Zacharias v. Zurich Insurance Company

[Indexed as: Zacharias v. Zurich Insurance Co.]

111 O.R. (3d) 611

2012 ONSC 4209

Ontario Superior Court of Justice,
Stevenson J.
July 16, 2012

Insurance -- Automobile insurance -- Statutory accident benefits -- Insurer required to pay compound interest rather than simple interest on overdue payments pursuant to s. 24(4) of Statutory Accident Benefits Schedule -- Accidents before January 1, 1994 -- Statutory Accident Benefits Schedule -- Accidents before January 1, 1994, R.R.O. 1990, Reg. 672.

The plaintiff was injured in a motor vehicle accident in 1990. She brought an action claiming weekly income benefits from the defendant insurer. The defendant sought a determination before trial of the question whether the plaintiff was entitled to compound interest or simple interest on the arrears of weekly income benefits, if any, owing to her.

Held, the motion should be granted.

Section 24(4) of the Statutory Accident Benefits Schedule -- Accidents before January 1, 1994 provides that the insurer "will pay interest on overdue payments from the date they become overdue at the rate of 2 per cent per month". When s. 24(4) was enacted, it was the intention of the legislature to impose a penalty on insurers for late payments or payments that

had not been made at all. Section 24(4) should be interpreted as providing for the payment of compound interest.

Cases referred to

Bank of America Canada v. Mutual Trust Co., [2002] 2 S.C.R. 601, [2002] S.C.J. No. 44, 2002 SCC 43, 211 D.L.R. (4th) 385, 287 N.R. 171, J.E. 2002-795, 159 O.A.C. 1, 49 R.P.R. (3d) 1, 113 A.C.W.S. (3d) 56; Bathurst Paper Ltd. v. New Brunswick (Minister of Municipal Affairs), [1972] S.C.R. 471, [1971] S.C.J. No. 124, 22 D.L.R. (3d) 115, 4 N.B.R. (2d) 96, 1971 CarswellNB 14; Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, 2002 SCC 42, 2002 SCC 42, 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, J.E. 2002-775, 166 B.C.A.C. 1, 100 B.C.L.R. (3d) 1, 18 C.P.R. (4th) 289, 93 C.R.R. (2d) 189, REJB 2002-30904, 113 A.C.W.S. (3d) 52; Bristol-Myers Squibb Co. v. Canada (Attorney General), [2005] 1 S.C.R. 533, [2005] S.C.J. No. 26, 2005 SCC 26, 253 D.L.R. (4th) 1, 334 N.R. 55, J.E. 2005-996, 39 C.P.R. (4th) 449, 139 A.C.W.S. (3d) 552; Canada 3000 Inc. (Re), [2006] 1 S.C.R. 865, [2006] S.C.J. No. 24, 2006 SCC 24, 269 D.L.R. (4th) 79, 349 N.R. 1, J.E. 2006-1215, 212 O.A.C. 338, 20 C.B.R. (5th) 1, 10 P.P.S.A.C. (3d) 66, 148 A.C.W.S. (3d) 182; Canada Labour Relations Board v. Quebecair, [1993] 3 S.C.R. 724, [1993] S.C.J. No. 114, 108 D.L.R. (4th) 1, 160 N.R. 321, J.E. 93-1815, 17 Admin. L.R. (2d) 141, 93 CLLC 14,062 at 12372, 43 A.C.W.S. (3d) 396; CanadianOxy Chemicals Ltd. v. Canada (Attorney General), [1999] 1 S.C.R. 743, [1998] S.C.J. No. 87, 171 D.L.R. (4th) 733, 237 N.R. 373, J.E. 99-861, 122 B.C.A.C. 1, 133 C.C.C. (3d) 426, 29 C.E.L.R. (N.S.) 1, 23 C.R. (5th) 259, 41 W.C.B. (2d) 411; Diamond Estate v. Robbins, [2006] N.J. No. 3. 2006 NLCA 1, 253 Nfld. & P.E.I.R. 16, 22 C.P.C. (6th) 1, 144 A.C.W.S. (3d) 823; Gill v. Zurich Insurance Co., [1999] O.J. No. 4333, 17 C.C.L.I. (3d) 39, 92 A.C.W.S. (3d) 680 (S.C.J.); J.W. v. Canadian General Insurance Group, [1999] O.F.S.C.I.D. No. 22; McMaster v. Dominion of Canada General Insurance Co., [1994] O.I.C.D. No. 122; Ross River Dena Council v. Canada (Attorney General), [2012] Y.J. No. 1, 2012 YKSC 4, [2012] 2 C.N.L.R. 276 [page612]

Statutes referred to

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 128, (4)(b), (g)

Insurance Act, R.S.O. 1990, c. I.8 [as am.], s. 282(10) [as am.]
Insurance Law, N.Y.C. 5106
Interest Act, R.S.C. 1985, c. I-15 [as am.]
New York Insurance Code, s. 5106
Patent Act, R.S.C. 1985, c. P-4 [as am.]
Rules and regulations referred to
New York Regulation 68, 11 NYCRR 65, s. 65.15(h)
O. Reg. 293/10, s. 46(2)
Patented Medicines (Notice of Compliance) Regulations, SOR/93-133 [as am.]
Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rule 21.01(1)
Statutory Accident Benefits Schedule -- Accidents after December 31, 1993 and before November 1, 1996, O. Reg. 776/93 [as am.], s. 68
Statutory Accident Benefits Schedule -- Accidents before January 1, 1994, R.R.O. 1990, Reg. 672 [as am.], s. 24(4)
Statutory Accident Benefits Schedule -- Accidents on or after November 1, 1996, O. Reg. 403/96 [as am.], s. 46(2)
Statutory Accident Benefits Schedule -- Effective September 1, 2010, O. Reg. 34/10 [as am.]
Authorities referred to
Driedger, Elmer A., The Construction of Statutes (Toronto: Butterworths, 1974)
Kruger, J.P., M.E. Atchison and M.P. Richardson, Report of the Automobile Insurance Board (Ontario: Ministry of Financial Institutions, 1989)
Sullivan, Ruth, Statutory Interpretation, 2nd ed. (Toronto: Irwin Law, 2007)
Sullivan, Ruth, Sullivan on the Construction of Statutes, 5th ed. (Markham, Ont.: LexisNexis, 2008)
Waddams, S.M., The Law of Damages, 3rd ed. (Aurora, Ont.: Canada Law Book, 1997)

MOTION for a determination before trial of a question of law.

Russell J. Howe, for plaintiff/responding party.

Eric K. Grossman, for defendant/moving party.

Endorsement of STEVENSON J.: --

Introduction

[1] Nancy Zacharias ("Zacharias") alleges that she sustained personal injuries as a result of a motor vehicle accident (the "accident"), which occurred on December 18, 1990. At the time of the accident, Zacharias was insured under a policy of automobile insurance issued by the defendant, Zurich Insurance Company ("Zurich"). Zacharias is claiming weekly income benefits from Zurich as a result of the accident.

[2] Zurich seeks a determination of a question of law prior to trial. That question is whether Zacharias is entitled to simple [page613] interest or interest that compounds monthly, on the arrears of weekly income benefits, if any, owing to her by Zurich.

Factual Background

[3] Zacharias is claiming weekly income benefits from Zurich under the Statutory Accident Benefits Schedule -- Accidents before January 1, 1994, R.R.O. 1990, Reg. 672, the regulations to the Ontario Motorist Protection Plan (the "OMPP legislation"). Zurich paid benefits to Zacharias at the rate of $216.37 per week from December 25, 1992 to January 26, 1996.

[4] Zurich terminated Zacharias' weekly income benefits on January 26, 1996. Zacharias subsequently issued a statement of claim on August 25, 1997. In her amended amended statement of claim, issued on October 29, 2003, among the relief sought, she is seeking weekly income benefits from December 18, 1990, at the rate of $600 per week, plus interest at 2 per cent per month.

[5] The parties have not resolved the issue of income replacement benefits and, in addition, there is a dispute regarding whether any interest owing would be simple interest or compound interest. Zacharias claims that interest on any arrears found to be payable at trial is to be compounded monthly at 2 per cent. Zurich states that the provisions of s.

24(4) of the OMPP legislation provide for simple interest of 2 per cent per month or 24 per cent per annum.

Issue

If the plaintiff is found to be entitled to arrears of weekly income benefits pursuant to the OMPP legislation, is she entitled to simple interest or compound interest on the arrears of income replacement benefits?

(i) Determination of a question of law

[6] Rule 21.01(1) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 states:

> 21.01(1) A party may move before a judge,
>
> (a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs . . .

and the judge may make an order or grant judgment accordingly.

[7] Based on the submissions of counsel, I advised counsel that I would determine the issue with respect to interest prior to the [page614] trial of this matter as I agreed that the determination of this issue may assist with disposing of all or part of the action or substantially shorten the trial.

(ii) History of the Statutory Accident Benefits Schedule interest provision ("SABS")

[8] There have been many changes to no-fault automobile legislation in Ontario. In 1990, Ontario's no-fault automobile legislation was introduced by Bill 68 as a regulation to the Insurance Act, R.S.O. 1990, c. I.8 under the OMPP legislation. The OMPP legislation applied to accidents occurring between June 22, 1990 and December 31, 1993.

[9] Subsequent no-fault legislation under the Statutory Accident Benefits Schedule -- Accidents after December 31, 1993 and before November 1, 1996, O. Reg. 776/93 ("Bill 164") was

then introduced and this legislation applied to accidents occurring between January 1, 1994 to October 31, 1996. After this, further legislation was introduced under Statutory Accident Benefits Schedule -- Accidents on or after November 1, 1996, O. Reg. 403/96 ("Bill 59"). Bill 59 was modified but not completely replaced by further legislation, O. Reg. 293/10 ("Bill 198"). A new SABS came into force on September 1, 2010 pursuant to Statutory Accident Benefits Schedule -- Effective September 1, 2010, O. Reg. 34/10.

[10] Zacharias' accident occurred on December 18, 1990; therefore, the applicable SABS is the OMPP legislation.

[11] The issue in this case arises because s. 24(4) of the OMPP legislation states:

> 24(4) The insurer will pay interest on overdue payments from the date they become overdue at the rate of 2 per cent per month.

[12] There is, therefore, no specific mention of compounding interest in s. 24(4). By contrast, s. 68 of Bill 164, which replaced the OMPP legislation for accidents occurring after December 31, 1993, states that "[i]f payment of a benefit under this Regulation is overdue, the insurer shall pay interest on the overdue amount for each day the amount is overdue from the date the amount became overdue at the rate of 2 per cent per month compounded monthly." Section 46(2), the interest provision in both Bill 59 and Bill 198, uses the same language as Bill 164.

[13] Zurich submits that a change of language in legislation must be presumed to have some significance. The change in the interest provisions from the OMPP and subsequent SABS legislation should be viewed as purposive. Zurich relies upon this [page615] principle as enunciated in Elmer A. Driedger, The Construction of Statutes (Toronto: Butterworths, 1974), at p. 127.

[14] Zurich also relies on Bathurst Paper Ltd. v. New Brunswick (Minister of Municipal Affairs), [1972] S.C.R. 471,

[1971] S.C.J. No. 124, 1971 CarswellNB 14, at para. 12, wherein Chief Justice Laskin stated that legislative changes may reasonably be viewed as purposive, unless there is internal or external evidence to show that only language polishing was intended. A legislative amendment must accomplish something of substance, and it is untenable to suggest that a legislative amendment was done merely to improve the drafting.

[15] Zurich contends that the change in the interest provisions from the OMPP legislation to Bill 164 by adding the term "compounded monthly" must be assumed to have accomplished something of substance. The only conclusion must be that the change was intended to, and did, effect a change in the interest provisions from simple to compound interest.

[16] Zurich also submits that there is no provincial act respecting interest in Ontario. It relies on the federal Interest Act, R.S.C. 1985, c. I-15, which specifically provides that where no rate is fixed by the agreement or by law, the rate of interest shall be 5 per cent per annum. Zurich submits that the federal government has provided for a default annual interest rate that is not compounded and which accrues on an annual basis, not monthly.

[17] Zurich also points to the fact that in Ontario, prejudgment and post-judgment interest rates on awards of damages are governed by the Courts of Justice Act, R.S.O. 1990, c. C.43. Section 128 allows the court to award interest, but not "where interest is payable by a right other than under this section". They state that s. 128(4)(g) supports the proposition that the Courts of Justice Act does not specifically apply to SABS claims. They submit that where the legislation provides for interest to be paid, it is notable that subsection (b) specifically states that interest shall not be awarded "on interest accruing under this section". There is specific provision for simple, not compound interest. They submit that the default interest payable on awards of damages in Ontario is simple interest.

[18] Zurich also submits that since the introduction of the OMPP legislation, the Insurance Act has included a special

award provision that specifically refers to compound interest. Section 282(10) of the Insurance Act reads as follows:

> 282(10) If the arbitrator finds that an insurer has unreasonably withheld or delayed payments, the arbitrator, in addition to awarding the benefits and interest to which an insured person is entitled under the Statutory [page616] Accident Benefits schedule, shall award a lump sum of up to 50 per cent of the amount to which the person was entitled at the time of the award together with interest on all amounts then owing to the insured (including unpaid interest) at the rate of 2 per cent per month, compounded monthly, from the time the benefits first became payable under the schedule.

[19] This section does not apply to overdue payments that are governed by the interest provisions set out in the SABS. The section applies only to interest on a special award which may be granted in addition to payment of the overdue benefit. Section 282(10) has not changed with the various SABS regimes. Compound interest has been payable with respect to the special award since the OMPP legislation was enacted.

[20] Zurich relies on arbitral decisions in support of its position. They submit that these decisions, as well as various other court decisions, indicate that interest payable under the OMPP legislation is simple interest, not compound interest. In support of their position, they rely on the decisions of McMaster v. Dominion of Canada General Insurance Co., [1994] O.I.C.D. No. 122 and J.W. v. Canadian General Insurance Group, [1999] O.F.S.C.I.D. No. 22 for the principle that in the absence of statutory language specifying that compound interest is payable, the legislative provision for "interest" means simple interest. They state that the distinction between the interest provision in s. 24(4) of the OMPP legislation versus the special award interest provision in s. 282(10) of the Insurance Act makes this point irrefutable. The special award provision specifically provides for interest "compounded monthly" while s. 24(4) does not.

[21] Additionally, Zurich submits that s. 24(4) is not punitive in intent. It imposes a charge for the insurers' use

of money overdue to the applicant. Zurich contrasts this with the purpose of the special award, which is to penalize the unreasonable withholding or denial of benefits from the time the benefits first became payable.

[22] Zurich also states that a rate of interest that is not qualified by words such as "calculated" or "compounded", and is not accompanied by any direction concerning the frequency of calculation or compounding, is to be calculated as simple interest. In the absence of such wording in s. 24(4) of the OMPP, interest under the OMPP legislation is simple interest and such a requirement ought not to be read into s. 24(4). If the legislature had wanted compound interest payable on overdue benefits, it would have specified that, as it did in s. 282(10) of the Insurance Act and in subsequent SABS legislation.
[page617]

(iii) Compound interest

[23] The issue of compound interest awards was addressed by the Supreme Court of Canada in Bank of America Canada v. Mutual Trust Co., [2002] 2 S.C.R. 601, [2002] S.C.J. No. 44, 2002 SCC 43. In that case, at paras. 23 and 24, Major J. recognized that as a matter of commercial practice, compound interest awards are standard practice [at paras. 23 and 24]:

> Simple interest and compound interest each measure the time value of the initial sum of money, the principal. The difference is that compound interest reflects the time-value component to interest payments while simple interest does not. Interest owed today but paid in the future will have decreased in value in the interim just as the dollar example described in paras. 21-22. Compound interest compensates a lender for the decrease in value of all money which is due but as yet unpaid because unpaid interest is treated as unpaid principal.
>
> Simple interest makes an artificial distinction between money owed as principal and money owed as interest. Compound interest treats a dollar as a dollar and is therefore a more precise measure of the value of possessing money for a period of time. Compound interest is the norm in the banking and

financial systems in Canada and the western world and is the standard practice of both the appellant and respondent.

[24] Major J. recognized, at para. 36, that although historically considered a way to punish a defendant, an award of compound interest is no longer considered punitive: "The modern theory is that judgment interest is more appropriately used to compensate rather than punish." Major J. went on to quote [at para. 37] the following passage from S.M. Waddams, The Law of Damages, 3rd ed. (Aurora, Ont.: Canada Law Book, 1997), at p. 437, which explains the reasoning behind the use of compound interest:

> [T]here seems in principle no reason why compound interest should not be awarded. Had prompt recompense been made at the date of the wrong the plaintiff would have had a capital sum to invest; the plaintiff would have received interest on it at regular intervals and would have invested those sums also. By the same token the defendant will have had the benefit of compound interest.

[25] Finally, Major J. confirmed that that as a matter of equity, the court may award compound interest under its equitable jurisdiction [at paras. 44 and 45]:

> Compound interest is no longer commonly thought to be, in the language quoted in Costello, supra, at pp. 492-93, usurious or to involve prohibitively complex calculations. Compound interest is now commonplace. Mortgages are calculated using compound interest, as are most other loans, including such worthy endeavours as student loans. The growth of a company or a country's gross domestic product over a period of years is often stated in terms of an annually compounded rate. The bank rate, which garners much attention as an indicator of the health and direction of the economy, is a [page618] compound interest rate. It is for reasons such as these that the common law now incorporates the economic reality of compound interest. The restrictions of the past should not be used today to separate the legal system from the world at large.

> If the court was unable to award compound interest on the breach of a loan which itself bore compound interest, it would be unable to adequately award the plaintiff the value he or she would have received had the contract been performed. To keep the common law current with the evolution of society and to resolve the inconsistency between awarding expectation damages and the courts' past unwillingness to award compound interest, that unwillingness should be discarded in cases requiring that remedy for the plaintiff to realize the benefit of his or her contract.

(iv) Principles of statutory interpretation

[26] In order to properly determine the issue before me, I must engage in statutory interpretation. There are a number of leading Supreme Court of Canada cases on statutory interpretation. These cases consistently cite the modern principle, as articulated by Elmer Driedger in his text, Construction of Statutes, as the governing principle of statutory interpretation. This often-quoted passage has appeared in innumerable decisions on statutory interpretation, and the law is succinctly summarized by the Supreme Court of Canada in Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, 2002 SCC 42, at paras. 26-30:

> In Elmer Driedger's definitive formulation, found at p. 87 of his Construction of Statutes (2nd ed. 1983):
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, Stubart Investments Ltd. v. The Queen, [1984] 1 S.C.R. 536, at p. 578, per Estey J.; Qubec (Communaut urbaine) v. Corp. Notre-Dame de Bon-Secours, [1994] 3 S.C.R. 3, at p. 17; Rizzo & Rizzo Shoes Ltd.

(Re), [1998] 1 S.C.R. 27, at para. 21; R. v. Gladue, [1999] 1 S.C.R. 688, at para. 25; R. v. Araujo, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 26; R. v. Sharpe, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, per McLachlin C.J.; Chieu v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 27. I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the Interpretation Act, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute [page619] Interpretation in a Nutshell" (1938), 16 Can. Bar Rev. 1, at p. 6, "words, like people, take their colour from their surroundings". This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described in R. v. Ulybel Enterprises Ltd., [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52, as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter". (See also Stoddard v. Watson, [1993] 2 S.C.R. 1069, at p. 1079; Pointe-Claire (City) v. Quebec (Labour Court), [1997] 1 S.C.R. 1015, at para. 61, per Lamer C.J.)

Other principles of interpretation -- such as the strict construction of penal statutes and the "Charter values" presumption -- only receive application where there is ambiguity as to the meaning of a provision. (On strict construction, see: Marcotte v. Deputy Attorney General for Canada, [1976] 1 S.C.R. 108, at p. 115, per Dickson J. (as he then was); R. v. Goulis (1981), 33 O.R. (2d) 55 (C.A.), at pp. 59-60; R. v. Hasselwander, [1993] 2 S.C.R. 398, at p.

413; R. v. Russell, [2001] 2 S.C.R. 804, 2001 SCC 53, at para. 46. I shall discuss the "Charter values" principle later in these reasons.)

What, then, in law is an ambiguity? To answer, an ambiguity must be "real" (Marcotte, supra, at p. 115). The words of the provision must be "reasonably capable of more than one meaning" (Westminster Bank Ltd. v. Zang, [1966] A.C. 182 (H.L.), at p. 222, per Lord Reid). By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement in CanadianOxy Chemicals Ltd. v. Canada (Attorney General), [1999] 1 S.C.R. 743, at para. 14, is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids" (emphasis added), to which I would add, "including other principles of interpretation".

For this reason, ambiguity cannot reside in the mere fact that several courts -- or, for that matter, several doctrinal writers -- have come to differing conclusions on the interpretation of a given provision. Just as it would be improper for one to engage in a preliminary tallying of the number of decisions supporting competing interpretations and then apply that which receives the "higher score", it is not appropriate to take as one's starting point the premise that differing interpretations reveal an ambiguity. It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger, and thereafter to determine if "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning" (Willis, supra, at pp. 4-5).

[27] In a recent decision of the Supreme Court of Yukon, Ross River Dena Council v. Canada (Attorney General), [2012] Y.J. No. 1, 2012 YKSC 4, at paras. 8-12, Gower J. relied on the work of Professor Ruth Sullivan in her text Sullivan on the Construction of Statutes, 5th ed. (Markham, Ont.: LexisNexis,

2008) to further explain the modern principle: [page620]

The modern principle has been cited and relied upon in innumerable decisions of Canadian courts, and in Re: Rizzo & Rizzo Shoes Ltd., [1998] 1 S.C.R. 27, at para. 21, it was declared to be the preferred approach of the Supreme Court of Canada. See also: Bell ExpressVu Limited Partnership v. Rex, 2002 SCC 42, at paras. 26 and 27.

Professor Sullivan describes the three "dimensions" of the modern principle, at pages 1 and 2 of her text. The first dimension is the textual meaning or ordinary meaning, which she notes that Driedger calls the "grammatical and ordinary sense of the words."

The second dimension is legislative intent. Professor Sullivan states that this aspect of interpretation is captured in Driedger's reference to "the scheme and object of the Act and the intention of Parliament."

The third dimension of the modern principle is compliance with established legal norms. Professor Sullivan notes that these norms are part of the "entire context" in which the words of an Act must be read, and that they are also an integral part of legislative intent.

At page 3 of her text, Professor Sullivan concludes as follows:

> The modern principle says that the words of a legislative text must be read in their ordinary sense harmoniously with the scheme and objects of the Act and the intention of the legislature. In an easy case, textual meaning, legislative intent and relevant norms all support a single interpretation. In hard cases, however, these dimensions are vague, obscure or point in different directions. In the hardest cases, the textual meaning seems plain, but cogent evidence of legislative intent (actual or presumed) makes the plain meaning unacceptable. If the modern principle has a weakness, it is its failure to acknowledge and address the dilemma created by hard cases.

(Italics already added; my underlining)

(v) The use of interpretive aids

[28] There are numerous examples in Supreme Court jurisprudence where interpretive aids have been used to discern the meaning of a statutory provision. For example, in Canada 3000 Inc. (Re), [2006] 1 S.C.R. 865, [2006] S.C.J. No. 24, 2006 SCC 24, at para. 57, the Supreme Court made the following comments:

> Though of limited weight, Hansard evidence can assist in determining the background and purpose of legislation; Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, at para. 35; R. v. Morgentaler, [1993] 3 S.C.R. 463, at p. 484. In this case, it confirms Parliament's apparent intent to exclude legal titleholders from personal liability for air navigation charges. The legislative history and the statute itself make it clear that Parliament did not intend CANSCA to replace or override the existing regulatory framework but rather to fit cohesively within it. In introducing CANSCA, the Minister of Transport stated that the Aeronautics Act, which establishes the essential regulatory framework to maintain safety in the aviation industry, "will always take precedence over the commercialization legislation" (House of Commons Debates, March 25, 1996, at p. 1154). In the Ontario Court of Appeal, Cronk J.A. highlighted a number of other instances where government spokespersons emphasized to Members of Parliament that CANSCA was to fit within the [page621] existing regulatory framework which generally favours the narrow meaning of "owner"; see, e.g., House of Commons Debates, May 15, 1996, at p. 2834; May 29, 1996, at p. 3144; June 4, 1996, at pp. 3394 and 3410; and Debates of the Senate, vol. 135, 2nd Sess., 35th Parl., June 10, 1996, at pp. 588-89.

[29] In Bristol-Myers Squibb Co. v. Canada (Attorney General), [2005] 1 S.C.R. 533, [2005] S.C.J. No. 26, 2005 SCC 26, at para. 156, Bastarache J. accepted the use of a Regulatory Impact Analysis Statement ("RIAS") in determining the context and purpose of impugned legislation:

> It has long been established that the usage of admissible

> extrinsic sources regarding a provision's legislative history and its context of enactment could be examined. I held in Francis v. Baker, at para. 35, that "[p]roper statutory interpretation principles therefore require that all evidence of legislative intent be considered, provided that it is relevant and reliable." Consequently, in order to confirm the purpose of the impugned regulation, the intended application of an amendment to the regulation or the meaning of the legislative language, it is useful to examine the RIAS, prepared as part of the regulatory process (see Sullivan, at pp. 499-500)[.]

[30] These passages demonstrate in general the court's willingness to use legislative history to determine the meaning and purpose of a statute. Ruth Sullivan explains what is meant by "legislative history" in her text Sullivan on the Construction of Statutes, supra, at p. 593:

> In a broad sense the legislative history of an enactment consist of everything that relates to the conception, preparation and passage of the enactment, from the earliest proposals for legislation to royal assent. This includes the reports of law reform commissions and other similar bodies; departmental and committee studies and recommendations; proposals and memoranda submitted to Cabinet; the remarks of the Minister responsible for the bill; materials tabled or otherwise brought to the attention of the legislature during the legislative process, including explanatory notes; materials published by the government during the legislative process, such as explanatory papers or press releases; legislative committee hearings and reports; debates on the floor of the legislature; the record of motions to amend the bill; regulatory impact analysis statements; and more.

(vi) Commission reports

[31] At p. 599 of her text, Professor Sullivan also describes the court's use of commission reports in determining the purpose and context of legislation. Commission reports and similar documents have often been brought to the attention of the legislature or tabled during the legislative process.

Because legislation is often preceded by the report of a law reform commission or similar body that has investigated a problem and recommended a legislative response, these reports can be admissible as evidence of external context and the legislative history of the statute. However, even though they can form part of the context and [page622] history of the legislation, they are not admissible as direct proof of legislative intent. That said, Sullivan points out, at p. 600, that commission reports can permit the court to draw inferences about the purpose of the legislation and the meaning of particular provisions. Commission reports and comparable publications are currently being used by courts for multiple purposes, including as evidence of external context, as direct evidence of legislative purposes or as direct evidence of the meaning of the text. In support of this statement, Sullivan cites the Newfoundland Court of Appeal in Diamond Estate v. Robbins, [2006] N.J. No. 3, 2006 NLCA 1, at para. 62:

> [T]he Limitations Act is based on the extensively researched work of the Newfoundland Law Reform Commission (Commission) and gives effect to substantially all of the recommendations of the Commission thereof. Accordingly it is appropriate to refer to the Commission's reports as evidence of context, legislative purpose and textual meaning.

(vii) Model legislation

[32] Professor Sullivan discusses the role of model legislation in her text Sullivan on the Construction of Statutes, supra, at pp. 630-31. At p. 630, she describes the court's use of model legislation in the following terms:

> When a statute appears to be modelled on existing legislation, whether from the same or another jurisdiction, interpretations of the model legislation are presumed to have been known and taken into account in drafting the new legislation. If the previous interpretations were formally brought to the attention of the legislature, they are part of the legislative history of the statute and this may afford them additional weight. See, for example, R. v. Lyons, [1984] 2 S.C.R. 633, [1984] S.C.J. No. 63 and Dickason v. University

of Alberta, [1992] 2 S.C.R. 1003, [1992] S.C.J. No. 76.

[33] Professor Sullivan states in Statutory Interpretation, 2nd ed. (Toronto: Irwin Law, 2007) that "both the model legislation itself and case law interpreting it may be relied on in interpretation". Based on these authorities, I am satisfied that the court's use of model legislation can include a comparison of the statute being interpreted to the statute that it was modelled on.

(viii) The interpretation of regulations

[34] The rules of statutory interpretation, including the modern approach to statutory interpretation, apply equally to the interpretation of regulations. However, because regulations are normally made to complete and implement a statutory scheme, that statutory scheme forms an important part of the context in which the regulation must be read: see Sullivan, supra, at p. 368. The leading case on the interpretation of regulations is [page623] Bristol-Myers Squibb Co. v. Canada (Attorney General), supra. In that case, the Supreme Court interprets the meaning of the Patented Medicines (Notice of Compliance) Regulations, SOR/93-133 in the context of the Patent Act, R.S.C. 1985, c. P-4, the Act that authorized them. Binnie J. emphasizes in this case that in interpreting regulations, courts should rely not only on the purpose for which the regulation-making powers were conferred, but the purposes of the enabling statute as a whole. He states, at para. 38 of the decision:

> The same edition of Driedger adds that in the case of regulations, attention must be paid to the terms of the enabling statute:
>
> > It is not enough to ascertain the meaning of a regulation when read in light of its own object and the facts surrounding its making; it is also necessary to read the words conferring the power in the whole context of the authorizing statute. The intent of the statute transcends and governs the intent of the regulation.
>
> (Elmer A. Driedger, Construction of Statutes (2nd ed.

1983), at p. 247)

> This point is significant. The scope of the regulation is constrained by its enabling legislation. Thus, one cannot simply interpret a regulation the same way one would a statutory provision. In this case, the distinction is crucial, for when viewed in that light the impugned regulation cannot take on the meaning suggested by BMS. Moreover, while the respondents' argument draws some support from the language of s. 5(1.1) isolated from its context, it overlooks a number of significant aspects of the "modern approach".

Disposition

[35] Applying the tools of statutory interpretation and based on the reasons below, I find that interest under s. 24(4) of the OMPP legislation is compound interest and therefore Zacharias is entitled to compound interest on any arrears of income replacement benefits found to be owing to her by Zurich.

[36] The ordinary meaning of a statute is "the natural meaning that appears which the provision is simply read through as a whole". See Canada Labour Relations Board v. Quebecair, [1993] 3 S.C.R. 724, [1993] S.C.J. No. 114, at p. 735 S.C.R. In this case, the words of the provision in question are the words in s. 24(4) and, of particular importance, the words "at the rate of 2 per cent per month". The interpretive question is whether or not, in the absence of the words "compounded monthly" that were later added to similar provisions, those words can be inferred from the overall context, scheme and object of the Regulation. The problem in this case arises from the absence of words specifying whether simple or compound interest applies. To the extent that s. 24(4) of the OMPP legislation is silent on that point, a reading of the words in their "grammatical and ordinary [page624] sense" is impossible. However, the contextual and purposive analysis requires that the entire Act be read in its grammatical and ordinary sense, and not merely the provision in question.

[37] The interpretive exercise also involves reading the words harmoniously with the scheme and object of the Act and

the intention of the provincial legislature, and reading the words in their entire context. Professor Sullivan suggests that the contextual reading is informed by established legal norms, and these norms are integral to determining the intention of the legislature. When engaging in a contextual analysis, it is important to draw attention to a point made by Iacobucci J. in Bell ExpressVu, supra, at para. 29, [See Note 1 below] where he stated, "[b]y necessity, however, one must consider the 'entire context' of a provision before one can determine if it is reasonably capable of multiple interpretations". Iacobucci J. went on to quote Major J. in CanadianOxy Chemicals Ltd. v. Canada (Attorney General), [1999] 1 S.C.R. 743, [1998] S.C.J. No. 87, who stated, at para. 14, "It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids." This point was restated by the Supreme Court in Bristol-Myers Squibb Co. v. Canada (Attorney General), supra, at para. 43, and Canada 3000 Inc. (Re), supra, at para. 44.

[38] I do find in this case that there is genuine ambiguity with respect to s. 24(4) of the OMPP legislation and that resort needs to be made to external interpretive aids and extrinsic materials in order to determine the issue. However, I note that Professor Sullivan argues that confining the use of extrinsic materials to the interpretation of legislation that has been interpreted to be ambiguous is misleading and should be abandoned. Professor Sullivan writes, at p. 576 of her text:

> To say that a provision is not ambiguous, that its meaning is clear or "plain", is a conclusion reached at the end of interpretation. It is a judgment that can appropriately be made only in light of all the available evidence of legislative meaning and intent. The issue, then, is whether the assistance afforded by extrinsic materials -- as legal context, as evidence of external context, as evidence of legislative intent, or as authoritative opinion evidence -- [page625] should be included in the initial work of interpretations. It is hard to see why it should be excluded.

[39] The interpretive aids and model legislation provided by

Zacharias in this case include the Report of the Automobile Insurance Board (Ontario: Ministry of Financial Institutions, 1989) (Co-chairs: J.P. Kruger, M.E. Atchison and M.P. Richardson) (the "Kruger Report"), provisions from the New York State no-fault insurance scheme and both New York and Ontario jurisprudence interpreting the interest provisions in the no-fault insurance scheme.

[40] In accordance with an order in council dated March 2, 1989, the then Automobile Insurance Board (the "Board") conducted a lengthy hearing to examine a threshold no-fault system of privately delivered auto insurance. Led by John P. Kruger, the board delivered its report on July 18, 1989. The Kruger Report was addressed to the Lieutenant Governor in Council and was clearly tabled during the legislative process and played a central role in legislative debates.

[41] The Kruger Report is the only real indication of the intention of the legislature with respect to the interest provisions contained in the OMPP regulations, making direct reference to them. The Kruger Report recommended adopting the New York State no-fault insurance arbitration/conciliation scheme in which interest payable on no-fault benefits was determined to be compounded.

[42] The report admonished the insurance industry's performance in delivering existing no-fault benefits as abysmal, a fact that had been confirmed by Mr. Justice Coulter Osborne in his report on auto accident compensation in Ontario a few months prior, and confirmed by the evidence which was presented to the Kruger commission throughout its investigation. The Board considered it imperative to put in place mechanisms to ensure that no-fault benefits were in fact delivered to insured Ontarians and in accordance with the insurers' obligations under the contract of insurance: see the Kruger Report, at p. 103. The Board advocated the adoption of an alternative dispute resolution system that acknowledged the special needs of injured persons requiring rehabilitation: see the Kruger Report, at pp. 9-14 and 122.

[43] New York State adopted its no-fault insurance scheme in

1974. It recognized, among other things, that timely payment of benefits would be paramount, given the abrogation of the victims' rights to sue in tort and their need for rehabilitation following car accidents. For this reason, New York legislators specified that late payments would be subject to interest at a very [page626] high rate to penalize insurance companies for their failure to pay benefits in a timely manner. The interest provision in place at that time, s. 65.15(h) of New York Regulation 68, 11 NYCRR 65, specified an interest rate of "2% per month, compounded and calculated on a pro-rata basis using a 30 day month" on all outstanding benefits. Section 5106 of the New York Insurance Code, as it then was, provided that "all overdue payments shall bear interest at the rate of two percent per month": Insurance Law, N.Y.C. 5106: Fair Claims Settlement.

[44] In Ontario, the Board recommended the inclusion of "substantial interest penalties for late payment of no-fault benefits". A penalty of 2 per cent per month, the amount charged in New York, was considered appropriate by the Board: see the Kruger Report, at p. 111.

[45] The Kruger Report recommended that a similar enforcement scheme be adopted in Ontario, noting that "evidence indicated that large interest penalties are quite effective, while lesser penalties, such as those imposed in Michigan, tend to be less effective": see the Kruger Report, at pp. 125-28.

[46] Upon reviewing this extrinsic material, I am able to draw inferences about the purpose of the legislation and the meaning of s. 24(4) of the OMPP legislation. The purpose of the provision was to prescribe a penalty to insurers for their failure to reconcile claims for the no-fault benefits promptly. The New York model was followed as was described in the testimony of state officials from New York and the recommendations of the Kruger commission. I find that subsequent change to the SABS which included the word "compounded" is likely indicative of language polishing to reflect the real intention of the legislature and the purpose of the legislation at the time the OMPP legislation was enacted, given the recommendations with respect to compound

interest found in the Kruger Report.

[47] Proper and timely delivery of no-fault benefits was critical given that the no-fault system contemplated at the time severely restricted and often precluded an accident victim's rights of action in tort. The Board had recommended the inclusion of substantial interest penalties for late payment of no-fault benefits. There was a need to ensure that there were adequate measures in place so that no-fault benefits were paid promptly. The Board and the witnesses referred to the 2 per cent per month interest charge as a "penalty" on late payment of no-fault benefits. This was no doubt suggested as a measure to penalize insurance companies for failure to pay benefits in a timely manner.

[48] It is arguable that based on the shift in the way the law views compound interest, that compound interest is now more [page627] properly characterized as being compensatory as opposed to penal. However, when s. 24(4) of the OMPP legislation was enacted in 1990, I find that the intention of the legislature was to impose a penalty on insurers for late payments or on payments that had not been made at all. It is not simply a charge for the insurer's use of money overdue to the applicant as submitted by Zurich. The intention of the legislature was for it to be much more than that as I have determined.

[49] Zacharias relies on the decision of Gill v. Zurich Insurance Co., [1999] O.J. No. 4333, 17 C.C.L.I. (3d) 39 (S.C.J.) in support of her position. At para. 71 of Gill, Justice Eberhard found interest payable on outstanding no-fault benefits under s. 24(4) of the OMPP legislation to be compounded monthly. Counsel submits that this decision remains good and binding law. Counsel further submits that the arbitrators' decisions provided by Zurich were premised on their belief that the interest provision in the regulation was not penal in nature and such reasoning is incorrect. I agree that this was an improper characterization of s. 24(4) and that the legislature intended for it to impose a penalty for late payment of benefits.

[50] Additionally, I find that the fact that s. 282(10) of the Insurance Act includes the word "compounded" does not mean that the legislature intended for simple interest to apply to overdue payments under s. 24(4). Regulations must be interpreted so as to fit the scheme established by the enabling Act and further its purposes. As I have found above, the purpose of s. 24(4) of the OMPP legislation was to penalize insurers for overdue payments in accordance with the recommendations made in the Kruger Report. Therefore, the inclusion of the word "compounded" in the statutory provision, but not in the regulation, adds support to Zacharias' contention that the absence of the words "compounded monthly" in the interest provision of Bill 68 (the OMPP legislation) may be a drafting error and the inclusion of those words in the interest provision of Bill 164 was an instance of language polishing and not a substantive amendment.

[51] Therefore, applying the modern approach of statutory interpretation to the issue before me, I find that interest charged under s. 24(4) of the OMPP legislation is compounded interest and therefore Zacharias is entitled to compound interest on any arrears of income replacement benefits found to be owing to her.

Order

[52] I make the following order: [page628]

(i) the plaintiff, Nancy Zacharias is entitled to compound interest on any arrears of income replacement benefits which may be found to be owing to her; and

(ii) I urge the parties to agree on costs, but should they be unable to do so, the plaintiff shall serve and file written submissions no longer than three double-spaced pages together with her costs outline within 20 days. The defendant shall serve and file written submissions no longer than three double-spaced pages together with its costs outline within 20 days thereafter.

Motion granted.

Notes

Note 1: See, also, para. 30 of Bell ExpressVu: "It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger, and thereafter to determine if 'the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning'."
