schizophrenia does not mean that a claimant lacks the capability to deal with an Arbitration. He noted that L.G. had success at Arbitration 3 years earlier against the Insurer. But, he also felt that L.G. might, (as any other person) be better represented by counsel. Finally, the Arbitrator concluded that he lacked the legislative authority to make any ‘independent’ inquiries as an Arbitrator, but had to rely on the parties submissions on capacity.

Implications:

Canadian Courts and Tribunals have recognized autonomy rights. Those rights, in part, allow citizens to represent themselves at hearings and before the Courts. For those who have the capacity to make decisions (or who have given an advanced directive while capable), we have moved beyond forced confinement of the mentally ill and forced administration of drugs and treatment. While we may disagree with choices made by some, Canadian law allows all persons to make both wise and foolish choices.



As a largely unknown fact, lawyers, Arbitrators, and Judges in English speaking countries rely on the evidence of a paranoid schizophrenic in Court or at Arbitration many times each year. Very frequently, the Oxford English Dictionary (“OED”) is cited as authority for the meaning of a word and the definition is rarely disputed. However, in the mid 1800’s one of the largest and most valuable contributors of words and definitions to the OED was a paranoid schizophrenic surgeon – Dr. W.C. Minor. Those contributions still remain in updated editions of the OED. If paranoid schizophrenic and deceased Dr. Minor can be heard and relied on today, so can L.G.

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 Dr. Brian Murphy at Legate & Associates: bmurphy@legate.ca.