Bar reacts to first case on minor injury guideline

BY JUDY VAN RHIJN
For Law Times

Nicole Corriero is used to receiving cheers for her hockey-scoring prowess but right now the personal injury lawyer at Lofranco Corriero is getting accolades for helming the first case examining the application of the minor injury guideline.

On March 26, 2013, the Financial Services Commission of Ontario released an arbitration decision involving Lenworth Scarlett and Belair Insurance Co. Inc. that was strongly in favour of the plaintiff and is now under appeal.

Corriero credits arbitrator John Wilson with moving the matter forward. "The hearing was booked for September," she recalls. "But arbitrator Wilson wanted to do a preliminary hearing to deal with the [guideline]. He wouldn't let it be put off. That said to me that he really wanted to get something out there."

Corriero realized she might be running the first case under the guideline when she began her research and found there were no other decisions. "I certainly felt the pressure," she says.

Her client claimed to have a pre-existing condition that prevented him from achieving maximal recovery from the minor injury, which is one of the exceptions under the guideline, as well as a psychological injury that placed him outside of it.

In his decision, Wilson stated that while an insurer may disagree that the plaintiff suffers from depressive symptoms or post-traumatic stress disorder as claimed, "that is the very sort of conflict that is meant to be resolved in court or by arbitration on the issue of reasonableness of the particular treatment proposed, not by unilateral veto of benefits of the insurer."

Corriero's argument was that the statutory accident benefits schedule is consumer-protection legislation and any ambiguity should be in favour of the insured person. Wilson expanded on that issue in a 16-page analysis. "He made a point to be exceptionally thorough," says Corriero.

"I'm sure he was cognizant that the industry has been waiting for quite some time and that his decision was going to be scrutinized under a microscope by both sides."

Plaintiff-side lawyers are happy with what they're seeing. Jason Singer of Singer Kwinter calls it a very supportive decision for the rights of accident victims. "It's an extra quiver in our arsenal," he says.

Laura Hillyer of Martin & Hillyer Associates is planning to turn Wilson's pronouncement that the guideline is a non-binding interpretive aid into a screen saver. "It's music to our ears. The arbitrator went further than he had to. He gave us some very useful language."

Charles Gluckstein of Gluckstein & Associates LLP is particularly happy to see the burden of proof shifted to the insurer. Wilson construed the minor injury guideline regulations as an exception inserted in the policy for the purpose of exempting the insurer from a liability the policy would otherwise cover. "To date, they have assumed that everyone's in the [minor injury guideline] until proven otherwise," says Gluckstein.

"This sends a message to insurers that they can't make that decision without credible medical evidence. They can't have a blanket policy."

Darcy Merkur of Thomson Rogers says the decision has the potential to finally constrain the guideline. "Insurers try hard to put a [minor injury guideline] umbrella over anyone with any signs of whiplash. Most seriously injured people have whiplash as well." He hopes the case will end that practice. "We all needed clarity. Insurers will push the line over as far as they can but once the line is drawn clearly in the sand, insurers generally play by the rules."


Nicole Corriero is observing a willingness to negotiate since the decision came out.

Wilson also noted a decision to place someone in the guideline must be an interim one that's open for review once additional information becomes available. Sandra DiMeo of Ferguson DiMeo in St. Thomas, Ont., believes insurance companies have been categorizing people without giving much thought to the process. "The decision on the [guideline] is made at such an early part of the process when there is not much medical evidence. Now they have to continuously re-evaluate as new information becomes available."

Brian Goldfinger of Goldfinger Personal Injury Law is also cheering the ruling. "Just because on Day 1 you are put in the [minor injury guideline] doesn't mean that on Day 2 you can't be taken out of it." However, he warns any change will create a lot of work for insurance companies. "People don't realize the amount of turnover they have. Adjusters are here today and gone tomorrow. It takes time for a new adjuster to get up to speed on a file."

There's still a consensus that plaintiffs are now in a much better position. "Insurers have known that plaintiffs are facing a long process to try and get out of the [minor injury guideline]," says Hillyer.

"They have been putting those files in a pile that they don't have to touch for a year. If they do that now, they will be in a very difficult position when they finally go to court, especially if there is increased mental distress because the injury prevents a person from working or spoils their enjoyment of life."

Some lawyers have already noticed a change in insurer behaviour. Corriero is observing a willingness to negotiate that wasn't there before and DiMeo was happy to see a settlement in a mediation on exactly the same point as Scarlett's matter the following week. Merkur has begun sending out copies of the decision with an assertive letter demanding a review and is getting a more receptive response but he warns there will still be a disconnect.

"Most people in the [minor injury guideline] don't end up with lawyers. Often their disability certificates are filled out by physiotherapists and chiropractors who hint at or suggest a focus on whiplash. Insurers won't unilaterally review cases unless there are challenges from lawyers and paralegals."

However, there's now some optimism that many disputes will settle when they reach mediation, another area where changes are working in the plaintiff's favour. FSCO advises that since the intervention of ADR Chambers, the backlog of mediation files has decreased to 8,258 files from 29,142 on March 31, 2012. It's expecting to eliminate the backlog by the end of September 2013. At present, though, lawyers are still finding their clients have to wait for long periods before they get to the commission.

Lawyers are also noting what the case says about the state of auto insurance in Ontario.

"The plaintiff won the case, but was it really a win for him?" asks Goldfinger.

"It was 2-1/2 years from the date of the car accident to the date of the arbitration. This plaintiff was not insured with OHIP so had to pay for all his treatment out of his own pocket. From an administrative point of view, it's a big waiting game. Even though you might eventually get out of the [minor injury guideline], no amount of money will ever compensate you for the time spent waiting."

Adam Wagman, managing partner at Howie Sacks & Henry LLP, expresses a similar sentiment. "The bigger problem is that treatment delayed is often treatment denied. A physical or psychological injury that could have been helped three months after the accident becomes ingrained three years down the road. I am optimistic that we can win the legal battles but how do we help people who are going without treatment? It is a disservice to legitimately injured people."

Charles Flaherty of Flaherty Sloan Hatfield goes further as he says the case should shame the regulator. He points to the amount of time it took Scarlett to obtain a very modest remedy, the total cost of the process, and the approach of the insurer in adjusting the file when it comes to his contention that the whole situation is an abomination.

"There is no way that it is justifiable that someone pay so much for a policy of insurance, then take so much time and spend so much money to obtain so meagre a benefit. If the purpose of first-party benefits is to provide medical relief quickly, the case of Scarlett shows that they do not. It should be an embarrassment to the regulator that they allowed this demonstration to occur."

Goldfinger is calling for the elimination of the minor injury guideline altogether. Singer agrees. "The amount of $3,500 is woefully insufficient for the vast majority of accident victims. Payment should be based on need, not a formal framework that pegs people into a certain category. Eliminating it would be a positive step for most accident victims." LT