Punishing An Accident Benefit Insurer > $25,000 in Mental Distress Damages

The Issue

In Ontario car accidents, in most cases you will be entitled to receive Accident Benefits no matter who caused the accident.

But what if your Accident Benefits insurer is unreasonable in addressing your claims? What if they deny all of your requests, without justification?

Below we review a case that awarded an insured $25,000 for mental distress arising from repeated denials by her Accident Benefits carrier of her applications for benefits. ankle.

Why This Matters

Accident benefits are the most common claim arising from any car accident.

People tend to claim at least some income replacement benefits and some medical benefits (i.e. physiotherapy or chiropractic treatment).

The problem arises when the injured person is denied benefits by their insurer, despite the insured person indicating that they are still in pain, distress, need of care.

It's important to remember that if the Accident Benefits insurer's actions are unreasonable then, as with other insurance contract relationships, it is possible that they will be sanctioned for their conduct via damages awarded by a Court.

The Details

The recent Ontario Court of Appeal case of **McQueen v. Echelon General Insurance Company, 2011 ONCA 649 (CanLII)**, the Court upheld the Trial decision to award the insured $25,000 for mental distress damages payable by her Accident Benefits insurer, Echelon General Insurance Co.

The Court described the situation as follows:

> *[52] Echelon also submits that this is merely a case about the denial of benefits and the simple denial of benefits does not amount to bad faith.*
>
> *[53] I accept that a lack of good faith is not to be inferred simply because an insurer does not pay a claim. However, based on the findings of the trial judge, it cannot be said that this case was one in which Echelon simply denied benefits.*
>
> *[54] The reasons of the trial judge must be read as a whole. The specific section of the judgment in which he deals with damages for bad faith and mental distress cannot be separated from the balance of the judgment in which he makes findings in relation to Echelon's conduct. It is evident that those findings lay the foundation for his reasoning on damages.*
>
> *[55] As early as para. 12 of the reasons, the trial judge refers to Fidler v. Sun Life Assurance Co. Ltd., 2006 SCC 30 (CanLII), 2006 SCC 30, [2006] 2 S.C.R. 3 (Fidler), noting that in Fidler, the Supreme Court of Canada held that an insurer owes a common law duty to act in good faith in all its dealings with an insured and has an additional duty not to inflict unnecessary mental distress. He returns to Fidler*

> *in paras. 51 and 52 of the reasons, stating that in a case of alleged mental distress, the court must be satisfied that:*
>
> *a) an object of the contract was to secure a psychological benefit that brings mental distress upon breach within the reasonable contemplation of the parties; and*
>
> *b) the degree of mental suffering caused by the breach was of a degree sufficient to warrant compensation.*

[56] Throughout the reasons, the trial judge repeatedly notes that Echelon refused to provide benefits on the basis that they were not "reasonable and necessary" but Echelon gave no reasons for why they were not reasonable and necessary: see, for example, para. 33.

[57] It is also clear that the trial judge was critical of Echelon for relying on Dr. Kwok's report, which was based on a "superficial examination lasting only 30 minutes" (para. 39), especially as Echelon had not given Dr. Kwok a copy of the report its own occupational therapist, which was favourable to Ms. McQueen (paras. 34 and 36).

[58] In the section of the reasons in which the trial judge concludes that damages for mental distress are warranted, he begins by pointing out a number of claims that Echelon denied, contrary to medical recommendations. He then refers to internal notes from Echelon's files that were in evidence. He finds that the expressions in the notes connote an outmoded attitude that runs against the reasoning in Whiten v. Pilot Insurance Co., 2002 SCC 18 (CanLII), [2002] 1 S.C.R. 595, and Fidler. At paras. 58-9 of the reasons, he makes key findings of fact:

> *[58] … I find that the Echelon file notes are evidence of an adversarial approach to the Plaintiff ab initio and in behaving in this manner, the Defendant has breached its contract of insurance with the Plaintiff.*

> *[59] … Echelon's adversarial position poisoned the process very early on, notwithstanding that it owed the Plaintiff a duty of good faith throughout. Early on there was a negative predisposition toward the Plaintiff by the Defendant and these "notes" were the clarion call to the file going forward.*

[59] The trial judge found that one object of the insurance contract was to secure the plaintiff's peace of mind and that it was within the reasonable contemplation of the parties that breach of the peace of mind promise would bring about mental distress.

[60] The trial judge went on to find that Ms. McQueen had suffered and that the suffering was of a degree that warranted compensation. He notes that some Indication of Ms. McQueen's mental state in the period following the accident emerges from the clinical records of her treating psychiatrist, Dr. Prayaga. He said there were some two dozen reports in evidence in this regard. Between 2003 and 2007, Dr. Prayaga reported to Dr. Picketts (Ms. McQueen's family doctor) ten times regarding her mental distress over the accident and the difficulties she was encountering with Echelon.

[61] The trial judge went on to canvas the "extensive medical evidence" during the relevant period before concluding that Echelon created an adversarial relationship with Ms. McQueen that was likely to create mental distress and that, in fact, it did cause such mental distress. He found that her distress was palpable and accepted her evidence that the change in her emotional and psychological conduct was the result of her relationship with Echelon (para. 71).

[62] The trial judge then concluded with a brief summary of instances in which Echelon had terminated or denied her benefits even though the medical evidence demonstrated that those benefits were reasonable and necessary. This included Echelon: terminating housekeeping benefits in the face of medical documentation stating that Ms. McQueen required housekeeping assistance; failing to pay transportation expenses to medical assessments and treatments in the face of clear medical evidence that she needed taxi transportation; and, repeatedly delaying access to medical treatments.

> *[63] To the extent that Echelon argues that the trial judge was unaware of the differences between a claim for SABS benefits and for damages for mental distress and that he erred in his various factual findings, I reject these arguments. The brief summary of his reasons shows that he was alive to the issues and that his findings were fully available on the record.*

The Trial decision of Justice Harris can be found here - **McQueen v. Echelon General Insurance Company, 2009 CanLII 66152 (ON SC).**

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