MVACF and Barnes: "Incurred" Attendant Care Amendment Applies to Current Claims

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The Statutory Accident Benefits Schedule ("SABS") was amended effective February 1, 2014, limiting recovery for attendant care provided by non-professional service providers (e.g., family members and friends) to "incurred" expenses, meaning the amount of the economic loss sustained by the service provider as a result of providing the care. Before the amendment, the jurisprudence held that once *any* economic loss was established, the *full* amount of the services prescribed in the Form 1 was recoverable.

On April 6, 2017, Director's Delegate Rogers overturned the Arbitrator's decision in the case *MVACF and Barnes* (P16-00087) finding that attendant care benefits payable after February 1, 2014 in relation to an accident before February 1, 2014 are limited to the amount of economic loss sustained by a non-professional service provider.

Notably, in *Davis and Wawanesa Mutual Insurance Company* (2015 ONSC 6624), the same issue was in dispute as in *Barnes.* In that case, the arbitrator found that the amendment would affect a substantive and vested right and therefore did not apply the amendment retrospectively to the claimant's accident benefit claim. The decision was upheld on appeal to the Superior Court.

In *Barnes*, Director's Delegate Rogers disagreed with the reasoning in *Davis* and distinguished the other decisions relied upon in *Davis* on the grounds that the accidents in

those cases occurred after the amendments. Further, Director's Delegate Rogers noted that comments made in prior caselaw (*Federico and State Farm,* FSCO P12-00022, March 25, 2013) that rights to SABS benefits were vested and could not be altered by subsequent amendment of the Schedule were *obiter* and therefore not binding.

Director's Delegate Rogers pointed to the language of s. 268(1) of the *Insurance Act* as establishing three principles: "First, it displaces the concept of a motor vehicle liability policy as a private agreement between an insurer and its insured. The terms of the agreement are set by the legislation. Second, it makes the *Schedule* a part of every policy. Third, it makes all amendments to the *Schedule* a part of every policy, including all terms, conditions, provisions, exclusions and limits."

Director's Delegate Rogers relied on the earlier appeal decision in *Gan Canada Insurance Company and Lehman* (FSCO P97-00064, August 10, 1998) which held that an amendment to the pay-pending provisions in s. 23(8) of the *SABS-1994,* effective December 31, 1994, applied to ongoing claims.

Director's Delegate Rogers noted that on judicial review, *Lehman* was upheld by the Divisional Court and unlike *Federico,* the vesting issue was not *obiter.* Therefore, Director's Delegate Rogers held that he was bound to follow *Lehman* and not *Federico*, noting the Divisional Court's rationale, as follows:

> *Lehman* rejects the ideas that rights to accident benefits arise from a private contractual agreement and vest at the time of the accident:
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> > Automobile insurance in Ontario is strictly regulated. While automobile insurance policies are contractual, the terms of the standard policy are set by provincial legislation. Subsection 268(1) of the *Insurance Act* provides that every automobile insurance policy includes statutory accident benefits set out in the regulation - the *SABS-1994* - **and any amendments to the regulation**:…

> **This provision clearly contemplates amendments to the *SABS-1994* that will affect the coverage provided in existing policies. In other words, the terms of an automobile insurance policy are not fixed for its entire duration.** For accidents after January 1, 1995, there is no question that the 1995 version of subsection 23(8) of the *SABS-1994* applies, even if the policy was issued in 1994. **The harder question, raised in this appeal, is whether the 1995 amendments can affect ongoing claims arising from accidents that occurred before January 1, 1995.**
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> **In my opinion, the legislation creates a right to statutory accident benefits, but only those provided in the regulations - which may be amended from time to time.**" [emphasis in original]

Director's Delegate Rogers found the February 1, 2014 amendment has immediate application, but is neither retroactive (it does not "change the past legal effect of a past situation") nor retrospective (it does not "change the future legal effect of a past situation"). He explained:

> Ms. Barnes had no right to attendant care after February 1, 2014, just because she had been injured in an accident before that date. Her right to attendant care was contingent upon her ongoing need, the provision of services, and her incurring an expense. Therefore, in Ms. Barnes' circumstances, the application of the amendment fits into the category of legislation that has immediate application. The amendment changes "the future legal effect of an on-going situation." That is prospective application of the amendment and not retrospective.
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> …
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> I find it 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 *Federico* approach is inconsistent with s. 268(1) and incompatible with the history of frequent amendments to the *SABS,* both incremental and wholesale.

Ultimately, Director's Delegate Rogers held that "Ms. Barnes had no vested right to determination of her entitlement to attendant care benefits under the *Schedule* as it existed at the time of her accident". Consequently, her claims for attendant care after February 1, 2014 are not payable unless they are "incurred" in accordance with the amended definition.

Of note, the recent FSCO decision of *Stranges and State Farm Mutual Automobile Insurance Company* (FSCO A15-004442, September 14, 2017) follows and gives support to Director's Delegate Rogers' findings in MVACF and Barnes.

The Director's Delegate's decision of *MVACF and Barnes* has been referred to the Divisional Court for judicial review. No date has been set for the hearing as yet. It will be interesting to see how the Court deals with this issue, given the significance for the many ongoing claims involving serious injuries and the potentially valuable benefits in dispute.