Errors on "Incurred" Expenses: New Trial Ordered in SABS Claim

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In the recently released case of *Pucci v. The Wawanesa Mutual Insurance Company*, 2020 ONCA 265, the Court of Appeal dealt with the central issue of whether the trial judge erred in holding that the respondent, Ms. Pucci, was entitled to payment of housekeeping and attendant care benefits for the time period prior to judgment even if she had not actually incurred those expenses as defined in the *Statutory Accident Benefits Schedule-2010* ("*SABS*").

The Accident Benefits Claim

Wawanesa classified Ms. Pucci as eligible for the maximum housekeeping and attendant care benefits available under the *SABS* to persons who are not catastrophically injured. Ms. Pucci subsequently applied for a determination that her condition amounted to a catastrophic impairment.

Wawanesa advised Ms. Pucci that it would not pay attendant care benefits beyond two years and sent her for insurer examinations. Further to these reports, Wawanesa took the position that her catastrophic impairment was not directly caused by the accident and agreed to only pay for attendant care and housekeeping benefits to the date of notice from Wawanesa in February 2016.

Trial Judge's Decision

The trial judge held that Ms. Pucci was entitled to housekeeping expenses, fixed at the rate of $100 per week, and attendant care benefits at the rate of $6,000 per month (the maximum available under the *SABS*). Most notably, the trial judge found that the benefits were to run from June 14, 2016 (104 weeks post-accident) to the date of the judgment and "thereafter as incurred". Wawanesa appealed these findings.

Appeal

On appeal, Wawanesa argued that, while the trial judge appropriately limited payments for housekeeping and attendant care post-judgment to expenses "incurred", the trial judge nevertheless erred in failing to place the same limitation on any amounts owed in reference to those benefits for the pre-judgment period from February 2016 to March 2019.

The Agreed Statement of Facts at trial stated that Ms. Pucci was paid approximately $29,000 for attendant care in 2018 and there was no evidence of any housekeeping expenses in the time period prior to judgment. Accordingly, Wawanesa argued that Ms. Pucci was only entitled to the expenses for the period that they were actually incurred and, if the trial judge found the expenses had been incurred, then she erred in law in failing to apply the definition of "incurred" pursuant to s. 3(7)(e) of the *SABS.*

Furthermore, Wawanesa argued that, if the trial judge deemed the expenses to have been incurred under s. 3(8) of the *SABS* on the basis of Wawanesa's delay in providing its reports, she acted on a material misapprehension of the relevant evidence.

Appellate Decision

On the issue of incurred, the Court found that the trial judge was required to apply s.3(7) to determine whether Ms. Pucci had incurred the relevant housekeeping and attendant care expenses. In this regard, she erred in applying the broader meaning found in earlier case law.

The Court held that "requiring Wawanesa to pay housekeeping and attendant care expenses for the period prior to judgment (March 2019) should have required payment only of expenses 'incurred' by Ms. Pucci within the meaning of s. 3(7)(e) of the *SABS-2010.*" In this case, there was no evidence of any incurred expenses aside from the payments for attendant care in 2018.

On the issue of s.3(8) of the *SABS* (deeming a benefit incurred if the insurer unreasonably withheld or delayed payment), the Court held that the trial judge erred in her application of s.3(8) in finding that Wawanesa acted unreasonably in withholding the benefits, including that she materially misapprehended the evidence in concluding that there had been a nine-month delay in producing the medical reports from the insurer examinations.

New Trial or Exercise Limited Fact-Finding Powers

The Court held that it "could first set aside the trial judge's finding that Wawanesa acted unreasonably in withholding the benefits because that finding was based on a material misapprehension of the evidence and a failure to consider relevant evidence, and then,

on its own review of the evidentiary record, make a finding that Wawanesa did act unreasonably."

The Court noted that appellate fact-finding can promote finality and efficiency and that, in civil proceedings, "appellate courts should avoid ordering a new trial if, in light of the nature of the factual issues, and the state of the trial record, the appellate court can confidently make the necessary factual findings without working any unfairness to either party".

The Court stated that "Wawanesa's duty of good faith required it to fully and fairly assess Ms. Pucci's claim that she had been catastrophically impaired as a result of the car accident." The Court further held that "Wawanesa could not simply treat Ms. Pucci as though she were a tort claimant and, armed with an expert's opinion, put her to the proof of her claim."

While the Court was critical of Wawanesa's expert's opinion, the Court ultimately held that "the record does not permit a finding of fact in this court about the reasonableness of Wawanesa's denial of coverage. The question attracted little attention in the development of the evidence at trial. Any attempt to draw the necessary inferences from this record would quickly slip into speculation."

As such, the Court allowed the appeal, set aside the judge's order pertaining to the housekeeping and attendant care benefits, and ordered a new trial.

While a new trial is undoubtedly frustrating for the parties, particularly in light of the ongoing court closures and pending delays, the trial judge made some clear errors that were appropriately corrected by the Court of Appeal such that a new trial is required.