IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Economical Mutual Insurance Company v. Rushton, 2008 NSSC 237

Date: 20080805
Docket: SH 288743A
Registry: Halifax

Between:

The Economical Mutual Insurance Company

Applicant

v.

Lyndsay Janelle Rushton

Respondent

D E C I S I O N

Judge: The Honourable Justice Gerald R P Moir

Heard: 24 June 2008 at Halifax

Counsel: Mr. Wayne Francis for the appellant
Mr. David M Brannen for the respondent

Moir J.:

Introduction

[1] The standard auto insurance policy in Nova Scotia limits recovery of Section B benefits in two ways, time and amount. Recovery is limited to "expenses incurred within four years from the date of the accident" and it is subject to a "limit of $25,000" per person.

[2] This Small Claims Court appeal turns on the word "incurred" in the temporal limit. Ms. Rushton received physiotherapy treatment at the IWK Children's Hospital. She was discharged when she turned eighteen, but her physician recommended she continue physiotherapy. She did, but, in the meantime, the fourth anniversary of the accident arrived.

[3] The question is whether the expense of ongoing physiotherapy was "incurred" before the anniversary. Adjudicator David T. R. Parker found that it was incurred before the anniversary.

Standard of Review

[4] A good starting point to determine the standard of review is existing case law. If the necessary analysis has already been carried out, there is no need for a repetition: *Dunsmuir* v. *New Brunswick*, [2008] S.C.J. 9 at para. 57.

[5] Both Mr. Francis and Mr. Brannen submit that the standard of review is correctness, and they refer to *Brett Motors Leasing Ltd.* v. *Welsford*, [1999] N.S.J. 466 (SC) at para. 14. Brett does not expressly apply the standard of review analysis described in *Dunsmuir*. However, the conclusion in *Brett* clearly follows from that approach.

[6] The *Small Claims Court Act* provides a right of appeal on a question of law or procedural fairness. As observed in *Brett*, review of fact-finding is precluded. (Indeed, the preclusion is as practical as it is legal: the adjudicator reports the evidence and findings. This court does not go behind the report. This is in keeping with the purpose of this Act, which is to secure a quick and inexpensive determination.) The question in this case is one of law.

[7] The purpose of the tribunal (*Dunsmuir*, para. 64) is to quickly and inexpensively determine claims under $25,000. It deals with the same kinds of issues as this court does, and does not operate in a specialized field.

[8] The question at issue in this case is the correct interpretation of a contract, the text of which is prescribed by statute. There is no special expertise in the

Small Claims Court that places it in a better position to determine that question.

[9] So , this court must review Adjudicator Parker's decision to determine whether it is correct.

Facts

[10] In his report, Adjudicator Parker quotes from an agreed statement of facts:

1. Janelle Rushton ("Ms Rushton") is 19 years old and resides in Halifax, Nova Scotia;
2. Ms. Rushton was injured in a motor vehicle accident on August 15, 2002;
3. At the time of the accident Ms. Rushton was insured under Section B of Economical Insurance Company automobile policy;
4. Ms. Rushton has been treated by her family physician, Dr. Tanya Munro, who referred her for physiotherapy.
5. Ms. Rushton was initially assessed at Physiotherapy Atlantic in Halifax.
6. Ms. Rushton received physiotherapy treatment at the Colchester Physiotherapy and Body Mechanics Clinic from August 28, 2002, to December 22, 2004. During this time she received approximately 147 treatments, which were paid for, in part, by the Defendant. Part of these treatments was paid for by a private medical insurance plan.
7. On referral from Dr. Munroe, Ms. Rushton attended the IWK Health Centre's Pediatric Complex Pain Clinic, where she came under the care of Dr. Allen Finley. Ms. Rushton has attended this clinic, on an out-patient basis, from March 17, 2003, until September 2006 (when she was discharged because she exceeded the maximum age requirements for treatment at that clinic).
8. At the recommendation of Dr. Findley, Ms. Rushton resumed physiotherapy treatment within the Pediatric Complex Pain Clinic on December 5, 2005. This treatment was provided by physiotherapist Mike Sangster. During this time Ms. Rushton received approximately 29 treatments up until the time she was discharged. The Defendant did not pay for these treatments as

they were paid in full by MSI. The Defendant did, however, pay for travel expenses associated with attending this treatment.

9. On July 27, 2006, Ms. Rushton attended a medical examination by the insurance company's medical advisor, Dr. John Heitzner.

10. On August 9, 2006, Dr. Findley advised that Ms. Rushton's treatment plan with physiotherapy should continue once she was discharged from the IWK Pediatric Complex Pain Clinic. On August 10, 2006, Economical was provided with that report and Ms. Rushton's requested approval for reimbursement of physiotherapy expenses that would begin once she was transferred from the IWK to a private clinic.
11. On August 14, 2006, Economical Insurance, advised that it would not pay for physiotherapy, unless it was delivered in conjunction with Botox injections, as recommended by Economical Insurance's medical advisor, Dr. Heitzner.
12. The four year limitation period for coverage under the policy for medical and rehabilitation expenses expired on August 15, 2006.
13. On September 29, 2006, Ms. Rushton attended physiotherapist Nick Matheson, One to One Wellness Centre, for continuation of her physiotherapy program previously provided by Mike Sangster. Ms. Rushton attended 60 sessions of treatment up to the present time.
14. Economical has refused to pay physiotherapy treatment incurred after the expiry of the four year coverage period under section B of the policy.
15. Ms. Rushton has incurred $3,080 for physiotherapy treatment provided by One to One Wellness, and has paid $2,950 out-of-pocket which has not been reimbursed by the Defendant.
16. There is currently $10,840.84 left of the $25,000 maximum coverage for medical.

[11] The adjudicator's report includes the following under the title "Additional Facts":

> At the hearing I heard from Michael Sangster, MBA, BSc PT, the Claimant's physiotherapist at the IWK Pain Clinic and from Nick

> Matheson, a physiotherapist with One to One Wellness Centre located in Halifax.....
>
> I also heard from the Plaintiff in this action. Based on the information I received from all the witnesses there is a prescribed program to deal with the symptoms of the Plaintiff following the accident. The treatments that have been ongoing since September 29, 2006, are reasonable as outlined by Nick Matheson in an attempt to deal with the ongoing pain of the Claimant and are necessary at this time to ensure the Claimant maintains her functioning and continues to improve. (Report, p. 4 to p. 8)

[12] Adjudicator Parker provides a further record of the evidence, and of his findings, towards the end of the Report:

> Based on the testimony of Mike Sangster, the physiotherapy that was completed on the Claimant following the accident up to the time the Claimant was discharged from the IWK, was necessary and there is no indication the expenses incurred from the treatment were not unreasonable. The absence of any suggestion they were not reasonable and the fact they were paid for by the Defendant lends to this reasonable inference. The Court heard from the testimony of Mr. Sangster that this treatment should be continued on the plaintiff not at the IWK as the Claimant passed into the adolescent stage and IWK's mandate was to deal with children. Also Mr. Sangster recommended that the Claimant see Nick Matheson specifically as his clinic dealt with situations such as faced the Claimant. While Mr. Matheson did his own assessment, the treatment and goals were similar to those through the IWK Clinic and there is a community of interests between both clinics concerning treatment of the Claimant. (Report, p. 12)

[13] For Economical Mutual, Mr. Francis supplements the report in his brief and, as well, emphasises some parts of the report. I do not think Mr. Brannen objects to the supplement. Mr. Francis writes as follows:

> In our case, the analysis of when the physiotherapy expenses were "incurred" begins with determining the state of Ms. Rushton's care prior at the expiry of the four year cut-off date; ie.; 30 treatments at the IWK from December, 2005 until August, 2006. Given her age, Ms. Rushton was to be transferred from care at the IWK into a different facility in the summer of 2006. Her attending physician at the IWK was Dr. Finley. Dr. Finley did not testify at trial. The court did accept his May 25, 2007 Affidavit into evidence [Attached at Tab

5]. Exhibit "C" to that Affidavit is Dr. Finley's own letter of August 1, 2006 which states:

> Her (Ms. Rushton's) current treatment plan involves primarily physiotherapy interventions, **which should continue indefinitely**....
>
> My recommendation would be **on-going treatment** with an expert in pain physiotherapy, probably including acupuncture, shoulder stability and strengthening, neural mobilization and paced activity. I would certainly expect this to continue **for at least the next year, and probably longer.** [emphasis is supplied by Mr. Francis]

Ms. Rushton was not assessed by physiotherapist Nick Matheson until September 29, 2006 - 6 weeks after the eligibility cut-off date. At trial Mr. Matheson was clear that he did not review the IWK physiotherapy records or consult Dr. Finley prior to his assessment and treatment of Ms. Rushton (at p. 10 of trial decision). Subsequent to the initial assessment, Ms. Rushton continued treatment with Mr. Matheson up until at least the date of trial.

Adjudicator's Determination

[14] Adjudicator Parker referred to *MacLeod* v. *Lumbermen Mutual Casualty Company*, [1993] N.S.J. 154 (SC) and extracted from that decision the following test for determining whether an expense was "incurred" even though liability for payment did not arise before the fourth anniversary of the accident:

> Would they [the expenses] happen as a result of treatment that was done within four years of the accident? or
>
> Were they part of an ongoing treatment, part of which, was deferred to a later date?
>
> It is treatment that must be determined in all the circumstances as a certainty to exist at some point past the four year limitation and not a mere possible speculation of optional future potential services.

[15] The adjudicator then provided the passage at page 12 of his report quoted above and concluded that "the MacLeod test" had been met because the treatment was "a 'natural, highly probable extension' of the treatment instituted prior to the limitation date."

Appellant's Position

[16] Mr. Francis points out that the *MacLeod* decision requires proof of an element of certainty before an expense, not yet contracted, can be found to have been incurred before the fourth anniversary. In extracting a test from *MacLeod*, the adjudicator excluded this element of certainty from the first two of the three questions.

[17] Mr. Francis also argues that the approach taken by Adjudicator Parker makes the four-year limitation meaningless. While he does not challenge the *MacLeod* interpretation, Mr. Francis emphasises the need for certainty and casts that against the background of *Hobbs* v. *General Accident Insurance Co. of Canada*, [1989] P.E.I.J. 45 (CA), which held that an expense is "incurred" only if the insured paid the expense or made herself liable to do so.

[18] In summary, Economical Mutual's position is that further physiotherapy treatment was merely recommended when the anniversary arrived, the duration was unknown, and the cost was unknown. Ms. Rushton was not exposed, with certainty, to the expense of further physiotherapy.

Respondent's Submission

[19] Mr. Brannen submits that the *Hobbs* decision of the P.E.I. Court of Appeal is the last of a line of cases that took the narrow view of "incurred" as paid or payable. He refers to the interpretative approach that prefers broad meaning for coverage provisions and narrow meaning for exclusions, even in statutorily prescribed insurance policies: *Amos* v. *Insurance Corporation of British Columbia*, [1995] S.C.J. 74.

[20] In that light, Mr. Brannen presents *MacLeod*, and four subsequent decisions, as compelling an interpretation of the temporal limit on Section B coverage supportive of Adjudicator Parker's conclusion.

Cases on "Incurred" in Section B Coverage

[21] The *Oxford English Dictionary*, 2nd ed., s.v. "incur" tells us that the word came into English from a Latin origin in the sixteenth century. It had numerous senses as both an intransitive and a transitive verb, but the reported senses have become obsolete except this transitive sense:

> To run or fall into (some consequence, usually undesirable or injurious); to become through ones own action liable or subject to; to bring upon oneself.

This statement seems to include a nuance of meanings. In the first, the subject of the consequence does not necessarily do anything to bring about the consequence. One merely runs or falls into it, unlike the subject in the second whose own action brings about liability or some other consequence.

[22] It seems that the second was embraced in *Hobbs* but, since that case was decided in 1989, the courts have embraced the wider sense as applicable to the Section B wording.

[23] *Placken* v. *Canadian Surety Co*., [1990] O.J. 358 (ODC) came shortly after *Hobbs*. District Court Judge Kurisko decided that the insured incurred the expense of an artificial leg when he underwent amputation.

[24] Justice Goodfellow decided *MacLeod* in 1993. He said, at para. 41, that the expense had to be "more than mere possible speculation" at the anniversary, and "optional future expenses" were not good enough either. The clause excluded expenses that do not have the required "certainty" denoted by "incurred". It does not exclude sufficiently certain expenses for treatment "the execution of [which] is deferred".

[25] Paragraphs 41 and 42 read as follows:

> 41 In order for reasonable expenses to qualify as having been "incurred" within four years from the date of the accident, something more than mere possible speculation or optional future expenses, that do not have the certainty required to conclude they have been incurred, but the execution of such is deferred, must exist.
>
> 42 In many cases such as *Placken* the conclusion will be obvious. Similarly, if treatment is certain, but medically postponed such as the *Stokes* case, you would again have that degree of certainty required. In a situation where a program, say dental work, is partly completed at the limitation arrival, the future requirement of concluding the program of treatment would also qualify as having "incurred" within the limitation period and being merely in part deferred. The deferral would not in such a case bring into question a certainty of requirement of treatment but means that it has effectively been incurred.

On the facts of the MacLeod case, Justice Goodfellow found that a course of injections to alleviate pain followed by Ms. MacLeod in Ontario after the

anniversary was incurred “but the execution of the treatment and its continuation was merely deferred post the limitation period” (para. 52).

[26] Mr. Francis argues that this decision establishes a principle that a program must be in place before the anniversary. He contrasts the expenses for pain treatment allowed by Justice Goodfellow with the expense of an operation in Atlanta, which he did not allow. In my view, *MacLeod* does not lay down such a principle. The only principle is that the expense must be “incurred” before the anniversary.

[27] Mr. Brannen refers me to *Bridges* v. *General Accident Indemnity Co.*, [1994] N.S.J. 297 (SC). A Small Claims Court adjudicator allowed a claim for psychiatric treatment after the fourth anniversary. The need for treatment was determined before the anniversary although the number of treatments was unknown. The adjudicator found “this treatment should ... be covered since it clearly originated before the expiry of the period”. Justice Scanlan referred to *MacLeod* and dismissed an appeal.

[28] *Wawanesa Mutual Insurance Co.* v. *Smith*, [1998] O.J. 5058 (SCJDC) provides a thorough review of authorities on the meaning of “incurred” in the temporal limitation provision of standard Section B coverage.

[29] Shortly before the four-year anniversary, Mr. Smith was discharged from a brain injury program with a list of equipment he would need. By letter dated five days before the anniversary, a psychologist estimated Mr. Smith needed psychological services that would cost $9,064. A motions judge allowed summary judgment for the cost of the equipment and the services. The insurer appealed to the Divisional Court.

[30] Justice Campbell wrote for the Divisional Court. At para. 17 to para. 27, he reviewed numerous Canadian and American authorities. At para. 28 he concluded:

> To sum up the "incurred" cases, there are no Ontario appellate decisions on point. The trial judgments range from the narrow interpretations in *Hasson* and *Virginia State Farm* through the gray area described in *MacLeod v. Lumberman Mutual Casualty Co.* to the liberal interpretation that favours the insured in *Stokes*, *MacDonald*, and *Placken*.

[31] Justice Campbell concluded on the subject of the meaning of “incurred”:

> First: although capable of a narrow meaning the word "incur" is capable also of the wider meaning of "run into", "render *oneself* liable to", "bring upon oneself" or "be subject to". There is a wider sense in which the expenditure is incurred within the time limit as soon as it is

> known with certainty that it is necessary and its amount is ascertained. (para. 35)

He was of the view that a remedial and purposive interpretation was required, one which did not require the issue "to finance, or pledge her credit, in order to secure the very benefits for which she is insured" (para. 38).

[32] The analysis of the coverage concludes with para. 39:

> I conclude that an insured, to incur an expenditure within four years within the meaning of the standard policy, need not actually receive the items or services or spend the money or become legally obliged to do so. It is sufficient if the reasonable necessity of the service or item and the amount of the expenditure are determined with certainty before the end of four years. It is a question of fact in each case, whether the requisite degree of certainty has been established.

[33] Justice Campbell reviewed the facts and concluded that the appeal should be dismissed.

[34] Justice Glennie of the New Brunswick Court of Queen's Bench adopted the reasoning in *Wawanesa* at para. 37 of *Chestnut* v. *State Farm Mutual Automobile Insurance Company*, [2005] N.B.J. 237 (QB). He said at para. 38:

> It is enough to establish or determine that the program or plan of treatment was determined and required prior to the limitation date.

[35] *Wawanesa* seems to suggest that the exact amount of the cost of future purchases or services must be known at the fourth anniversary. That was the case in *Wawanesa*. That was not, however, the case in *MacLeod* or *Chestnut*. Justice Glennie deals with this issue at para. 38 of *Chestnut*:

> I am of the view the Standard New Brunswick Policy's benefit provisions should be interpreted liberally in favour of the insured and that a remedial and purposive interpretation requires the word "*incurred*" to be given a wide, determined with certainty meaning. Provided the insured person establishes to a requisite degree of certainty reasonable necessity for the treatment or item claimed was determined within four years of the accident, then, in such event, the insurer is required to pay. It is a question of fact in each case, whether the requisite degree of certainty has been established. In my opinion, it is not necessary to actually determine the actual cost of the treatment or item within the four year time line. It is enough to

establish or determine that the program or plan of treatment was determined and required prior to the limitation date.

Interpretation of Temporal Limitation

[36] Mr. Francis argues that Justice Goodfellow laid down a principle in *MacLeod* that a program had to be in place before the fourth anniversary. The adjudicator's formulation of a test based on *MacLeod* similarly suggests that it is possible to develop principles by which the temporal limitation will be found to apply, or not apply. In my respectful opinion, these approaches miss the central point: the adjudicator was called upon to interpret and apply the provisions of a contract.

[37] In each case the parties and, failing their agreement, a court must ascertain what the contract means and apply it to the facts. There is no reason for categories or formalized principles.

[38] *MacLeod* is not at odds with *Wawanesa*. I see *MacLeod* as an early step towards a degree of uniformity achieved in, and clarity expressed in, *Wawanesa* and *Chestnut*.

[39] I adopt the reasoning in *Wawanesa* and *Chestnut*. The word "incurred" is to be given the broadest meaning of running or falling into some consequence, usually undesirable. In the context of Section B coverage the undesirable consequence is always an expense. In the context of the temporal limitation in the standard Section B coverage, "incurred" is not limited to receiving services or things, paying for them, or making oneself liable for them. Rather, the insured incurs the expense of obtaining a service or acquiring equipment, medication or another thing when it is known with certainty that the service or other thing is necessary. That is to say, when the expense befalls upon the insured.

Conclusion

[40] I do not think the adjudicator's attempt to formulate a test based on *MacLeod* was very helpful to the decision-making process. As has been seen, the jurisprudence has become more clear since *MacLeod*. However, the adjudicator's findings make it clear that he applied the terms of the temporal limitation provision just as they have been interpreted since *MacLeod*.

[41] As the adjudicator found, physiotherapy stopped at the IWK because Ms. Rushton turned eighteen, not because the treatment was no longer required.

The IWK treatments and the recommendations "that this treatment should be continued" justified the adjudicator's inference that treatment remained necessary. I do not agree that he lost sight of the need for certainty. He found the treatment to be "a 'natural, highly probably extension' of the treatment instituted prior to the limitation date."

[42] In my assessment, Adjudicator Parker applied the correct interpretation of the temporal limitation on Section B coverage, although his exclusive reliance on the *MacLeod* decision and his attempt to formulate a test based on it may have obscured his reasons slightly.

[43] The appeal will be dismissed with costs to the respondent at the limit prescribed in the legislation.

J.