TOP FIVE*

ACCIDENT BENEFIT

CASES OF 2011

* Defence counsel are notoriously weak at math

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The following are decisions from the Financial Services Commission of Ontario and the Courts of particular significance in 2011.

1. Kusnierz v Economical Mutual Insurance Company [2011] ONCA 823

Catastrophic Impairment

Robert Kusnierz, then age 29, lost his left leg below the knee in a single vehicle accident in December 2001. He has used 10 different prosthetics in the ten years since the accident. The parties appeared before Justice Lauwers on an agreed statement of facts to determine of Mr. Kusnierz met the catastrophic impairment definition found in section 2 of the *SABS.* At trial, it was determined that Mr. Kusnierz did not suffer a 55% whole person impairment as defined in the *American Medical Association Guides to the Evaluation of Permanent Impairment, 4th edition*, and that a percentage score for psychological impairments could not be attributed to Mr. Kusnierz to bring his score above 55%.

On December 23, 2011, the Ontario Court of Appeal overturned the decision of Justice Lauwers and allowed Mr. Kusnierz to attribute a percentage score for his psychological impairments to be added to his physical impairments score to enable him to combine them to a score above 55% and enable him to qualify as catastrophically impaired pursuant to the section 2(1.1)(f) definition. Justice James McPherson, writing for the panel, quoted liberally from the earlier and opposite decision from Justice Harvey Spiegel in *Desbiens v. Mordini,* noting that the goals of the SABS supported a conclusion that combining physical and psychological impairments is appropriate under cl. 2(1.1)(f).

The Court of Appeal, in reaching its conclusions, largely preferred to give the benefit to the claimant noting:

- the Legislator did not expressly forbid the combination of both physical and psychiatric injuries, and the interpretation of the *Guides* equally supports combining as it does the opposite;
- the purpose of the *Guides* supports combination: the *Guides* aim of assessing the total effect of a person's impairments on his or her everyday activities, reasonably includes psychological, mental and behavioural impairments;

- that the *Guides* enumerate situations where the assessment of a person's physical impairment must take into account Chapter 14 mental and behavioural impairments;

- the trial judge's interpretation of the law, the application of the principle of implied exclusion was incorrect. The Court noted the examples in the *Guides* are illustrative

rather than exhaustive, such that combining physical and psychiatric impairments can indeed be done "in accordance with" the *Guides*

- that allowing combining will still accord with the purpose of the *SABS,* where attaining the catastrophic designation will remain exceptional. Under either approach, the class of persons who will attain a catastrophic designation will remain small;

- allowing a combination promotes the fairness and the objectives of the statutory scheme.

2. McQueen v. Echelon General Insurance Company [2011] ONCA 649

Punitive Damages and Mental Distress

The insurer denied the plaintiff's housekeeping, transportation benefits and the cost of several assessments despite the existence of clear medical evidence that the benefits were required. In maintaining its denial, the insurer relied upon selective insurer examinations to uphold its denial of benefits, while ignoring the insurer examinations and other medical evidence that clearly stated that the plaintiff required the housekeeping, transportation and further assessments.

The Ontario Court of Appeal substantively upheld the trial judge's decision to award all benefits sought as well as damages for bad faith and mental distress. In coming to its decision, the Ontario Court of Appeal confirmed that where mental distress is alleged, the plaintiff must satisfy the court of the two part test laid out by the Supreme Court of Canada in *Fidler v. Sun Life Assurance Co. Ltd.*, [2006] 2 S.C.R. 3, specifically:

i. an object of the contract was to secure a psychological benefit that brings mental distress upon breach within the reasonable contemplation of the parties; and

ii. the degree of mental suffering caused by the breach was of a degree sufficient to warrant compensation.

The Ontario Court of Appeal agreed that one of the objectives of an insurance contract is to secure the claimant's peace of mind and that it was within the reasonable contemplation of the parties that breach of the peace of mind promise would bring about mental distress. Peace of mind need not be the dominant or sole object of the contract, but only one of the objects of the contract. Finally, damages for mental distress may be awarded to any person who is insured under a standard automobile policy, whether that person is the named party or otherwise.

The Ontario Court of Appeal agreed that the insurer's actions amounted to more than a simple denial of benefits. In coming to its decision, the court paid particular attention to the insurer's denial of benefits contrary to medical recommendation, reliance on superficial insurer examiner reports without providing the same examiners key documentation supporting the claimant's

further need for specified benefits and most importantly, the insurer's internal notes which were found to be adversarial *ab initio* contrary to the duty owed to the insured required by contract of insurance. Taken in sum, these were held to warrant a $25,000.00 award for mental distress.

3. Whipple v. Economical Mutual Insurance Company [2011] Appeal P10-00020

What constitutes an accident?

This was a FSCO appeal decision heard by Director's Delegate, David Evans. The claimant sustained catastrophic injuries after he attempted a headstand on a stripper pole installed in limousine bus while the bus was moving. In his analysis, the Director's Delegate began by applying a two part test to the interpretation of what constitutes an "accident pursuant to section 2(1) of the *Statutory Accident Benefits Schedule.*

The first test remains the "use-or-operation purpose test" as set out in *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405, requiring a determination as to whether the incident resulted from the "ordinary and well-known activities to which automobiles are put." In order to determine this, the Director's Delegate confirmed that the test must be catered to the particular vehicle to see what type of ordinary and well-known activities would be for *that* vehicle. In this instance, it was determined that the limo bus was specifically designed for party activities, with no rules or waivers in place and a stripper pole which was an invitation to the exact forms of activities which transpired. Accordingly, it was determined that the claimant's use of the stripper pole and the handstand that flowed from the same was not outside of the party vehicle's ordinary use.

The second test is the causation test as set out in the Ontario Court of Appeal decision of *Chisholm v. Liberty Mutual Group* (2002), 60 O.R. (3d) 776 (CA), which requires the use or operation of the automobile directly cause the impairment. Three tests are useful to assist with this determination, specifically: the "but for", "intervening act" and "dominant feature" tests. The Director's Delegate found that the causation test was not particularly necessary in this instance as the injuries flowed from the ordinary use of the vehicle, which also satisfied the causation test herein.

In the end, the Director's Delegate dismissed the appeal and agreed with the arbitrator's conclusion that the injury occurred naturally from the increasingly creative activities around the pole which was an integral part of the vehicle, that it was part of the ordinary course of things for the party bus and that the use or operation of the automobile was the dominant feature of the incident itself, as the pole was an integral aspect of the vehicle itself. The claimant's headstand met both the purpose and causation tests and was thus considered an "accident" for the purposes of the *Statutory Accident Benefits Schedule.*

It is significant to note however, that the Director's Delegate emphasized that his decision was to be limited in its narrow application to the specific set of facts in this case. He was clear that an accident will not necessarily be found in any incident involving a "headstand or any other dangerous antic"

4. **Downer v. Personal Insurance Company [2011] ONSC 4980**
   Another decision as to what constitutes an accident (assault)

In this case, the plaintiff had pulled into a gas station and was in the process of arranging his money when he was assaulted by unknown assailants though his car window. As the vehicle was idling, the plaintiff was able to put his van into gear during the assault and drive the vehicle away from his assailers. The plaintiff subsequently claimed entitlement to statutory accident benefits.

In determining whether the plaintiff was involved in an accident within the meaning of section 2 of the *Statutory Accident Benefits Schedule*, Murray J. again visited the tests as laid out in *Amos v. Insurance Corporation of British Columbia*, [1995] 3 S.C.R. 405 and *Chisholm v. Liberty Mutual Group* (2002), 60 O.R. (3d) 776 (CA) as were previously described in *Whipple v. Economical Mutual Insurance Co. (Supra).*

In applying the test from *Amos*, it was determined that the injuries resulted from the ordinary and well-known activities to which automobiles are put as purchase fuel at a gas station is an activity to which all vehicles are put. The test was therefore satisfied.

With respect to the test from *Chisholm,* the court determined that as the use of the car had not ended before the injury was suffered, the insured had not physically left the car during the injury, the engine was running when he was assaulted and the lack of temporal distance between the end of the use of the car and the injuries, the dominant feature test was satisfied. The logical and probable inference from the facts was that the assailants were intent on taking possession of and seizing control of Mr. Downer's vehicle while Mr. Downer was in possession and control of his vehicle which was sufficient to form the conclusion that in this case there is a direct or proximate causal relationship between the plaintiff's injuries and the ownership. As a consequence, the plaintiff was found to have been in an "accident" within the meaning of the *SABS.*

This decision is under appeal.

The decision and tests set out in *Downer* were subsequently followed in the December 5, 2011 decision of *Martin v. 2064324 Ontario Inc. (c.o.b. Freeze Night Club) et al* [2011] O.J. No. 5471. Notably, Mr. Martin's injuries included those suffered when his foot was run over by his own car after it was stolen by his assailants, which ought reasonably make a difference as to whether this is an "accident".

5. **Buckle v. Motor Vehicle Accident Claims Fund [2011] FSCO A10-000010**
   Is a golf cart an "automobile"?

In this case, the claimant was injured when she fell out of a golf cart while it was driven on a public highway. It was uncontested by all parties that the golf cart was being operated illegally on the highway as it was not licensed, registered or insured. The live issues were (1)whether a golf cart constitutes an "automobile" and (2) whether there was an "accident".

Pursuant to section 224(1) of the *Insurance Act*, "automobile" includes:

(a) a motor vehicle required under any Act to be insured under a motor vehicle liability policy, and

(b) a vehicle prescribed by regulation to be an automobile.

The arbitrator quickly concluded that a golf cart was not a prescribed automobile for the purposes of the *Insurance Act*, thus the sole residual question was whether a golf cart being driven on a highway is required to be insured under a motor vehicle liability policy in Ontario.

According to the section 1(1) *Compulsory Automobile Insurance Act*:

> "motor vehicle" has the same meaning as in the *Highway Traffic Act* and includes trailers and accessories and equipment of a motor vehicle.

Section 1(1) of the *Highway Traffic Act* defines "motor vehicle" as follows:

> "motor vehicle" includes an *automobile*, a motorcycle, a motor-assisted bicycle unless otherwise indicated in this Act, *and any other vehicle propelled or driven otherwise than by muscular power*, but does not include a street car or other motor vehicle running only upon rails, a power-assisted bicycle, a motorized snow vehicle, a traction engine, a farm tractor, a self-propelled implement of husbandry or a road-building machine. [Emphasis added]

As the *Highway Traffic Act* only speaks to "motor vehicles" which includes as automobiles as a subset of the same, the arbitrator adopted the three-part test approved by the Ontario Court of Appeal in *Adams v. Pineland Amusements Ltd. et al.* to interpret the statutory language, and asked the following questions:

1. Is the vehicle an "automobile" in ordinary parlance?
   * If not, then,
2. Is the vehicle defined as an "automobile" in the wording of the insurance policy?
   * If not, then,
3. Does the vehicle fall within any enlarged definition of "automobile" in any relevant statute?

As a golf cart was determined not to be an automobile in ordinary parlance nor was there a policy in place at the time of the loss, the arbitrator was required to determine whether a golf cart was considered an automobile by another relevant statute. In coming to his conclusion, the arbitrator noted that Ontario has a bifurcated legislation that regulates travel of certain classes of vehicles "on highways" and "off highways" with the *Highway Traffic Act* regulating such the public highways and the *Off-Road Vehicles Act* in turn regulating the activity in other *loci.*

The arbitrator concluded that since the *Off-Road Vehicles Act* specifically places golf carts beyond its regulatory reach, golf carts must due to an exclusive disjunction, be governed by the provisions of the *Highway Traffic Act* when they are driven on highways [emphasis added], otherwise they would be left completely unregulated which could not have been the legislative intent. Furthermore, golf carts fit within the definition of a motor vehicle and are not explicitly exempted from regulation. Finally, as the overall purpose of these statutes is to provide safety on the highways and to allocate risk in case of accidents, the statutory scheme implies that golf carts when driven on the road are required to have insurance and as such, the arbitrator concluded that the claimant was involved in an automobile accident and entitled to claim statutory accident benefits.

6. *Therrin v. Motor Vehicle Accidents Claims Fund* [2011] FSCO A10-000094

Right to apply to the MVAC for unlicensed off-road vehicular injuries

The claimant became a paraplegic in a single vehicle off road motorcycle accident. The insured was not insured and applied for medical rehabilitation benefits from the Motor Vehicle Accident Claims Fund ("MVAC"). It was accepted by all parties that the insured was not entitled to housekeeping or loss of income benefits, however the MVAC argued that section 226 (2) of the *Insurance Act* disentitled the insured from statutory accident benefits in its entirety due to section 226 (2), which reads:

> "This part does not apply to a contract providing insurance in respect of an automobile not required to be registered under the *Highway Traffic Act*, unless it is insured under a contract evidenced by a form of policy approved under this Part."

The MVAC argued that since the insured's off-road vehicle was required to be registered under the *Off-Road Vehicles Act*, not the *Highway Traffic Act*, the claimant was therefore not entitled to statutory accident benefits due to the legislative gap in section 226 (2) of the *Insurance Act*.

The arbitrator determined that the claimant's application to the MVAC was not based on any contract but rather on the statutory obligation imposed on the MVAC by section 268 of the *Insurance Act* and the *Motor Vehicle Accident Claims Act*. The arbitrator also found that section 226(2) of the *Insurance Act* had no application to the applicant's claim for statutory accident

benefits as the limitations as argued would frustrate the legislative intention that anyone involved with an automobile accident be provided with the compensation needed to return to normal life as quickly as possible. As a result, the arbitrator concluded that in spite of the fact that the off-road vehicle was not properly insured or licensed, the claimant was still entitled to apply to the MVAC Fund for medical rehabilitation benefits.

7. **Echelon General Insurance Company v. Henry [2011] ONSC 3673**
   Scope of examinations in examinations under oath

The claimant was injured in an automobile accident and applied for accident benefits with two insurance companies. Both insurance companies paid the claimant statutory accident benefits for the same accident before discovering the existence of the other application insurer and application. One insurer scheduled an examination under oath to determine whether the claimant had willfully misrepresented facts when she applied for accident benefits but the claimant refused to answer any questions related to her application for benefits and payments received from the second insurer on the basis that it was not relevant.

The court determined that with respect to examinations under oath, the language of section 33 is quite broad. The relevant provisions of section 33 and 48 of the *Statutory Accident Benefits Schedule* are as follows:

> 33.(1.1) If requested by the insurer, a person who applies for a benefit under this Regulation as a result of an accident shall submit to an examination under oath, but is not required to,
>
> (a) submit to more than one examination under oath in respect of matters relating to the same accident.
>
> (1.4) The insurer shall limit the scope of the examination under oath to matters that are relevant to the person's entitlement to benefits under this Regulation.
>
> 48.(1) If an insured person has willfully misrepresented material facts with respect to an application for a benefit, the insurer may terminate payment of the benefit.

In coming to its conclusions, the court made several important observations. First, the court was clear that there was no prescribed limit to examining a person who is *receiving* benefits under oath. Instead, an insurer is entitled to examine a person who *applies* for benefits, whether that person is receiving benefits or not, thus it is not a proper denial to answer questions solely because benefits had been terminated. Second, section 33(1.4) permits an insurer to examine on

matters that are relevant to the person's entitlement to benefits and not only as to whether a person is entitled to the benefits.

As an insured person is only entitled to receive statutory accident benefits from one insurer, the court determined information as to whether the claimant has applied for and received benefits from another insurer in respect of the same accident is relevant to the entitlement to benefits irrespective of any alleged willful misrepresentation in the application for benefits.

Finally, in ordering that the claimant re-attend their examinations under oath, the court also concluded that that the language of section 33 of the *Schedule* was "broad and imposes no limit on the scope of the examination as long as it pertains to matters relevant to [the claimant's] entitlement to benefits."

8. Kohl v. ING Insurance Company of Canada [2011] O.J. No. 1556

Commencing an action before mediation

The plaintiff was injured in a single vehicle accident when his car struck a wall. He commenced an action as against his insurer claiming accident benefits and bad faith damages for denying his claim for catastrophic impairment and the benefits for which he would be entitled thereto.

After his examinations for discovery, the plaintiff sought to amend his statement of claim to include medical and rehabilitation benefits pursuant to the *Schedule* for behavioural therapy, physiotherapy and further income replacement benefits.

The insurer opposed the amendments sought in that they were premature in that these claims have not yet been the subject of a failed mediation at FCSO contrary to section 281(2) of the *Insurance Act* and thus there would be no jurisdiction to hear the claim until such time. The plaintiff had attended mediation in 2008 as to whether he would be found catastrophically impaired due to his injuries. The plaintiff had also applied for another FSCO mediation with respect to the medical and rehabilitation benefits sought to be amended herein, but was informed by FSCO that there was an increased delay and wait time for mediations and that the plaintiff would be contacted by FSCO once the mediator had been appointed.

The court determined that that the additional claims were "substantially connected" to the plaintiff's claim for catastrophic impairment which had already been mediated. In concluding the same, the court distinguished the facts at hand from the decision in *Amorini v. Select Coffee Roasters Inc.*, [2001] O.J. No. 581 (Div. Ct.) where no steps were taken in respect of mediation before the expiration of the two year limitation. In this case, multiple steps had been taken before FSCO regarding mediation and as such the court chose instead to apply the reasoning in *Woodman v. State Farm Mutual Automobile Insurance Company*, [1999] O.J. No. 521 and *Royal*

Insurance v. Pisani, [1994] O.J. No. 2616 (Gen. Div). Both decisions spoke to a more liberal interpretation of section 281(2) of the *Insurance Act*, where the courts were of the view that if some accident benefit claim arising out of an accident has been mediated and mediation has failed, there is no need to go through mediation again for other benefits under the same policy arising out of the same accident,

In this action, the court concluded that the plaintiff had complied with section 281(2) of the *Insurance Act* as the plaintiff had already failed mediation concerning his claim for catastrophic impairment. The court determined that there is no need to go through an additional mediation for the other benefits being the subject of the amendment which are dealt with under the same insurance policy arising out of the same accident. Otherwise, it would create unnecessary expense and certainly unnecessary delay as we do not know how long it will take before any further mediation can take place before FSCO regarding these other claims which would be cause prejudice to the plaintiff.

9. Reeve v. Pembridge Insurance Company [2011] O.J. No. 4235

Compelling a plaintiff's tort and accident benefits action to be tried together

The plaintiff herein sought leave to appeal a decision of Taylor J. requiring the plaintiff's tort action and accident benefits action, both relating to injuries allegedly sustained in a single motor vehicle accident, be tried together.

In considering the leave, Parayeski J. concluded that the judge at first instance exercised his discretion and had considered that both claims arose from injuries allegedly sustained in a single motor vehicle accident and had concluding there were common questions of fact involved which would be a the waste of judicial resources in having separate trials. Also of importance was the avoidance of potentially inconsistent verdicts should these actions proceed separately.

With respect to the argument that a tort action arises out of a motor vehicle accident and an accident benefits action arises out of an alleged breach of contract by the provider of accident benefits coverage, Parayeski J., determined that it is a distinction "without a great deal of meaningful difference" as the alleged injuries are at the root of both claims.

Parayeski J., also concluded that the fact that the two actions may not be at the same stage of proceeding does not militate in favour of keeping them separate as the less advanced one can easily be "caught up" with minimal effort.