# Unsuccessful Family Law Act claimant spared costs award on policy grounds

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**FOCUS ON PERSONAL INJURY**

The Ontario Superior Court of Justice refused to saddle a family member who claimed compensation under s. 61 of the Family Law Act with the costs of a five day jury trial in a recent decision. While costs were awarded against the injured plaintiff (whose occupiers liability claim was rejected by the jury), the defendant's request for costs on a joint and several basis against all plaintiffs was rejected on policy grounds.

In Boyuk v. Loblaws Supermarkets Ltd. [2007] O.J. No. 732, Justice Paul Perell stated:

"I agree that in the circumstances of this case, it is appropriate to make a costs award only against the elder Boyuk. Her daughter's claim was a statutory and derivative one, and the daughter's participation to assert this derivative claim, although unsuccessful, should not expose her to a costs award.

"I agree with the submission of plaintiffs' counsel that if unsuccessful Family Law Act claimants were automatically exposed to costs, it would discourage family members from making these claims, although the legislation clearly intended that such claims are available to them."

Counsel who represent plaintiffs in all manner of personal injury claims must inevitably consider whether to join family members into a lawsuit. Exposure to costs will often figure prominently in the decision, especially when liability is seriously contested or the family assets would otherwise not be exposed. Often, the injured family member is disabled and has no divisible assets unless the spouse is named. Hence, the costs consequences can and often do discourage family members from pursuing what would otherwise be a bona fide claim. The decision in Boyuk offers welcome relief to family members.

The result makes sense because the real contest is between the person who sustained the injury and the defendant. A defendant who requests costs on a joint and several basis is attempting to spread the collection net as widely as possible, no matter how minor the role played by family members in the proceedings.

In another decision bringing bad news to the personal injury Bar, the Ontario Court of Appeal has decided that insurers in first party accident benefit claims are not required to comply with the findings of a Designated Assessment Centre (DAC) after mediation takes place and fails. This decision runs contrary to established practice in Ontario since the inception of the DAC system in 1994. Generally speaking, when the DAC finds in favour of the insurer, the benefit is not paid, but if the DAC finds in favour of the claimant the insurer is required to

pay the benefit. For instance, if a DAC finds that a treatment plan is reasonable, or a person meets the criteria for an income benefit or has sustained a catastrophic impairment, the insurer is obliged to pay ongoing benefits in accordance with the DAC unless and until a judge or arbitrator finds otherwise. Not any more. It would seem the insurance company wins the DAC "coin toss" either way.

According to Liberty Mutual Insurance Company v. Manuel Fernandes, [2006] O.J. No. 3514, once mediation fails, the insurer is no longer required to follow the DAC. While the central issue under appeal was not the enforceability of DAC reports, the court was faced with a dilemma and in fashioning a solution, may have created a bigger problem.

Liberty Mutual was attempting to challenge a DAC finding by commencing an action, while continuing to pay benefits in accordance with the DAC report, which is not unusual. However the defendant (the insured) moved to strike the claim on the somewhat draconian basis that a DAC finding is binding for all time - that an insurer has no means to contest the report and is precluded from doing so.

Justice Kathryn Feldman, speaking for a unanimous panel, reviewed the Insurance Act and concluded that insurers are indeed prohibited from applying to court to contest DAC findings. The insured is however free to do so.

Faced with the dilemma of binding insurers to a DAC for all time, without an opportunity to have their day in court, the learned justices avoided the problem entirely, by devising another solution. Now that insurers are free to ignore the DAC, once mediation fails, the insurer may refuse to pay and it would then be up to the claimant to commence proceedings. Thus the matter would be litigated, and the problem solved. However, the implications of this quick fix are startling when one considers that 12 years of arbitral decisions requiring insurers to pay according to the DAC until a court or arbitrator decides otherwise, have effectively been overruled and insurers are now left to their own discretion in deciding whether to follow a DAC report prior to trial, a trial which can be several years down the road.

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