Causation in SABS Claims: The Proper Test

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The appropriate test for causation in statutory accident benefits ("SABs") matters has been the subject of much confusion in recent years. Fortunately, the Divisional Court has recently provided required clarity, stating that the "but for" test applies, absent exceptional circumstances.

Prior Cases

In *Monks v. ING Insurance*,[1] the Ontario Court of Appeal held that the "material contribution" test applies to statutory accident benefits cases.

However, more recently in *Blake v. Dominion of Canada General Insurance Co.*,[2] the Court of Appeal signalled a shift away from the "material contribution" test towards a general application of the "but for" test in SABs matters.

Nevertheless, despite the shift away from the "material contribution" test, certain decisions at the Licence Appeal Tribunal ("LAT") have often referenced both tests and then reached a determination on causation without specifically stating which one is the default test for causation in SABs matters.[3]

New Case

Accordingly, clarification on appeal/judicial review was needed. This has now been provided by the Divisional Court in the decision of *Sabadash v. State Farm et al*.[4]

Facts

In *Sabadash*, the applicant had various pre-existing injuries prior to the accident and evidence suggested that, as a result of the accident, he suffered a mild traumatic brain injury triggering his ongoing symptoms.

The applicant applied for SABs from State Farm, including IRBs. The insurer completed various insurer examinations and found that the applicant did not meet the test for entitlement to IRBs.

FSCO Arbitration

The matter proceeded to arbitration at the Financial Services Commission of Ontario. The arbitrator granted the applicant's request for IRBs and other benefits.

In so doing, the arbitrator did not "accept State Farm's submission that the 'but for' test endorsed by the Courts in accident negligence cases is to be applied to a determination of causation in the statutory accident benefit context."

Instead, he applied a "material significant factor" standard.

Director's Delegate

The matter was appealed by the insurer to the Director's Delegate on the grounds that the incorrect test was applied by the arbitrator rather than the correct "but for" test.

The Director's Delegate allowed the appeal on the basis that the "but for" test should have been applied.

Judicial Review

The applicant sought judicial review of the Director Delegate's decision.

In the judicial review decision, the Divisional Court outlined that the parties agreed that the test to be applied to determine entitlement to benefits is the "but for" test as set out by the Supreme Court of Canada *Clements v. Clements.*[5]

Nevertheless, the parties sought articulation from the court of the causation analysis to be applied in an accident benefits claim.

At paragraph 31 of the decision, the Divisional Court set out the analysis to be used in accident benefits cases, including that the test for establishing causation is the "but for" test and that, as set out in *Clements,* it is a general rule that "a plaintiff cannot succeed unless she shows as a matter of fact that she would not have suffered the loss "but for" the negligent act or acts of the defendant."[6]

Furthermore, as set out in *Clements,*[7] the court highlighted that the material contribution test should only be applied in "exceptional circumstances" and that "a material contribution to the risk of impairment is one that falls outside the *de minimis* range."

The Divisional Court ultimately found that the arbitrator should have applied the "but for" test as set out in *Clements* and a failure to do so was an error of law.

Furthermore, while the Director's Delegate was correct in applying the "but for" test, the Divisional Court found that he was incorrect in suggesting that the plaintiff must prove on a balance of probabilities that the accident alone could have caused the impairment (i.e. that it was "the cause" as opposed to a "necessary cause").

The court also held that the Director's Delegate was incorrect in failing to find that the "but for" and "material contribution to risk or injury" tests are alternatives.

As such, the Divisional Court clarified that the "but for" test need not be proven in a "material contribution to risk" case.

The matter was ultimately remitted back to a different arbitrator to apply the correct "but for" test.

Conclusion

Accordingly, it is now clear that the "but for" test should be applied in SABs matters. The alternative "material contribution" test is only applicable in "exceptional circumstances" as set out in *Clements*. Adjudicators at the LAT are bound by this decision.

This is a necessary pronouncement that should settle the confusion regarding causation in SABs matters moving forward.

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[1] 2008 ONCA 269
[2] [2015] O.J. No. 1218 (ONCA) – see para 71.
[3] See, most recently, *S.A. vs. Aviva Insurance Canada*, 2018 ONLAT 18-000651/AABS.
[4] 2019 ONSC 1121.
[5] 2012 SCC 32 (CanLII), [2012] 2 S.C.R. 181.
[6] See: *Clements* at para. 46.
[7] Ibid.