



FSCO A08-002642

BETWEEN:

H.T.

Applicant

and

**SECURITY NATIONAL INSURANCE CO./
MONNEX INSURANCE MGMT. INC.**

Insurer

DECISION ON A MOTION

Before: Arbitrator John Wilson

Heard: January 20, 2009, at the offices of the Financial Services Commission of Ontario in Toronto.

Appearances: Deanna S. Gilbert for H.T.
Christopher A. Caston for Security National Insurance Co./
Monnex Insurance Mgmt. Inc.

Issues:

The Applicant, H.T., was injured in a motor vehicle accident on September 8, 2003. She applied for and received statutory accident benefits from Security National Insurance Co./ Monnex Insurance Mgmt. Inc. ("Security"), payable under the *Schedule*.¹

H.T. subsequently developed what Dr. Tamara Biederman, her treating psychologist, described as a major depressive disorder with psychotic features. She was noted as experiencing suicidal ideation. There were also reports of unusual physical, cognitive and psychological reactions during and subsequent to various assessments.

¹The Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996, Ontario Regulation 403/96, as amended.

H.T. applied for catastrophic impairment designation on August 13, 2008, based principally on her psychological impairments.

Security, in an effort to make a determination on the issue requested further medical assessments, which counsel for H.T. rejected on the basis that there had been numerous assessments to date and that further assessments would create a serious risk to the life and well-being of H.T. This position was based primarily on the opinion of the treating psychologist, Dr. Biederman.

Dr. Biederman's conclusion was that:

[H.T.] suffers significant setbacks when faced with the stress of assessments. With each setback it takes longer to bring her back to her pre-assessment status and she feels increasingly hopeless. While in this state, [H.T.] is known to become actively suicidal and has asked health professionals to assist in ending her life. She has also attempted to hoard medication (which is monitored by her partner) for several days in an effort to overdose herself. In my opinion, anything that risks a setback for [H.T.] risks her life.

The parties were unable to resolve their dispute concerning both catastrophic impairment and the appropriate manner in which any assessments would proceed through mediation, and H.T. applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

The preliminary issue is:

1. Does H.T. need to make herself available for further catastrophic assessments at this time, or can the issue be dealt with by a reference to Dr. Jerome who last assessed H.T. on September 12, 2008?

Result:

1. Security is required to proceed with a determination of catastrophic impairment for H.T., at this time, on the basis of currently available assessments, reference of the issue to those past assessors and a review of the available documentary evidence. At this time, given H.T.'s current condition it is not reasonable to schedule further in-person examinations, although Security may refer supplementary questions to the previous examiners, with regard to the claim for catastrophic impairment. It would therefore be reasonable to refer the issue back to Dr. Jerome who has expertise in catastrophic impairments, and who has recently examined H.T., for a further paper review of the issue of catastrophic impairment from a psychiatric perspective.

EVIDENCE AND ANALYSIS:

This is an unusual matter in that issues arose early on in the dispute between H.T. and her insurer, and what was essentially a motion for directions was brought on behalf of H.T. prior to the first pre-hearing.

H.T. was paid certain benefits subsequent to her motor vehicle accident. It is my understanding that benefits continue to be paid. Consequently, the key dispute brought to arbitration is not whether specific benefits are payable, but whether H.T. is entitled to a declaration that she meets the definition of "catastrophic impairment".

Now that the DAC process has been dispensed with, the normal procedure to request catastrophic impairment is to file a request for determination of catastrophic impairment in accordance with section 40(1) of the *Schedule*.

In H.T.'s case this was done on August 13, 2008. This request was supported by a report from Dr. Biederman who opined that H.T. met the test for catastrophic impairment. The principal grounds for such a finding would be the serious psychological sequelae of the accident. As noted above, the claim for catastrophic status was filed on August 13, 2008.

On September 12, 2008, H.T. attended for an insurer's examination performed by Dr L. Jerome, a psychiatrist. Dr. Jerome's report has been filed in this matter. In that report the psychiatrist reported that [H.T.]'s "current function is significantly impaired with evidence of delusional thinking and hallucinatory experiences with Major Depression and Anxiety symptom burden in association with chronic pain. She is at times quite confused and incoherent and suicidally preoccupied and unable to function in most areas.

Dr. Laurence Jerome continued with the comment that: "(G)iven the severity of her functional impairment and symptom burden and the duration of this illness, I think that this lady should be seriously considered for an in-patient assessment and treatment program for Post-Traumatic Stress Disorder."

Dr. Jerome's observations were consistent with Dr. Biederman's comments and reports of a previous experience that H.T. had in an unrelated psychiatric examination, which occurred in the context of the tort action.

In addition to the observations of Dr. Jerome, its own examiner, Security was furnished with a report from Dr. Biederman, a psychologist who had treated H.T. over a period of years.

Dr. Biederman's considered opinion was that continued exposure to insurer's examinations would be harmful to H.T., since it would trigger suicidal ideation, a risk that was consistent with her recent history. In Dr. Biederman's opinion, further insurer's examinations posed a significant risk to H.T.'s health and well-being.

Security has now scheduled a further battery of examinations relating to the claim for catastrophic impairment. These examinations involve a psychiatric examination by Dr. Alex Luczak, a different psychiatrist than used before, an examination by Dr. Rehan Dost, a neurologist and Ms. Judy Phillips, an occupational therapist.

Security insists that H.T. make herself available for these examinations, since it considers the information to be gathered necessary to make a decision as to entitlement to a catastrophic impairment designation. Curiously, however, Custom Rehab & Assessments, the company

arranging the assessments advised that the “post 104 IE reports (the most recent September 2008 I.E’s) will not be required in order to make at CAT impairment Determination.”

The legislative (and contractual) framework for insurer’s examinations is found in section 42(1) of the *Schedule* which provides:

For the purposes of assisting an insurer determine if an insured person is or continues to be entitled to a benefit² under this Regulation for which an application is made, an insurer may, as often as is reasonably necessary, require an insured person to be examined under this section by one or more persons chosen by the insurer who are members of a health profession or are social workers or who have expertise in vocational rehabilitation.

Security has taken the position that section 42 gives it almost unlimited discretion to order examinations by a designated professional of its choice “as often as is reasonably necessary.”³ Since Security deems the supplementary examinations necessary to determine eligibility to catastrophic status, the proposed examinations are both reasonable and necessary.

H.T., on the other hand has suggested that an insurer’s discretion is somewhat more circumscribed than imagined by Security, and that in the circumstances of this case it would not be reasonable to ask H.T. to attend any further assessments. She also points to the unexplained proposed change in psychiatric assessors as raising questions about the bona fides of the further assessments.

It is clear even from a reading of the legislation itself that an insurer’s discretion to order section 42 examinations is not unfettered. Any examination must be for the purposes of determining an entitlement of ongoing entitlement to benefits “for which an application is made.” In addition, such examinations can only be held “as often as is reasonably necessary.”

²I note that for the purposes of this motion, both parties have assumed that “benefit” as used in section 42, includes a declaration of catastrophic status. Without accepting or rejecting that notion, I have assumed for this decision that the parties’ interpretation is correct.

³There is also considerable arbitral jurisprudence relating to the timing and the reasonableness and necessity of section 42 assessments which is not directly relevant to this matter.

Arbitrator Blackman commented in *Campeau and Liberty Mutual Insurance Company*:

IME [independent medical examinations] and DAC [Designated Assessment Centre] examinations are not defence medical examinations. They do not arise because the physical or mental condition of an adverse party in an existing legal proceeding is in question. They are legislatively mandated as part of a statutory scheme of first-party contractual rights and obligations, to clarify, as part of the normal adjusting process, whether an applicant has met the applicable entitlement requirements.⁴

Section 42 of the *Schedule*, as well as all of the statutory accident benefits provisions are legislatively incorporated into each automobile insurance policy issued in Ontario. Incorporated as well into each policy are the myriad of mutual obligations that arise between an insurer and an insured from both statute and common law.

H.T. has taken the position that the discretion of an insurer to schedule examinations pursuant to section 42 is circumscribed by its obligations to its client. Indeed the relationship between an insured and his or her own first party insurer, (as is the case in accident benefit matters) can be more than just a simple arms-length commercial relationship.

It has often been said that in general the relationship between an insured and an insurer is one of *uberrimae fideis*, utmost trust.

The duty of good faith also requires an insurer to deal with its insured's claim fairly. The duty to act fairly applies both to the manner in which the insurer investigates and assesses the claim and to the decision whether or not to pay the claim. In making a decision whether to refuse payment of a claim from its insured, an insurer must assess the merits of the claim in a balanced and reasonable manner. It must not deny coverage or delay payment in order to take advantage of the insured's economic vulnerability or to gain bargaining leverage in negotiating a settlement. A decision by an insurer to refuse payment should be based on a reasonable interpretation of its obligations under the policy.⁵

⁴(FSCO A00-000522, March 12, 2001)

⁵702535 *Ontario Inc. v. Non-Marine Underwriters, Lloyd's of London*, [2000] O.J. No. 866

While such a relationship generates responsibilities for the contractual parties to deal fairly with one another, it does not necessarily follow that these obligations translate into a fiduciary duty between the insurer and its insured.

The fact that a contract is one of utmost good faith does not however mean that it gives rise to a general fiduciary relationship. The relationship between insured and insurer is not akin to the relationship between, say, guardian and ward, principal and agent, or trustee and beneficiary. In these latter instances, the inherent character of the relationship is such that the law has traditionally imported general fiduciary obligations. The insurer-insured relationship is contractual, the parties are parties to an arm's-length agreement. The principle of *uberrima fides* does not affect the arm's-length nature of the agreement, and, in my opinion, cannot be used to find a general fiduciary relationship.⁶

What the court of appeal is saying in *Plaza*, however is that while there is not a generalized fiduciary obligation between insurers and insured, it remains a question that must be decided on the facts of each case.

As pointed out by Dickson J. in *Guerin v. The Queen*, *supra*, at p. 384:

It is sometimes said that the nature of fiduciary relationships is both established and exhausted by the standard categories of agent, trustee, partner, director, and the like. I do not agree. It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed.

The court in *Plaza* however cautioned:

These obligations, however, do not import general fiduciary duties into each and every insurance relationship. *Before such fiduciary obligations can be imported there must be specific circumstances in the relationship that call for their imposition.*⁷ [Emphasis added]

LaForest, J. in *Hodgkinson v. Simms*⁸ noted the fact-based nature of the analysis of fiduciary duty:

⁶*Plaza Fiberglass Manufacturing Ltd. v. Cardinal Insurance Company et al* 18 O.R. (3d) 663

⁷*Ibid.*

⁸*Hodgkinson v. Simms* [1994] 3 S.C.R. 37

In summary, the precise legal or equitable duties the law will enforce in any given relationship are tailored to the legal and practical incidents of a particular relationship. To repeat a phrase used by Lord Scarman, “[t]here is no substitute in this branch of the law for a meticulous examination of the facts.”⁹

The general characteristics of a fiduciary relationship have long been established. In *Knoch Estate*¹⁰, Griffiths, J.A., in considering the nature of the fiduciary relationship, observed that:

“in general, the fiduciary relationship arises where one party places a trust or confidence in another or is dependent on the other in some significant way.”¹¹

Wilson J. in dissent in *Frame v. Smith*¹², identified the usual characteristics of a fiduciary relationship as:

- (1) The fiduciary has scope for the exercise of some discretion or power.
- (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
- (3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

In this matter, the insurer clearly has discretion as to whether or not to request section 42 examinations, and to the discretion to decide the manner and the frequency of such examinations. It also claims to have “unlimited discretion” in this domain.

The focus is on the identification of relationships in which, because of their inherent purpose or their presumed factual or legal incidents, the courts will impose a fiduciary obligation on one party to act or refrain from acting in a certain way. The obligation imposed may vary in its specific substance depending on the relationship, though compendiously it can be described as the fiduciary

⁹see *National Westminster Bank plc v. Morgan* [1985] 1 All E.R. 821 (H.L.)

¹⁰*Knoch Estate v. Jon Picken Ltd.* 83 D.L.R. (4th) 447 (C.A.)

¹¹(1991), 4 O.R. (3d) 385

¹²[1987] 2 S.C.R. 99 approved by the court in: *International Corona Resources v. Lac Minerals* [1989] 2 S.C.R. 574

duty of loyalty and will most often include the avoidance of a conflict of duty and interest and a duty not to profit at the expense of the beneficiary.¹³

Some of the consequences of a finding of a fiduciary relationship were discussed by Fletcher Moulton L.J. in *Coomber*:

All these are cases of fiduciary relations, and the Courts have again and again, in cases where there has been a fiduciary relation, interfered and set aside acts which, between persons in a wholly independent position, would have been perfectly valid. Thereupon in some minds there arises the idea that if there is any fiduciary relation whatever any of these types of interference is warranted by it. They conclude that every kind of fiduciary relation justifies every kind of interference. Of course that is absurd. The nature of the fiduciary relation must be such that it justifies the interference.¹⁴

Although the insurer/insured relationship is contractual and not *prima facie* a fiduciary relationship, it is important to note that the provisions relating to insurer's examinations are mandatory provisions in the policy. H.T. cannot contract for automobile insurance in Ontario without being subject to those provisions. While an insurer may waive the benefit of relying on section 42 examinations, H.T., or any other insured in Ontario has no choice faced with a properly framed request for an insurer's examination.

Given the medical evidence in the form of reports from Dr. Biederman, which have not been seriously challenged, H.T. is "peculiarly vulnerable" to the stress of further examinations. If her treating psychologist is to be believed, the risk of suicide is a real potential consequence of further examinations.

Consequently, I find that in the context of arranging further section 42 examinations, the relationship between this insurer and H.T. is fiduciary in nature. Security, in deciding whether or not to proceed with assessments, and the manner in which they are to be held must not only

¹³*Lac Minerals Ltd. v. International Corona Resources Ltd.* [1989] 2 S.C.R. 574

¹⁴*In re Coomber*, [1911] 1 Ch. 723

consider H.T.'s interests, and balance them with its own¹⁵, but must give preference to H.T.'s interests over those of its own company.

Even if I am wrong that the authority to order section 42 examinations could give rise to a fiduciary relationship, the jurisprudence has long been that an assessor, at the very least, must avoid injuring the examinee.

House of Lord's decision in *X (Minors) v. Bedfordshire County Council*¹⁶, where it is stated:

The doctor does not by examining the applicant come under any general duty of medical care to the applicant. He is under a duty not to damage the applicant in the course of the examination but beyond that this duties are owed to the insurance company and not to the applicant.

Likewise many American cases recognize a duty of the physician "to 'conduct the examination in a manner not to cause harm to the person being examined.'"¹⁷

In examining the role of an assessor in Ontario, Power, J. in *Worthman* observed:

Matlow J. was correct in holding that "although many of the authorities cited seem to establish the principle that a doctor retained by a third party to examine and report on a person to the third person owes no legal duty to the person other than to avoid injuring her, it may well be that, on the facts of this case, the legal duty owed by the defendants to the plaintiff may have been broader in the context of the mechanism established for the resolution of contested claims for no-fault benefits by the Insurance Act, R.S.O. 1990, c. I.8. As well, it may be that the duty to avoid injuring the plaintiff extended to the avoidance of both psychological and economic injuries."¹⁸

¹⁵As would be the case in a relationship of utmost trust — Cumming J. commented in *Bullock* (supra) "the insurer may not treat the insured as an adversary whose interests may be disregarded. This encompasses a duty to settle claims without litigation in appropriate cases: This implies a reasonable and competent investigation to determine whether a claim will be honoured."

¹⁶(1995) 3 All E.R. 353

¹⁷See *Rand v. Miller*, 185 W.Va 705, 707; 408 SE2d 655 (1991)

¹⁸*Worthman v. Assessmed Inc. et al* 80 O.R. (3d) 249

Thus in this case where there is uncontroverted evidence that further testing may create or raise a suicide risk, it is incumbent upon an assessor, and the insurer retaining that assessor to proceed in a manner that will avoid harming the insured. To do otherwise would be not only “unreasonable” but a breach of the specific obligations that an insurer has to its insured in such situations of vulnerability.

Although it would appear (from the timing of the application) that Security ought to have known of the potential for a catastrophic impairment claim before the psychiatric assessment was completed, it did not take any steps to have Dr. Jerome include catastrophic impairment in his assessment of H.T.

Admittedly, the timing of the assessment and the claim for catastrophic impairment was close and the Insurer would have had to act with some dispatch to combine both examinations. It also may not have fully appreciated the potential consequences of multiple examinations at the time.

All of which creates a dilemma for both the Insured and in the Insurer in this matter. The Insurer is under an obligation to do no harm to its insured, even if that entails restricting its right to medical examinations. The Insurer is also under an obligation to make a fair determination on the issue of catastrophic impairment once that is raised by H.T. It says that it cannot fairly consider the request without more information, information that will be obtained from the insurer’s examinations that it has scheduled.

I do not accept however that it is impossible to develop a protocol for the determination of catastrophic assessment that will avoid putting H.T. in danger while still providing Security with sufficient information to make its determination.

Until recently, the first step in resolving disputes about catastrophic impairment was the reference to a CAT DAC. While recourse to such an institution is now no longer available, it is useful to consider the protocols used by the CAT DACs in determining a reasonable approach to assessing catastrophic impairments.

CAT DACs operated under the scrutiny of FSCO and were expected to follow protocols established by FSCO in consultation with the industry and contained in the *Catastrophic Impairment Designated Assessment Centre Assessment Guidelines*.¹⁹

While the *Guidelines* accept that assessments may be made in areas not specifically identified in an application for catastrophic impairment the spirit of the process is to avoid over-assessing a claimant: As noted:

Accordingly the intake process and assessment protocols have been designed to focus the assessment appropriately and, where possible, to “stage” assessments so that only necessary investigations are undertaken.

In order to further this aim the *Guidelines* set up a procedure, which from intake includes “appropriate exits from the process”. These are defined as “decision points that allow CAT DAC decisions based on a review of documents only or following any scheduled clinical assessments.” Indeed the protocol specifically allows for a file review as the basis for determining catastrophic impairment, even though it considers that a decision of “not catastrophic” cannot be made without a clinical assessment.

It is important to note that the catastrophic element of this claim is still in its early days. Security’s obligation when it received the claim for catastrophic status is set out in the *Schedule*:

- 40(1) An insured person who sustains an impairment as a result of an accident may apply to the insurer for a determination of whether the impairment is a catastrophic impairment.
- (2) Within 30 days after receiving an application under subsection (1), the insurer shall give the insured person,
 - (a) a notice stating that the insurer has determined that the impairment is a catastrophic impairment; or
 - (b) a notice advising the insured person that the insurer requires the insured person to be examined under section 42 to assist the insurer in determining if the impairment is a catastrophic impairment.

¹⁹FSCO, Revised April 2002

Although not directly stated, as in the *Guidelines*, when taken with the provisions of section 42 (insurer examinations) it is clear that there are several decision or “exit points” in the new catastrophic evaluation scenario.

Firstly, the Insurer must make a preliminary determination, based on the information in its possession, whether or not the insured person meets the definition of catastrophic impairment. Only if it is determined that the person is not catastrophic, or that there is insufficient information to make a determination do assessments come into play.

Section 42 contemplates insurer examinations taking place either by examination of the insured, or by a “paper review” of materials related to the claimed disability. Indeed, section 42(3) specifically identifies several situations where there is no discretion to opt for a personal examination of the applicant. Otherwise there is a discretion in the Insurer to request either a “paper review” or a personal examination.

Once a decision is made to proceed to personal examinations, there is also a necessary decision as to the nature and frequency of the examinations to be undertaken.

Although in this matter, there was no direct evidence as to the decision process leading to the choice of the specific examinations requested, my impression is that the Insurer envisaged a full-blown assessment process from the start without provision for preliminary decision points. It would appear however from the correspondence between Mr. Payne and Security, and the correspondence enclosed from Custom Rehab and Assessments that if anyone addressed the actual needs for examination, it may well have been the assessment facility and not Security. Indeed the September 25, 2008 letter from the CAT Assessments Manager at Custom Rehab indicates that it is the facility rather than Security that will be making “the CAT Impairment Determination”.²⁰

²⁰Section 40(8) of *the Schedule* clearly distinguishes between the “report” and the “determination” – the first which is made pursuant to section 42, while the second is made by the Insurer pursuant to section 40. In addition some courts have distinguished between a merely administrative exercise of discretion

Although absent from the affidavit evidence, Mr. Caston's submissions included the suggestion that the specific choice of examinations came from the assessment company not from any reasoned decision by Security itself. It was the assessment equivalent of "round up the usual suspects."

While there is no problem with Security delegating the conduct of assessments to experts, it remains responsible to determine the nature of the investigation, and to make the ultimate determination as to entitlement.

I note that in this matter there was no evidence as to why in-person examinations were contemplated, or even as to whether any consideration had been given as to the sufficiency or not of a paper review.

Unlike the CAT DACs in previous legislation section 40 of the *Schedule* gives the responsibility for making any catastrophic determination squarely to the Insurer. That responsibility includes the subsidiary decisions of whether to accept or reject the evidence provided by an insured and the whether to order any assessments. It also includes deciding on appropriate assessors and the manner in which the assessment will take place.

In most situations, the lack of such an evidentiary foundation for assessment would not be critical. Indeed in the light of the psychological nature of the claim for catastrophic impairment, recourse to a psychological or psychiatric assessment would normally be understandable.

In this case however, because of the unusual potential consequences of further assessment, the decision process becomes more critical. Security is saying in essence that it cannot determine the issue of catastrophic impairment without further in-person attendance at assessments.

It is not as though Security has not had the opportunity to assess H.T. From August 13, 2008, Security was aware that a catastrophic determination was requested. The psychiatric evaluation took place on September 12, 2008, the dental evaluation on September 18, 2008, and the examination by a physiatrist took place on October 1, 2008.

Security provided no evidence as to why these examiners were not requested to opine on catastrophic impairment as well as the substantive benefits at issue. Nor has it provided an opinion from any of the examiners as to whether they are in a position to speak to the issue of catastrophic impairment based on the examinations which they performed so recently, aided perhaps by a paper review of the updated record.

I accept that on the evidence before me, H.T. has made a credible case that further assessments as planned would likely have caused her harm or increased the risk of suicide. I also accept that, as noted earlier, Security has an obligation in setting up the assessment of catastrophic impairment determination in such a way that any examinations at the very least do not harm H.T. Consequently, the further assessments outlined in the OCF-25 dated September 10, 2008 were not reasonable.

Nor were they necessary. It should be remembered that Dr. Jerome's psychiatric IE had not yet taken place at the time that the OCF-25 was signed. Security, had it acted promptly could have consulted Dr. Jerome and the other consultants with regard to catastrophic impairment, obviating the need for further examinations.

I simply do not accept that Security has led the necessary evidentiary foundation to suggest that its proposed assessment plan is reasonable or that it is the only reasonable alternative at this point, or the least intrusive way to proceed in these unusual circumstances.

I note that counsel for H.T. have suggested that a reasonable alternative might be for Security to "request an opinion from Dr. Jerome as to whether the Applicant insured suffers a catastrophic impairment". Security's response to this is that "while the Insurer approves of Dr. Jerome for the purpose of conducting a Medical, Rehabilitation insurer's examination, they do not prefer to use him for the purposes of a catastrophic impairment examination."

Counsel for Security confirmed that it is not a question of whether or not Dr. Jerome is qualified to render an opinion, but merely a preference, the application of the Insurer's unfettered discretion to choose any assessor it wants.

As noted above with regard to insurer's examination in general, the insured's discretion is not unfettered and must be exercised in a manner that respects the interests of the insured, or at the very least does not harm the insured.

Although there is much greater discretion in choosing examiners in the context of litigation-related medicals than in section 42 examinations, some of the judicial commentary in that forum is informative in establishing a baseline for the decision-making process.

Even in a litigation situation, experts retained to report on the medical condition of a party have obligations to the process that transcend loyalty to the party hiring them.

Gillese, J.A. in *Horodnsky Farms* set out the following comments on an expert's role:

Expert opinion tendered by a party is a unique type of evidence. Although generally retained by one side to the litigation or the other, experts are expected to be neutral. Their testimony is meant to assist the court and the trier of fact, not to bolster the theory of the case presented by one of the two sides. Their status as experts derives, in significant measure, from the assumption that they will offer the court objective opinions on which the court is entitled to rely.²¹

It is clear also that in the choice of such an independent expert, one party's strategic interests does not trump issues of fairness.²² Given the first-party relationship in accident benefit matters, the responsibilities of experts chosen to assist in the determination²³ of benefit entitlement should be no less than for unrelated parties in an adversarial situation. In this matter it is not enough for

²¹*Horodnsky Farms Inc. v. Zeneca Corp. (c.o.b. ZenecaAgro)* 82 O.R. (3d) 229 reversed on other grounds by 83 O.R. (3d) 792 in which S.T. Goudge, R.A. Blair and R.G. Juriansz JJ.A. stated: "finding about the contents of the memorandum, we agree that the rule entitles the appellant to obtain on discovery the foundational information contained in the memorandum."

²²See *Scissons v. Lajoie* [2008] O.J. No. 24

²³Some courts have distinguished between the legitimate exercise of administrative discretion and the mandatory determination of an issue based on legal concepts, with the latter entailing fairness obligations on the part of the decision-maker- see *P.L.D. v. Prince Edward Island (Registrar of Motor Vehicles)* [2001] P.E.I.J. No. 30. While the power of "determination" granted to an individual or an office by statute is often categorized as a "statutory power of decision" triggering a plethora of responsibilities with regard to natural justice and fairness, it is not necessary to go as far as that to find that an insurer has a responsibility to the parties to fairly address the issue referred to it and to make any determination on the widest information available to it.

Security to have an unexplained preference for a new and different psychiatrist, when such an abrupt change in assessors can lead to the inference of expert-shopping for a more favourable report.

Consequently I find that, in this matter, Security's professed interest in finding yet another psychiatrist to examine H.T. as to catastrophic impairment does not trump its obligations to both make a fair determination as to catastrophic status and to avoid harm to H.T. arising from the process.

Security claims to have already made a determination as to entitlement to a catastrophic designation. In its OCF-9 dated October 23, 2008, it stated:

Please be advised that we have made a determination that your impairment(s) do not meet the criteria for catastrophic impairment as a result of your failure or refusal to attend the examination as required.

I note as well that the Insurer attempted as well to charge H.T. for the costs of the assessments that she did not attend, notwithstanding prior notice of her intention not to attend.

On November 10, 2008, Mr. Payne, counsel for H.T. wrote to Security reviewing the communications and correspondence that had taken place with regard to the inadvisability of H.T. attending further assessments at that time. Mr. Payne wrote:

Upon receiving this information [the OCF 9] I contacted you by telephone and advised you that we were requesting that you actually ask the doctors involved in the previous examinations if they could provide you with a [sic] opinion on your insured's catastrophic status. You refused to do this.

I further advised you that in my opinion, the insurer has ample evidence to appreciate that [H.T.'s] impairments are psychiatric in nature. Your own psychiatrist, Dr. Jerome, makes this absolutely clear to you in his report you received on October 16, 2008. He has also detailed for you how critical your insured's position is. Her very life is at risk. [emphasis in original]

I accept that the evidence and the submissions made in this matter would support Mr. Payne's contention that his client was justified in not attending the further assessments arranged by Security, that Security was aware of the risk to the health and life of H.T. of further assessments at that time, and that the Insurer categorically refused to explore alternative methods of obtaining the necessary medical opinions to make a determination as to catastrophic impairment.

Consequently, I find that the purported determination based on non-attendance is of no effect, since it was made in the light of facts which suggested that H.T. was not obliged to attend the assessments it had arranged.

I note again in this context that the Insurer neither attempted to cross-examine Dr. Biederman on her reports or her opinions as to risk, nor was there evidence that the insurer ever tried to obtain an opinion from its own psychiatric assessor, Dr. Jerome, as to the risk arising from further assessments.

I have found that H.T. was not obliged to attend the further Insurer's examinations set up under the auspices of Custom Rehab and Assessments Canada, since to require her to attend would have unreasonably risked her health and life, a fact that Security was aware of when it set up the examinations.

Since non-attendance at the I.E. was given as the sole reason for the Insurer's purported determination of non-eligibility to catastrophic status, it would follow that the Insurer's obligation under section 40 to make a proper determination as to catastrophic status remains unfilled.

It is still in the interest of H.T. to get sufficient probative evidence in the hands of Security for it to make a fair and considered determination of her claim to catastrophic impairment. Although she has not yet exhausted her non-catastrophic entitlements, a continuation of the current situation would suggest that it would be a reasonable possibility.

As noted earlier, the former DAC evaluation process proceeded on the assumption that a proper review was first done of the CAT application and related materials to find the appropriate assessors and to determine whether catastrophic status could be reached on the basis of the paper evidence.

If as part of the preliminary assessment process, a DAC could make a finding of catastrophic impairment, it does not sound unreasonable for an insurer under the new format to make a similar preliminary determination, and to stage the determination process in such a way as to permit a determination to be made at each stage with the least risk and disruption to H.T. This can best be done in co-operation with H.T.'s treating health practitioners, and her present counsel. While obviously H.T. has an obligation to share relevant information for such a determination, and to facilitate access to H.T. if such can be done without harmful consequence, it is also incumbent upon the Insurer to be realistic and to accept alternative means of assessment that respect H.T.'s vulnerability.

Since it is generally accepted that I have no authority to order an insured to undergo a medical assessment, a reasonable corollary of that statement would be that I have no authority to mandate that an insurer undertake a specific examination. I can, however comment on what would be reasonable and necessary in the circumstances, both retrospectively and prospectively.

A reasonable first start in the determination process would be to refer the questions related to catastrophic impairment to practitioners who have previously examined H.T., together with any updates of information that may be currently available. This would especially include a reference to Dr. Jerome, who has only recently examined H.T.

Unless there is a significant change in H.T.'s condition, further direct assessments, however necessary will continue to be unreasonable.

The alternative to a co-operative approach to assessment may well be that the parties proceed to arbitration on the basis of a less-than-complete record, and leave the decision to the arbitrator who will ultimately hear the substantive issues in this matter.

EXPENSES:

If the parties can not agree on the disposition of expenses arising from this motion, I may be spoken to on that issue.

John Wilson
Arbitrator

February 9, 2009
Date



FSCO A08-002642

BETWEEN:

H.T.

Applicant

and

**SECURITY NATIONAL INSURANCE CO./
MONNEX INSURANCE MGMT. INC.**

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Security is required to proceed with a determination of catastrophic impairment for H.T., at this time, on the basis of currently available assessments, reference of the issue to those past assessors and a review of the available documentary evidence.
2. At this time, given H.T.'s current condition it is not reasonable to schedule further in-person examinations, although Security may refer supplementary questions to the previous examiners, with regard to the claim for catastrophic impairment.
3. It would therefore be reasonable to refer the issue back to Dr. Jerome who has expertise in catastrophic impairments, and who has recently examined H.T. for a paper review of the issue of catastrophic impairment from a psychiatric perspective.

John Wilson
Arbitrator

February 9, 2009
Date