Claim No. SCCH 280202

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as: Rushton v. Economical Mutual Insurance Company, 2007 NSSM 90

BETWEEN:

LINDSAY JANELLE RUSHTON

Claimant

- and -

ECONOMICAL MUTUAL INSURANCE COMPANY

Defendant

DECISION AND ORDER

Adjudicator: David T.R. Parker

Heard: October 15, 2007

Decision: October 24, 2007

Counsel:

David M. Brannen represented the Claimant
Wayne Francis represented the Defendant

This matter came before the Small Claims Court at Halifax, Nova Scotia, on the 15th day of October, A.D. 2007.

Pleadings

(a) Summary of the Claimant's pleadings

The Claimant was a passenger in the Claimant's motor vehicle which was involved in an accident on August 15, 2002. The Claimant's mother was operating the motor vehicle

at the time of accident.

The Claimant's mother prior to the accident entered into a contract of automobile insurance, PN 8940511, with the Defendant Insurance Company. The Claimant is entitled to accident benefits pursuant to the policy.

As a result of the accident the Claimant suffered injuries including (a) a general straining, spraining and tearing of the muscles, tendons, ligaments, nerves and vessels throughout her body; (b) headaches; and (c) jaw, neck, shoulder and back pain. The Claimant stated her injuries were accompanied by fatigue, emotional trauma, diminished energy, mood changes, sleeplessness and chronic pain and stiffness, which continue and will continue into the future. The Claimant stated her activities have been affected.

As a result the Claimant has undergone physiotherapy, massage therapy and other forms of medical treatment.

The Claimant stated she has attended IWK Health Centre, Pediatric Complex Pain Clinic for treatment of injuries and conditions arising from the collision.

The Claimant stated that Dr. Finley is the Medical Director of the Pediatric Complex Pain Clinic and a letter dated August 9, 2006, recommended a physiotherapy program for treatment of injuries the claimant suffered in this automobile accident.

The Defendant has failed to pay benefits under the Policy of Insurance and the claim is for payment of these benefits pursuant to the insurance contract, special damages, interest and costs.

The Defence

The Defendant acknowledges it issued a Standard Auto Policy #8940511 to the Claimant's mother and that it was in force at the time of the accident when the Claimant was injured.

The Defendant stated that under Section B of the Policy, the claimant was entitled to receive coverage for certain medical and rehabilitation expenses for up to four years after the accident up to a maximum amount of $25,000.00.

The Defendant stated it paid for various medical treatments for four years following the accident but denies it owes for medical and rehabilitation expenses beyond the four year coverage period.

In the alternative the Defendant states if the Claimant is entitled to some coverage she is not entitled to the physiotherapy treatments outlined by Dr. Finley on August 9, 2006, as the reasonable necessity and costs of the treatment have not been established.

The Defendant also states that the Small Claims Court does not have jurisdiction to make declaratory orders.

Facts

Prior to commencing proceedings the Claimant provided the Court with an Agreed Statement of Facts which was as follows.

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 an Economical Mutual 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. Munro, 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 24, 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.

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 received into evidence two affidavits from the deponent Dr. G. Allen Finley, M.D. FRC PD FAAP. Counsel Wayne Francis for the Defendant properly challenged both these affidavits as the author of same would not be present to be cross-examined. The Supplemental Affidavits refers to the Botox injections which he did not recommend to the Claimant. It would appear from the agreed statement of facts that this is correct as the Defendant would only pay for physiotherapy if it would have been done in conjunction with the Claimant having Botox injections. The primary affidavit of Dr. Finley contained the letter of Dr. Finley dated August 9, 2006, as an exhibit to the affidavit and Counsel for both parties confirmed that Dr. Finley said, "Her current treatment plan involves primarily physiotherapy interventions, which should continue indefinitely."

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.

Section B subsection 1(1) of the SPF No. 1 Standard Automobile Policy in Nova Scotia which is the policy before this Court states the following:

Section B – Accident Benefit

The Insurer agrees to pay to or with respect to each insured person as defined in this section who sustains bodily injury or death by an accident arising out of the use or operation of an automobile:

Subsection 1 – Medical Rehabilitation and Funeral Expenses
(1) All Reasonable expenses incurred within four years from the date of the accident, as a result of such injury for necessary medical, surgical, dental, chiropractic, hospital, professional nursing and ambulance service and for any other service within the meaning of insured services under the *Health Services and Insurance Act* and for such other services and supplies which are, in the opinion of the physician of the insured person's treatment occupational retraining or rehabilitation of said person, to the limit of $25,000 per person.

Issues

The Claimant's solicitor has framed the issues nicely and they are in conformity with the issues raised in the Defendant's pleadings and they are as follows:

1. Is Ms. Rushton entitled to physiotherapy expenses beyond the four year period after the date of loss?

2. Is the physiotherapy treatment that Ms. Rushton has received from the One to One Wellness Centre "reasonable and necessary" as defined by Section B, subsection 1(1) of the SPF No. 1 Standard Automobile Policy (Nova Scotia)?

The second issue was not a major focus of the Defendant's argument. It became clear from the evidence of the physiotherapists that a thorough assessment was completed on the Claimant including following the time that the four year period under the policy had expired that is August 15, 2006. It was also clear that at this time it was necessary to continue with treatment as prescribed by the physiotherapist Nick Matheson to ensure the Claimant did not regress and to ensure she maintain and increase her functioning capacity. It was clear from the Plaintiff's testimony that in order for her to carry on her educational plans and perform at the level required of a serious student, in this case Dalhousie, these treatments are required. I am certainly satisfied that the physiotherapy services are necessary, the costs as to their reasonableness has not be argued and I would go further and say the prescribed treatment is not only necessary, but it is as well, reasonable treatment required in this situation.

The first issue is much more problematic for the Claimant. That is can the Claimant recover those physiotherapy expenses that occurred beyond the four year period.

The diagnosis of Nick Matheson was done independently of the IWK's involvement and there was no recommendation of what a doctor required. This assessment by Nick Matheson was done after the four year period. Further all expenses related to Nick Matheson and the Claimant was incurred after the four year anniversary date of the Defendant.

Section "B" coverage clearly states that it will cover all reasonable expenses incurred within four years from the date of the accident.

Counsel have referred the Court to *MacLeod v. Lumbermen Mutual Casualty Company*, 121 N.S.R. (2d) 146.

Justice Goodfellow in the *MacLeod* case characterizes Section B benefits as a scheme of limited no fault coverage above the basic coverage provided by provincial plans and individual insurance policies.

At paragraph 41 Justice Goodfellow stated,

> "In order for reasonable expenses to qualify as having been 'incurred' within four years from the date of the accident, something more that 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."

Justice Goodfellow goes on to explain:

> "in many cases such as Placken the conclusion will be obvious." [*Placken v. Canadian Surety Co.* 47 C.C.C. L.I. 268 where prosthesis expenses were incurred within the meaning of Section "B" benefits when the amputation took place. Justice Goodfellow said, "I agree with the conclusion of Kurisko at page 273…I conclude that the plaintiff 'incurred' the prosthesis expenses at the time his leg was amputated because he thereupon became liable to, or subject to, such expenses during the rest of his life. Similarly, if treatment is certain, but medically postponed such as the *Stokes* case [*Stokes v. State Farm Automobile Insurance Co.,* Ontario County Court, unreported, October 25, 1982. The plaintiff suffered damage to her teeth and the dental work was not done until after the four year period as it was not possible to proceed earlier. The court concluded the insurance company was liable for costs the plaintiff ran in danger of within four years of the accident. You would again have that degree of certainty required. In a situation where a programme, say dental work, is partially completed at the limitation arrived, the future requirement of concluding the programme 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 required treatment but means that it has effectively been incurred."

It is my view there are five considerations in total.

1) Was the four years exceeded in terms of payment for treatment?
2) If so, when were these expenses incurred? To determine when the expenses qualify as incurred, I must consider the following.
3) Would they happen as a result of treatment that was done within four years of the accident? or
4) Were they part of an ongoing treatment part of which was deferred to a later date? Or

5) 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.

Based on the testimony of Mike Sangster, the physiotherapist 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, and 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. Therefore the test has been met and I can conclude that the plaintiff's expenses were incurred and fall within the *MacLeod* test and being physiotherapy treatment as a "natural, highly probable extension" of the treatment instituted prior to the limitation date.

The Claimant is asking that fees be paid for the treatment expenses following August 15, 2006, to September 14, 2007, in the amount of $43,080.00. I can only assume if treatment continues within the parameters of this decision and the requirements of Section "B" they will be paid by the Defendant up to the limit of the policy. Obviously however I can make no ruling on that as it would be premature.

Dated at Halifax, this 24 day of October, 2007.

_____

David T.R. Parker
Small Claims Court Adjudicator