The Top Statutory Accident Benefits Cases of 2016

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Overview

The following cases are considered to be the top 6 Statutory Accident Benefits Schedule (SABS) cases of 2016. The topics that will be explored are: what is considered an "accident" under section 3 of the SABS; the impact of non-attendance at insurer examinations; the appropriate causation test in accident benefits cases; an insurer's duty to act in good faith; and when the limitation period begins to run in the termination of income replacement benefits. In general, these courts and tribunals ensured appropriate protections for individuals applying for accident benefits, in keeping with the legislation being consumer protection legislation.

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WHAT IS CONSIDERED AN "ACCIDENT"?

The cases below considered whether the subject incident fell within the definition of "accident" pursuant to section 3(1) of the *SABS*. Section 3(1) defines accident as:

> *"accident" means an incident in which the use or operation of an automobile directly causes an impairment or directly causes damage to any prescription eyewear, denture, hearing aid, prosthesis or other medical or dental device.*[1]

The courts consider whether the incident involved the use or operation of an automobile (the purpose test) and whether the automobile directly caused the impairment (the causation test). It appears that the court is taking an expansive approach in determining what constitutes an accident under the *SABS*.

1. *Economical Mutual Insurance Company v Caughy*, 2016 CarswellOnt 4358 (ONCA).

In this case, the court considered whether the application judge erred in finding that a tripping incident was an accident under the *SABS*.[2] The Court of Appeal affirmed the decision and found that an accident within the meaning of the *SABS* had occurred.[3]

Mr. Caughy (the Respondent), and his wife and two daughters were camping at a country music festival over the August long weekend. Mr. Caughy parked, detaching his camping trailer from his truck. The truck was parked in a manner that allowed space between his truck and another trailer. The space could be used as a walkway for campers.[4]

At some point during the long weekend, two motorcycles were parked in front of the trailer adjacent to the Respondent's truck.[5] During the day, the motorcycles were not parked blocking the walkway; at night, the motorcycles were moved and parked on the walkway without

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[1] O. Reg. 34/10: *Statutory Accident Benefits Schedule – Effective September 01, 2010* under the *Insurance Act*, R.S.O. 1990, c I-8 at s 3(1).
[2] *Economical Mutual Insurance Co. v Caughy*, 2016 CarswellOnt 4358 (ONCA) at 1 ("*Caughy*").
[3] *Caughy* at 2.
[4] *Caughy* at 3.
[5] *Caughy* at 4.

the Respondent knowing. At night, the Respondent, his daughter, and a friend, were playing tag around his parked truck. As the Respondent, who was intoxicated, proceeded towards the walkway between his truck and the adjacent trailer, he tripped over one of the motorcycles. The force of the impact propelled the Respondent into his truck, which he collided with, and he then fell to the ground. The impact of the Respondent hitting his car resulted in him sustaining serious spinal cord injuries. The insurer, the Applicant, denied benefits on the basis that the incident was not an accident within the meaning of the *SABS*.[6]

The judge hearing the Application found that the temporary parking of the motorcycle - even on a walkway - constituted an ordinary or well-known use or operation of the vehicle.[7] The parked motorcycle was a dominant feature of the incident and the injuries sustained.[8] The Application judge concluded that this incident fell within the meaning of accident under the *SABS*, and satisfied the test set out in *Amos v Insurance Corp. of British Columbia*.[9] The insurer appealed on the basis that the Application judge did not interpret the purpose test properly and errored in finding that the purpose test was met in these circumstances.[10]

The Court of Appeal found that the purpose test was met, as the parking of a vehicle is a common use of a vehicle. A vehicle is designed to be parked and vehicles spend most of the time parked.[11] The Court of Appeal confirmed that a motor vehicle does not need to be in active use for an incident to be deemed an accident under the *SABS*.[12]

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[6] *Caughy* at 7.
[7] *Caughy* at 8.
[8] *Caughy*
[9] *Caughy* at 9.
[10] *Caughy* at 10.
[11] *Caughy* at 17.
[12] *Caughy* at 21.

2. *Roberts v. Intact Insurance Co*., 2016 CarswellOnt 810 (FSCO A14-002957, January 4, 2016).

Roberts also considered whether an incident was deemed to be an accident under the *SABS*. The Arbiter found this incident to be an accident and clarified the term "**disembarking**" for incidents that do not appear to be the typical accident involving a motor vehicle.

The Applicant and her friends went to a lake, after a night of drinking at a bar, in a pick-up truck that was owned by one of the friends.[13] The friends backed up the pickup truck such that the truck's tailgate extended over the lake water and then put the car in park. The Applicant and her friends were using the tailgate and box to jump and do "cannonballs" into the water. The Applicant was seen standing on the box of the truck bed and then a few minutes later was seen floating face down in the water. It was later determined that the Applicant had jumped into approximately 1 foot of water. As a result of the jump, she became a quadriplegic.[14] The insurer of the truck rejected the application for benefits on the basis that the incident was not an accident within the meaning of the SABS.

The Arbiter found that this incident was an accident under the *SABS,* meeting both the purpose and causation tests.[15] In regards to the purpose test, the arbiter found that the ordinary use of a motor vehicle includes getting in and out of the vehicle (embarking and disembarking).[16] In terms of disembarking, the Arbiter noted that the term "disembarking" is not defined under the *SABS*. There is no requirement that "disembarking" can only occur from the passenger compartment.[17] The Arbiter also noted that disembarking need not only occur at the end of a

[13] *Roberts v Intact Insurance Co*., 2016 CarswellOnt 810 (FSCO A14-002957, January 4, 2016) at 4-7 ("*Roberts*").
[14] *Roberts* at 8, 10, & 13.
[15] *Roberts* at 38.
[16] *Roberts* at 20
[17] *Roberts* at 30

journey.[18] The Applicant, therefore, was found to have been operating the motor vehicle in the ordinary sense. The Applicant also passed the causation test that "but for" the parking of the vehicle by the edge of the water and the disembarking from the vehicle, the resultant injuries would not have occurred.[19]

INSURER EXAMINATION REQUESTS

3. *Larry Ward v. State Farm Mutual Automobile Insurance Co.*, 2016 CarswellOnt 1292 (FSCO A14-010161).

This case confirmed the insurer's duty when requesting insurer examinations, particularly that an insurer needs to clearly and sufficiently set out the medical or other reasons why an examination is being requested. If the insurer does not, the notice of examination may be insufficient and the applicant may proceed to arbitration with respect to the denied issue despite the non-attendance at the insurer examinations.

Mr. Ward was in a motor vehicle accident on October 18, 2007. He was receiving income replacement benefits until October 10, 2014 when they were terminated.[20] He applied for mediation and then arbitration. A preliminary issue raised was whether Mr. Ward was precluded from proceeding to arbitration due to his non-attendance at four insurer examinations that were to determine his income replacement benefits entitlement, pursuant to section 55(2) of the *SABS*.[21] Arbiter Matheson concluded that Mr. Ward was not precluded from proceeding to arbitration.[22]

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[18] *Roberts* at 30-31.
[19] *Roberts* at 37.
[20] *Ward v State Farm Mutual Automobile Insurance Co.,* 2016 CarswellOnt 1292 (FSCO A14-010161, January 15, 2016) at 1 ("*Ward*").
[21] *Ward* at 1, 2, & 11.
[22] *Ward* at 3.

Mr. Ward had previously attended nine medical examinations to determine income replacement benefit entitlement.[23] The Applicant argued that the insurer had not complied with section 44(5) (a) of the *SABS*, which requires the insurer to set out the medical or other reasons for the examinations.[24] Arbiter Matheson reviewed the notices to determine whether State Farm provided these reasons. He interpreted the requirement to mean that the medical reasons must tell the Applicant in an unsophisticated way why the tests are reasonable and necessary.[25] The insurer's letter of notice mentioned a Life Care Plan and an Occupational Therapist's Acquired Brain Injury Report. The Arbiter found that these did not meet the medical reasons test.[26] The notice was considered to be insufficient in stating why the tests were reasonable and necessary.[27] Accordingly, the Arbiter held that the insurer could not rely on the non-attendance of the examinations.[28]

This case also confirmed that a denied Treatment and Assessment Plan still requires the insurer to pay for the insured's transportation to and from the appointment.[29] It was also confirmed that an expense of $250 or less does not require a treatment plan to be submitted by the insured.[30]

[23] *Ward* at 12.
[24] *Ward* at 13, 14, & 16.
[25] *Ward* at 20.
[26] *Ward* at 17 & 20.
[27] *Ward* at 20-21.
[28] *Ward* at 21.
[29] *Ward* at 28.
[30] *Ward* at 27.

DETERMINING CAUSATION

4. *Vandergaag v Aviva Canada Inc.*, 2016 CarswellOnt 1962 (FSCO A12-007924, February 1, 2016).

This case deliberated the appropriate test for determining causation in statutory accident benefits cases. Arbiter Sherman considered the purpose behind the statutory accident benefits legislation and concluded that the material contribution test best complied with the legislation's purpose. There have been differing conclusions in relation to the appropriate test for causation in accident benefits cases. It is yet to be determined how causation will be interpreted by the Adjudicators of the Licence Appeal Tribunal.

Ms. Vandergaag was 8 years old when she was involved in a motor vehicle collision on January 4, 2007.[31] Injuries suffered as a result of the accident included memory loss, depression, bullying, problems with her cognitive function, and so on.[32] The Insured claimed that she was suffering from a catastrophic impairment and the Arbiter had to determine whether the motor vehicle accident caused Michaela's injuries. At issue was whether the appropriate test to determine causation was the "but for" test or the "material contribution" test.

The Applicant argued that the less onerous material contribution test applied in the circumstances, relying on the Ontario Court of Appeal case of *Monks v ING Insurance Co of Canada*.[33] The Arbiter noted that there has been no definitive conclusion by the Court of Appeal that the material contribution test is the only test for causation in accident benefits cases.[34] Aviva argued that the appropriate test for causation was the "but for" test, relying on the recent

[31] *Vandergaag v Aviva Canada Inc.,* 2016 CarswellOnt 1962 (FSCO A12-007924, February 1, 2016) at 4 & 6 ("*Vandergaag*").
[32] *Vandergaag* at 24, 25 45, & 46.
[33] *Vandergaag* at 57 citing *Monks v ING Insurance Co. of Canada*, 2008 CarswellOnt 2036 (ONCA).
[34] *Vandergaag* at 58.

Ontario Court of Appeal decision in *Blake*.[35] The Court of Appeal found no error in the trial judge's application of the "but for" causation test, which was held in the case of *Clements (Litigation Guardian of) v Clements* to be the appropriate test for determining causation in negligence cases.[36] Arbiter Sherman distinguished between negligence and statutory accident benefits cases:

> *… a statutory accident benefits case involves contract law. The insured person claims accident benefits under a policy of automobile insurance that he or she has contracted with the insurance company…one of the main objectives of insurance law is consumer protection, particularly in the field of automobile insurance.*[37]

Considering the purpose behind the legislation, which is to provide protection to those who have sustained injuries in a motor vehicle accident with benefits on a no fault basis, Arbiter Sherman concluded that the material contribution test best complies with its purpose. Legal causation for *SABS* purposes can be different from the legal causation for torts purposes. Arbiter Sherman later found that the motor vehicle accident did materially contribute to Michaela's impairments.[38]

Not mentioned in the *Vandergaag* case, the 2016 case of *Agyapong v Jevco Insurance Co*. considered the appropriate causation test to use in statutory accidents cases. It was concluded that the "but for" test was appropriate, relying on *Blake*. *Agyapong* determined that the *Blake* decision implied that the "but for" test remained to be the default in accident benefits matters when there is not a specific request and justification made for the material contribution test.[39] There is currently no consensus in the appropriate causation test to apply in AB cases.

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[35] *Vandergaag* at 60 citing *Blake v Dominion of Canada General Insurance Co*., 2015 CarswellOnt 3259 (ONCA) ("*Blake*").
[36] *Vandergaag* at 60-61 citing *Clements (Litigation Guardian of) v Clements*, 2012 CarswellBC 1863 (SCC).
[37] *Vandergaag* at 62.
[38] *Vandergaag* at 106 & 133.
[39] *Agyapong v Jevco Insurance Co*, 2016 CarswellOnt 1966 (FSCO A11-003445, January 25, 2016) at 65 ("*Agyapong*").

INSURER HAS A DUTY TO ACT IN GOOD FAITH

5. *Nader v State Farm Mutual Automobile Insurance Company* 2016 CarswellOnt 4074 (FSCO A13-003230, March 7, 2016).

This case considered the insurer's duty to act in good faith. The court interpreted this to include that an insurer has an obligation to ensure that a graduated return to work plan is possible and the insurer must make reasonable inquiries before terminating income replacement benefits.

Mr. Nader was injured in a motor vehicle accident on May 16, 2010.[40] He was receiving accident benefits from his insurer, State Farm; however, disputes eventually arose in regards to his entitlement to the benefits. Mr. Nader's income replacement benefits, housekeeping and home maintenance benefits and attendant care benefits were terminated mostly on the basis of the findings of three insurer examinations.[41]

Mr. Nader's income replacement benefits were terminated on the basis that a physiatry report recommended a gradual return to work over a period of six weeks. The Applicant contends that he was unable to return to work at the time his benefits were terminated, as the job duties of his pre-accident occupation were physically demanding and there were no light duties that he could have done to assist in a graduated return to work program. The Applicant argued that he was substantially unable to return to his pre-accident work for the first two years after the accident. It should be noted that Mr. Nader did not contact his employer to discuss any potential accommodation.[42]

The arbiter found that Mr. Nader was entitled to an income replacement benefit for the first 104 weeks post-accident, as he was substantially unable to perform the tasks of his

[40] *Nader v State Farm Mutual Automobile Insurance Company*, 2016 CarswellOnt 4074 (FSCO A13-003230, March 7, 2016) at 1.
[41] *Nader* at 11.
[42] *Nader* at 29.

employment before the accident.[43] State Farm was notified of the failure of Mr. Nader to return to his pre-accident work. This was provided about six weeks after Mr. Nader was given notification of the return to work program.[44] The court opined that State Farm did not make inquiries into why there was not a return to work.[45]

The court held the following:

> I accept that Mr. Nader, like any insured person who is not incapacitated, has an obligation under the Schedule to take reasonable measures to obtain treatment, participate in rehabilitation, and seek employment. I further accept that this would include pursuing a graduated return to work program, if available, and participating in related active rehabilitation. However, the OCF-9 in this case seems to simply assume that Mr. Nader would be able to engage in a graduated return to work, and does not advise Mr. Nader that inquiries into the availability of a graduated return to work program rested upon him as a positive obligation (whether graduated work seemed like a possibility to him or not given the nature of his job). While Mr. Nader could have done more to explore a graduated return to work, I find that State Farm could and should have done more to clearly communicate its expectations of Mr. Nader.
>
> More importantly in this case is the duty of a first party insurer to act in good faith. This duty extends to continuing to adjust the insured person's file with an open mind on the basis of new information, and to take reasonable steps to facilitate claims. In this case, Mr. Nader's counsel contacted State Farm to advise that he had not returned to work. I find that the duty to act in good faith made it incumbent on State Farm to make reasonable inquiries at that point to determine the reason for the non-return and, if necessary, to follow-up with the pre-accident employer to confirm the availability (or not) of a graduated return to work. I have no evidence that State Farm did either. Given Dr. Armitage's recommendation, upon which the OCF-9 was based, the duty would also include looking at whether Mr. Nader had been continuing to participate in treatment, especially active rehabilitation. It was not sufficient for State Farm's adjuster to simply state "our determination still stands regardless." I find this constituted a failure to continue to adjust the file in good faith and, notwithstanding any shortfall in Mr. Nader's own conduct, disentitled State Farm in the circumstances of this case from being able to continue to rely on the initial position it took in its OCF-9.[46]

[43] *Nader* at 17.
[44] *Nader* at 30.
[45] *Nader* at 30.
[46] *Nader* at 36-37.

The arbitrator found that an insurer needs to make the reasonable inquires in order to determine the reason for the insured not returning to their pre-accident employment and if needed, to follow-up with the employer to confirm the possibility of a graduated return to work program before terminating the income replacement benefits. In addition, the court interpreted this duty to include inquiring into whether the applicant has been continuing to participate in treatment, especially active rehabilitation. It is obligatory on the insurer to provide support and make the inquiries in order to effectively handle the file and to not rely on their original position.

RUNNING OF LIMITATION PERIOD

6. *Bonaccorso v Optimum Insurance Co*., 2016 CarswellOnt 361 (ONCA).

The Appellant appealed the order from a summary judgment motion that dismissed her claim for income replacement benefits. The Court of Appeal made an important finding on the proper limitation period when there is a termination of benefits. In effect, the court placed a cap on the time period for which an applicant may dispute the termination of their benefits.

The Appellant was involved in a motor vehicle collision on February 4, 2008, and was receiving income replacement benefits until June 28, 2009 when she returned to her employment.[47] The insurer sent a letter on June 22, 2009, outlining that no further benefits would be payable once she began full-time work.[48] Another letter was sent on February 8, 2010, by the insurer outlining when these benefits were being terminated, which was on June 28, 2009.[49] This letter also stated in bold letters that there was a two-year time limit from the date of refusal to arbitrate or commence an action.[50] The Appellant worked for a period of time until

[47] *Bonaccorso v Optimum Insurance Co*., 2016 CarswellOnt 361 (ONCA) at 2 ("*Bonaccorso*").
[48] *Bonaccorso* at 3.
[49] *Bonaccorso* at 4.
[50] *Bonaccorso*

February 15, 2011, when she was unable to continue because of the injuries she sustained as a result of the motor vehicle collision. The Appellant requested reinstatement of her benefits on July 13, 2012, but the benefits were denied on July 20, 2012, due to the limitation period having passed.

The court agreed with the motion judge and found that the limitation period began to run on the date the letter of February 8, 2010, was sent out indicating when the income replacement benefits would be terminated and not on the day the Appellant stopped working. In the letter, the insurer was clear that there was a discontinuation of benefits, there was an explanation of the process in disputing the termination, and the two year limitation was set out.[51]

The Appellant argued that the motion judge erred in not considering section 11 of the *SABS*, which states that a temporary return work does not impact the right to resume income replacement benefits, if the insured is unable to continue in their employment as a result of their injuries. If the insured's argument that the limitation period began to run when she stopped working was accepted, this would effectively extend the claimant's entitlement to benefits for an indeterminate amount of time. Court was concerned this would run counter to the needs of limitation periods, which includes finality, certainty, and diligence.[52] The court stated "simply put, the temporary return to work provision does not prevail over the limitation period".[53]

The Appeal was dismissed.

[51] *Bonaccorso* at 12.
[52] *Bonaccorso* at 17.
[53] *Bonaccorso* at 19.

TABLE OF AUTHORITIES

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1. O. Reg. 34/10: *Statutory Accident Benefits Schedule – Effective September 01, 2010* under the *Insurance Act*, R.S.O. 1990, c I-8.

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1. *Agyapong v Jevco Insurance Co, 2016 CarswellOnt 1966* (FSCO A11-003445, January 25, 2016).

2. *Blake v Dominion of Canada General Insurance Co*., 2015 CarswellOnt 3259 (ONCA)

3. *Bonaccorso v Optimum Insurance Co*., 2016 CarswellOnt 361 (ONCA).

4. *Clements (Litigation Guardian of) v Clements*, 2012 CarswellBC 1863 (SCC).

5. *Economical Mutual Insurance Company v Caughy*, 2016 CarswellOnt 4358 (ONCA).

6. *Monks v ING Insurance Co. of Canada*, 2008 CarswellOnt 2036 (ONCA).

7. *Nader v State Farm Mutual Automobile Insurance Company* 2016 CarswellOnt 4074 (FSCO A13-003230, March 7, 2016).

8. *Roberts v. Intact Insurance Co*., 2016 CarswellOnt 810 (FSCO A14-002957, January 4, 2016).

9. *Vandergaag v Aviva Canada Inc.*, 2016 CarswellOnt 1962 (FSCO A12-007924, February 1, 2016).

10. *Ward v. State Farm Mutual Automobile Insurance Co*., 2016 CarswellOnt 1292 (FSCO A14-010161).