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Top Ten Accident Benefits Cases of 2014

by Renée Vinett

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Guo and State Farm Mutual Automobile Insurance Company - March 26, 2014

Facts:

- Ming Guo was a Chinese citizen visiting Ontario with her family and was injured in a car accident on August 18, 2011.
- As a result of her injuries she was unable to return to her home country.
- When she was released from the hospital she stayed with her two daughters in a rented basement apartment during her lengthy recuperation.
- Ms. Guo applied for attendant care benefits, but was denied by State Farm on the basis that such services were not "incurred expenses".
- The principal question was whether or not her daughters, in providing attendant care, suffered an "economic loss".

Guo and State Farm Mutual Automobile Insurance Company - March 26, 2014

Three arguments were advanced by Ms. Guo:

- Her daughters suffered an economic loss because they were prevented from returning to employment awaiting them in China.
- Although her daughters were in Canada on student visas and were not authorized to work, they had been working part time in a nail salon and paid cash by the owner. As a consequence of providing their mother attendant care, they were compelled to work fewer hours and thereby incurred an economic loss.
- Her daughters had suffered an economic loss because they had incurred expenditure by providing an apartment and maintaining a household in order to support their mother while she recovered from her injuries.

Guo and State Farm Mutual Automobile Insurance Company - March 26, 2014

Finding:

- Based on the third argument **only**, Arbitrator Robinson determined that Ms. Guo's daughters had suffered an "economic loss".
- During the hearing, State Farm raised an implicit concern that the economic loss of the daughters was manufactured by the fact that Ms. Guo's husband was a wealthy businessman in China who had neglected or wilfully refused to support her during her convalescence in Canada.
- The Arbitrator concluded that "the test set forth in ss. 3(7)(e) does not remit us to an inquiry about whether an economic loss could have been prevented. We are only authorized to determine whether or not it in fact occurred."

Dominion of Canada General Insurance Company and Beltrame - June 13, 2014

- Appeal dismissed August 26, 2014 and appeal file was administratively closed pending the final arbitration decision on all substantive issues in dispute.

Dominion of Canada General Insurance Company and Beltrame - June 13, 2014

Facts:

- Nancy Beltrame was injured in a motor vehicle accident on July 2, 2009, sustaining a brain injury.
- Initially she was self-represented.
- After receiving her Application for Accident Benefits, Dominion identified non-earner and housekeeping benefits as some of the benefits to which Ms. Beltrame may be entitled.

Dominion of Canada General Insurance Company and Beltrame - June 13, 2014

- Dominion requested that the she provide a Disability Certificate.
- Ms. Beltrame submitted three Disability Certificates completed by her family physician.
- On all three occasions, her doctor indicated that she met the test for housekeeping benefits.
- However, on two occasions he indicated that she did not meet the test for non-earner benefits, and on the third he indicated that the test was not applicable.

Dominion of Canada General Insurance Company and Beltrame - June 13, 2014

The hearing proceeded on two preliminary issues:

- Is Ms. Beltrame precluded from proceeding to arbitration with her claim for non-earner benefits because she did not submit a disability certificate stating that she suffered a complete inability to carry on a normal life within 104 weeks of the accident?

- Did Dominion owe Ms. Beltrame a duty to arrange a neuropsychological insurer examination in relation to her claims for non-earner benefits?

Dominion of Canada General Insurance Company and Beltrame - June 13, 2014

Arguments:

- Dominion argued that Ms. Beltrame was precluded from bringing her application for non-earner benefits to arbitration because she did not submit a disability certificate stating that she suffered a complete inability to carry on a normal life within 104 weeks of the accident.

- Ms. Beltrame argued that Dominion failed to assist her in claiming accident benefits because it failed to arrange a neuropsychological insurer examination.

Dominion of Canada General Insurance Company and Beltrame - June 13, 2014

- Applying *McIntosh and Allstate Insurance Company of Canada*, Arbitrator Alves found that additional information provided by Ms. Beltrame was reflected in the claims examiner's notes.

- Arbitrator Alves specifically referenced an October 2, 2009 entry wherein the claims examiner states **"Head injury to be thoroughly investigated ... Clmt is NEB by definition & benefit to be addressed closer to 26 week mark."**

Dominion of Canada General Insurance Company and Beltrame - June 13, 2014

Findings:

- A claims examiner of sound and moderate judgement would appreciate that a traumatic brain injury gives rise to cognitive, emotional, and behavioural impairments that may impact on an insured person's need for accident benefits.
- An insurer has a duty to act in good faith and deal with insured's fairly.
- Dominion should have known that there was a particular time sensitivity involved in arranging a neuropsychological exam in relation to Ms. Beltrame's entitlement for non-earner benefits at the 26 week mark.
- Such an examination would assist not only the insured but the insurer in adjusting the claim.

Dominion of Canada General Insurance Company and Beltrame - June 13, 2014

- Dominion's inaction caused a delay in crystallizing the dispute regarding non-earner benefits and provided a reasonable explanation for Ms. Beltrame's delay in providing evidence establishing her NEB entitlement.

Kelly and Guarantee Company of North America - August 7, 2014

Background:

- Stephanie Kelly suffered catastrophic injuries when injured in a car accident on April 6, 2009. She was hospitalized for approximately 3 months.
- It wasn't until February 1, 2013 a retroactive Form 1 was prepared for the period of April 6 to June 23, 2009.
- Guarantee refused to pay the attendant care for this period, since, in its view, the Form 1 and the assessment did not comply with the requirements of the Schedule.
- In addition, Guarantee did not view the claim as reasonable, given the level of services already provided by the hospital.

Kelly and Guarantee Company of North America - August 7, 2014

Argument:

- Guarantee argued that there is no provision for a retroactive Form 1 in the Schedule, therefore the attendant care services claimed were not payable.

Findings:

- Arbitrator Wilson disagreed with Guarantee's narrow approach to the attendant care provisions of the Schedule, stating that insurance coverage provisions are to be interpreted broadly, while coverage exclusions or restrictions are to be construed narrowly in favour of the insured.

Kelly and Guarantee Company of North America - August 7, 2014

- In Ontario the SABS is intended to provide prompt and timely financial assistance to those in need after an accident.

- The Arbitrator found that requiring an injured person in every circumstance to complete all the paperwork including a Form 1 before incurring any attendant care expenses was not congruent with the scheme of the SABS.

M.T. and RBC General Insurance Company - February 28, 2014

Background:

- M.T. was injured in a car accident on June 20, 2009. M.T. had a long work history in a variety of occupations. She had lost the use of her lower arm in 1992 for which she continued to receive workplace compensation.

- In July 2008, M.T. had suffered a breakdown because of workplace stress and was off work for 10 weeks. She returned to work in or around September or October 2008 and was subsequently terminated in November 2008. She was off work for approximately 8 months at the time of the accident and was receiving employment insurance benefits.

- M.T. submitted that it was always her intention to return to work, but she was taking a break at the time of the accident.

M.T. and RBC General Insurance Company - February 28, 2014

- In January 2009 she had moved to Manitoulin Island to live with friends. She claimed that she helped her friends with their children, as well as their cooking, cleaning, gardening and taking care of her sick friend.

- In May 2009, her employment insurance was close to running out so she contacted a number of temporary employment agencies in Sudbury. Her intention was to work in Sudbury during the week and return to Manitoulin Island on weekends.

- She claimed that her plans were derailed by the motor vehicle accident.

M.T. and RBC General Insurance Company - February 28, 2014

- M.T. applied for accident benefits from RBC.
- With respect to IRBs, M.T. submitted that she had not worked since the car accident, and several medical practitioners agreed that she was unable to work for the foreseeable future.
- RBC claimed that M.T. suffered soft tissue injuries and an exacerbation of a pre-existing psychological condition and that her pre-existing psychological issues caused her to be removed from the work force before the accident.

M.T. and RBC General Insurance Company - February 28, 2014

- Arbitrator Richards considered the question of causation and found that the test for "material contribution" should be applied to determine whether M.T. could not work because of her pre-existing impairments, or because of impairments arising from the motor vehicle accident.

- If the accident materially contributed to her inability to work, then RBC would be liable for accident benefits in accordance with the provisions of the Schedule.

- RBC would not escape liability just because M.T. suffered from impairments prior to the motor vehicle accident.

M.T. and RBC General Insurance Company - February 28, 2014

- Arbitrator Richards found M.T. to be a credible witness.
- He also found that her current psychological condition was in stark contrast to her past condition and that the motor vehicle accident had materially contributed to her impairments and left her completely unable to engage in suitable work due to her mental state.
- Accordingly, she was entitled to IRBs.

Reichert and Chubb Insurance Company of Canada - February 5, 2014

- Mr. Reichert was injured in a car accident on October 1, 2007.
- He sought a determination that he had suffered a catastrophic (CAT) impairment due to a mental or behavioural disorder as a result of the accident.
- Chubb claimed that Mr. Reichert suffered a pre-existing condition related to stress and difficult personal circumstances, such as his mother's death.
- Mr. Reichert claimed that he suffered from dementia as a result of frontal brain damage arising from the accident, which was supported by many of the assessors, and was seeking attendant care benefits.

Reichert and Chubb Insurance Company of Canada - February 5, 2014

- The majority of the medical evidence from Chubb and Mr. Reichert's examiners showed that he suffered some head trauma or brain injury as a result of the accident leading to serious cognitive difficulties as well as various mental or behavioural problems.

- There was agreement that Mr. Reichert's memory problems and difficulty with executive problem-solving were consistent with injuries to the frontal areas of the brain and that he had physical and other findings consistent with the mechanism of the accident.

Reichert and Chubb Insurance Company of Canada - February 5, 2014

- Arbitrator Muniz found that the accident materially contributed to the development of Mr. Reichert's mental or behavioural disorder.
- The preponderance of the evidence was that the dementia had affected his daily life in all areas and in some areas to a significant degree.
- The Arbitrator further found that Mr. Reichert had a significant impediment in the areas of concentration, persistence and pace and had significant decompensation in work or work-like settings such that he had a marked impairment.
- She also found that his prognosis for work in the future was poor at best.

Reichert and Chubb Insurance Company of Canada - February 5, 2014

- The Arbitrator concluded that he had a marked impairment on account of a mental or behavioural disorder resulting from the accident.

- He was determined Catastrophically Impaired, despite his pre-existing condition, and entitled to monthly attendant care benefits.

Burgess and Pembridge Insurance Company - June 6, 2014

- Beth Ann Burgess, 27, was injured in an accident on July 30, 2007.
- She sustained a concussion when an article she was transporting in her car hit her in the head, as well as other soft tissue injuries.
- She suffered from daily tension headaches; migraines; sharp, slicing neck and shoulder pain; cognitive issues, such a trouble focusing and word finding; and fatigued easily.
- Prior to the accident, Ms. Burgess had recently opened a speciality food store and catering business in cottage country. Her parents helped her with the company and held shares in it, but Ms. Burgess was responsible for the management of the business, and largely responsible for its operations.
- The business was seasonal (spring through fall). From winter through spring, Ms. Burgess worked with her father with his tax and accounting practice.

Burgess and Pembridge Insurance Company - June 6, 2014

- Ms. Burgess made no attempts to return to work in the first few weeks following the accident. Thereafter, and over time, she eventually returned to performing some of her pre-accident tasks at the store, as well as doing some work for her father.

- She claimed that she was never able to return to these positions on a full time or competitive basis and it was only with great assistance and indulgences from her parents that she was able to keep the store operating at all or continue to do any work for her father.

- In March 2007, Ms. Burgess' business closed and she did not work for her father thereafter. She then concentrated her efforts on academic upgrading, retraining to be an accountant in a certificate program at York University, which she commenced in September 2010.

Burgess and Pembridge Insurance Company - June 6, 2014

- She testified that, before the accident, it was not her desire to become an accountant, but she enrolled in the program because she hoped it was something she would be able to do even with her limitations.

- She noted that it would lead to a career that was sedentary, at least compared to the demands of an entrepreneur in the retail sector.

- Ms. Burgess submitted that, for the first 104 weeks post-accident, she was substantially impaired in her ability to perform the essential tasks of her pre-accident employment, and that she continued to suffer from a complete inability to engage in any employment for which she was reasonably suited by education, training and experience, at least up until her start date as an accountant at Soberman's, which was scheduled for October 1, 2012.

Burgess and Pembridge Insurance Company - June 6, 2014

- She submitted that the post-accident work she did for her business and her father was of such diminished value that the payments she received should not be deducted from her IRB entitlement as "income from employment," but should be more fairly characterized as gratuitous payments from generous parents.

- Pembridge initially relied on an expert report by BDO Dunwoody, but due to what the insurer claims were serious flaws in the report, it no longer relied upon it at the date of the hearing.

- Additional documentation had been provided by Ms. Burgess to Pembridge in October 2011.

Burgess and Pembridge Insurance Company - June 6, 2014

- For whatever reason, Pembridge did not provide BDO with the additional information.

- In closing submissions, Pembridge took the position, for the very first time, that the additional information provided by Ms. Burgess established that she continued to work post-accident to a sufficient extent that she did not suffer a substantial inability to engage in her pre-accident employment for any period.

Burgess and Pembridge Insurance Company - June 6, 2014

- Arbitrator Muniz found a significant problem with Pembridge's position in that it relied heavily on its own counsel's analysis and interpretation of selected financial records rather than being supported by an expert opinion contained in an updated accounting report.

- In the result, Arbitrator Muniz determined that Ms. Burgess was completely unable to engage, in any sort of sustained or reliable way, in any employment (including alternative employment) for which she was reasonably suited by education, training and experience from 104 weeks post-accident to September 30, 2012 (a date agreed upon by all parties).

- Pembridge was also ordered to pay a special award of $10,000.

Western Assurance Company and Burden - April 28, 2014 -- Judicial Review pending

- Cliff Burden, was injured in car accident on August 17, 2001, and sought weekly income replacement benefits from Western Assurance Company.
- Western paid IRBs to August 13, 2004, the stoppage date set out in the Notice of Stoppage of Weekly Benefits and Request for Assessment sent by Western on July 29, 2004.
- Mr. Burden did not seek to mediate this stoppage until 2010, even though Part 4 of the OCF-17 warned him that he had two years from the date of stoppage to dispute it by seeking mediation.
- The hearing proceeded on the determination of this preliminary issue.

Western Assurance Company and Burden - April 28, 2014 -- Judicial Review pending

- Arbitrator Kowalkski found that Western's refusal was rendered void by Part 5 of the OCF-17, in that it made a request for a mandatory DAC assessment in order to mediate the stoppage of weekly benefits, when such a request was optional.
- The form did not meet the requirement set out in Smith v. Cooperators General Insurance Co. that at a minimum a notice of stoppage should include a description of the most important points of the dispute resolution process, such as the right to seek mediation.
- The form was found to be confusing regarding this basic information and, therefore, a valid refusal had not been given.
- Therefore, the two-year time limit had not begun to run, and Ms. Burgess could proceed to arbitration.

Western Assurance Company and Burden - April 28, 2014 -- Judicial Review pending

- Western appealed the decision, which was heard by Director's Delegate Evans.
- Western argued that the Arbitrator was required to consider circumstances beyond the insurer's notice of refusal when determining whether the refusal was adequate. Namely, that Mr. Burden was represented by counsel at the time of the refusal and was therefore valid.
- Director's Delegate Evan's, following the Court of Appeal decision of Golic v. ING Insurance Co. of Canada, 98 O.R. (3d) 394, affirmed the Arbitrator's decision.
- Western has filed for Judicial Review.

McDonald and Aviva Canada Inc. - February 21, 2014

- Brittny McDonald, was injured in a car accident on January 7, 2008 at the age of 20.
- At the time of the accident, she was working as an apprentice hairstylist and had just completed 2000 apprenticeship hours required to become a licensed hairstylist in Ontario, but had yet to write her certification exams.
- Due to her injuries, Ms. McDonald was no longer able to work as a hairstylist.
- In January 2009 she applied to Aviva for vocational retraining requesting funding for (presumably one of) two community college programmes: a two-year Business Accounting Programme and a three-year Business Administration Programme.

McDonald and Aviva Canada Inc. - February 21, 2014

- Aviva denied the treatment plan and sent Ms. McDonald for an Insurer's Examination in March 2009.
- The orthopaedic IE opined that she would not require retraining if she had surgery to her back.
- Aviva maintained its denial of the treatment plan but nevertheless paid for tuition and books for two college upgrading courses in November 2009 when Ms. McDonald submitted receipts for them.
- In March 2010, Ms. McDonald advised Aviva of her intention to become a teacher and the fact she had been accepted into a four year combined Bachelor of Arts and Education degree at Lakehead University in Thunder Bay, commencing September 2010.

McDonald and Aviva Canada Inc. - February 21, 2014

- She asked Aviva to pay the cost of tuition. Aviva said it would only fund the college programme.
- Ms. McDonald did not submit a new Treatment Plan for the university course, nor did Aviva request one.
- Ms. McDonald underwent surgery in April 2010 and went ahead with her plans for university. She completed the first two years at her own expense, relocating to Thunder Bay to do so. She did not continue in September 2012 because she could not afford the remaining two years.
- Ms. McDonald applied for arbitration claiming that Aviva owed approximately $40,000 in expenses for tuition, books and living accommodation in Thunder Bay for the four year university programme as a rehabilitation measure under s. 15 of the *Schedule*.

McDonald and Aviva Canada Inc. - February 21, 2014

- Aviva refused to pay on the basis that she had not submitted a Treatment Plan for it under s. 38 of the Schedule.

- Aviva paid the full tuition cost of $8,202 for the three year community college programme that Ms. McDonald never attended, taking the position that it was not liable for anything more.

- The matter proceeded to arbitration on the preliminary issue of whether Ms. McDonald failed to comply with s. 38 of the Schedule with respect to the four year university programme at Lakehead University.

McDonald and Aviva Canada Inc. - February 21, 2014

- Ms. McDonald did not submit a formal Treatment Plan until April 16, 2013, the week before the preliminary issue hearing. She tendered a more complete version of the treatment plan during the hearing.

- Aviva submitted that s. 38(1.1) of the *Schedule* states that an insurer is not required to pay for any rehabilitation expenses incurred before the insured person submits a Treatment Plan and as Ms. McDonald did not submit a Treatment Plan for her university expenses before she incurred them, the matter ends there.

- Aviva further argued that a university teaching degree is not a necessary and reasonable rehabilitation measure for under s. 15 of the *Schedule*.

McDonald and Aviva Canada Inc. - February 21, 2014

- Ms. McDonald's argued that Aviva should not be allowed to rely on her failure to submit a Treatment Plan to defeat her claim because Aviva never advised her that they required a Treatment Plan for her university expenses until October 4, 2012, well after she had already completed two years of the four-year university course and after she had incurred the expenses.
- Ms. McDonald argued that Aviva failed in its obligations under s. 32 of the *Schedule*, and in its obligations as her first party insurer to adjust her claim with utmost good faith.
- She also submitted that the full cost of the university degree is a reasonable rehabilitation measure under s.15 of the *Schedule*, which Aviva should pay.

McDonald and Aviva Canada Inc. - February 21, 2014

- Arbitrator Sapin found Ms. McDonald's failure to submit a Treatment Plan for the four-year university degree until April 22, 2013 was not a bar to her proceeding to arbitration on the issue of whether or not the expenses claimed up to October 4, 2012 were reasonable and necessary
- Aviva was liable to pay for the cost of university tuition fees and books Ms. McDonald incurred for her first two years at Lakehead as a reasonable and necessary rehabilitation measure.
- Moreover, Aviva failed its own obligations under s. 32 to advise Ms. McDonald that if she wanted Aviva to fund a university education she should have submitted a further Treatment Plan.

Hamilton v Aviva Canada Inc. - February 10, 2014

- Jean Hamilton was injured in a car accident on June 12, 2009. She applied for a catastrophic impairment designation under category G or marked psychological impairment.
- Aviva declined to make a determination on catastrophic impairment until a further occupational therapy "in-home" assessment took place.
- Mrs. Hamilton declined to undergo a further occupational therapy in-home assessment since the Insurer already conducted an occupational assessment which, in combination with clinical records of the treating occupational therapists, should have provided adequate information for the Insurer's expert to formulate his opinion as to catastrophic impairment.

Hamilton v Aviva Canada Inc. - February 10, 2014

- A motion was brought to determine whether the arbitration, on the issue of catastrophic impairment, should be stayed by reason of Mrs. Hamilton's failure to make herself reasonable available for a further in-home occupational therapy assessment.

- There was no issue about the examination by a neuropsychologist (which had already been completed and a report prepared), only this further proposed examination which was to be performed by an occupational therapist (OT). Neither Aviva, nor the neuropsychologist, were able to provide the rationale for an additional examination.

Hamilton v Aviva Canada Inc. - February 10, 2014

- The Arbitrator found that OT exams can form a valuable part of any catastrophic impairment, but the burden of demonstrating a further in-home examination was reasonable was placed on Aviva.

- In this case, it was the obligation of the neuropsychologist assessing catastrophic impairment to consult, collate and incorporate that situational information before reaching a definite conclusion as to impairment.

- The report, which was issued by the neuropsychologist, was internally inconsistent with the need for any further assessments as his review of the many OT reports failed to include an existing in home review by an OT in 2009, and he claimed that no further "clinical information or diagnostic testing is required in order to confirm my diagnosis."

Hamilton v Aviva Canada Inc. - February 10, 2014

- The Arbitrator therefore found that Aviva did not meet the evidentiary burden of proving that Mrs. Hamilton was required to attend the further occupational therapy examinations proposed by Aviva.

- He also found that a stay of the arbitration at this juncture was not an appropriate remedy.

Asokumaran and TD Home and Auto Insurance Company - January 30, 2014

- Mangaleswary Asokumaran was injured in a car accident on September 5, 2010. Ms. Easan, a friend of Ms. Asokumaran, provided caregiver and housekeeping services for her during her recovery from September 6, 2010 to September 4, 2012.

- The hearing proceeded on the preliminary issue of the meaning of subparagraph B of subsection 3(7)(e)(iii) of the 2010 Schedule.

- More specifically, whether Ms. Easan had incurred an "economic loss" by having purchased bus tickets to travel to and from Ms. Asokumaran's home to provide services.

Asokumaran and TD Home and Auto Insurance Company - January 30, 2014

- For caregiver and housekeeping services provided by a friend or family member the insured person must demonstrate that the benefits were received, that the insured person promised to pay or is required to pay, and that the service provider sustained an economic loss as a result of providing the service to the insured person.

- Ms. Asokumaran submitted that any type of monetary loss including out-of pocket expenses, such as the cost of transportation associated with providing services to the insured person, constitutes economic loss.

Asokumaran and TD Home and Auto Insurance Company - January 30, 2014

- TD submitted that economic loss should be given a restrictive meaning, so that only a loss of income or lost wages by a service provider qualifies an insured person to receive reimbursement for caregiver benefits and housekeeping expenses.

- TD further submitted that unfairness would result from using transportation expenses as a determining factor because, in effect, the distance between a care provider's home and that of the insured person becomes the yardstick in determining whether a benefit is payable.

Asokumaran and TD Home and Auto Insurance Company - January 30, 2014

- Arbitrator Alves was not persuaded by the Insurer's submissions that the term "economic loss" should be read restrictively so that only those losses will qualify.

- The purchases involved the expenditure of funds by the service provider, were a monetary loss to her and therefore qualify as an economic loss within the meaning of the *Schedule*.

Thank you for attending!

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