Before the Changes Come
The Top Ten AB Cases of 2015

Ontario Insurers Adjusters Association Claims Conference – February 3, 2016

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The Cases

1. *Simser v. Aviva Canada Inc*., 2015 ONSC 2363
2. *Grigoroff v. Wawanesa Mutual Insurance Co*., 2015 ONSC 3585
3. *Zhang and State Farm Mutual Insurance Company* (FSCO A13-005985, April 14, 2015)
4. *State Farm Mutual Insurance Company and Williams* (FSCO Appeal P15-00001, July 17, 2015)
5. *Bustamante v. Guarantee Co. of North America*, 2015 ONCA 530
6. *Zurich Insurance Co. v. Chubb Insurance Co. of Canada*, 2015 SCC 19
7. *Allstate Insurance Co. of Canada v. ING Insurance Co. of Canada*, 2015 ONSC 4020
8. *State Farm Mutual Automobile Insurance Company v. Old Republic Insurance Company of Canada*, 2015 ONCA 699
9. *The Guarantee Company v. Dong Do et al.*, 2015 ONSC 1891 (Div. Ct.)
10. *Cook and RBC* (FSCO Appeal Order P14-00038, May 4, 2015); and *Henderson and Wawanesa Mutual Insurance Company* (FSCO A14-001758, July 9, 2015)

Attendant Care Benefits

Case: *Simser v. Aviva Canada* 2015 ONSC 2363

Question: What is the meaning of the phrase “economic loss” in s. 3(7) of the SABS?

Simser v. Aviva Canada 2015 ONSC 2363

Facts:

- Simser was seriously injured in a motor vehicle accident in 2010 and was found to require assistance with attendant care.
- He claimed his ex-wife and daughter suffered an economic loss as a result of providing the care (ex. Missed time from work and school)
- Aviva denied that the care provided met the test of “incurred” and the matter proceeded to arbitration

Simser v. Aviva Canada (2015) (Div. Ct.)

Analysis:

The Divisional Court upheld the Arbitrator and Director's Delegate's decisions that:

- There was no evidence of pecuniary loss (ex. loss of wages or overtime)
- The evidence did not establish that the lawn care company provided the services in the course of its ordinary employment
- There must be more than a *de minimus* loss of opportunity, "economic loss" is restricted to a monetary or financial loss

Attendant Care Benefits

Case: *Grigoroff v. Wawanesa Mutual Insurance Co. (2015) (ONSC 3585)*

Question: When does interest start to run on retroactive attendant care benefits that are “overdue”?

Grigoroff v. Wawanesa Mutual Insurance Co. (2015) (ONSC 3585)

Facts:

- G was involved in an MVA on December 7, 2001
- He did not submit an Assessment of Attendant Care Needs, Form 1 until **February 2009**
- The Form 1 claimed *retroactive care* from January 2002 to August 2003, AND interest on the overdue benefit

Grigoroff v. Wawanesa Mutual Insurance Co. (2015) (ONSC 3585)

In Litigation:

- Wawanesa was ordered to pay the benefit for the period in dispute, but the parties could not agree on when interest began to accrue
- G maintained that interest began accruing as of the date that attendant care was found payable from (2002)
- A panel of the Divisional Court confirmed interest only began to run upon receipt of the retroactive Form 1, in 2009, pursuant ss. 46(1) and 39(4) of the *SABS*

Examinations Under Oath

"I'll ask you once more, and I remind you that you are *under oath*! Why did you *cross the road*?!"

Zhang and State Farm Mutual Insurance Company (FSCO A13-005985), April 14, 2015

Facts:

- Zhang was requested to attend an EUO and satisfy production requests
- Due to non-compliance, several benefits were eventually terminated pursuant to s. 33 of the *SABS*
- Counsel for Zhang stated his client would only attend an EUO once benefits were reinstated

Zhang and State Farm Mutual Insurance Company (FSCO A13-005985), April 14, 2015

The Decision:

- Arbitrator Jeff Musson found that section 33 of the *SABS* "clearly states" that an Insurer has the authority to request one EUO. He was ordered to attend within 90 days.
- If he didn't attend in 90 days, State Farm could move for dismissal of the Application for Arbitration.
- There is no authority in the *SABS* for an insured to request the reinstatement of benefits as a condition to attending an EUO.

*State Farm and Williams (*FSCO Appeal P15-00001, July 17, 2015)

The Facts:

- Williams was injured in an MVA on August 18, 2008
- State Farm started paying Income Replacement Benefits (IRBs) in October of that year
- In July 2013, State Farm sent him a notice for an EUO and Williams attended but refused to answer questions on the basis that the request for an EUO was too late

*State Farm and Williams (*FSCO Appeal P15-00001, July 17, 2015)

Applicable Law: *Statutory Accident Benefits Schedule (SABS)*

The right to an EUO is set out in s. 33(2) says that if an insurer requests one, an applicant shall submit to the EUO, but is not required to…

- A) submit to more than one exam
- B) submit when incapable

*State Farm and Williams (*FSCO Appeal P15-00001, July 17, 2015)

Applicable Law: *Statutory Accident Benefits Schedule (SABS)*

- s. 33(6) outlines the consequences of not complying with s. 33

- The insurer is not liable to a pay a benefit in respect of any period in which an insured person failed to comply with a request for reasonable information or a valid EUO

*State Farm and Williams (*FSCO Appeal P15-00001, July 17, 2015)

Applicable Law: *Statutory Accident Benefits Schedule (SABS)*

- s. 33(8) states that if an insured comes into compliance after a period of non-compliance…
  - A) benefits are reinstated if they were being paid
  - B) benefits may start to be paid if a reasonable explanation exists for the delay in compliance

*State Farm and Williams (*FSCO Appeal P15-00001, July 17, 2015)

Applicable Law: *Statutory Accident Benefits Schedule (SABS)*

- Counsel for Williams ignored s. 33 and chose to argue that under s. 36(2), Insurers are given a 10 days time limit after receiving the application for benefits and disability certificate to:
  - 1) Request further information
  - 2) Conduct an EUO
  - 3) Request an insurer's examination

*State Farm and Williams (*FSCO Appeal P15-00001, July 17, 2015)

At Arbitration:

- Arbitrator Murray found that pursuant to section 36(2) of the *SABS*, following submission of an OCF-1 and OCF-3, an insurer has only 10 days to ask for an EUO!

10 DAYS?

*State Farm and Williams (*FSCO Appeal P15-00001, July 17, 2015)

What happened next?

- State Farm appealed and won
- Director's Delegate Evans found:
  - The time limit in s. 36(2) applies to the limited circumstances at the beginning of the adjustment of a specified benefits claim
  - This does not preclude an insurer from initially paying the claim and later requesting information or an EUO
  - If an insured attend an EUO and refuses to answer reasonable questions, it cannot be said that the insured submitted to the EUO

*State Farm and Williams (*FSCO Appeal P15-00001, July 17, 2015)

The Appeal: Policy Matters

- Director's Delegate Evans found Arbitrator Murray's decision troubling

- Commented that insurers would be limited to requiring an EUO within 10 days of an application for specified benefits *or* forgoing the EUO and being limited to a later EUO with questions unrelated to specified benefits

Limitation Periods

Bustamante v. Guarantee Co. of North America, 2015 ONCA 530

Facts:

- B was involved in a car accident on June 3, 2004
- She applied for accident benefits and submitted an Election of Benefits Form in which she selected Income Replacement Benefits
- On September 1, 2004, Guarantee advised that she was not eligible for Non-Earner Benefits ("NEBs") by virtue of receiving IRBs

Bustamante v. Guarantee Co. of North America, 2015 ONCA 530

Facts:

- The correspondence from Guarantee to B warned her of a two year time limit to dispute the claim

- B's IRB's were discontinued on July 26, 2006 following a post-104 week assessment which found her to be no longer disabled

- In September 2009, B notified Gurantee that she intended to pursue a claim for NEBs. Guarantee denied the claim and after a failed Mediation, brought a motion for Summary Judgment.

Bustamante v. Guarantee Co. of North America, 2015 ONCA 530

Summary Judgment:

- The Motions Judge determined that the limitation period began on either September 1, 2004, the date that B was initially denied NEBs, or on July 26, 2006 when her IRBs were discontinued
- She was out of time! But decided to appeal…

Bustamante v. Guarantee Co. of North America, 2015 ONCA 530

The Court of Appeal:

- "Section 281.1(1) of the *Insurance Act*, and Section 51(1) of the *SABS* establish a two year limitation period for commencement of litigation or arbitration after the insurer's refusal to pay a benefit claimed."
- A limitation period begins to run as soon as a claimant is denied a specific benefit. The limitation period to Mediate NEBs had expired

Priority Disputes

Case: *Zurich Insurance Co. v. Chubb Insurance Co. of Canada,* 2015 SCC 19

Question: When is an insurer obliged to “pay first and dispute later”?

Answer: Always!!

Zurich Insurance Co. v. Chubb Insurance Co. of Canada, 2015 SCC 19

Facts:

- The claimant ("SS") involved in a single-vehicle accident in a vehicle rented from Wheels 4 Rent. The car was insured under a policy provided by Zurich and SS had not purchased the optional death and dismemberment policy offered by Chubb.
- Following the accident, SS submitted an OCF-1 to Chubb. Chubb declined to pay benefits on basis that there was no motor vehicle policy in place

Zurich Insurance Co. v. Chubb Insurance Co. of Canada, 2015 SCC 19

- Eventually SS received benefits from Zurich, which insured Wheel 4 Rent's rental vehicles pursuant to a "motor vehicle liability policy".
- A Priority Dispute was commenced
- At Arbitration, it was found that Chubb was not obligated to pay benefits under "pay first, fight later" rules and that Zurich should pay
- Zurich appealed successfully: Chubb was an "insurer" under the statutory regime. The policy Chubb issued to Wheels 4 Rent created a sufficient nexus between Chubb and SS to require AB payment
- This decision was reversed by the Court of Appeal, with Juriansz, J.A. dissenting.

Zurich Insurance Co. v. Chubb Insurance Co. of Canada, 2015 SCC 19

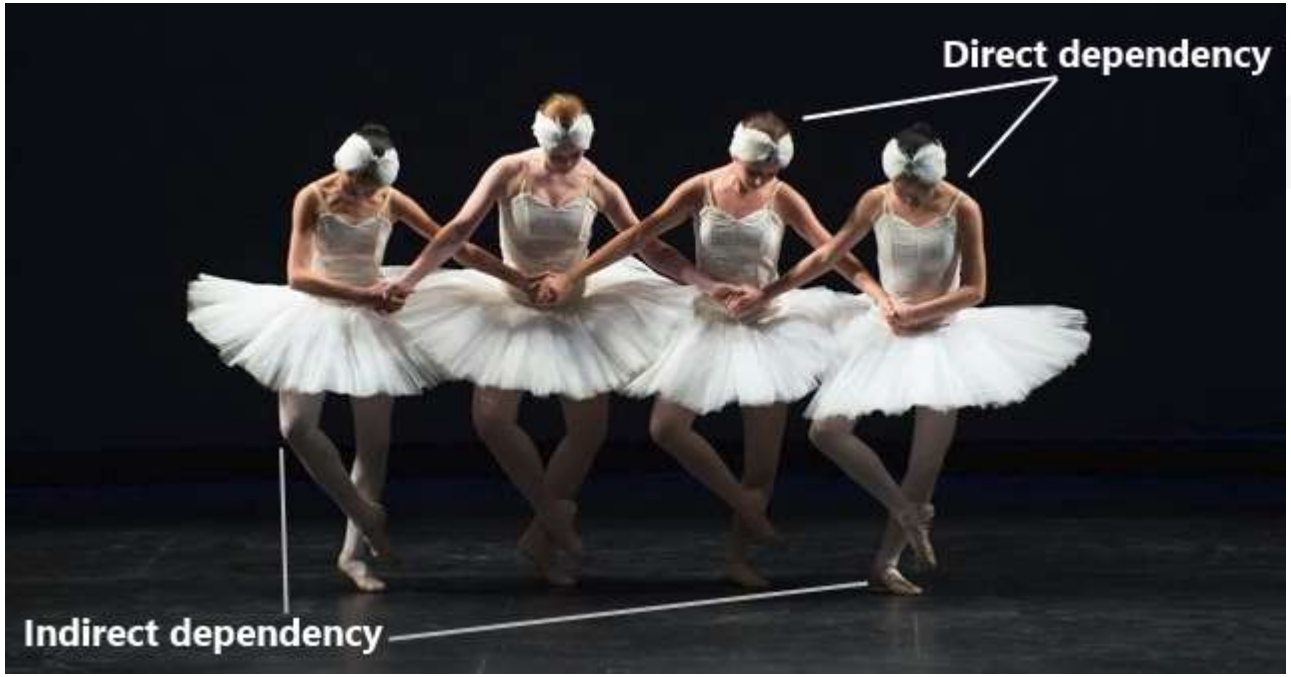
Analysis:

- The Supreme Court of Canada confirmed Juriansz J.A.'s Dissent from the Court of Appeal, finding that any motor vehicle liability insurer in Ontario is obligated to respond to a claim for accident benefits and then initiate a priority dispute, regardless of their relationship to the insured person.

Priority Disputes

Case: *Allstate Insurance Co. of Canada v. ING Insurance Co. of Canada,* 2015 ONSC 4020

The Issue: How should principal dependency be calculated?



Allstate Insurance Co. of Canada v. ING Insurance Co. of Canada, 2015 ONSC 4020

The Facts:

- R was standing outside a vehicle insured by ING when she was struck by a vehicle insured by Aviva. R was arguably, dependent on her mother who was insured by Allstate.
- R submitted her OCF-1 to

Allstate and it disputed priority

stating it rested with Aviva

or ING.

Allstate Insurance Co. of Canada v. ING Insurance Co. of Canada, 2015 ONSC 4020

- At Arbitration, Arbitrator Vance Cooper found that R was dependent on her mother, and priority rested with Allstate
- Arbitrator Cooper used statistical data, such as the low-income cut-off to make his decision.
- Arbitrator Cooper did not use the 51% analysis!
- Allstate appealed.

Allstate Insurance Co. of Canada v. ING Insurance Co. of Canada, 2015 ONSC 4020

Superior Court Decision, per Myers J.:

- Math is but one consideration in determining principal dependency and is not dispositive
- Calculating an individual's financial dependency from expert reports can result in "artificial and inaccurate" findings
- While Allstate lost this particular priority dispute, its expert's figures with respect to R's financial means were used in the calculation, and the case was closely decided on the 51% threshold

LOSS – TRANSFER DISPUTES

State Farm Mutual Automobile Insurance Company v. Old Republic Insurance Company of Canada, 2015 ONCA 699

Facts:

- Old Republic was the insurer of a Pepsi Truck that rear-ended a stopped Dodge, which subsequently rear-ended a stopped Nissan, insured by State Farm

- State Farm claimed indemnification from Old Republic pursuant to the Loss Transfer provision of the *Insurance Act*

State Farm Mutual Automobile Insurance Company v. Old Republic Insurance Company of Canada, 2015 ONCA 699

Applicable Law: Fault Determination Rules

- Rules for Automobiles Travelling in the Same Directions and Lane
  - 9(1) applies with respect to incidents involving three or more automobiles that are travelling in the same direction and in the same lane (a “chain reaction”)
  - Rule 9 further describes a theoretical situation involving vehicles A, B and C

State Farm Mutual Automobile Insurance Company v. Old Republic Insurance Company of Canada, 2015 ONCA 699

Applicable Law: Fault Determination Rules

- Rules for Automobiles Travelling in the Same Directions and Lane
  - 9(4) states that if only automobile C is in motion when the incident occurs,
    - A) in the collision between automobiles A and B, neither driver is at fault for the incident; AND
    - B) in the collision between automobiles B and C, the driver of automobile B is not at fault and the driver of automobile C is 100 per cent at fault for the incident

State Farm Mutual Automobile Insurance Company v. Old Republic Insurance Company of Canada, 2015 ONCA 699

The Loss Transfer Dispute:

- While both the Arbitrator and Superior Court decisions found loss transfer applied, the Court of Appeal said “nope”

- The ONCA ruled that the word “incident” in Rule 9(4) referred to a **specific collision** in a chain reaction collision, and not the entire chain reaction itself

The Guarantee Company v. Dong Do et al., 2015 ONSC 1891 (Div. Ct.)

Facts:

- D applied for a CAT designation in December 2006, in relation to an accident which occurred on October 9, 2005
- Guarantee denied the CAT application on May 2, 2007 and outlined D's right to dispute the refusal to pay a benefit within two years
- Following a series of section 25 and section 44 CAT assessments, Gurantee notified D, via letter on April 10, 2008 that he was still not designated as CAT. D disputed this determination

The Guarantee Company v. Dong Do et al., 2015 ONSC 1891 (Div. Ct.)

The Arbitration:

- Guarantee brought a Preliminary Issue Motion to determine whether the arbitration was precluded from proceeding as the Application for Mediation was filed more than two years after the CAT denial

Analysis:

- Section 281.1(1) the *Insurance Act*:
  - A mediation proceeding or evaluation under section 280 or 280.1 or a court proceeding or arbitration under section 281 shall be commenced within two years after the insurer's refusal to pay the benefit claimed

The Guarantee Company v. Dong Do et al., 2015 ONSC 1891 (Div. Ct.)

Analysis:

- Arbitrator Susan Alves concluded that the denial of CAT designation was **not** a "refusal to pay a **benefit**" but rather a threshold question that determines the quantum of or entitlement to benefits
- Guarantee did not specifically communicate that a refusal of CAT triggered the limitation period
- On appeal, Director's Delegate Lawrence Blackman agreed with the Arbitrator's decision

The Guarantee Company v. Dong Do et al., 2015 ONSC 1891 (Div. Ct.)

At Divisional Court:

- Justice Young ruled that the Director's Delegate's decision was reasonable and dismissed the application for Judicial review.

Takeaway:

- A denial of a CAT determination is <u>not</u> a denial of a benefit, therefore it does not trigger the two year limitation period

CATASTROPHIC IMPAIRMENT (“CAT”)

Catastrophic Impairment

Background:

- Traditionally, CAT assessments to determine eligibility for further benefits were funded from the medical and rehabilitation limit of $50,000 in Section 18 of the *SABS*

- This may no longer be the case…

Cook and RBC (FSCO Appeal Order P14-00038, May 4, 2015)

Facts:

- In January 2013, Mr. Cook submitted a Treatment and Assessment Plan (OCF-18), for CAT determination, for $12,960.00

- The OCF-18 was denied because Mr. Cook did not submit an Application for Determination of Catastrophic Impairment (OCF-19)

- Mr. Cook eventually submitted an OCF-19 and RBC arranged a CAT Insurer Assessment on November 13, 2013

Cook and RBC (FSCO Appeal Order P14-00038, May 4, 2015)

Facts:

- Mr. Cook was found to have a 7% Whole Person Impairment (WPI) and therefore not catastrophically impaired

- Mr. Cook brought a preliminary issue motion seeking funding of the rebuttal assessment, pending the determination of CAT at Arbitration

Cook and RBC (FSCO Appeal Order P14-00038, May 4, 2015)

The Arbitration:

At the preliminary issue motion, Arbitrator Stuart J. Mutch found…

- Mr. Cook's request for funding of a CAT assessment is an "expense", not a "benefit"

- An Arbitrator is permitted under section 279 of the *Insurance Act* and section 67 of the *Dispute Resolution Practice Code* to award interim expenses

- Section 18 of the *SABS* precluded him from awarding the cost of the assessment once the $50 000 non-CAT policy limits were exhausted

Cook and RBC (FSCO Appeal Order P14-00038, May 4, 2015)

Analysis:

On appeal, Director's Delegate Lawrence Blackman found…

- The relief sought was an Expense and not a Benefit

- Since CAT determination is not a *benefit*, section 18(5) does not apply AND s. 18 **did not** preclude him from awarding the cost of the assessment, in excess of the $50,000.00 med/rehab limits. So, he awarded it.

- His discretion to award interim expenses under sections 279(4.1) and 282(11.1) of the Insurance Act was not limited by section 18 of the SABS

Henderson and Wawanesa Mutual Insurance Company (FSCO A14-001758, July 9, 2015)

Facts:

- Henderson submitted a Treatment and Assessment Plan requesting Wawanesa cover the expense of a CAT assessment

- Wawanesa denied the treatment plan on the basis there were no remaining funds within the $50,000 non CAT limit

Henderson and Wawanesa Mutual Insurance Company (FSCO A14-001758, July 9, 2015)

Analysis:

- Arbitrator Bowles held that section 18 did not apply to a request for funding the CAT assessment, therefore the amount for the cost of the CAT assessment was payable.
- The insured did not apply for a benefit, assessment or examination in relation to a medical benefit. She "follow[ed] a procedure set out in section 45" (i.e. catastrophic determination)
- Arbitrator Knowles relied on *Guarantee and Do*, to confirm a CAT designation was not a benefit, but a procedural process set out in section 45 of the *SABS*

The Takeaways (in case you missed them)

- CAT is NOT a benefit.
- Insurers are allowed to conduct EUOs.
- Limitation periods are important.
- Retroactive attendant care can be payable, but interest only starts after submission of the Form 1.
- If you are driving a heavy commercial vehicle, and start a chain reaction collision, don't worry too much about Loss transfer.
- Bring on 2016!

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