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
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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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Contact Mary-Ellen Thibodeau at maryellen@cdlawyers.org or 416-340-9859
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