

# FOCUS ON

## INSURANCE LAW

### Minor injury guideline

# *Scarlett v. Belair* heads for a third round

BY JUDY VAN RHIJN

For Law Times

**S**carlett v. Belair Insurance Co. Inc. was the attention-grabbing first decision on the application of the minor injury guideline. What started as a strong ruling in favour of the rights of injured parties has gone the other way in light of the director's delegate's decision on the appeal. With the case now heading for judicial review, there are hopes the Divisional Court will provide greater clarity and a more practical and proportional approach to the application of the minor injury classification.

Lawyer Nicole Corriero, who was co-counsel with Alex Voudouris of Pace Law Firm for Lenworth Scarlett, was busy before Christmas preparing the materials for the Divisional Court case. She anticipates that a hearing may occur in the spring or summer of 2015.

"We feel that certain elements of the director's delegate decision are not completely fair for applicants who are contesting an insurance company's decision that their injury might be a minor injury," says Corriero. "The judicial review will canvass the way the director's delegate treated the standard of proof compared to the standard common law approach and his findings on compelling evidence and the balance of probability."

Despite these issues, Corriero's main concern is that there's no preliminary way of determining eligibility. Director's delegate David Evans discouraged preliminary issue

hearings related to the minor injury guideline and remanded Scarlett back to a full hearing on all of the issues. "To require the applicant to go through an entire hearing, along with the hearing on the benefits, causes concern for access to justice and affordability," says Corriero.

"You are looking at a four-day hearing. If the person who is injured is found to have a minor injury, that's a lot of money to simply find out your entitlement."

Counsel for Scarlett have always maintained their client suffered from pre-existing psychological disabilities but argued his injuries weren't minor and therefore weren't subject to the minor injury cap. Corriero notes that at the time of the appeal, Scarlett had already exhausted the \$3,500. "When someone has exhausted the funding, it's hard to then finance a hearing just to find out if you can apply for a treatment plan beyond \$3,500. To have doctors come in and testify in person as well as all the time of the lawyers involved is very costly. Clearly in most cases people can't afford that."

Another disappointment to plaintiff lawyers was the director's delegate's failure to provide any clarity on the definition of what falls within the minor injury guideline, particularly what it means to have clinically associated sequelae such as chronic pain syndrome or psychological conditions.

Robert Deutschmann of Paquette Travers & Deutschmann in Kitchener, Ont., identifies himself as one of the many



It's very easy to exhaust the \$3,500 cap under the minor injury guideline, says Nicole Corriero.

lawyers who see a lot of significance in the issue. "The two biggest issues we struggle with on behalf of clients is what you have to do to get out of the [minor injury guideline] when you are suffering from chronic pain or depression. The initial injury may be a soft-tissue injury but if it doesn't go on to heal, chronic pain and psychological problems can arise. If you have a doctor provide a diagnosis of chronic pain or a psychologist provide a diagnosis of depression arising from an injury that at first blush falls within the [minor injury guideline], it is not clear from the [Financial Services Commission of Ontario] decision what will happen. Can we take it out of the [minor injury guideline] and access additional treatment without which they will not heal?"

Deutschmann believes the

issue goes to what the statutory accident benefits schedule is all about: getting people better. "Even insurers say that's what they want but from insurer to insurer, and adjuster to adjuster, it is not dealt with consistently. Some will agree to take it out and some take a hard-and-fast approach. Hopefully, the Divisional Court will come back with some answers."

Corriero has observed some softening of the insurance industry's position over the last year. "Since the initial decision and as the appeal decision has now been taken to the point of judicial review, there is a willingness on the part of insurance companies to try and settle cases. The applicants don't want to fund a full-on hearing. By the same token, the insurance company doesn't want to spend that

sort of money on a decision that is ultimately just going to decide if the injury is in the [minor injury guideline] or not. The file may not warrant going to a hearing.

"That being said, some insurance companies take a set position. In some of my more contentious cases, there are fewer settlements at the pre-hearing stage. We do substantial preparation and then they settle on the first day of the hearing or close to it. We have been seeing this trend since the law changed and particularly in the last year."

In the meantime, both Deutschmann and Corriero see their clients struggling with the \$3,500 limit as the issue drags on.

"The [minor injury guideline] is really restrictive both in the dollar amount and what's awarded," says Deutschmann.

"In my opinion, the monetary amount is completely unfair. People are left with a family doctor who wants to help but is limited in how much counselling they can give. They are left prescribing drugs which no one wants to take. Painkillers and muscle relaxants have their own problems."

Corriero agrees it's very easy to exhaust the \$3,500, especially with people who are off work and needing treatment in order to go back. "Once the benefit is denied or the insurance company notifies the person that there is no more funding, they are not keen to continue with treatments beyond what will be paid for. This raises the question whether they are mitigating their damages."

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