Dutton Brock LLP

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"If you're lucky enough to be Irish, then you're lucky enough."
- unknown author

Unidentified Motorist Protection: Insurers Be Wary of Parked Cars and Hidden Leprechauns

For those of us who plan on staying around the house this St. Patrick's Day, perhaps preoccupied with an unrelenting list of chores and stressors associated with the pending spring, we can now at least go about our never-ending tasks a little more briskly given the Court of Appeal's recent decision in Lewis v. Economical Insurance Group, [2010] O.J. No. 3158 (C.A.).

Bonnie Lewis, a pedestrian, sought coverage from her automobile policy with Economical Insurance Group after walking into a steel pole protruding from a truck parked the wrong way on the street in front of a convenience store. Ms. Lewis' claim against Economical was dismissed on a summary judgement motion, but was subsequently resurrected by the appellate court.

Since the truck could not be identified, Ms. Lewis sued her own insurance company for damages flowing from her serious head injury. Both her automobile policy and the OPCF Family Protection Endorsement, which she had purchased, provided coverage for personal injuries resulting from an accident involving an unidentified or uninsured automobile. Since Ms. Lewis was not an occupant of the parked truck when she was injured, she was entitled to coverage only if she was "struck by" or "hit by" the unidentified automobile.

In a unanimous decision delivered by Justice Laskin, the Court of Appeal found that Justice Eberhard had too narrowly interpreted the coverage provisions, contained in section 265(2)(c)(iii)(B) of the Insurance Act, section 5.3.1 of the O.A.P. 1 and section 1.6(a)(iii) of the OPCF 44R Family Protection Endorsement. The Court stated that Ms. Lewis may be able to recover if she could prove that the unidentified owner or driver of the truck was negligent. On this basis, the Court of Appeal overturned the dismissal and reinstated Ms. Lewis' action.

In his reasons for judgment, Laskin J.A. held that Ms. Lewis' entitlement to damages depended upon whether she was able to prove that the unidentified owner or driver of the parked truck was negligent. Laskin J.A., ultimately determined that the words "struck by" or "hit by" should be interpreted broadly, which would entitle Ms. Lewis to coverage for her injuries. He interpreted the law in this way for the following reasons:

First, the words "struck by" or "hit by" must be viewed in the context of a dominant purpose of this type of coverage in order to compensate victims injured as a result of an accident involving an unidentified automobile. Economical implicitly accepted, by virtue of paying Ms. Lewis statutory accident benefits, that she was involved in an incident where the use or operation of an automobile directly caused her injuries.

Second, in ordinary parlance, the words "struck by" or "hit by" generally connote "coming into contact with" and do not specifically attribute movement to either object involved. Accordingly, there is no difference between stating that "Ms. Lewis was struck by the pole" or "Ms. Lewis struck her head on a pole."

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Other topics

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Unidentified motorist protection

Third, although cases usually involve injuries resulting from the movement of automobiles, the legislature did not intend to exclude coverage for injuries resulting from contact with a stationary automobile.

Fourth, a literal interpretation is inappropriate because its application would bring about an unrealistic result or one that was not contemplated in the "atmosphere in which the insurance was contracted," meaning Economical would expect coverage regardless of whether a person was struck by a protruding pole on a slow moving truck or whether a person is struck by a protruding pole on a stationary truck.

Finally, existing case law demonstrates that Courts have extended coverage to persons who were not in any literal sense "struck by" or "hit by" an automobile. Accordingly, the judiciary would seem to be indicating that a narrow or literal interpretation of the words "struck by" would produce a result contrary to common sense and the legislative intent of section 265(1) of the Insurance Act, the section which mandates coverage.

Laskin J.A. held that the motion judge erred by interpreting the coverage provisions too narrowly and Ms. Lewis' appeal was allowed, and Ms. Lewis' appeal was allowed, with costs. Others, however, are still well-advised to watch where they're going!

Counsel for Economical has confirmed that the decision will not be appealed.

Andrea R. Lim is an Associate at Dutton Brock LLP. Her practice is focused on a variety of insurance defence work with a focus on first party accident benefits claims.

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Limitation Period Applied to Crossclaims:

Finding a 4 Leaf Clover in a field of Dandelions

In Waterloo Region District School Board v. Crd Construction Ltd., 2010 ONCA 838, a storm had blown down the walls of a school gymnasium. The Plaintiff School Board sued multiple Defendants but could not make a claim against the engineers involved in the construction because s. 46(1) of the Professional Engineering Act (now repealed) provided for a 12 month limitation period in relation to any action for damages arising from the provision of engineering services.

Since the Plaintiff School Board's action was commenced long after the former s. 46 limitation period had expired, the Plaintiff commenced an action by naming various contractors as Defendants. The Defendant contractors then filed various cross-claims against the engineer seeking contribution and indemnity.

The issue before a five member panel of the Ontario Court of Appeal was whether a cross-claim seeking contribution and indemnity can exist at all when the Defendant from whom contribution and indemnity is sought is no longer liable to the Plaintiff.

The Court concluded that under the Limitations Act, 2002, the period for bringing a claim for contribution and indemnity is two years from the time that a Defendant is served with a statement of claim. As a result, the Court held that the Defendant contractors could bring a cross-claim against the engineers. The fact that the engineers were no longer liable to the plaintiff did not matter.

Unfortunately, the Court did not comment on the discoverability principle – that is, after being served with a statement of claim, does the 2 year limitation period start running right away with respect to a Defendant's claim for contribution and indemnity? What happens when the identity of a third party is not discovered by a Defendant within 2 years of being served with a statement of claim? Is that unreasonable given the circumstances?

This issue will presumably turn on the facts of each case. It will be interesting, however, to see just how patient judges will be in applying the discoverability principle to claims for contribution and indemnity.

Alex Proulx is an Associate at Dutton Brock LLP. His practice focuses on insurance and liability defence work.

Deduction of collateral benefits

finding the pot of gold at the end of the rainbow

In Anand v. Belanger [2010] O.J. No. 4064, Stinson J. considered the credits due to an insurer pursuant to section 267.8(1) of the Insurance Act for collateral benefits. Geeta Anand, the Plaintiff, was injured in a motor vehicle accident on April 26, 2003. She commenced a tort action against the driver and owner of the vehicle that hit her, and added her insurer, State Farm, when it emerged that the driver was uninsured and was operating the vehicle without consent of the owner. At trial, the Plaintiff was awarded $271,679 in damages. The Court then assessed the amount of benefits that could be deducted from the damages award against State Farm.

The Plaintiff had received income replacement benefits (IRBs) in the amount of $35,374.32 until herbenefits were terminated on July 5, 2005. Upon termination, she commenced a FSCO arbitration proceeding claiming entitlement to unpaid ongoing IRBs. Prior to the arbitration, however, the parties settled for $120,000. Ms. Anand received $80,040 of that amount after deducting legal fees and disbursements.

Ms. Anand also received short term disability (STD) and long term disability (LTD) benefits through her workplace insurer, Manulife, in the amount of $12,411.43 and $32,119. respectively. After taking into account the so-called "tax model", these benefits totaled $37,361, according to the Court. After her LTD benefits were terminated, Ms. Anand sued Manulife in Superior Court. In June 2007, the parties settled for $125,000 all inclusive.

Section 267.8(1) of the Insurance Act provides that in an action for loss or damage arising directly from the operation of an automobile, the plaintiff's damages are reduced by payments received or receivable before the trial for statutory accident benefits or under an income continuation benefit plan for income loss and loss of earning capacity, and for all payments in respect of the incident that the plaintiff received before trial under a sick leave plan arising from the plaintiff's occupation or employment.

The parties agreed that the IRBs of $35,374.32 were collateral benefits under s.267.8(1), as were the STD and LTD benefits in the amount of $37,361 (though a dispute arose how to calculate the after-tax effects). The parties argued whether the settlements of $120,000 and $125,000 were likewise classified as collateral benefits. Interestingly, Stinson J. held that the $120,000 amount (minus $39,960 in costs) for the IRB claim fell within the scope of s.267.8(1), but the $125,000 payment did not.

The court's reasoning, essentially, was that the IRB Settlement Disclosure Notice form was entitled "Offer to Settle Income Replacement Benefits" and stated that payment was for all past and future IRBs. By contrast, the STD/LTD settlement document nowhere stated that it was a payment under an income continuation benefit plan; it was held to be, simply, a payment to settle a legal obligation.

Two crucial lessons can be gleaned from this case. First, settlements from FSCO or Superior Court actions are treated differently than IRBs, STDs, and LTD payments. The latter are clearly deductible collateral benefits. The former are deductible only where the language in the settlement documentation clearly indicates that the settlement is pursuant to s.267.8(1). This is the case even though the tort defendant, who by statute is entitled to the deductions, has no part or say in how the settlement and documentation are drafted. Secondly, legal fees paid from the settlement funds are subtracted from the amount that an insurer can deduct under s.267.8(1), so it is in the Plaintiff's interest to characterize as much of any settlement as "legal fees" as possible.

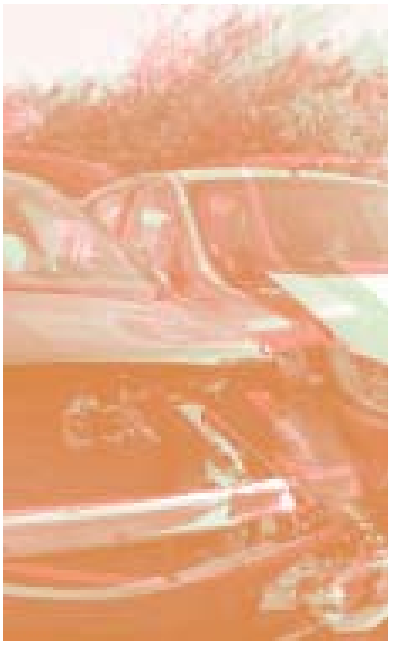
Elie Goldberg is a student-at-law at Dutton Brock LLP. His practice focuses on insurance defence work and personal injury claims.

Catastrophic Impairment

The Fighting Irish win new battle over Catastrophic Impairment

On October 19, 2010, the Superior Court released the Kusnierz decision which, among other things, dealt at length with the long-disputed issue of whether multi-disciplinary assessment teams who assess catastrophic impairment can combine clause 2(1.1)(f) with clause 2(1.1)(g) under the definition of catastrophic impairment outlined in the SABS.

Mr. Kusnierz was involved in a serious motor vehicle accident on December 24, 2001. He applied for and was denied catastrophic designation. He initiated a claim, which among other things, sought a declaration that he sustained a catastrophic impairment.



At trial, Justice Lauwers made a finding that the American Medical Association Guide to the Evaluation of Permanent Impairment (4th Edition) does not permit the combination of mental and behavioural impairments with physical impairments. More specifically, the court concluded that there was a clear distinction between mental and behavioural disorders referred to in Chapter 14 of the *Guide*, to which clause 2(1.1)(g) of the SABS specifically refers, and physical impairments assessed under the other Chapters of the Guide, to which clause 2 (1.1)(f) refers.

The Court reasoned that the impairments addressing mental and behavioural disorders are separately and specifically referred to in clause 2(1.1)(g) of the SABS. Chapter 14 of the AMA Guide does not permit an assessor to assign a percentage rating to mental and behavioural impairments.

The AMA Guide is incorporated into the regulation and where there are no provisions in the regulation, the Guide takes precedent. The categories listed that qualify as catastrophic impairment under clause 2(1.1) are very serious and would, by their nature, be relatively rare. The Court found there was no indication of legislative intent that the list be expanded by the exercise of discretion to combine 2(1.1)(f) with (g).

Justice Lauwers also concluded that the definition of catastrophic impairment outlined in Section 2(1.1) has the word "or" between clauses 2(1.1)(f) and (g), not "and". The Court then stated that had the legislature wanted the mental or behavioural impairments contemplated by clause 2(1.1)(g) to be combinable with the impairments to be assessed under clause 2(1.1)(f), it would have been easy to say so clearly.

This decision suggests that clauses (f) and (g) cannot be combined which has been the practice in multidisciplinary CAT assessments since the release of the Desbiens decision. We are now left with conflicting case law. The Plaintiff, Mr. Kusnierz, has filed a Notice of Appeal and this matter will be heard before the Court of Appeal for Ontario, likely lately this year. We will keep you advised on the outcome.

David Raposo joined Dutton Brock LLP as an associate in 2006. His practice focuses on the defence of Insurers with a strong emphasis on first party Accident Benefits claims.

It is that time of year again, our annual St. Patrick's day event is scheduled for:

Date: March 10th 2011

Location: Grace O'Malley's
14 Duncan Street Toronto

Time: 5pm - 8pm

Charity: WICC

For our contest to win cool Dutton Brock swag, provide the correct answer to this two part question: a) Which country was St. Patrick born in? and b) Which actor from that country starred as James Bond? Correct answers received by the end of March will be drawn to select a winner. Email two part answers to dlauder@duttonbrock.com

Editors' note

E-Counsel reports on legal issues and litigation related to our institutional, insured and self-insured retail clients. Dutton Brock LLP practices exclusively in the field of civil litigation. Any comments or suggestions on articles or E-Counsel generally can be directed to David Lauder or Paul Martin. You can find all our contact information and more at www.duttonbrock.com.

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