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September 2024

A lesson on interpretation: The Court of Appeal simplifies the evidentiary threshold for retroactive ACBs and the definition of 'incurred'

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Summary

In the case of *Morrissey v. Wawanesa Insurance Company*, 2024 ONCA 602, the Ontario Court of Appeal was exclusively concerned with interpreting "dense and difficult text in a changing and complex statutory scheme."[1] This is an important decision involving accident benefits and, in particular, attendant care benefits ("ACBs") as it deals with retroactive Form 1's. The Court of Appeal's analysis also clarified the applicable case law and prior accident benefits scheme with respect to the correct interpretation of the definition of "incurred."

Facts

The appellant, Mr. Morrissey, was catastrophically injured in a motor vehicle accident in 2000 and had been receiving ACBs from his insurer, Wawanesa Insurance Company. In April 2018, Mr. Morrissey submitted a claim for increased benefits to cover additional attendant care expenses incurred from October 2015 onward. When the claim was denied by Wawanesa, Mr. Morrissey applied to the Licence Appeal Tribunal ("LAT") for a determination of his dispute with his insurer, eventually making way to the Court of Appeal.

The appeal addressed whether the Adjudicator and Divisional Court erred in:

(1) interpreting s. 42(5) of the O. Reg. 34/10, *Statutory Accident Benefits Schedule – Accidents on or After September 1, 2010* (the "2010 Schedule") as requiring Mr. Morrissey to meet a test of 'urgency, impossibility, or impracticability' as a precondition to submitting a Form 1 for retroactive ACBs; and

1 *Morrissey v. Wawanesa Insurance Company*, 2024 ONCA 602 at para 33.

(2) in concluding that the definition of "incurred" in the 2010 Schedule requires Mr. Morrissey to substantiate the attendant care expenses.

Analysis

The Court held that the LAT and the Divisional Court erred in their interpretation and application of the Schedules.

Mr. Morrissey's claim for retroactive benefits and s. 42(5) of the 2010 Schedule

The Court found that the Adjudicator and the Divisional Court incorrectly interpreted s. 42(5). Specifically, "the Adjudicator and the Divisional Court erred in concluding that a retroactive Form 1 can be submitted and considered only where there is evidence of urgency of a need and/or impossibility or impracticability of compliance with the requirements of s. 42(5)."[2]

The Court clarified that "Once a Form 1 is submitted (which can cover a period that has already passed), the insurer is obliged to determine whether the expenses claimed in relation to that period are reasonable and necessary."[3] Relying on *Kelly v. Guarantee Company of North America*, 2014 ONFSCDRS 128 (FSCO Arb.), the Court observed that the question becomes "whether the evidence prior to the receipt of the Form 1 reflects the assessment contained in the Form 1."[4]

The definition of "incurred" from the 2010 Schedule does not apply to Mr. Morrissey's claim

The Court found that the interpretive issue of when an attendant care expense is incurred can be resolved by the transitional provisions of the two Schedules. The transitional provisions in both Schedules make it clear that the 1996 Schedule establishing entitlement to benefits applies. Mr. Morrissey's claim is governed by the word "incurred" as it appears in ss. 16 and 22 of Part V of the 1996 Schedule because his accident occurred in 2000. Therefore, he is not required to substantiate that he "incurred" attendant care expenses in accordance with s. 3(7)(e) of the 2010 Schedule.

Turning to the settled case law for the purpose of the 1996 Schedule, in order to "incur" an expenditure, the insured need not actually receive the items or services. This expansive definition accepts expenses to be considered "incurred" if it was "sufficient that the services or items are reasonably necessary, and the amount of the expenditure can be determined with certainty."[5]

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2 *Ibid* at para 60.

3 *Ibid* at para 63.

4 *Ibid* at para 55.

5 *Ibid* at para 11. See *Belair Insurance Co. v. McMichael* (2007), 86 O.R. (3d) 68 (Div. Ct.), at paras. 21-26; *Monks v. ING Insurance Company of Canada*, 2008 ONCA 269, 90 O.R. (3d) 689, at paras. 46-52; and *Pucci v. The Wawanesa Mutual Insurance Company*, 2020 ONCA 265, at paras. 35-36.

Conclusion

Morrissey provides a valuable interpretation of key statutory accident benefit Schedules and simplifies the evidentiary thresholds required for submitting Form 1's for retroactive ACBs. This decision also outlines the Court's approach to interpreting Schedules when the procedure for claiming benefits changes.

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