DATE: 20060906
DOCKET: C44262

COURT OF APPEAL FOR ONTARIO

LABROSSE, MOLDAVER and FELDMAN JJ.A.

B E T W E E N:	)	
	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	**Eric Sigurdson and Suzanne Courtlander for the appellant**
	)	
Plaintiff (Appellant)	)	
	)	
- and -	)	
	)	
	)	
MANUEL FERNANDES	)	**Eric Zeldin and Jane Conte for the respondent**
Defendant (Respondent)	)	
	)	
	)	**Heard: May 16, 2006**
	)	

On appeal from an order of Justice Geoffrey B. Morawetz of the Superior Court of Justice dated September 22, 2005, reasons reported at (2005), 78 O.R. (3d) 391.

FELDMAN J.A.:

Overview

[1] The respondent insured was injured in a car accident on April 7, 1999 and was eligible to receive statutory accident benefits from the appellant insurer under the *Insurance Act*, R.S.O. 1990, c. I.8 (the "Act") and the *Statutory Accident Benefits Schedule – Accidents On or After November 1, 1996*, O. Reg. 403/96 (the "SABS").[1] In

[1] The applicable provisions of the SABS have been substantially amended since their enactment, first by O. Reg. 281/03, which came into force on October 1, 2003 (the "2003 amendments") and second by O. Reg. 546/05, which came into force on March 1, 2006 (the "2006 amendments"). All references to provisions of the SABS in this decision will be to the sections as they read prior to the 2006 amendments.

accordance with the SABS, he was assessed for catastrophic impairment at a Designated Assessment Centre ("CAT DAC") where it was determined that he had suffered a catastrophic impairment in the accident and was therefore entitled to a higher level of certain benefits. In order to dispute this finding, the appellant insurer first initiated mediation in accordance with the Act. After the mediation failed, the insurer commenced an action for a declaration that the insured had not suffered a catastrophic impairment. The insured then brought a motion under Rule 21 to strike the insurer's claim on the basis that the Act did not allow an insurer to bring such an action.

[2] The issue on the motion and on this appeal was whether the dispute resolution scheme in ss. 279-283 of the Act for the determination of entitlement to and the quantum of statutory accident benefits constitutes a complete code and, if so, how it operates, or whether beyond the express provisions of the Act, an insurer has the right to bring an action in the Superior Court to challenge a catastrophic impairment designation. The motion judge struck out the insurer's action, holding that the provisions of the Act do form a complete code that does not give an insurer the ability to commence a court proceeding against an insured to challenge a CAT DAC. For the reasons that follow, I would dismiss the appeal.

Background

[3] The SABS governs the entitlement of an insured person to statutory accident benefits. Sections 279-283 of the Act provide the scheme for resolving disputes concerning that entitlement. One of the issues that an insured can raise is whether he or she suffered a "catastrophic impairment" as a result of the accident, entitling that insured to certain enhanced benefits. The respondent in this case claimed that he suffered catastrophic impairment as a result of his accident. Section 40 of the SABS, as it read prior to the 2006 amendments, provided the procedure when such a claim was made:

> 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) The insurer shall, within 30 days after it receives the application,
>
> (a) determine that the impairment is a catastrophic impairment and give the insured person notice of the determination;
>
> (b) determine that the impairment is not a catastrophic impairment and give the insured person notice of the determination, including the reasons for the determination; or

> (c) give the insured person notice that the insurer requires the insured person to be assessed by a designated assessment centre in accordance with section 43.
>
> (3) If the insured person receives a notice under clause (2) (b) and the insured person disputes the insurer's determination, the insured person may require that he or she be assessed by a designated assessment centre in accordance with section 43.
>
> (3.1) […]
>
> (4) The determination by the designated assessment centre is binding on the insured person and the insurer, subject to the determination of a dispute, in accordance with sections 279 to 283 of the *Insurance Act*, relating to whether the impairment is a catastrophic impairment.

[4] By subsection 40(4), the finding of the CAT DAC is binding on the insured and the insurer, but "subject to the determination of a dispute in accordance with sections 279 to 283 of the *Insurance Act* relating to whether the impairment is a catastrophic impairment." Therefore, although the determination that the respondent suffered a catastrophic impairment as a result of the accident was binding on both parties, it was subject to resolution of a dispute under ss. 279-283 of the Act.

[5] The key section of the Act is s. 281 which sets out the procedural and substantive requirements for dispute resolution:

> 281. (1) Subject to subsection (2),
>
> (a) the insured person may bring a proceeding in a court of competent jurisdiction;
>
> (b) the insured person may refer the issues in dispute to an arbitrator under section 282; or
>
> (c) the insurer and the insured person may agree to submit any issue in dispute to any person for arbitration in accordance with the *Arbitration Act, 1991*.
>
> (2) No person may bring a proceeding in any court, refer the issues in dispute to an arbitrator under section 282 or agree to

submit an issue for arbitration in accordance with the *Arbitration Act, 1991* unless mediation was sought, mediation failed and, if the issues in dispute were referred for an evaluation under section 280.1, the report of the person who performed the evaluation has been given to the parties.

(3) Subject to subsection (4), if mediation fails, the insurer shall pay statutory accident benefits in accordance with the last offer of settlement that it made before the failure until otherwise agreed by the parties or until otherwise ordered by a court, by an arbitrator acting under this Act or the *Arbitration Act, 1991* or by the Director.

(4) If a dispute involves a statutory accident benefit that the insurer is required to pay under subsection 268 (8) and no step authorized by subsection (1) has been taken within 45 days after the day mediation failed, the insurer shall pay the insured in accordance with the last offer made by the insurer before the failure until otherwise agreed by the parties or until otherwise ordered by a court, by an arbitrator acting under this Act or the *Arbitrations Act, 1991*, or by the Director.

(5) A step authorized by subsection (1) must be taken within two years after the insurer's refusal to pay the benefit claimed or within such longer period as may be provided in the *Statutory Accident Benefits Schedule*. [2]

[2] The limitation period provided in s. 281(5) was repealed by the new *Limitations Act, 2002,* S.O. c. 24, Sched. B., s. 39(5), and replaced with the new s. 281.1, which provides:

> 281.1 (1) A mediation proceeding or evaluation under section 280 or 280.1 or a court proceeding or arbitration under section 281 shall be commenced within two years after the insurer's refusal to pay the benefit claimed.
>
> (2) Despite subsection (1), a proceeding or arbitration under clause 281 (1) (a) or (b) may be commenced,
>
> (a) if there is an evaluation under section 280.1, within 30 days after the person performing the evaluation reports to the parties under clause 280.1 (4) (b);
>
> (b) if mediation fails but there is no evaluation under section 280.1, within 90 days after the mediator reports to the parties under subsection 280 (8).

The *Limitations Act, 2002* came into force on January 1, 2004.

[6] In accordance with s. 281(2), the appellant insurer first requested mediation of the issue. However, eighteen days after the mediation failed to resolve the dispute, the appellant insurer commenced its action in the Superior Court for a declaration that the respondent insured had not suffered a catastrophic impairment. The respondent insured then moved under Rule 21 for an order dismissing the action as frivolous and vexatious because s. 281(1) of the Act does not give the insurer the option of initiating court proceedings.

The Issue

[7] The issue raised by the insurer is best set out in paragraph 20 of the reasons of the motion judge:

> The argument of the [insurer] is that the dispute resolution procedures outlined in sections 279 - 283 must be interpreted in such a way as to provide a meaningful remedy for the insure[r] . In this case, the [insurer] submits that [it] should have the right to bring a proceeding in the court. To restrict the interpretation of section 281 so as to provide only the insured with the right to bring a proceeding in the court, results, in the submission of the [insurer], in an absurdity. The [insurer] submits that the consequences which result from such an interpretation is that all insurers in Ontario have rights under the *Insurance Act* and the *SABS* (in particular, sections 37 and 40), but cannot enforce such rights. In effect, they have no remedy. This interpretation, from the viewpoint of the [insurer], is incompatible with both the object of the *Act* [and] with the object of the *SABS*.

Analysis

[8] I agree with the insurer, that s. 40(4) of the SABS provides that the dispute resolution provisions of the Act are available to resolve a disagreement as to whether the insured was catastrophically impaired by the accident and therefore entitled to enhanced statutory accident benefits. The language of s. 37(5) of the SABS, dealing with income replacement, non-earner and caregiver benefits is even more clear that an insurer has the right to have a dispute resolved under the Act. It specifically provides that the insurer "may dispute" its obligation "in accordance with ss. 279 to 283 of the Act." That subsection, as it read prior to the 2006 amendments, stated:

> 37 (5) *The insurer may dispute the obligation* to pay a benefit in accordance with sections 279 to 283 of the Act and, pending the resolution of the dispute, the insurer shall pay the benefit if,
>
> > (a) the person undergoes a designated assessment referred to in paragraph 3 of subsection (3); and
> >
> > (b) the report from the designated assessment centre states that the person continues to have a disability that entitles the person to receive the benefit [Emphasis added].

[9] I also agree with the insurer that if the effect of the SABS is to make the decision of the CAT DAC binding and effective until the dispute resolution provisions of the Act have been used to change or confirm the result, then those provisions should be interpreted to give the insurer access to the dispute resolution regime.

[10] The respondent submits, to the contrary, that the wording of s. 281(1) is clear and unambiguous, and gives only to the insured the right to either go to court or to arbitration under the Act. The only option granted to an insurer is that it may agree to use private arbitration if the insured also agrees, but the insurer is given no unilateral right to initiate any court proceedings or arbitration under the Act. Therefore, the respondent says, the legislature intended that the insurer's only right is to go to mediation, but if mediation fails, and if the insured does not initiate court action or arbitration under the Act or agree to private arbitration, then the determination by the CAT DAC remains binding. The motion judge accepted this submission, concluding at para. 30:

> The *Insurance Act* sets up a complete code to deal with catastrophic impairment issues, including a dispute mechanism. It is not absurd to suggest that an insurer should be bound by the findings of an independent DAC as to whether an insured person meets the test of catastrophic impairment. The rights of an insurer are indeed restricted by sections 279-283, but this is what the Legislature intended. Simply put, the CAT DAC finding is binding on the insurer.

[11] With respect to the motion judge, in my view it was not the intent of the legislature that an insurer would be forever bound by a CAT DAC that is favourable to

the insured, and that the dispute resolution mechanism is only available to an insured who wishes to dispute an unfavourable CAT DAC finding. Rather ss. 281(3) and (4) disclose the full operation and effect of the dispute resolution scheme and how it is intended by the legislature to operate so that an insured maintains control of the process, but the insurer is still protected. The effect of ss. 281(3) and (4) is to put the onus on the insured to follow through with the dispute resolution process after a failed mediation in order to obtain any benefits he or she would be entitled to as a result of the contested CAT DAC. Subsections 281(3) and (4) and s. 268(8) provide:

> 281. (3) Subject to subsection (4), if mediation fails, the insurer shall pay statutory accident benefits in accordance with the last offer of settlement that it made before the failure until otherwise agreed by the parties or until otherwise ordered by a court, by an arbitrator acting under this Act or the *Arbitration Act, 1991* or by the Director.
>
> (4) If a dispute involves a statutory accident benefit that the insurer is required to pay under subsection 268 (8) and no step authorized by subsection (1) has been taken within 45 days after the day mediation failed, the insurer shall pay the insured in accordance with the last offer made by the insurer before the failure until otherwise agreed by the parties or until otherwise ordered by a court, by an arbitrator acting under this Act or the *Arbitration Act, 1991*, or by the Director.
>
> 268. (8) Where the *Statutory Accident Benefits Schedule* provides that the insurer will pay a particular statutory accident benefit pending resolution of any dispute between the insurer and an insured, the insurer shall pay the benefit until the dispute is resolved.

[12] These subsections complete the dispute resolution scheme. The parties agree that a catastrophic impairment designation under s. 40 of the SABS is not a “pay pending resolution” provision and does not fall within s. 268(8) of the Act; therefore s. 281(4) is not applicable. However, s. 281(3) does apply.

[13] The practical effect of s. 281(3) of the Act, read in conjunction with s. 40(4) of the SABS, is that although the CAT DAC finding is binding on both parties, if the insurer seeks mediation pursuant s. 280 of the Act and the mediation fails, the insurer need only pay benefits in accordance with the last offer of settlement it made before the failed

mediation, until the parties agree or until a court, an arbitrator, or the Director on appeal from the arbitrator under the Act, orders otherwise.

[14] Consequently, the onus is always on the insured to initiate dispute resolution after a failed mediation in order to seek any additional benefits that may be warranted by the CAT DAC. If the insured does not act, the insurer will only pay benefits in the amount at which it was prepared to settle. The insurer is thereby protected and need not pay the additional benefits to which it objects unless so ordered through the dispute resolution scheme. The insured is similarly protected as it has the right, pursuant to s. 281(1), to commence litigation or arbitration to try to obtain the benefit of a favourable CAT DAC finding.

[15] By leaving the choice of forum always with the insured, the legislature has guaranteed that the insured maintains control of the process including its timing and cost. See *Baron v. Kingsway General Insurance Co.* (2006), 35 C.C.L.I. (4th) 180 (Sup. Ct.) at para. 29. Arbitration under the Act is an expeditious and much less costly process than a court action, but the court option is open to an insured. At the same time, s. 281(5) (now s. 281.1), protects the insurer from any undue delay by the insured in initiating dispute resolution, by providing a two-year limitation (subject to the SABS) following an insurer's refusal to pay a claimed benefit, for a step to be taken under s. 281(1).

[16] The result is that when s. 281 is read in its entirety, it is evident that the insurer is not left without a remedy when it wishes to dispute the finding of the CAT DAC. It is given a remedy by the operation of the provisions: if an insurer wishes to dispute a CAT DAC finding, it can commence mediation. If mediation has been tried and failed, the insurer can revert to paying only what it was willing to settle for, until there is an agreement or an order directing a different amount. As a result, an insured cannot, in effect, allow the mediation to fail, then claim that the CAT DAC finding is binding on the insurer and take no further action. Rather, the insured would be obliged to use its right in s. 281 to initiate court or arbitration proceedings or to agree to private arbitration in order to seek to obtain the higher benefits that are available to a person with a catastrophic impairment.

[17] On the other hand, insurers should not view ss. 281(3) and (4) as an invitation to make an unreasonably low offer to settle in order to pay only that amount until the dispute is resolved. In *Samoila v. Prudential of America General Insurance Co.*, [1999] O.J. No. 2317 (Sup. Ct.) the insurer had made an offer of zero before mediation failed. On an interlocutory motion in the proceedings, Zalev J. exercised the power granted in s. 281(3) to order a higher amount. At paras. 25-27, he stated:

> Under s. 281 of the Insurance Act if mediation fails an insured is allowed to sue in a court of competent jurisdiction, refer the issues in dispute to an arbitrator under s. 282 or with the agreement of the insurer submit any issue in dispute to any person for arbitration.
>
> Section 281(3) provides that if mediation fails, the insurer shall pay statutory accident benefits in accord with the last offer of settlement that it had before the failure until otherwise agreed by the parties or otherwise ordered by a court or by an arbitrator acting under the Insurance Act or the Arbitration Act.
>
> Prudential takes the position that even if the plaintiff is successful on this motion it is not required to pay anything further as its last offer of settlement before mediation failed was zero. To give effect to this argument would be an invitation to other insurers to torpedo any mediation by offering zero as their last offer in the hope that this would circumvent their obligation to pay full interim benefits under s. 268(8) of the Insurance Act and the Statutory Accident Benefits Schedule. Fortunately for every insured the Legislature has given the court or an arbitrator power to order otherwise, and I am prepared to do so.

[18] In the result, I conclude that there is no need or basis for the court to read into the Act a right for insurers to initiate court action or to find that the language of s. 281 is not sufficient to remove any common law right that an insurer may have had to bring such an action. It is clear that the provisions of ss. 279 to 283 of the Act were intended to and do form a complete code for dispute resolution, which can work effectively and fairly for all parties.

Some Comments on Previous Case Law

[19] Before leaving the analysis of these provisions, I wish to address and acknowledge some of the jurisprudence that has discussed the issue of whether an insurer can initiate a civil action under s. 281(1). Historically, arbitrators under the Act have accepted that after a failed mediation, an insurer does have the right to commence an action in order to obtain a resolution of a statutory accident benefits entitlement dispute. See, for example, *Decicco v. State Farm Mutual Automobile Insurance Co.*, [1991] O.I.C.D. No. 11; *Gouliaeff v. Commercial Union Assurance Co. of Canada*, 1993 CarswellOnt 4758

(O.I.C.); *Adusei v. Royal Insurance Co. of Canada*, [1994] O.I.C.D. No. 21; *Miller v. Allstate Insurance Co. of Canada*, [1999] O.F.S.C.I.D. No. 77 (F.S.C.O. Arb.); *Mangat v. Non-Marine Underwriters, Lloyd's London*, 2000 CarswellOnt 5679 (F.S.C.O. Appeal); *D. (M.) v. Halifax Insurance Co.*, 2001 CarswellOnt 5152 (F.S.C.O. Appeal); *Sellathamby v. Allstate Insurance Co. of Canada*, 2002 CarswellOnt 4905 at paras. 44-45 (F.S.C.O. Arb.), aff'd 2002 CarswellOnt 6003 (F.S.C.O. Appeal).

[20] For example, in the early arbitration decision in *Decicco*, *supra*, the issue was whether in an arbitration initiated by an insured, the arbitrator could also address issues that the insurer wished to raise. It was in that context that the arbitrator stated that nothing in the Act removed an insurer's common law right to have issues resolved by a court. She reasoned that so long as the issues had first been mediated, it made sense to allow the insurer's issues to be decided in the ongoing arbitration rather than force the insurer to bring a separate proceeding in court, with the attendant extra cost and risk of inconsistent results. In 1996, s. 282(3) of the Act was amended to specifically provide that the arbitrator is to decide all issues in a dispute whether raised by the insured or the insurer.

[21] Much of the arbitral jurisprudence that states that the Act does not remove an insurer's right to bring a court action to decide disputes regarding statutory accident entitlement relies on the 1992 Superior Court decision in *Citadel General Assurance Co. v. Gogna*, [1992] I.L.R. 1-2891 (Ont. Ct. Gen. Div.). The issue in that case was whether an insurer's civil action for the repayment of benefits allegedly obtained by the insured by fraud and misrepresentation could proceed notwithstanding the insured person's subsequent application for arbitration. In that context, the court held that an insurer must have access to the courts to enforce repayment by an insured of benefits obtained by fraud or misrepresentation and that nothing in the Act specifically removed an insurer's common law right to obtain that enforcement.

[22] Arbitrators in subsequent cases have stated that *Citadel* sets out the appropriate approach for determining which proceeding should continue when the parties each want to proceed in different forums. However, the actual issue in those arbitration cases was how to proceed when the *insured* had commenced multiple proceedings (see, for example, *Mangat* and *Gouliaeff*, *supra*), not whether an insurer can commence a civil action. In that context, and in others, arbitrators have noted that insured persons have been given a choice under the Act, not available to insurers, of whether to proceed by way of arbitration or litigation. Arbitrators have then commented, in *obiter*, that the only option for insurers after a failed mediation is to proceed by way of court action.

[23] In my view, court access for the purpose of obtaining repayment of funds obtained in error or by fraud or misrepresentation is not limited by the scheme for resolution of disputes related to an insured person's entitlement to or the quantum of statutory accident benefits contained in ss. 279-283 of the Act. *Citadel* should therefore be distinguished from the present appeal.

[24] In *Citadel*, the court stated that, "at common law an insurer has a right of action for repayment of amounts paid to a person through error or fraud", and found that the common law right was not expressly or impliedly removed by the dispute resolution provisions of the Act.

[25] However, unlike the right to redress for fraud or misrepresentation, a catastrophic impairment designation is a statutory, not a common law creation. Also, s. 27 of the former *No-Fault Benefits Schedule* (now s. 47 of the SABS), which obliged an insured to repay any benefits that were paid through fraud or error, [3] differed from ss. 37(5) and 40(4) of the SABS because it did not address the procedure for dispute resolution, while ss. 37(5) and 40(4) specifically limit the availability of dispute resolution for statutory accident benefits entitlement to the procedures set out in ss. 279-283 of the Act. Of course, those sections do not include any right of an insurer to initiate a court proceeding.

[26] In my view, the reasoning in *Citadel* must be limited to actions involving the repayment of benefits obtained through fraud or error; to extrapolate from that case that insurers also have an absolute right to bring a court proceeding to determine statutory accident benefits entitlement issues is erroneous.

[27] Finally, one analysis that has been made to support the suggestion that s. 281(1) contemplates (although it does not provide) that an insurer is entitled to initiate court proceedings is the wording in s. 281(2) that states that "no person" shall commence court proceedings or arbitration or agree to private arbitration without first going to mediation (see, for example, *Decicco, supra*). The argument is made that the words "no person" indicate that persons other than an insured can bring court proceedings, and that otherwise, the legislature would have said "no insured" shall commence, etc. I see no merit in this argument. The phrase "no person" in s. 281(2) is used to preclude both insureds who bring court or arbitral proceedings as well as insureds *and insurers* who agree to private arbitration, from commencing any proceeding without first attempting mediation.

[3] The court did not consider whether s. 27 constituted a codification of the common law right or a complete procedural code for the repayment of benefits.

[28] I conclude that although there is historical arbitral and judicial case law[4] that suggests that an insurer may have the right to commence a court proceeding to determine statutory accident benefits entitlement issues, when that case law is read in its proper context, it is apparent that it evolved without consideration of the entire legislative scheme provided in s. 281. As discussed above, once the entire scheme is considered, it is clear that insurers are not left without a remedy to ensure that statutory accident benefits entitlement issues are adjudicated following a CAT DAC. There is therefore no need to read into the legislation a court remedy for insurers that is not provided by the legislation.

Result

[29] In the result, I would dismiss the appeal with costs fixed at $7,500 inclusive of disbursements and GST.

RELEASED: September 6, 2006 "KNF"

"K. Feldman J.A."
"I agree J.M. Labrosse J.A."
"I agree M.J. Moldaver J.A."

[4] E.g. for judicial authority see: *Royal & Sunalliance Insurance Co. of Canada v. Di Pietro* (2005), 33 C.C.L.I. (4th) 45. (Sup. Ct.)