DUTTON BROCK *BULLETIN*

April 27, 2017

Accident Benefits:
Retroactive Application of amendment to section 19 of the *SABS* re Economic Loss?
Motor Vehicle Accident Claims Fund & Barnes (2017), Appeal P16-00087

On April 6, 2017, the Director's Delegate Rogers rescinded the Order of the Arbitrator and determined that the insured's entitlement to attendant care benefits for services provided after January 31, 2014 was limited to a maximum of the economic loss sustained by the insured's service provider in providing the services. The Arbitrator found that the insured's claim for attendant care expenses submitted after January 31, 2014 was not limited by the economic loss sustained by her service provider in accordance with paragraph 19(3)(4) of the SABS. Further, the Arbitrator found that there are no transitional provisions for the rule changes that occurred and O. Reg. 347/13 is silent on the issue of whether it applies to claims arising from accidents before February 1, 2014, as such the arbitrator did not discern a clear legislative intent.

The Director's Delegate, however, found as follows:

- The amendment of section 19 of the *SABS* (O. Reg. 347/13), limiting attendant care to payment of economic loss of a service provider, is not retroactive as it changes the future legal effect of an on-going situation and as such it requires a prospective application of the amendment and not retrospective.
- It is illogical to apply the concept of vested contractual rights to a relationship in which the parties have no direct input in the terms of their relationship, and the terms may be amended from time to time without their input or consent.
- The approach in *Federico & State Farm Mutual Automobile Insurance Co.* (2012), FSCO A08-001138 (March 23, 2012), (2013) FSCO P12-00022 (March 25, 2013), (2014) ONSC 109 (Ont. Div. Ct.) was inconsistent with section 268(1) and incompatible with the history of frequent amendments to the *SABS*, both incremental and wholesale. Further, that the Arbitrator erred in applying *Federico* as the ruling on vested rights was unnecessary to the decision.
- Of note, the decision of *Davis (Litigation guardian of) v. Wawanesa Mutual Insurance Co.*, [2015] O.J. No. 5571, 2015 ONSC 6624 (Ont. S.C.J.), in which the Court found that the Plaintiff (who was involved in a motor vehicle accident prior to February 1, 2014) had a vested right to payment of attendant care to which she was entitled on the date of her accident, was non-binding and also turned upon the acceptance of the vested rights approach in *Federico*.
- The Arbitrator did not consider the effect of section 268(1) of the *Insurance Act*, R.S.O. 1990, c. I-8 and the earlier appeal decision in *Gan Canada Insurance Company & Lehman* (1998), FSCO P97-00064 (August 10, 1998), which was upheld upon judicial review. *Lehman* rejects the idea that rights to accident benefits arise from a private contractual agreement and vest at the time of the accident.

The decision is significant as insurers ought to consider taking a second look at claims for attendant care prior to the February 1, 2014 amendment, for accidents after September 1, 2010, and require proof of economic loss for such claims and base their payment on the amount of economic loss not the amount of the Form 1.

Dutton Brock will keep you up to date on any further developments, particularly if a judicial review is being considered.

If you would like more information on motor vehicle insurance, please do not hesitate to call.

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