

## INSURANCE LAW BULLETIN

March 2018 – Rose Bilash

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### RECENT TOP DECISIONS FROM THE LAT & FSCO

#### **Double Counting, No Interest on CAT Assessments, Limitation Periods and Deductibility of CPP Benefits**

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#### **Double Counting**

*Security National Insurance v. Allen* 2017 ONSC 6779 (December 20, 2017)

The Divisional Court recently released its ruling in *Security National Insurance Co. v. Miguel Allen*. Security National appealed Delegate Blackman's decision where he held that double counting neurological impairments in Chapter 4 and psychological impairments in Chapter 14 could be avoided through an analysis of causation. It was incumbent upon the arbitrator to determine emotional or behavioural disturbances under Chapter 4 resulting from neurological impairments, and emotional or behavioural disturbances under Chapter 14 resulting from mental disorders. In addition, ratings had to be provided under both Table 2 (mental status impairments) and Table 3 (emotional or behavioural impairments) in Chapter 4—the higher of the two ratings would be combined with mental/behavioural impairments rated under Chapter 14. On appeal, the Divisional Court held that the Delegate's decision attracted a high degree of deference given that catastrophic impairment was a specialized regime in which the Delegate had expertise. As the standard of review was one of reasonableness, the Court found that the Delegate's decision on all issues fell within a range of possible, acceptable outcomes which were defensible in respect of the facts and the law.

#### **No Interest Accrues on CAT Assessments**

*Sadat v. TD General Insurance Co.*, [2018] OFSCD No. 7

Arbitrator Jessica Kowalski held in the recently released decision, *Sadat v. TD General Insurance Co.*, that interest did not accrue on catastrophic impairment assessments as these were interim legal expenses payable under section 282(11) of the *Insurance Act*. As interest accrued only in respect of a benefit that was overdue, no interest was payable. We note that the same reasoning would apply to catastrophic impairment

assessments funded by the insurer under section 25(1)(4) of the *Schedule* as an adjusting expense.

### Limitation Periods

*S.T. v. Economical Mutual Insurance* (16-003034/AABS, November 17, 2017)

*S.T. v. Economical Mutual Insurance Company* dealt with whether a finding of catastrophic impairment extended the time limitation for benefits that flowed from it, in this case, attendant care and housekeeping benefits. The applicant raised several arguments, including that the respondent's denial of attendant care and housekeeping benefits at the two year mark, in 2010, was invalid because she had not been found to be catastrophically impaired until 2015. Therefore, she was not eligible to claim either benefit at the time of the denial. In other words, such a denial was legally incorrect as a limitation period could not be triggered for a benefit where there was no eligibility or ability to submit a claim. The applicant further argued that as there was no time limit for disputing and filing a catastrophic impairment application, there should be no time limit for disputing a denial of benefits that potentially flowed from the designation. Having found that the respondent's denial was clear and unequivocal, Vice Chair Heather Trojek held that the respondent's denial of the benefits at issue started the two year limitation period running, even if legally incorrect, noting that the tribunal was bound by the Court of Appeal decision in *Sietzema v. Economical Mutual Insurance Company*.<sup>1</sup> Importantly, Vice Chair Trojek agreed with the respondent's submission that the limitation period contained in the *Insurance Act* and the *Schedule* "played an important role in the world of statutory accident benefits" and that the objective of consumer protection had to be balanced against other objectives such as the finality and certainty that limitation periods provided. The decision was upheld on Reconsideration, though the decision was not available on CanLII at the time of preparing this Bulletin.

*A.F. v. North Blenheim Mutual* (16-002336/AABS, December 13, 2017)

*N.L. v. North Blenheim Mutual* (16-002606/AABS; December 13, 2017)

A different view regarding the finality of limitation periods was taken by Executive Chair Linda Lamoureux in *A.F. v. North Blenheim Mutual Insurance Company* ("A.F.") and *N.L. v. North Blenheim Mutual Insurance Company* ("N.L."). In A.F. and N.L., the Tribunal determined that the applications were statute-barred by the two-year limitation period in section 56 of the *Schedule*. Executive Chair Lamoureux reconsidered both decisions, on her own initiative, and found that the Tribunal made a significant error of law by failing to consider whether an extension of time should be granted under section 7 of the *Licence Appeal Tribunal Act*<sup>2</sup> ("LAT Act") which allowed the Tribunal to extend the time "fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal". Despite solid argument from the respondent that the Court of Appeal repeatedly upheld the strict application of limitation periods when a valid denial was given by the insurer, the Executive Chair indicated it was open to the legislature to amend the *LAT Act* to exclude *Insurance Act* matters from the application of section 7. Having not done so, the Executive Chair stated she had to assume that the legislature made an intentional decision not to create an exception for *Insurance Act* proceedings. The Executive Chair further rejected arguments that the discretionary power available under section 7 could

<sup>1</sup> 2014 ONCA 111

<sup>2</sup> 1999, S.O. 1999, c. 12, Sched. G

only be exercised if the relief was specifically sought by one of the parties and that the tribunal could not extend a limitation period on its own initiative. The astounding result of this reconsideration is that an extension of time is available in any limitation case under section 7 of the *LAT Act*, whether raised by the applicant or not.

### **Deductibility of CPP Benefits Not Applied For**

*Pan v. Allstate Insurance Company* (FSCO A16-003705, January 10, 2018)

The applicant argued that the insurer had no legislative authority to force an insured to apply for CPP benefits. The applicant also argued there was no reliable way to make a deduction as the amount and period of payment was unknown when eligibility was uncertain. Allstate argued that the claimant's tax returns demonstrated her eligibility for CPP benefits and that there was an obligation on the claimant to apply for and exhaust her collateral benefits before resorting to the accident benefits' carrier. Where benefits were available but not applied for, the insurer was entitled under section 4(1)(b) of the *Schedule* to deduct those benefits from any income replacement benefit. The arbitrator agreed with Allstate, relying on the recently released Court of Appeal decision, *Wilken v. Sun Life Assurance Company*<sup>3</sup> where the Court held that the plaintiff's voluntary decision to forgo WSIB benefits effectively denied the insurer its contemplated and permitted offset. The arbitrator found that the fact the claimant may not qualify for CPP benefits under the more rigorous "severe and prolonged" test was irrelevant. The arbitrator also rejected the claimant's argument that Allstate could not pursue an offset because it did not previously ask the claimant to apply for CPP disability benefits, noting that the claimant's decision to ignore her obligations under the *Schedule* should not prevent the insurer from having those provisions applied.

### **Definition of Accident**

*Dittman v. Aviva Insurance Company of Canada*, 2017 ONCA 617

The Supreme Court of Canada announced on February 9, 2018 that a panel of three judges will decide whether the Court will hear an appeal from the insurer in *Dittman v. Aviva Insurance Company of Canada*, where the Court of Appeal upheld a finding that spilling coffee while retrieving it from a drive-through window constituted a normal incident of the risk created by the use or operation of a vehicle.

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<sup>3</sup> 2017 ONCA 975 (December 12, 2017)