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INSURANCE LAW BULLETIN

March 26, 2013 – Rose Bilash

THE COURT OF APPEAL'S DECISION IN *PASTORE v. AVIVA*

ECONOMIC LOSS AND ATTENDANT CARE

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CATASTROPHIC IMPAIRMENTS

***Pastore v. Aviva Canada Inc.* (2012 ONCA 642)**

On September 27, 2012, the Court of Appeal unanimously reversed the decisions of the Divisional Court which found that all four areas of functioning were to be considered and accounted for in an assessment of catastrophic impairment under s.2(1.1)(g) and, that a Class 4 (marked) or Class 5 (extreme) psychological impairment under s.2(1.1)(g) could not include consideration for pain associated with physical injuries.

The Court of Appeal found that the Divisional Court erred in requiring Director's Delegate Blackman to be correct in his interpretation of the legislation. Rather, the Director's Delegate's interpretation needed only to be reasonable. By applying the standard of reasonableness, the Court imported the related notion of deference that recognizes the expertise of arbitrators. The Court therefore found that the Delegate's conclusion that the word "a" in clause (g) required only a single function from the *Guides* to be at the marked impairment level in order to qualify as catastrophic impairment, was "certainly within the range of possible, acceptable interpretations".

The Court of Appeal found similarly with respect to the issue of whether physical pain could be included in an analysis under clause s.2(1.1)(g). The Court found it was reasonable for the arbitrator to have included pain from the general medical condition to the extent that such pain was connected with the diagnosed mental disorder.

In regard to the issue of double counting of pain under clauses (f) and (g) when the impairments are combined, the Court stated:

> *Since this did not occur in this case, the possibility of double counting under clause (f) does not change the reasonableness of the Delegate's conclusion. In*

> *a case where that is a concern, the assessors and adjudicators may have to address the issue directly.*

The Court chose not to deal with the problem of double counting which arose in the wake of the Court of Appeal's decision in *Kusnierz v. The Economical Mutual Insurance Company*, [2010, ONSC 4462] that mental and behavioural impairments under s.2(1.1)(g) could be combined with physical impairments to arrive at a whole body impairment total under s.2(1.1)(f).

Finally, the Court of Appeal also agreed with the administrative decision-makers that the intent of the legislature was to give the concept of catastrophic impairment an inclusive rather than a restrictive meaning.

Commentary

In light of the Court of Appeal's decision in *Pastore* and the Court of Appeal's decision in *Kusnierz*, we have essentially returned to the principles espoused in *Desbiens*: one marked functional impairment is sufficient for a catastrophic impairment; combining physical and mental impairments is permitted; and, it is not necessary to remove from consideration all physically based pain-related impairments when conducting an assessment under s.2(1.1)(g). However, where we are at with respect to double counting is less clear.

We would also note that the Court of Appeal was not deciding whether the Director Delegate's approach was *correct*. Therefore, it is still open for a Director's Delegate to follow the reasoning of the majority in Divisional Court and, by way of judicial review, to obtain a ruling that this result was reasonable as well. However, we expect most arbitrators will follow the "Blackman approach".

The critical question of the correct interpretation therefore remains to be answered. Therefore, if a judge were to hear a catastrophic impairment dispute, it is open to the judge to choose the Divisional Court approach. As the judge is required to be correct in his/her conclusion, the Court of Appeal would finally have to answer the question: what is the correct interpretation?

ECONOMIC LOSS AND ATTENDANT CARE

Henry v. Gore Mutual Insurance Company (2012 ONSC 3687)

This case arose from a claim for attendant care benefits as a result of a motor vehicle accident that left the 18 year old applicant with catastrophic injuries. As a result, he required significant attendant care. The applicant's mother took a leave of absence from her full-time employment, working 40 hours per week with a salary of $2,100.00 per month, in order to care for her son. The applicant's attendant care needs were assessed at approximately $9,500 per month. There was one main issue in dispute:

> Do the facts that (a) the attendant care is provided by the applicant's mother, and (b) the mother left her employment to provide the attendant care, affect the calculation of attendant care benefits payable?

Gore took the position that if a service provider could show that she had sustained an "economic loss", then the expense payable to the applicant would be limited to an amount which indemnified the service provider to the extent of his or her financial loss. On that interpretation, Gore proposed to pay the applicant's mother for providing 8 hours of care per day notwithstanding the need for 24 hours of care.

"Incurred" is defined in s.3(7)(e)(ii) of the Schedule to require that the insured person has "paid the expense, has promised to pay the expense, or otherwise legally obligated to pay the expense" and that the person who has provided the service has "sustained an economic loss as a result of the providing the goods or services." The Court recognized that the new provision eliminated claims by non-professional service providers who had not sustained an economic loss.

Justice Ray stated that,

> *A plain reading of the section provides that if a family member stays home from work, loses income [emphasis added] in order to provide all reasonable and necessary attendant care to the insured, and the insured is obligated to pay, promises to pay or does pay the family member, then the definition [of "incurred"] has been met.*

Justice Ray noted that the amount of economic loss suffered had to be irrelevant as the Schedule provided no assistance in calculating the amount that would be owed to the service provider if payment was to be made on a proportional basis. This exclusion implied that it was only relevant that the service provider had incurred an economic loss and not that the person had suffered a specific amount of loss.

The Court determined that caregivers providing attendant care to family members were entitled to the full amount of attendant care benefits owed as long as they "incurred an economic loss." Accordingly, the court held that since the mother had sustained an economic loss by leaving her employment in order to provide attendant care for her son, she was entitled to receive the full amount of attendant care benefits available. In this case, that meant the maximum $6,000 per month was available to her.

Simser v. Aviva Canada Inc. **(2013 FSCO A11-004610)**

The applicant, Kevin Simser, received attendant care and housekeeping and home maintenance services from Julie and Kasey Simser and JJ Lawncare following his accident on November 10, 2010. The parties agreed that Mr. Simser had received the services and that he had paid, promised to pay or was otherwise legally obligated to pay for the services, leaving only the issue of whether Julie and Kasey Simser sustained an economic loss as a result of providing attendant care and housekeeping and home maintenance services to Mr. Simser. Arbitrator Edward Lee examined the meaning of "economic loss" under s. 3(7)(e) of the Schedule.

At the outset of the hearing, Mr. Simser sought to have expert opinion evidence accepted regarding the definition of "economic loss". This report, prepared by Professor Jack Carr, described economic loss as the term was understood in the field of economics. According to Professor Carr, there were various types of economic loss, which included loss of income as well as loss of time, leisure, labour and opportunity. A loss of opportunity was reflected in the example of a university student who lost time

from the work force because of his or her studies. Mr. Simser argued that "economic loss" should be given a wide and expansive interpretation, consistent with the consumer protection intent of the Schedule.

Aviva argued that the words, "economic loss" should be given their ordinary, everyday meaning, that being a financial or monetary loss. Aviva further argued that the application of Professor Carr's definition would result in the new section having essentially the same effect as the former section, in which case, the Legislature would have spoken pointlessly, which could not have been its intention.

Arbitrator Lee found that Aviva's interpretation was closer to the ordinary, everyday meaning of "economic loss". Nothing in the Schedule suggested that the specialized knowledge, theories and assumptions of Dr. Carr's definition were to be incorporated into the term "economic loss" under the Schedule. Moreover, accepting Dr. Carr's definition would result in every provider meeting this requirement, negating the meaning of the amendment. The insured's argument was rejected although Arbitrator Lee accepted that there may be specific occasions where a loss of opportunity might equate to an economic loss under the Schedule. Accordingly, no amounts for benefits claimed in the arbitration proceeding were payable.

Commentary

In *Henry v. Gore,* the Court accepted that once the non-professional service provider or family member proved that he or she sustained an economic loss, the service provider met the threshold and must be paid an attendant care benefit calculated in accordance with a Form 1. However, Justice Ray did not offer much clarification on the definition of "economic loss". At best, he confirmed that a loss of income constituted an economic loss.

With respect to the *Simser* decision, counsel for Mr. Simser, David Preszler, has confirmed that the decision is being appealed. We expect the interpretation of "economic loss" will eventually be heard by a court, possibly at the appellate level, given the implications of the outcome. Despite Aviva's compelling argument, it is likely that the Courts will give "economic loss" a broad interpretation so as to avoid discriminating between parents who are not employed and have no income which they sacrifice to provide care and those parents who receive the full value of the attendant care services they provide. Furthermore, the Courts have shown a clear trend towards a liberal interpretation of the Schedule in order to ensure the prompt availability of benefits to those most seriously injured and most in need.