CDL AB

CANADIAN DEFENCE LAWYERS

CDL Accident Benefits Newsletter Volume 2, Issue 1, August 21, 2018

CDL Accident Benefits Newsletter

Shirline Apiou, Dutton Brock LLP
Editor in Chief, CDL Accident Benefits Committee

Since our last edition of the AB newsletter, accident benefits disputes proceeding to the License Appeals Tribunal (LAT) continue to be on the rise. As many practitioners in this area will undoubtedly agree, this past spring and summer has been anything but dull. The LAT jurisprudence as available on CanLII is now well over 500 cases and there are many decisions in the process which have not yet been published. The LAT continues to respond effectively to the growing demands of claimants however procedural and administrative delays appear to continue. The wait times for published decisions, notices of case conferences, preliminary issue hearings and notices of motion—to name a few--continue to be an issue. Settlement meetings are being offered to participants in efforts to streamline the process. Hearings and other procedural matters are scheduled based on availability of the parties. In short, it appears we are headed back to a familiar place. Is everything old new again? In this issue, we see similar issues in accident benefits reinterpreted. Correlation is not causation and an accident has to directly cause an impairment as set out in the *Statutory Accident Benefits Schedule – Effective September 1, 2010*, O. Reg. 34/10. Production of relevant documentation in a timely manner continues to be an issue. Special Awards remain an issue to be considered in all cases. As we head into the fall season and with the new Ontario government in place, it remains to be seen whether the promise of change to the industry and the timely resolution of accident benefits disputes will continue to be on the agenda.

Coffee, Causation and Contortions: The Yogic Insurance Policy

Michelle T. Friedman, Senior Practice Counsel. CDL AB Committee Member
Thomas R. Hughes, Counsel
Aviva Trial Lawyers

You are running down your street, trip and fall headlong into a parked car. You were playing tag with your daughter, collided with a parked motorcycle then fell face first into a truck. You were struck by a bullet while seated in your vehicle. Were you involved in an accident?

One of the more difficult legal tests in Ontario's automobile insurance industry is what constitutes an accident. The statutory definition (an incident in which the use or operation of an automobile directly causes an impairment) is of little help. The accepted legal test has two parts:

1. The Purpose test:
Did the accident result from the ordinary and well-known activities to which automobiles are put?[1]. Since the decision in *Whipple*[2] the test has become more elastic. In *Whipple*, it was successfully argued that the use of a dancing pole inside the vehicle was a well-known activity to which automobiles are put.

2. The Causation Test:
Prior to 1996, both direct and indirect causes were enough to trigger coverage under an OAP. However, since *Chisholm*[3] the causation requirement has been narrowed to mean a direct cause. In *Chisholm*, the Plaintiff was seated in his car when he was struck by a bullet. The Plaintiff argued that but for driving is car, he would not have been shot.

The Court of Appeal at that time (2002) stated that legal entitlement to accident benefits requires not just that the use or operation of a car be a cause of the injuries but that it be a direct cause. A direct cause was defined as: "the active, efficient cause that sets in motion a chain of events which brings about a result without the intervention of any force stated and working actively from a new independent source."[4] The court dismissed the case. This was not an accident.

The Ontario Court of Appeal further modified the test in *Greenhalgh*:[5]

1. Was the use or operation of the vehicle a cause of the injuries?

2. If the use or operation of a vehicle was a cause of the injuries, was there an intervening act or intervening acts that resulted in the injuries that cannot be said to be part of the "ordinary course of things"? In that sense, can it be said that the use or operation of the vehicle was a "direct cause" of the injuries?

3. Was the use or operation of a vehicle the dominant feature of the injuries?

This interpretation was re-enforced as late as 2012 in *Downer*[6] where Mr. Downer was assaulted in his vehicle. The court found that it was not enough to show that the location of the assault was in the vehicle.

Fast forward to 2016 and our tag playing plaintiff in *Caughy*.[7] The court identifies that there is a dominant feature test, but does not apply it to the facts. They concentrate on the purpose test, when causation was the real issue.

In *Carr*[8] a fire truck was being used for demonstration purposes, and the Applicant fell from an stairwell on the truck and struck her head on the pavement. The insurer argued that the vehicle was not being used as an automobile. FSCO disagreed, and found this was an accident.
Fast forward to 2017, when Erin Dittmann[9] was at a drive through when hot coffee was spilled on her. When asked if this was an accident, the court came to the conclusion that,

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[1] 1995 CanLII 66 (SCC)
[2] 2012 ONSC 2612
[3] 2002 CanLII 45020 (ON CA)
[4] Ibid, at para 30
[5] 2004 CanLII 21045 (ON CA)
[6] 2012 ONCA 302
[7] 2016 ONCA 226
[8] FSCO P15-00062
[9] 2017 ONCA 617

"…but for her use of the vehicle she would not have been in the drive-through lane, would not have received the coffee cup while in the seated position…"

Oddly, the court also found but for being restrained by a seatbelt she may have been able to take evasive action to avoid the coffee. Still, if it isn't enough to show that an automobile was the location of an injury, how then does spilled coffee amount to an accident? The court goes on to explain:

> We are also satisfied that, as pointed out in the respondent's factum, the restraint of the seatbelt increased the respondent's exposure to the scalding liquid and thereby increased the level of her impairment…In this case, the use of a running motor vehicle in gear to access the drive-through and the seatbelt restraint were direct causes and dominant features of the impairment the respondent suffered.

Was Chisholm's vehicle not equipped with seatbelts? Did that prevent him from dodging the bullet? Maybe Mr. Downer could have fled his attackers if he wasn't belted in? Surely people spill coffee on themselves outside of a vehicle and are still unable to dodge it despite not being strapped in. One wonders if Ms. Dittman's vehicle had not been equipped with cup holders, would the act of getting coffee not be the ordinary use to which her vehicle was put?

At the end of the day, how stringent could a test be if merely being in the vehicle is enough to trigger coverage?

Does Priority or Loss Transfer apply to American Insurers who do not Operate in Ontario but have Signed the PAU?

Jason Frost, Schultz Frost LLP
AB Committee

Yes? No? Maybe?

A June 25, 2018 decision, *Personal and Zurich American*, addresses this 'grey area' in the priority and loss transfer case law. This decision clarifies that American insurers who file a PAU are not bound by the Ontario Priority and Loss Transfer schemes if the accident occurs outside of Ontario.

The accident involved a passenger vehicle struck by a tractor trailer insured by Zurich American. The passenger vehicle was insured by The Personal. The accident occurred Chicago, Illinois, and the passenger vehicle driver was a resident of Hamilton, Ontario. The tractor's Zurich American Insurance policy was issued in Illinois. A related company to the Zurich brand, Zurich Insurance Company, operated in Ontario. Zurich American did not.

Arbitrator Novick observed Justice Binnie's findings in *ICBC v Unifund [2003] S SCR 63*, that the PAU is about enforcement of insurance policies, rather than about "helping insurance companies … to seek to recover in their home jurisdictions their losses from other insurance companies located in a different jurisdiction when the accident took place in that other jurisdiction".

Noting the comments of Justice Cameron in *Primmum v. Allstate (2010) 100 O.R. (3d) 788*; aff'd by the Court of Appeal at 107 O.R. (3d) 159, that an insurer could avoid the application of Ontario's laws by incorporating a subsidiary to sell automobile insurance in a foreign jurisdiction, Arbitrator Novick agreed that loss transfer only applies to an out of province accident if the insurer is an Ontario insurer.

Ultimately, the accident occurred in Illinois, the policy was issued in Illinois, and the truck insured by the policy was not required to be insured under Ontario law, and Zurich American was not an Ontario "Insurer". Personal could not pursue indemnification under section 275 of the Insurance Act.
Personal and Zurich American (Arbitrator Novick, June 25, 2018)

So what is to become of the unfinished matters under FSCO once they shut down in December of 2018?

Debbie Orth,
Bertschi Orth Solicitors and Barrister LLP
CDL Board Member, AB Committee

The story begins in 1990 when the insured was involved in a motor vehicle accident. He subsequently was involved in another accident in 1996 and another in 1997. The insurer now representing the 1990 and 1996 accident is Aviva and the insurer for the 1997 accident is Progressive Insurance.

The insured applied for and received accident benefits in respect of each accident. The insured entered into a settlement with respect to the 1990 accident in late 2003. In the course of the 1996 accident claim Aviva denied benefits and no steps were taken to dispute the denial. In the 1997 accident he also entered into a settlement agreement in June of 2004.

Ten years following the settlement of the 1997 accident, the insured sought advice from his current counsel and commenced an Arbitration against Aviva with respect to the 1990 and 1996 accidents and commenced an Arbitration against Progressive for the 1997 accident. The basis of the insured's claim was to request that the settlements in the 1990 and 1997 be set aside and to claim past benefits for the 1996 accident.

At the initial Pre-Arbitration Hearing the three matters were addressed together and there were preliminary issues identified on each separate accident, including the doctrine of laches and limitation periods. The Pre-Arbitrator determined that each separate action would take its own individual route and therefore there was little to no sharing of information between the Aviva accidents and the Progressive accident.

Each accident has now proceeded on the preliminary issues through the stages of being heard by an Arbitrator, the Director's Delegate and have moved onto Judicial Review. The hearing for Judicial Review has been held with respect to the 1990 accident and has now moved on to leave to appeal to the Court of Appeal however the Judicial Review hearings for the 1996 and 1997 accidents remain to be heard.

In the meantime in the fall of 2017, the date originally scheduled for the Arbitration of the three matters together was quickly approaching. In light of the fact that the matters were not ready to proceed to Arbitration given the status of the Preliminary issues, it was ordered that the Arbitration Hearing be adjourned sine die.

Concerned with the fact that FSCO was closing its doors as of December 31, 2018 another Pre-Hearing was held in July wherein the parties were assured that, given by law FSCO was required to provide an Arbitrator to conduct the Arbitration, that when all actions have eventually exhausted the right of appeal and are ready to proceed to Arbitration an Arbitrator will be provided.

A LAT Third Party Production Motion You Say?

Cereise Ross, Summer Student, Schultz Frost LLP

The LAT Rules do not permit the equivalent of a Rule 30.10 motion, but they don't expressly bar them either. The recent July 18, 2018 LAT decision of *Aviva and O.E.* establishes a roadmap for bringing a motion for third party productions at the LAT.

The Insurer sought an Order for the production of the Applicant's Ontario Disability Support Plan ("ODSP") file on the basis that the records were relevant to the disputed claim for Non-Earner Benefits. The Insurer argued the ODSP file would provide confirmation of the applicant's pre-accident functional ability and any updates to the ODSP about being involved in an accident (query the ODSP assignment).

The production of the ODSP file was agreed upon and Ordered at the LAT Case Conference nearly a year prior to the motion. Counsel for the Insurer wrote multiple times seeking its production. Eventually counsel for the Applicant wrote to the ODSP, without response. Facing an upcoming LAT Hearing, the Insurer brought a motion to compel production of the ODSP records.

Rule 3.1 of the Common Rules of Practice and Procedure ("Rules") mandate a procedurally fair process that is also efficient and proportional to allow a timely resolution of the matter.

The Tribunal's *Rules* are silent with regards to third party disclosure requests. The only authority in the Tribunal is found in sec. 12(1)(b) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, ("SPPA") which states:

> "A tribunal may require any person, including a party, by summons, (b) to produce in evidence at an oral or electronic hearing documents and things specified by the tribunal, relevant to the subject-matter of the proceeding."

In *Ontario (Human Rights Commission) v. Dofasco Inc.*, the Ontario Court of Appeal addressed the issue of summons for productions in advance of a hearing. The court wrote to produce documents at hearing would inevitably lead to adjournments if they are produced for the first time at the hearing. The court referenced section 2 of the SPPA which provides

that rules made under it “shall be liberally constructed to secure the just, most expeditious and cost-effective determine of every proceeding on its merits.”

As such, a summons directing the Ministry of Children, Community and Social Services to produce the complete ODSP file prior to the hearing was granted.
Aviva and O.E., LAT 17-004493/AABS

More than correlation required to prove causation

Shelby Chung, Dutton Brock LLP
AB Committee

V.K. v. Allstate Insurance Company
2018 CanLII 61172 (ON LAT)

Adjudicator Truong found that the non-professional attendant care provider did not show economic loss as it was not proven that her bankruptcy was related to providing attendant care services, and further noted bank statements from the provider and pre-accident income earning information were inconsistent. Adjudicator Truong found an income loss was not shown and declined to award attendant care benefits. With respect to the Applicant’s claim for prescription glasses expenses, Adjudicator Truong rejected the Applicant’s main causation argument that because she never wore glasses pre-accident and began to have blurry vision and required glasses post-accident, that the expenses were accident-related. Adjudicator Truong held “I am not persuaded by this argument. Just because an applicant did not have a condition pre-accident and she does post-accident, it does not mean the accident caused the condition. Put simply, correlation is not causation. The applicant must adduce some evidence of causation for causation to be established.” Adjudicator Truong found the further records did not support the Applicant’s need for glasses as a result of the accident.

Special Award: To Do or Not To Do

Shirline Apiou, Dutton Brock LLP
Past-Chair, CDL AB Committee

17-006302 v. Aviva General Insurance, 2018 CanLII 61159 (ON LAT).

A recent case indicates that a special award can be added as an issue for the hearing even after the case conference. In F.A. v. Aviva, the case conference proceeded and the issues were set out in the Order issued by the adjudicator hearing the case conference. Two weeks before the scheduled hearing date, the applicant brought a motion to add a special

award as an issue for the hearing. Adjudicator Maedel hearing the motion noted the bar to add a special award was very low and commented that an adjudicator had the inherent jurisdiction to add a special award independent of any request from the parties. The Adjudicator noted that the applicant met the threshold to add the issue given the potential failure of the insurer to continually adjust the file which may have delayed benefits. The Adjudicator also agreed that a summons for the adjuster was warranted in the circumstances in light of the special award issue and the issuing of the summons was consistent with Rule 8 of the License Appeal Tribunal Rules of Practice and Procedure which did not require consent of the opposing party.

UPCOMING EVENTS

AB Committee Pub Night – September 13, 2018
Location: Duke Of Cornwall, 400 University Ave. Toronto 5:30-7:30
Speaker: Jason Frost, Schutz Frost LLP, CDL AB Committee Member

ALL CDL Members Welcome! RSVP to maryellen@cdlawyers.org

Special Award Audioconference Oct 11, 2018 12:30 pm
Speaker: Michelle Friedman, Aviva Trial Lawyers
Register now!

AB Fall Classic Nov 1, 2018
Chairs: Linda Matthews, Matthews Abogado LLP & Brian Cameron, Oatley Vigmond
Hyatt Regency, 370 King St W, Toronto, ON
Register now!

PAST EVENTS

Constitutional Challenges to the MIG, CDL Audioconference, December 6, 2017,
Audio recording available to access: **HERE**
Bill C-45: Impact on Insurance Issues, CDL Audioconference July 24, 2018
Audio recording available to access: **HERE**

The CDL AB Committee

The CDL AB Committee supports the Canadian Defence Lawyers and provides resources and continuing legal education in the area of accident benefits for defence lawyers and industry professionals.

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CDL AB

CANADIAN DEFENCE LAWYERS

CDL Accident Benefits Newsletter Volume 2, Issue 2, Dec 20, 2018

CDL Accident Benefits Newsletter

Shirline Apiou, Dutton Brock LLP
Editor in Chief, CDL Accident Benefits Committee

It is a daunting task to select recent decisions that may be of interest to accident benefit practitioners and our readers and this time around is no exception. The following is a brief glimpse into the world of accident benefits since our last edition. A recent case once again reviews a limitation concern that arises with the denial of benefits and a subsequent claim for catastrophic impairment in the area of accident benefits. On judicial review, it would appear that the two year limitation period in the *Insurance Act* is finite. In a rare decision, the License Appeals Tribunal (LAT) agreed with the insurer's finding of exclusion for coverage in considering whether a dirt bike was involved in an accident. If you've ever wondered whether dependency for care encompasses emotional support, there is now further clarification. In a case regarding dependency for care, being principally dependent for care on another for social and emotional support is key. Is a "chronic pain syndrome" sufficient to overcome the minor injury guideline? In a minor injury case, there must be clear objective evidence of a chronic pain diagnosis and a pre-existing condition must be proven to have effect on the claimant's condition. If you have ever wondered whether the two day cooling off period following the signing of a Release and Settlement Disclosure ends at the close of the business day--there is now precedent for the same. As we head into the holiday season, we look back at the year in review. As many practitioners know, 2018 was been busier than ever. With over 800 published decisions from the LAT, more completed hearings not yet released, delays in obtaining a case conference date, motions and preliminary issue hearings and other administrative issues, there are signs that the system is at full if not over capacity. Looking ahead we continue to defend various disputes in accident benefits with no signs of slowing down. Happy Holidays and Drive Safe!

Accident Benefits:
The SABS Limitation Period is a Hard Limit

Lisa Armstrong & Shalini Thomas
Strigberger Brown Armstrong LLP

The Applicant, Sotira Tomec, sought judicial review of the decision of the Licence Appeal Tribunal in *S.T. v. Economical Mutual Insurance Company*, 2018 CanLII 61170 (ON LAT).

Ms. Tomec was involved in a pedestrian-motor vehicle accident on September 12, 2008. Economical paid attendant care benefits and housekeeping benefits up to the 104-week mark, at which point Economical sent her a letter and Explanation of Benefits, both dated August 26, 2010, containing a refusal to pay further attendant care benefits and housekeeping benefits beyond September 12, 2010. The Explanation of Benefits contained language regarding the dispute resolution process and a warning of the two-year limitation

period to dispute the refusal to pay further benefits. Ms. Tomec did not dispute the refusal to pay further attendant care benefits and housekeeping benefits until more than six years later, on September 20, 2016. In the interim, Ms. Tomec submitted an Application for Determination of Catastrophic Impairment, dated May 13, 2015 and via letter dated November 4, 2015, Economical deemed her catastrophically impaired.

At the Licence Appeal Tribunal, Ms. Tomec argued that the limitation period should not start to run before she was deemed catastrophically impaired, which was when she discovered she had a claim.

In response, Economical argued that the limitation period contemplated by the SABS and the *Insurance Act*, R.S.O. 1990, c. I.8 is triggered by the insurer's refusal to pay a benefit such that the doctrine of discoverability is not applicable to SABS disputes. Economical relied upon the decision of *Kirkham v. State Farm*, [1998] O.J. No. 6459 (leave to appeal refused) in which the Divisional Court adopted the reasons of FSCO's Director's Delegate, David R. Draper.

In the FSCO Appeal Decision, Delegate Draper noted that prior to the 1990 amendments of the *Act*, the no-fault benefit provisions were contained in a Schedule to the *Act,* which required an insured to commence an action or proceeding against the insurer "within one year from the date on which the cause of action arose and not afterwards."

The *Insurance Act* was then substantially amended in 1990, enhancing the role of statutory accident benefits and establishing a dispute resolution system, which required an insured to commence a dispute "within two years from the insurer's refusal to pay the benefit claimed". Delegate Draper noted that the Legislature's amendment clearly established a new triggering event for the SABS limitation period, marking a clear shift away from the cause of action approach. In agreeing with Delegate Draper, the Divisional Court in *Kirkham* found that the SABS limitation provision was precise and unambiguous.

The Tribunal's Vice-Chair followed the decision in *Kirkham,* finding that the principle of discoverability does not apply to accident benefits such that Ms. Tomec was statute barred from proceeding with her claim for attendant care benefits and housekeeping benefits as Economical issued a clear and unequivocal denial of both benefits.

The Divisional Court considered the appropriate standard of review of the Tribunal's decision, noting that the question of whether the discoverability principle applies is a general question of law that goes beyond the expertise of the Tribunal and is a question that must be answered uniformly for all adjudicators deciding cases under the *Insurance Act*. However, ultimately, the Court found that it was unnecessary to come to a definitive conclusion on the applicable standard of review since there was no error, even on a correctness standard.

After considering its own decision in *Kirkham v. State Farm* and the Ontario Court of Appeal's decisions in *Levesque v. Crampton Estate*, 2017 ONCA 455, *Haldenby v. Dominion,* 55 O.R. (3d) 470*, Turner v. State Farm*, (2005) 195 OAC 61 and *Sietzema v. Economical*, 2014 ONCA 111*,* the Divisional Court held:

as found by the Tribunal, the insurer had clearly and unequivocally refused to pay those expenses as of September 12, 2010. Pursuant to the clear words of the limitation period, which ties it to a period of two years after the insurer's refusal to pay the benefit claimed, the claim is time barred."

The Divisional Court confirmed that the limitation period set out in the *Insurance Act* and the SABS fall within the category of "hard" limitations periods, which are triggered by a fixed and known event, as opposed to the day a claim was discovered.

The Divisional Court noted that although it may be considered harsh, there are important policy considerations on both sides:

In the case of the *Insurance Act*, and claims under the SABS, an insurer has no control over when an insured applies for a designation of catastrophic impairment. An insurer would not continually assess a claimant if ongoing expenses are not being submitted. Presumably, the legislature thought it important to provide for a reasonable period, after which an insurer's obligation would be discharged, whether or not meritorious claims may be discovered later.

Leave is being sought to the Court of Appeal.

The Boa Constricts

Michelle Friedman, AB Committee, & Danielle Wilkinson
Aviva Trial Lawyers

In the previous article, we noted the increasingly elastic nature of the arbitral treatment of the definition of an "accident" under the *Statutory Accident Benefits Schedule*. Since that time, two decisions have come out from the LAT suggesting that the boa is constricting once more.

Both decisions narrowly interpret coverage; the Tribunal engaged in statutory interpretation, resolving in favour of the Insurer's interpretation of the legislation.

In the 2018 case of *M.B. v. Travellers1*, the applicant was injured driving an off-road vehicle (dirt bike), at a closed course competition sanctioned by Canadian Motorsport Racing Corporation and sponsored by Rockstar Energy Drink.

Travellers denied the applicant's claim for accident benefits on the basis that he was not involved in an "accident" as the vehicle was not an "automobile".

Adjudicator Kowal applied the burden of proof analysis set out in the SCC case of *Ledcor Construction Ltd.* v. *Northbridge Indemnity Insurance Co.*2 as follows:

- Phase I: Onus rests with the applicant in the interpretive phase of establishing coverage
- Phase II: Onus rests with the Respondent in establishing an exclusion
- Phase III: Onus rests with the applicant in establishing the exception to the exclusion

During Phase 1 the applicant must establish coverage under a contract of insurance. He must prove he was involved in an "accident" and that the vehicle is an "automobile". Adjudicator Kowal relied on the test in *Adams v. Pineland Amusements Ltd* 3 to define "automobile". Both parties agreed that the third element of the test was the only applicable question, i.e. does the vehicle fall within any enlarged definition of an "automobile" in any relevant statute?

The Tribunal's decision rested on whether the dirt bike was an automobile required to be insured under any act in section 224(1) of the *Insurance Act,* or if the dirt bike was exempt from mandatory coverage pursuant to section 2(1) of O.Reg.863, a regulation of the *Off-Road Vehicles Act.*

Section 2(1) of O.Reg. 863 designates classes of vehicles exempt from the requirement of

insurance including “off road-vehicles driven or exhibited at a closed course competition or rally sponsored by a motorcycle association”.

The Tribunal was asked to consider two alternative interpretations of section 2(1):

> “Off road-vehicles driven or exhibited at a closed course competition or rally sponsored by a motorcycle association” (i.e.: both closed course competitions and rallies have to be sponsored by a motorcycle association to be exempt from insurance); or
>
> “Off road-vehicles driven or exhibited at a closed course competition **or** rally sponsored by a motorcycle association” (i.e.: closed course competitions are exempt and rallies sponsored by motorcycle associations are also exempt.)

The parties agreed that the Applicant was driving in a closed course competition. They also agreed that it was not sponsored by a motorcycle association.

The Respondent argued that the requirement of sponsorship by a motorcycle association applied only to rallies and not to closed course competitions. The Tribunal accepted the Respondent’s submission that the “Last Antecedent Rule” of statutory interpretation applies: when no comma is present, a qualifying clause only applies to the last antecedent – “sponsored by a motorcycle association” applies only to rallies.

The Tribunal underscored that the purpose and intent of the *ORVA* is to protect the public when off-road vehicles are driven on land that the owner does not occupy and to allow vehicles to remain uninsured if they are being driven on the owner’s land, which would not pose a risk to the public. An exemption from insurance for a closed-course competition is consistent with the purpose and intent of the legislation. Moreover, risks are controlled with rallies sponsored by motorcycle associations and an exemption of insurance in this situation is also consistent with the purpose and intent of the legislation.

Adjudicator Kowal found that the Applicant was not involved in an “accident” as defined by the *Schedule* because he was not driving a vehicle that meets the definition of an “automobile”. The dirt bike was exempt from the requirement of insurance pursuant to s.2(1) of O.Reg. 863 as he was driving an off-road vehicle at a closed-course competition.

In the second recent LAT decision of *OM v. Aviva Insurance Company4*, the Tribunal undertook a contextual and purposive approach to interpret the exclusionary provisions of coverage under s.268(1.1) of the *Insurance Act*.

Subsection 268(1.1), known as the “no crash no claim” provision, excludes coverage for Accident Benefits from those injured while occupants of a public transit vehicle that does not collide with another automobile or object. “Special purpose facilities for persons with disabilities” are excluded from this exemption under s.224(1) of the *IA.*

O.M. was disabled pre-accident: she used a walker, lost vision in one eye, suffered from COPD, emphysema and a knee injury. On the date of loss O.M. was injured from a fall while trying to find a priority seat on a public bus. Aviva denied coverage under subsection 268(1.1). O.M. claimed that she was not excluded from coverage by virtue of the exemption of “special purpose facilities for persons with disabilities” under s.224(1).
The Tribunal agreed with the submissions of Aviva’s counsel, Andy Smith, that “special purpose facilities” required a special service to be provided to persons with a disability.

The Tribunal did not exclude the possibility that “special purpose facilities” could apply to all or just part of a vehicle, but that priority seating on a public bus is not a special service offered to persons with disabilities: all riders pay the same fare and have access to priority seating.

The Tribunal distinguished priority seating from services such as Wheel Trans or DARTS in

Hamilton which place extra requirements on the driver, such as ensuring that riders are secure. Regular transit operators do not have this kind of obligation because priority seating is available to anyone who uses the transit and disabilities are not always apparent by simply looking at a person. The Tribunal found that it was outside the intention of the legislature to place this obligation on all public transit operators.

As a result, Aviva's denial of coverage on the basis of s.268(1.1) was successfully upheld. The License Appeal Tribunal's interpretation of an "accident" in these two recent cases has narrowed coverage in these circumstances. However, it remains to be seen how the Executive Chair will interpret these provisions if either matter is reconsidered.

Applicant v Aviva: Dependency for Care

Shelby Chung, Dutton Brock LLP
AB Committee

In *Applicant and Aviva Insurance Company*, 2018 CanLII 110955 (ON LAT), the Applicant's 48 year old adult child, D.H., was involved in a motor vehicle accident on October 31, 2014, when he was struck as a pedestrian while crossing the road, resulting in a fractured leg. He suffered surgical complications due to his diabetes, resulting in death from his injuries two months post-accident. The Applicant applied for a death benefit under the *Schedule* which was denied by the insurer.

As a preliminary issue, Adjudicator Norris allowed the hybrid (written and teleconference) hearing to proceed where the Applicant failed to submit any initial written submissions and only replied to the insurer's responding submissions, and accepted that the Applicant did not rely on any documents disclosed after the cut-off date and distinguishing the case from *K.K. and Unifund Assurance Company* (2018 CanLII 13159, (ON LAT)) which dealt with written submissions only.

The main issue in dispute was whether the deceased, D.H. was dependent upon the Applicant at the time of the accident. While D.H. had been diagnosed as mentally disabled since approximately four years of age, he was living independently from the Applicant at the time of the accident.

The Applicant took the position that D.H. was principally dependent for care on the Applicant, and the support and services provided by others providers was arranged for and coordinated by the Applicant.

Adjudicator Norris referenced the analysis in *Miller v. Safeco Insurance Co. of America* (1985 CanLII 2022, (Ont. C.A.) in his analysis which required him to look beyond the dependent's financial independence and to consider the ability to provide for one's own basic needs. Other factors referenced by Adjudicator Norris included, from *Intact and MVACF* (2012, www.densemadr.com):

- social and emotional support
- companionship
- protection
- and services such as feeding, clothing, cleaning, and transportation.

Adjudicator Norris also noted the two main factors considered in *Harris and Liberty Mutual Insurance Company* (1998, FSCO):

- the nature of the emotional and physical care provided; and,
- whether in fact the dependent was principally dependent on the applicant for care having regard to the amount and duration of the dependency for care, the needs of the claimant and the ability of the claimant to be self-supporting.

Adjudicator Norris concluded the Applicant was the principal provider of social and emotional support for D.H., noting that the Applicant regularly called D.H. on the telephone during the day, had helped D.H. set up residence in 1987, and set up and participated in the ongoing management of D.H.'s other forms of support through providers. While Adjudicator Norris accepted that service providers, such as Avenue II, provided support in the form of assistance with personal care and organized outings, he found that the evidence showed that the Applicant would help D.H. with household chores, teach him various routes in order for him to walk around and use public transit, monitor his diet, and help with clothing maintenance. Adjudicator Norris found the insurer's counter submissions showing examples of independence did not outweigh the evidence that the Applicant principally satisfied D.H.'s needs for care.

Having found that D.H. was principally dependent for care on the Applicant, Adjudicator Norris did not address financial dependency, and ordered the insurer pay the death benefit of $10,000 along with interest.

Condition vs. syndrome, it's in the terminology

Aly Pabani, Dutton Brock LLP

17-006571 v. TD Home & Auto Insurance Company, 2018 CanLII 115669 (ON LAT)
A recent case indicates that without further clarification or development by an assessor, a "chronic pain condition" is not equivalent to "chronic pain syndrome".

In *Applicant and TD Home & Auto Insurance Company*, the Applicant relied on the report of a chiropractor to argue that his impairments removed him from the MIG. The report outlined that "the applicant suffered serious depressive symptoms and PTSD as a result of the accident, in addition to suffering from a chronic pain condition". Adjudicator Derek Grant found that the physician did not define "chronic pain condition" or equate it to "chronic pain syndrome". In that regard the wording provides no guidance for the basis of the diagnosis or how this "condition" removes the Applicant from the MIG. The report was dismissed.

The Applicant also advanced an argument that he was not subject to the MIG on the basis that a right knee MRI revealed a "small effusion in the suprapatellar joint recess, a flap tear of the anterior horn lateral meniscus which is displaced and a thickening of proximal deep fibers compatible with prior sprain injury". The Applicant contended that the definition of a minor injury does not include a tear. Adjudicator Grant disagreed and held that a minor injury does not include a full tear injury, though a partial tear as is the case here, falls under the definition of a minor injury.

In addition, the Applicant advanced that his pre-existing condition was aggravated as a result of the accident and that this pre-existing condition placed him outside of the MIG. Adjudicator Grant disagreed and held that there is no indication of any worsening of the applicants pre-existing condition. We are reminded that the test to determine that a pre-existing condition removes and applicant from the MIG is that the pre-existing condition must be proven to impact the Applicants recovery time. Though a pre-accident MRI showed

mild degenerative changes, the results are in line with subsequent diagnostic images post-accident.

Ultimately the case is a noteworthy reminder there must be clear, objective evidence, obtained through diagnostic testing or other medical assessment that concludes a person suffers from chronic pain with a diagnosis of “chronic pain syndrome”. It further defines that a flap tear is partial in nature and does not remove an applicant from the MIG, while reminding us of the test for pre-existing medical conditions and MIG removals.

Two Day Cooling Off Period Ends at ?

Shirline Apiou, Dutton Brock LLP
Past-Chair, CDL AB Committee

In the recent LAT decision of *E.P.* and *Sovereign* (November 6, 2018, 17-004529/AABS), Adjudicator Mather considered whether the parties had reached a binding settlement in a preliminary issue hearing. In that case, the applicant was represented by counsel and signed a Release and Settlement Disclosure Notice at a resumption case conference. The applicant then rescinded the settlement by notice to her counsel and to insurer’s counsel after the close of the second business day. The insurer relied on the *Settlement Regulation*, O. Reg. 664 under the *Insurance Act*, R.S.O. 1990, C. I.8. The Applicant argued that she had until midnight on the second business day to rescind the settlement. Adjudicator Mather agreed with the insurer that the regulations made under the *Insurance Act* formed an integrated scheme. However, a business day is not defined under the Settlement Regulation and Adjudicator Mather found that a business day is 24 hours and accordingly the time period for rescission did not expire at the close of the business day on 5:00p.m. The Applicant was allowed to rescind the settlement agreement and to proceed to a hearing for a determination of benefits claimed on the LAT application.

What is the interplay between the **Personal Information Protection and Electronic Documents Act** (PIPEDA), the federal legislation privacy law for private-sector organizations and the insurer’s obligation to produce documentation requested by insureds in the area of statutory accident benefits? Stay tuned for more information and developments on these topics brought to you from Accident Benefits Committee and Canadian Defence Lawyers.

UPCOMING EVENTS

AB Committee Pub Night February 21, 2019
Location: Duke Of Cornwall, 400 University Ave. Toronto 5:30-7:30
Speaker: Devan Marr, Strigberger Brown Armstrong LLP
“New Trends and Issues in Accident Benefits Litigation”

ALL CDL Members Welcome! RSVP to maryellen@cdlawyers.org

Loss Transfer/Priority Disputes Feb 28, 2019 - 9 am **Register now!**
Chaired By: Dan Strigberger, Strigberger Brown Armstrong &
Ashleigh Leon, Miller Thomson

PAST EVENTS

Special Awards, CDL Audioconference, October 11, 2018
Audio recording available to access: **HERE**
Bill C-45: Impact on Insurance Issues, CDL Audioconference July 24, 2018
Audio recording available to access: **HERE**

The CDL AB Committee

The CDL AB Committee supports the Canadian Defence Lawyers and provides resources and continuing legal education in the area of accident benefits for defence lawyers and industry professionals.

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