

## TOP 10 ACCIDENT BENEFITS CASES OF 2007

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After canvassing a number of lawyers\* for their opinion about the most important accident benefits cases of 2007, a number of trends were evident. Most agreed on the identity of the top few cases. Most agreed that the long-term implications of those decisions have yet to be determined. And there was absolutely no consensus regarding the identity of the other cases that ought to round out the top ten. What this means, of course, is that there are several other “important” decisions that didn’t make it into this paper. With apologies to those cases that were left off of the list (and to the lawyers involved in those cases), the following are the Top 10\*\* Accident Benefits Cases of 2007.

**McMichael v. Belair (2007)**, 86 O.R. (3d) 68 (Ont. Div. Ct.)

### **“Incurred” attendant care expenses**

David McMichael was involved in an accident on June 14, 1998. He sustained a number of injuries, including a skull fracture, multiple serious orthopedic injuries, a pneumothorax, a crush fracture of his T9 vertebra, cuts and abrasions requiring plastic surgery, and a mild traumatic brain injury. However, at the time of the arbitration hearing many years after the accident, his most disabling problem was his addiction to

crack cocaine, which he allegedly developed as a result of the accident.

Belair denied his entitlement to post-104 income replacement benefits and attendant care benefits (which necessarily involved a determination of “catastrophic impairment”). All of these issues, including the causation issue related to the crack cocaine addiction, proceeded to arbitration and appeal at FSCO, where it was determined that Mr. McMichael’s addiction to crack resulted from the accident, that he had sustained a catastrophic impairment, and that he was entitled to IRBs and attendant care benefits. Both decisions (P05-00006, Dir. Delegate Makepeace, March 14, 2006, affirming A02-001081, Arbitrator Muir, March 2, 2005) are an excellent read on the issues of catastrophic impairment and causation. However, the sole issue that proceeded to the Divisional Court was the entitlement to past attendant care benefits from the date that they were denied until the date of the Arbitration decision.

The insurer took issue with the determination that Mr. McMichael had “incurred” attendant care expenses for the time period in question. Because he had alienated his family as a result of his drug addiction, and because he did not have the financial resources to pay for the required care, Mr. McMichael did not actually receive any attendant care for the relevant period of time. The insurer argued that attendant care was not “incurred” and no benefits should therefore be awarded. Mr. McMichael on the other hand argued that the term “incurred” ought to be given a broad, liberal interpretation, and that fundamental public policy considerations ought to ensure that insured persons who

have money to purchase services that had been denied by an insurer are not treated better than those persons without similar financial resources.

While many cases had dealt with the definition of “incurred” before, this case was somewhat unique in that it dealt with services that had never been rendered, and could never be replaced in the future. Arguably, this was different from the cases where care was actually rendered by a family member with no payment nor any agreement to provide payment (see *Stargratt v. Zurich Insurance Co.*, (FSCO A99-000521, October 4, 2001)) or cases where medical services were not provided in the past but could (at least in theory) be provided in the future (see *Kennelly v. Wawanesa Mutual Insurance Co.*, (FSCO A99-000139, January 21, 2000)).

Justice Lane, writing on behalf of the Court, relied upon the earlier case law and arbitration decisions, a broad and liberal interpretation of the word “incurred”, and the public policy reasons to uphold the decision of the Arbitrator and Director’s Delegate. Underlying the decision was the proper foundation that the Plaintiff had laid to support his contemporaneous claim for attendant care benefits. A proper application for benefits was made, a Form 1 was submitted, and the insurer was aware that Mr. McMicael was at “great risk” if attendant care was not provided in a timely way (a risk that ultimately manifested itself). This decision has implications for just about every category of benefits under the SABS, and will create serious concerns for insurers. The case was not appealed any further by the insurer.

**Ms. G. v. Pilot**, P06-00004, September 4, 2007 (Dir. Delegate Makepeace)

### **Catastrophic Impairment**

This is another decision in the line of cases resulting from Ms. G's motor vehicle accident on August 20, 1998, in which she sustained serious orthopedic and psychological injuries. In a previous arbitration, Ms. G was awarded nanny expenses as a rehabilitation benefit under s. 15. That decision was overturned on appeal (August 28, 2006, Dir. Delegate Makepeace) and the case is currently pending before the Divisional Court. The recently released decision deals with the issue of catastrophic impairment. The original arbitration decision of Arbitrator Blackman (A04-000446, March 16, 2006) provides an excellent overview of how an arbitrator ought to approach the catastrophic analysis, particularly when dealing with the 55% whole person impairment test.

Arbitrator Blackman was faced with a significant challenge in this case. Three different catastrophic assessments had been conducted, with several follow up reports from these assessors. The DAC had several problems, including an undisclosed conflict of interest, improper unilateral dealings with the insurer, and was incomplete because psychological issues and dental/dietary issues were not considered. After the evidence was complete, a med/rehab DAC was released with a detailed psychological evaluation, and the arbitration was reopened in order for this important evidence to be considered. He had to deal with evidence from Ms. G that painted a somewhat different picture of her impairments (particularly on the dental/dietary issues) than what was apparently reported to the various assessors.

Ms. G objected to the evidence of the DAC, based on the various breaches of the DAC guidelines (conflict of interest, unilateral communication with the insurer, and failing to have the proper assessors). The insurer took the position that, as a result of all of these problems, a new DAC ought to be ordered before the arbitration could continue. It argued that, because the SABS mandates an evaluation “in accordance with” the AMA Guides, and because the Guides require (as a starting point) a medical evaluation, Arbitrator Blackman could not come to any conclusion until a DAC had an opportunity to assess the previously unassessed impairments.

Arbitrator Blackman commented that it is not the job of an arbitrator to simply accept one of the conflicting medical opinions about catastrophic impairment, thereby rejecting the other opinions. Instead, the arbitrator ought to conduct a detailed analysis that may involve accepting some portions of some medical opinions, rejecting other portions of those same opinions, and possibly arriving at conclusions that are different from all of the medical experts. Director’s Delegate Makepeace agreed with this approach, “. . .which is consistent with Justice Spiegel's treatment of the issue in *Desbiens v. Mordini*. The *Guides* establish methods and benchmarks to facilitate reasoned and consistent impairment ratings, but they do not relieve the arbitrator of his responsibility under the *Insurance Act* to assess the evidence and decide the catastrophic impairment issue in accordance with the *SABS*.” In performing this detailed analysis, Arbitrator Blackman considered evidence that none of the catastrophic assessors had considered in coming to their conclusions. He considered the DAC, but gave it limited weight due to the

problems that he found with the DAC process and review. He arrived at different percentage ratings for various impairments than did the catastrophic assessors. And he arrived at a whole person impairment that was different than any of the catastrophic assessors. Director's Delegate Makepeace approved of this very involved approach on behalf of the Arbitrator, and upheld his decision that Ms. G had sustained a catastrophic impairment. This case must be reviewed in detail before proceeding with a hearing to determine the issue of catastrophic impairment based on the 55% whole person impairment test.

**Stranges v. Allstate (2007)**, 47 C.C.L.I. (4th) 244 (S.C.J.)

**Consequences of an insurer's failure to properly terminate IRBs**

Ms. Stranges sustained injuries in a motor vehicle accident on May 18, 1996. Income replacement benefits were paid, and then terminated in September of 1997. In the action, Ms. Stranges claimed ongoing benefits on the basis that she remained disabled, and also on the basis that Allstate had improperly terminated her benefits.

Justice Borkovich, following the reasoning of the Supreme Court in *Smith v. Co-operators General Insurance Co.*, [2002] 2 S.C.R. 129, held that the notice of termination was improper, and therefore invalid. Since an insurer must follow the provisions of the SABS (s. 64 of the Bill 164 SABS in this case) in terminating an insured's benefits, and since the insurer did not do so, he ordered the reinstatement of income replacement benefits, plus interest. Justice Borkovich also stated that he would have awarded ongoing benefits as a result of an improper DAC that was conducted. Ms. Stranges had allegedly

sustained both physical and psychological injuries as a result of the accident, but the insurer only arranged the Disability DAC with a musculo-skeletal assessor (who did comment that Ms. Stranges had a “disabling” major depressive disorder, unrelated to the motor vehicle accident). By not arranging a proper DAC, including a psychological component, the insurer was in breach of the SABS and benefits ought to be paid until a proper DAC was conducted.

It is important to point out that Justice Borkovich ordered the payment of ongoing benefits (plus interest, which totalled approximately \$600,000), even though he determined that Ms. Stranges had recovered from her injuries by the fall of 1998 and, since that time, did not meet the test for entitlement to income replacement benefits!

The potential implications of this decision are significant. Arguably, almost every termination of income replacement benefits before *Smith v. Co-operators* was not in keeping with the *SABS*. Therefore, it would reason that every insured who has not settled their accident benefit claims on a full and final basis since their benefits were improperly terminated would have a valid claim for the payment of such benefits, plus interest at 2% per month compounded monthly, from the time of the termination right up to date.

**Haimov v. ING**, A05-002734, May 9, 2007 (Arbitrator Murray)

**Entitlement to Attendant Care benefits while in hospital**

Mr. Haimov sustained devastating, catastrophic injuries in 2005. The insurer refused to pay attendant care benefits, taking the position that his attendant care needs were being met by the various hospitals and rehabilitation facilities where he resided since the

accident. His family had provided significant care since the day of the accident, in varying amounts as permitted by the different facilities where he resided. By the time of the hearing, Mr. Haimov's family was exhausted but did not have the financial resources to pay for the additional care that they alleged was required. Baycrest (the facility where Mr. Haimov resided at the time of the hearing) permitted 24 hour care to be provided by family members or private nurses, in addition to whatever supports Baycrest could provide. Mr. Haimov brought a motion for interim benefits, requesting that attendant care benefits be paid for the care that his family had provided in the past, as well as for \$6,000 per month ongoing until the full arbitration hearing. The IE concluded that Mr. Haimov required \$154.63 of attendant care per month, to assist him with exercise, and that the balance of the care that he required would be provided by the nursing staff at Baycrest.

With respect to the urgency of the matter, an issue to be considered on any motion for interim benefits, it was found that the high likelihood of Mr. Haimov suffering a seizure would potentially lead to irreparable harm if 24 hour care was not provided.

Regarding the amount of attendant care that ought to be paid by the insurer, Arbitrator Murray pointed out numerous errors and omissions that made the IE unreliable. Instead, she preferred the evidence of the various family members and specialists as to the importance of 24 hour care. Further, evidence was provided from the Ministry of Health that, "attendant care (or personal support service) is not a service provided by a nurse; is not an insured services under the HIA (*Health Insurance Act*); is not an insured hospital

service under the Act and lastly is not an OHIP insured service.” The Arbitrator therefore concluded that Mr. Haimov was entitled to the attendant care benefits requested.

A further issue arose as to the nature of the co-payment that the insurer had been making to Baycrest, in the amount of \$1,500.00 per month. The insurer took the position that this was an attendant care benefit, and therefore deductible from the benefits awarded by the Arbitrator. However, the co-payment was defined to be “the Chronic Care patient’s contribution towards **accommodation and meals**” (emphasis added) which is “charged by the hospital”. Since the Form 1 did not provide for any assessment of such expenses, it could not be said that the co-payment was an attendant care expense. It was therefore held to be a medical and rehabilitation expense, not deductible from the attendant care benefits payable by the insurer.

It is hoped that this decision will finally put to rest insurers’ refusal to pay attendant care benefits simply because an injured victim is in a hospital or rehabilitation facility.

**Vasina v. ING**, A05-001207, May 31, 2007 (Arbitrator Muir)

### **Videotaping IE exams**

Ms. Vasina claimed that she sustained a catastrophic impairment as a result of a motor vehicle accident in 2004. The insurer requested a multi-disciplinary s. 42 examination in this respect. Ms. Vasina wanted to videotape the examination, and although the insurer initially consented, it later changed its’ position due to objections from the various assessors. When Ms. Vasina insisted that, because she had been injured as a result of a

previous assessment, because previous assessors had failed to accurately report her symptoms, and because of her cognitive and memory deficits, she ought to be entitled to videotape the assessment. The insurer took the position that she had not made herself “reasonably available” for the examination and brought a motion to stay the arbitration on this basis.

Arbitrator Muir reviewed the relevant case law (including the leading decision on videotaping defence medical examinations, *Bellamy v. Johnson* (1992), 90 D.L.R. (4<sup>th</sup>) 564 (Ont. C.A.)), and in the end found that Ms. Vasina had made herself reasonably available for the examination. After a detailed review of the case law, Arbitrator Muir held that,

“An applicant must establish that there is some basis for the concern giving rise to the request. The Court of Appeal articulated the standard as "a potential for a bone fide concern". It seems to me that this includes a significant subjective component. There may be circumstances where an entirely subjective belief on the part of an applicant in, for example the unreliability of an expert would support the recording of an assessment.

...

Such requests are apparently not routine and indeed should not be, as they inevitably will add to the complexity and expense of these matters.

...

It also must be shown that the method of recording will not adversely affect the ability of the assessor to do their job and provide to the insurer the information it

needs to make a determination of entitlement. For the Court of Appeal in *Bellamy* this was the primary consideration, although in reading between the lines of the reasons of Justice Doherty, it may be that this onus is easily met by an applicant and may indeed shift at some point to the assessors in question to show what the problem with a recording would be.

...

Finally, there must be a consideration of the impact the recording of such assessments on the dispute resolution process and on the conduct of the ultimate arbitration hearing, if there is one. I do think that, as did the arbitrators in *Peters* and *Cameron*, that there are important distinctions between a section 42 (or a DAC) assessment and a defence medical that would suggest a higher level of openness and transparency than might be required in a traditional tort case.”

Arbitrator Muir commented that the videotaping might enhance settlement possibilities because Ms. Vasina would have more confidence in the conclusions of the assessment. The IE might arguably be given more weight because of the objective accuracy and completeness of the examination.

This case provides a clear road map to insureds who wish to videotape IE assessments.

**Vytlingam v. Farmer**, [2007] S.C.C. 46; **Herbison v. Lumbermens**, [2007] S.C.C. 47

### **Definition of “accident”**

These two cases were just released by the Supreme Court of Canada. While both were tort claims that related to an insurer’s obligation to pay a tort award under the OPCF 44R endorsement, and under a motor vehicle liability policy, respectively, the decisions will impact directly on the interpretation of the term “accident” in the SABS.

In both cases, the Plaintiffs were required to prove that their injuries arose “directly or indirectly from the use or operation of an automobile” in order to recover under the insurance policies. The precondition to an insured’s entitlement to benefits under the SABS is the involvement in an “accident”, which is defined to be “an incident in which the use or operation of an automobile directly causes an impairment...”. The similarity in wording between this definition and the terms considered by the Supreme Court make the decisions highly relevant to claims under the SABS.

In **Vytlingam**, the tortfeasors threw large rocks off a highway overpass onto the Plaintiff’s car. He sustained catastrophic injuries, and pursued a claim against his insurer under the Family Protection Endorsement (OPCF 44R). The claim was based on the fact that the Plaintiff himself was in his car at the time of the injury, the tortfeasors used their car to transport the heavy rocks to the overpass and also used their car as a “getaway” vehicle. The tort could not have been committed “but for” the use of the motor vehicle. The Ontario Court of Appeal found for the Plaintiff, but Justice Binnie, writing for the unanimous Supreme Court, began the analysis by commenting that,

“the Court of Appeal paid close attention to the "inadequately insured" aspect but not enough, in my opinion, to whether or not Farmer's tort was committed as a "motorist", i.e. whether the claim arose through **an unbroken chain of causation** from the ownership or directly or indirectly from the use or operation of a motor vehicle.” (emphasis added)

In **Herbison**, the Plaintiff was shot by a fellow hunter who was using his vehicle to access a hunting stand, and wanted to recover his damages from the tortfeasor's motor vehicle liability policy. The tortfeasor, while driving his vehicle, thought he saw a deer and got out of his vehicle to fire the offending shot. As in **Vytlingam**, the Plaintiff argued that the tort could not have been committed without the use of the vehicle; the tortfeasor needed his vehicle to access the hunting stand due to a medical condition, the noise of his muffler prevented him from hearing the voices that would have indicated the presence of a person, and he agreed that he would not have taken the shot without his headlights illuminating the area in question. The Ontario Court of Appeal found in favour of the Plaintiff.

Justice Binnie, for the unanimous Supreme Court, succinctly stated the (now) proper test for this evaluation, as follows,

“The questions are, firstly, whether the Herbison claim is in respect of a tort committed by Wolfe in using his motor vehicle as a motor vehicle and not for some other purpose and, secondly, whether there is an **unbroken chain of causation** linking the Herbison injuries to the use and operation of the Wolfe

vehicle which is shown to be more than simply fortuitous or "but for." (emphasis added)

This test will almost certainly now be applied in the analysis of whether or not an insured was involved in an "accident" in the SABS context.

**Kitchenham v. AXA**, unreported, September 10, 2007 (Ont. Div. Ct.)

**Deemed undertaking rule**

This decision is an important first step in clarifying the obligation of an insured to produce tort defence medicals and surveillance in the context of an accident benefits claim. The plaintiff had commenced and subsequently settled a tort action. During the examination for discovery in the accident benefits action, AXA requested production of a defence medical report and surveillance that had been produced by the defendant in the tort action. The plaintiff refused production, based on Rule 30.1, the "deemed undertaking rule". The motions judge held that the Rule in these circumstances dealt not with the production of those documents, but the use to which those documents could be put at a trial, and therefore ordered the documents to be produced.

The Divisional Court disagreed with this analysis. It held that the material in question was clearly obtained by the plaintiff in the prior tort action in accordance with Rule 30.1.01(1)(a), and the clear wording of the Rule meant that the deemed undertaking applied to the defence medical report and the surveillance report. However, the Court

went on to state that it is open to an insurer to seek an order that the evidence ought to be disclosed despite the deemed undertaking rule, pursuant to Rule 30.1.01(8), which states,

(8) If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the court may order that sub-rule (3) does not apply to the evidence or to information obtained from it, and may impose such terms and give such directions as are just.

Because the evidence of potential prejudice and the interest of justice was not before the Divisional Court, it was directed that the issue be dealt with by a motions court judge, on a full record. Unfortunately, the Court provided no guidance as to what factors ought to be considered on such a motion.

It is suggested that the onus will be on the insurer to show that the interest of justice outweighs any prejudice that a plaintiff claims would result from the disclosure. Given an insurer's fairly broad rights to IE examinations, the difference between the (at least theoretical) aims of a defence medical examination and a first party examination, the insurer's unfettered right to conduct surveillance and the different issues that are dealt with in the different cases, it will be difficult for an insurer to show that the "interest of justice" will outweigh the prejudice to a plaintiff, as long as the plaintiff puts forward some evidence of the prejudice that will result from the disclosure.

**Aviva v. Balvers (2007)**, 49 C.C.L.I. (4th) 313 (Ont. S.C.J.)

**Scope of, and right to, an examination under oath after the commencement of legal proceedings**

Aviva denied Balvers' claim for certain accident benefits. Balvers commenced an action seeking payment of those benefits. Aviva requested an examination under oath pursuant to s.33(1.1) of the SABS. Balvers took the position that the insurer had no right to the examination once litigation was initiated, and that the scope of any such examination should be strictly limited to benefits that had been denied by the insurer. Justice Stewart disagreed, holding that the scope of the examination was quite broad pursuant to the SABS and could cover any reasonable questions that touch on the entitlement to past, present, or future benefits. Further, Justice Stewart held that the statutory right to an examination under oath was not taken away by the commencement of legal proceedings and the consequential right of an insurer to conduct an examination for discovery under the Rules – "both entitlements may co-exist in harmony".

**Abrams v. Aviva**, A06-000806, July 25, 2007 (Arbitrator Ashby)

**Effect of payment into court on the insured's choice of forum**

Mr. Gibson was killed in a car accident. At the time of his death he was living with Ms. Abrams, who claimed the spousal death benefit. Aviva took the position that she was not a spouse and denied the claim (as well as the claims of her children as dependants of Mr. Gibson). Aviva did pay benefits to Mr. Gibson's two children, to whom he had an obligation to provide support under a court order. After the arbitration was commenced, Aviva made a payment into court of the \$25,000 death benefit, on the basis that this

amount would have to be paid to either Ms. Abrams, or Mr. Gibson's children. Aviva then took the position that Ms. Abrams' arbitration was stayed and that she would have to make an application for payment of the funds out of court and prove her entitlement as a spouse.

Arbitrator Ashby held, pursuant to *Fernandes v. Liberty* (2006), 82 O.R. (3<sup>rd</sup>) 524 (C.A.), that Ms. Abrams had an unfettered right to choose the forum to resolve her dispute. While the insurer's payment into court might impact on the issues of interest and the special award (which issue was left to the hearing arbitrator), such payment cannot impact upon the insured's unilateral right to choose the forum.

**Mamaca v. Coseco (2007)**, 47 C.C.L.I. (4<sup>th</sup>) 288 (Ont. Master)

#### **Production of the insurer's file in a bad faith action**

This excellent and thorough decision of Master Dash deals with many of the usual issues that arise in bad faith claims, including litigation privilege, the date at which an insurer can reasonably anticipate litigation, the dominant purpose test, piercing litigation privilege where there is prima facie evidence of bad faith, and waiver of litigation privilege. The decision reviews all of the pertinent case law on this issue, and quotes the ratio from each important decision.

**Luskin v. Personal**, A06-001216, May 25, 2007 (Arbitrator Wilson)

**Circumstances where arbitrators may award costs against a solicitor personally**

Mr. Luskin did not attend the pre-arbitration hearing. The lawyer appearing on his behalf at that hearing gave what was categorized as an “undertaking” that Mr. Luskin would appear at the rescheduled hearing. Unfortunately, Mr. Luskin did not appear at the second pre-arbitration hearing and was not available by phone, despite the representations of the articling student appearing on his behalf. The pre-hearing was therefore adjourned again, and this time the Arbitrator ordered Mr. Luskin’s attendance and advised that he would be looking for submissions regarding the costs thrown away of the two aborted pre-hearings. Mr. Luskin did not appear at the third hearing. A different articling student attended on his behalf. As a result, the Arbitrator awarded costs thrown away, payable jointly by Mr. Luskin and his counsel.

The moral of the story is – don’t give an undertaking that your client will appear if you have any reason to believe that he or she will not do so; inform FSCO promptly and in advance if your client is not going to be able to attend a pre-hearing; and, whatever you do, don’t send an articling student with limited knowledge and information to a pre-hearing where an Arbitrator has indicated the possibility of awarding costs against a solicitor personally!

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\* While I am indebted to all of those who provided their input (you know who you are), I would like to specifically mention and thank Kadey Schultz and Catherine Zingg, both of whom took my request for input seriously enough to provide written submissions!

\*\* For those of you paying close attention, there are actually 11 cases commented upon in this paper. I couldn't choose between the last few and therefore decided to include them all. I hope that I will be pardoned for going slightly beyond the bounds of my assigned topic.