THE IMPACT OF MONKS V. ING

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Is insurance intended to indemnify a person for her actual losses? Not if it is provided under Ontario's accident benefit regime. On April 14, 2008, the Court of Appeal released a decision which addresses this issue. It follows four decisions at first instance from Justice Lalonde in September 2005, including the main decision spanning 410 pages.

Suzanne Monks was rendered an incomplete quadriplegic after having been in 3 car accidents in 6 years. She was found to be disabled from her former job as a rehabilitation consultant as well as from any other form of employment, and she required attendant care for life.

ING responded to the claims from the last of the three accidents. The first accident, under OMPP, was minor. The second accident, under Bill 164, was significant, and was settled in April 2002 for $1.275 million plus costs. Ironically, while the second accident was responded to by Zurich Insurance Company, by the time of the settlement, ING had bought Zurich's personal lines business.

In respect of the third claim, ING took the position that Ms. Monks was "catastrophic" from the second accident, and that the third accident did not cause a catastrophic impairment where Ms. Monks was already catastrophically injured. ING therefore terminated benefits being paid following the third accident as of May 2002, one month after settling the second loss.

After a two month trial Justice Lalonde held that Ms. Monks was indeed "catastrophic" by reason of the third accident, ordered ongoing benefits by way of a declaration, and found aggravated damages were owed in addition to interest payable on "overdue" benefits at the statutory rate of 2% per month, compounded monthly.

Writing for Gillese, and Watts J.A, Justice Cronk dismissed the appeal, with the exception of the risk premium awarded on costs, which was overturned.

In addition to dismissing ING's appeal on causation, the Court of Appeal's decision adds to a growing line of cases suggesting that the notion of indemnity may be irrelevant in the context of statutory accident benefits.

ING's argument that the trial judge erred in making an award under the *Statutory Accident Benefits Schedule* (*SABS*) for expenses that had not or would not be incurred, was dismissed. The court adopted the same broad approach in identifying an incurred expense as did the Divisional Court in ***Belair Insurance Company v McMichael*** (2007) 86 O.R. (3d) 68, citing with approval the comments in ***Wawanesa Mutual Insurance Company v. Smith*** (1998), 42 O.R. (3d) 441. In that case it was held that an insured person need not finance a claim in order to secure the benefits to which she is entitled. It was not even necessary for the insured to actually receive the items or services or to become obliged to pay for anything. It was sufficient if the reasonable necessity of the service or item and the amount required could be determined with certainty.

In each of ***McMichael*** and ***Monks***, this broad definition of "incurred" has been adopted to apply to past and present claims under the *SABS*, even where no goods or services have been received by the insured. As such, while the *SABS* requires an expense to be "incurred" for an insurer to be obliged to pay a benefit, the Court of Appeal suggests that this is a mere technicality to be read down in favour of an insured person in virtually all circumstances.

The Court of Appeal in ***Monks*** has arguably expanded the availability of declaratory relief in the no fault era post 1990. ING had relied on a prior Court of Appeal decision, ***Monachino v Liberty*** (2000) 47 O.R. (3d) 481, in which it was held that two criteria must be satisfied in order to grant declaratory relief: "[T]he case before the court must be genuine, not moot or hypothetical; and the declaration must be capable of having some practical effect in resolving the issues the case raises."

In ***Monachino***, the court refused a request for declaratory relief for future accident benefits, suggesting that the two pre-conditions would rarely be met. It was thought that this was the last word on the subject, approximately eight years ago. Indeed, since then, there have been few attempts to obtain a declaration for entitlement to future benefits, none of which have been successful

In ***Monks***, The Court referred to a much earlier Court of Appeal decision in ***Coombe v Constitution*** (1980) 29 O.R. (2d) 729, pre-dating the no fault era where accident benefits were much more modest than they are today. In ***Coombe***, the court granted a declaration in respect of weekly no fault benefits of $140 per week on the basis that the insured should not have to continuously establish entitlement to benefits on a week-by-week basis after the disability was proven at trial

Where ING had ceased paying benefits to Ms. Monks as of May 2002, the Court of Appeal found the case was not similar to ***Monachino***, and found that Ms. Monks was

entitled to the protection of a declaration of entitlement, speaking to the "reasonable necessity" of goods and services outlined in a future plan of care which had been put before the court in the context of the aggravated damages claim. The trial judge ordered that the Ms. Monks would still have to substantiate specific expense claims, but would not need to prove that her expenses were reasonable and necessary on a go forward basis. It would be for ING to prove that the claims were not reasonable and necessary if it chose not to honour the claims.

The Court of Appeal found that this approach was in keeping with ***Coombs***, which remains good law.

The effect of the ***Monks*** decision could be profound. Whereas accident benefit insurers could previously rely on the court's disinclination to order that future accident benefits be paid out in a lump sum, ***Monks*** may create a significant departure from this. Where there is no longer a need to prove that an expense has been or will be incurred, and where a declaration of future entitlement might be granted, an insurer may have little opportunity to obtain and lead evidence to vary a declaration order in the future, thereby effectively making the declaration tantamount to a final word on the claim. Suffice to say, ***Monks*** may solidify a movement by the insurance industry for more substantial changes to the accident benefit product as the Government embarks on its 5 year review of Bill 198.