

Ontario Court of Appeal Releases Its Decision On Pre-Judgement Interest in *Van Galder v Economical Mutual Insurance Company*

In this catastrophic accident benefits case, the insurer appealed Justice Kershman's finding that interest became overdue on amounts owed, and thus payable, from the dates of denial rather than the date of the insured's catastrophic impairment designation. The Court restricted its decision to the particular facts of this case.

On January 20, 2004 the insured was involved in a motor vehicle accident resulting in a compound tri-malleolar fracture to her right ankle and undisplaced fracture of the distal left tibia. Multiple surgical procedures were unsuccessful in obtaining union resulting in a mid-tibial amputation in 2008.

Following exhaustion of non-CAT benefits, the insured made four applications for catastrophic impairment designation between 2007 and 2012, each of which save the last were rejected as incomplete. Upon the receipt of catastrophic insurer's assessments confirming catastrophic impairment, Economical designated the insured catastrophically impaired on July 19, 2013.

Economical paid the insured lump sum payments of retroactive attendant care and housekeeping benefits from their 2005 and 2006 denial dates respectively. However, the insurer only paid interest from July 23, 2013, the date Economical said the payment was due.

Economical argued that the amounts owed did not become 'overdue' until the insurer made its catastrophic determination in 2013. The insurer also put forth a new argument on Appeal that the insured's injuries did not deteriorate to the level of catastrophic impairment until she was assessed in 2013 and, as such, no catastrophic benefits were overdue until that time.

The Court of Appeal affirmed Justice Kershman's decision on the basis that Economical's argument "ignores the application judge's acceptance of the Respondent's position that she has been catastrophically impaired since the time of the accident" stating "The Appellant had the Respondent's initial application and assessments. That in good faith it failed to recognize earlier that the Respondent was catastrophically impaired and should have received enhanced benefits does not affect the fact that those benefits were owing and then overdue to the Respondent from August 2005 for attendant care and January 2006 for housekeeping/home maintenance."

Further, the Court found that as Economical did not challenge Justice Kershman's factual finding that the insured had been catastrophically impaired since the date of the accident, it would not consider the insurer's new argument due to the resulting prejudice to the insured.

Dutton Brock LLP

438 University Avenue, Suite 1700

Toronto, Canada M5G 2L9

Telephone: (416) 593-4411 Fax: (416) 593-5922

www.duttonbrock.com