CITATION: McLinden v. Payne, 2010 ONSC 6868
BARRIE COURT FILE NO.: 01-B3295
DATE: 20101213

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
SAMANTHA McLINDEN, MATTHEW McLINDEN and ASHLEY McLINDEN, minors under the age of eighteen years, by their Litigation Guardian SAMANTHA McLINDEN	Brian I. Monteiro, for the Plaintiffs
Plaintiffs	Bruce Keay, for the Defendant
– and –	
MELISSA PAYNE	
Defendant	
	HEARD: December 7, 2010

EBERHARD, J.

[1] The plaintiffs bring this motion to amend the Statement of Claim by adding the Co-operator's General Insurance Company as a party and defendant. Co-operators is the statutory accident benefits provider. Samantha McLinden was injured in a motor vehicle accident on April 6, 2001. In 2003 she applied for a determination of catastrophic impairment ("CAT"). The application was denied in a report dated June, 2006. By Statutory Accident Benefits Schedule,[1] (SABS) section 40(4), 51 and Insurance Act section 281.1(1), the applicant had two years to dispute the denial.

[1] 40(4)The determination by the designated assessment centre is binding on the insured person and the insurer, subject to the determination of a dispute, in accordance with sections 279 to 283 of the Insurance Act, relating to whether the impairment is a catastrophic impairment. O. Reg. 403/96, s. 40.
51. (1) A mediation proceeding or evaluation under section 280 or 280.1 of the Insurance Act or a court proceeding or arbitration under clause 281 (1) (a) or (b) of the Act in respect of a benefit under this Regulation shall be commenced within two years after the insurer's refusal to pay the amount claimed.

[2] In 2009 Samantha McLinden made a second application for determination of catastrophic impairment. Co-operators argues that the application is a statute barred challenge to the earlier determination beyond the limitation period created by SABS section 40(4), 51 and Insurance Act s 281.1(1).

[3] The plaintiff characterizes the application as a new application independent of the earlier denial and submits that on the basis of appropriate statutory interpretation, there is no restriction upon subsequent applications for a CAT designation.

[4] The plaintiff argues by its plain meaning, section 40(4) does not preclude multiple CAT applications. Rather it is silent. Ample case law is cited to support the proposition that the SABS constitute consumer protection legislation and as such must be read generously with any limitations construed narrowly.[2] By purposive analysis,[3] it is submitted that the intent of the legislation would be defeated if a deserving plaintiff were denied opportunity to demonstrate catastrophic injury when it matures to that status. The CAT application form inquires whether it is an application or reapplication and requires a reason for a reapplication. While the approved form cannot be the tail that wags the legislative dog, the inclusion of that inquiry does raise the question of what the drafters had in mind.[4]

[5] Co-operators offers a satisfactory explanation in proposing that an unsuccessful application under one section of the definitions for catastrophic determination does not necessarily impede an application under a different section without going beyond the several limitation periods set out in the legislation, particularly the two year appeal period of a denial under section 40(4).

[6] There is little jurisprudence to assist in the analysis of this section. Both counsel cite *Wry v. Aviva*, Co-operators preferring the appeal decision by the Deputy Director[5] while the plaintiff quotes the original arbitrator who stated:

> The legislation does not expressly forbid such applications and clearly contemplates reapplications. I therefore find it reasonable to argue that an applicant can reapply for determination of catastrophic impairment under the same criterion or his condition

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281.1 (1) Limitation period — 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.

[2] *Smith V. Co-Operators General Insurance Co*., [2002] 2 S.C.R. 129 *Ontario New Home Warranty Program v. Lukenda* (1991), 2 O.R. (3d) 675 (C.A.) . *Liddiard v. Tarion Warranty Corp.* (2009), 99 O.R. (3d) 656 (Div. Ct.) Monks V. ING Insurance Co. of Canada (2008), 235 O.A.C. 1 (C.A.) *Arts (Litigation Guardian of) v. State Farm Insurance Co.* (2008), 91 O.R. (3d) 394 (S.C), leave to appeal refused, [2008] O.J. No. 5740 (S.C.)

[3] *Wawanesa Mutual Insurance Co. v. Smith* (1998), 42 O.R. (3d) 441 (Div. Ct.) *Belair Insurance Co. v. McMichael* (2007), 86 O.K. (3d) 68 (Div. Ct.)

[4] *Wry v. Aviva*, Appeal Decision, P09-00016 & P09oo16C at page 9

[5] PO9-00016 and P09-00016C

> changes over time. This approach would be consistent with the broad and liberal interpretation mandated by the consumer protection nature of insurance legislation.[6]

[7] The Deputy Director's appeal decision emphasizes the need for certainty and finality and gives voice to the consumer protection interpretation by referencing that a plaintiff has a choice as to when to apply for the catastrophic determination, has a choice of forum and procedure in the event of denial.

[8] The compelling justice issue that draws me towards an interpretation that permits a second application, notwithstanding expiry of the dispute period for a denial, is in the easily imagined scenario where a subsequently deserving applicant for a catastrophic designation was not catastrophically injured at a time when application for such status is made. The application can occur when the condition is stabilized or, after three years even if the condition is not yet stabilized. It is easy to suppose that catastrophic status may not be demonstrable at that stage but could develop or appear by a material change in circumstances at some later date. Unlike the several cases cited by Co-operators[7] which hold that an expired claim cannot be revived by a deterioration or change in circumstances, the CAT designation is not one where fading memories or continuing uncertainty of potential claims resonate with unfairness against the responding party. The need to put claims for IRB benefits or disputes of denials of treatment into a timeframe is a valid concern, but unfairness weighs heavily against a claimant whose injuries become catastrophic over time. The silence of the legislation on whether a late CAT application can be made, though initially denied, may leave room for determination of CAT status under the SABS schedule section 40 when such a condition appears.

[9] This was the reasoning of the arbitrator in *Wry v. Aviva*. He found reapplication possible by statutory interpretation. Nevertheless, that arbitrator denied the claim on the basis that it was not factually distinct from the earlier claim and did therefore fall within the section 40(4) restriction. The report makes it clear that there was evidence before the arbitrator upon which such a fact finding could be made.

[10] This gives rise to a concern. While it may be tempting to interpret silence as leaving open a second application, beyond the dispute period of an earlier denial, where there is a material change in circumstances such that catastrophic designation can now be justified, the schedule lacks any procedure as to the stage when a finding of change of circumstances might be considered.

[11] In the present case the plaintiff wishes to amend the Statement of Claim and seek a declaration from the court that the plaintiff's injuries are catastrophic. If that is permitted

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[6] *Wry v. Aviva Canada Inc.* F.S.C.O. A07-001774
[7] *Haldenbv v. Dominion* 55 O.R.(3d) 470 *Kirkham v. State Farm* O.I.C. P96-00069 *West v. Aviva* FSCO A08-000170

without any demonstration that the plaintiff's condition has changed since the earlier denial, then the dispute procedure set out in section 40(4) is meaningless.

[12] On the other hand, Co-operators simply refused to consider the second application that came its way, so the determination of a change in condition or new condition now catastrophic in status is not available by the procedure for an application under the SABS schedule section 40.

[13] There is clear disadvantage in permitting an application to the court for a declaration of catastrophic injury without first requiring a finding that the condition to be considered is different from that which was denied and not challenged under the dispute procedure set out in section 40(4). If a disappointed claimant is permitted to proceed by way of an amended Statement of Claim, or even a new action against the SABS provider, it could well become the norm, an opened floodgate clearly not intended under the SABS schedule and the section 40(4) procedure.

[14] Accordingly, to advance the compelling argument that a deserving plaintiff ought to have the section interpreted to permit a second application, beyond the section 40(4) dispute period for denial, by way of new Statement of Claim or amended Statement of Claim, I find there must be evidence of a change in circumstances such that the court is not simply being asked to consider the same condition already denied and not challenged by the procedure set out in the SABS legislation.

[15] A report of Omega Medical Associates dated March 12, 2009 was placed before me. It is entitled Catastrophic Impairment Rebuttal Report. The preamble states:

> The MDAC Report concluded that Ms. McLinden did not meet the definition of catastrophic impairment under any of the criteria listed under section 2 of the Statutory Accident Benefit Schedule (SABS).
>
> In accordance with your request, we have undertaken a multidisciplinary assessment as a response to the MDAC evaluation. In submitting this report we are disputing the ratings of this section 42 assessment.

[16] The report does indeed have the appearance of a critique of the 2006 decision focussing heavily on why these new clinicians disagree with those who reported in 2006.

[17] By way of a demonstration that the application is for new and changed circumstances, the plaintiff argues a demonstration of deterioration at page 39 of the Report which is part of a discussion of a current evaluation that Ms. McLinden satisfies a DSM-4 criteria for the diagnosis of opiod dependence. Argument was not developed before me contrasting any qualitatively different circumstances upon which the 2009 application for CAT designation differs from the condition for which such a designation was denied in 2006.

[18] Therefore, using the very reasoning urged upon me from the arbitrator in *Wry v. Aviva*, I do not reject the statutory interpretation that would allow a new application for CAT designation where sufficient distinction from the original evidence can be demonstrated to base a provisional finding that there is something new to consider. In the present case I have not been persuaded that, in fact, this application is anything other than a rehashing of the evidence that was insufficient in 2006 to justify a CAT designation. I do not foreclose the possibility that by reason of the consumer protection nature of the SABS schedule that a second application beyond the section 40(4) limitation period may be possible as not prohibited. However, nothing before me persuades me that the present application is anything other than a dispute of the denial and that is not a matter on which the legislation is silent. Rather, by the terms of section 40(4), 51 and *Insurance Act* section 281.1(1), such a dispute is permissible within two years. Within two years the plaintiff has the choice of a court action. However, by the clear terms of the section, that dispute opportunity does not last beyond two years.

[19] The motion to amend is dismissed.

[20] The parties may file written submissions as to costs by December 20, 2010 not to exceed two pages together with a costs outline and any offers.

EBERHARD, J.

Released: December 13, 2010