2018 CarswellOnt 17515
Financial Services Commission of Ontario (Appeal Decision)

Sovereign General Insurance Co. and Abyan, Re

2018 CarswellOnt 17515

SOVEREIGN GENERAL INSURANCE COMPANY (Appellant) and ABDIRAHMAN ABYAN (Respondent) and INSURANCE BUREAU OF CANADA ONTARIO TRIAL LAWYERS ASSOCIATION and ATTORNEY GENERAL OF ONTARIO (Intervenors)

David Evans Dir. Delegate

Heard: March 14, 2018
Judgment: October 5, 2018
Docket: P17-00068

Proceedings: reversing *Abyan and Sovereign General Insurance Co., Re* (2017), 2017 CarswellOnt 15853, Benjamin Drory Member (F.S.C.O. Arb.)

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Headnote

Insurance --- Actions on policies — Legislative safeguards — Charter of Rights and Freedoms

Insured made claim for benefits under Statutory Accident Benefits regime — At arbitration, it was found that definition of "minor injury" insofar as it includes chronic pain arising from minor injuries, and requirement for pre-accident condition to be documented in order to escape the effects of "minor injury" definition, were contrary to right to equality under law pursuant to s. 15 of Canadian Charter of Rights and Freedoms — Arbitrator found Minor Injury Guideline arbitrarily discriminates against accident victims who suffer chronic pain as clinically associated sequelae to accident, in ways that those who do not suffer from chronic pain resulting from accident do not — Insurer appealed — Appeal allowed — Arbitrator made findings in factual vacuum — Whether insured had undocumented pre-existing condition that would prevent him from achieving maximal recovery within accident Guideline's limits should have been decided first — Even if arbitrator initially perceived that constitutional issue could in some circumstances become relevant to disposition, he should have first decided whether insured in fact suffered from chronic pain — Arbitrator should have first determined whether or not $3500 limit prescribed by s. 18(1) of Statutory Accident Benefits Schedule would otherwise have applied and, if so, made finding of fact as to whether insured had undocumented pre-existing condition that would prevent him from achieving maximal recovery — Matter remitted for reconsideration.

Insurance --- Automobile insurance — Extent of risk — Terms of art — Miscellaneous

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chronic pain — Arbitrator should have first determined whether or not $3500 limit prescribed by s. 18(1) of Statutory Accident Benefits Schedule would otherwise have applied and, if so, made finding of fact as to whether insured had undocumented pre-existing condition that would prevent him from achieving maximal recovery — Matter remitted for reconsideration.

***David Evans Dir. Delegate*:**

1 Under section 283 of the *Insurance Act*, R.S.O. 1990 c. I.8 as it read immediately before being amended by Schedule 3 to the *Fighting Fraud and Reducing Automobile Insurance Rates Act*, *2014*, and Regulation 664, R.R.O. 1990, as amended, it is ordered that:

1. The appeal of the Arbitrator's order dated September 14, 2017 is allowed in full. The order is rescinded in its entirety, and the matter is returned to arbitration for determination of whether Mr. Abyan is entitled to payment of his claim for a psychological assessment.

2. If the parties are unable to agree about expenses of this appeal, an expense hearing may be arranged in accordance with Rule 79 of the Dispute Resolution Practice Code. No expenses are payable to the intervenors.

***David Evans Dir. Delegate*:**

I. NATURE OF THE APPEAL

2 Sovereign General Insurance Company appeals the order of Arbitrator Drory dated September 14, 2017. The Arbitrator found that two provisions of the *SABS-2010* [1] were unconstitutional, namely the definition of "minor injury" insofar as it includes chronic pain arising from minor injuries, and the requirement for a pre-accident condition to be documented in order to escape the effects of the "minor injury" definition.

3 However, the Arbitrator made these findings in a factual vacuum. Whether Mr. Abyan suffers chronic pain, is subject to the Minor Injury Guideline, and had an undocumented pre-existing condition that would prevent him from achieving maximal recovery within the Guideline's limits should have been decided first.

4 Therefore, the matter is returned to arbitration for a determination of those questions.

II. BACKGROUND

5 Mr. Abyan sought accident benefits for an accident that occurred on June 19, 2015. The sole substantive issue before the Arbitrator was funding for a psychological assessment for $1,995.32 proposed by Dr. Jon Mills by way of an OCF-18 dated October 15, 2015.

6 Prior to the arbitration hearing regarding this benefit, Mr. Abyan brought a preliminary issue motion alleging that two aspects of the SABS were unconstitutional under his rights to equality (s. 15) and to life, liberty and security (s. 7) under the *Charter*. [2] He argued that it was unconstitutional for chronic pain syndrome to fall within the definition of "minor injury" in s. 3 of the *SABS* as "clinically associated sequelae" and that it was unconstitutional to require him to show that pre-existing conditions were documented by a health practitioner before the accident, as required in the amended s. 18(2) of the *SABS*.

7 At the preliminary issue hearing, which only Mr. Abyan attended, he led medical evidence mostly through Dr. Tajedin Getahun, his medico-legal orthopaedic surgeon. However, while the Attorney General of Ontario did not intervene in the challenge, it advised that constitutional questions should only be heard as necessary and not in a factual vacuum.

8 The Arbitrator dismissed the alleged s. 7 Charter breach but found that both s. 3 and s. 18(2) of the *SABS* were in breach of s. 15 of the *Charter*:

Every individual is equal before and under the law and has the **right to the equal protection and equal benefit of the law without discrimination** and, in particular, without discrimination **based on** race, national or ethnic origin, colour, religion, sex, age or mental or **physical disability**.

[Emphasis added.]

9 The correct two-stage test to be applied to determine whether there has been a breach of Charter equality was set out in *Withler v. Canada (Attorney General)*, 2011 SCC 12 (S.C.C.) (CanLII) at para. 30: does the law create a distinction based on an enumerated or analogous ground, and does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

10 The Arbitrator cited the discussion in *Taypotat*[3] about the relative focus of each of those stages, followed by lengthy citations from*Martin*.[4] The Arbitrator noted that in *Martin*, the Supreme Court held that Nova Scotia's statutory workers' compensation scheme violated s. 15 of the *Charter* in providing only short-term benefits to sufferers from work-related chronic pain.

11 In his analysis portion regarding s. 15, the Arbitrator relied on *Martin* as evidence of inaccurate negative assumptions towards chronic pain sufferers widely held by employers, compensation officials, and the medical profession itself, some of whom identified that the correction of negative assumptions and attitudes of this kind would be a significant step in improving the treatment of chronic pain.

12 He then cited the definition of "minor injury" in s. 3 of the *SABS* and in the relevant Minor Injury Guideline: "one or more of a sprain, strain, whiplash associated disorder, contusion, abrasion, laceration or subluxation and includes any clinically associated sequelae to such an injury." He noted the definition of the MIG as well. He cited sections 15 and 16 of the *SABS* that establish entitlements to medical and rehabilitation benefits for those injured in automobile accidents in Ontario, but noted those entitlements are limited by the caps for cases of "minor injuries" in section 18.

13 Subsection 18(1) sets out that the limit for "an insured person who sustains an impairment that is predominantly a minor injury shall not exceed $3,500 for any one accident, less the sum of all amounts paid in respect of the insured person in accordance with the Minor Injury Guideline."

14 Subsection 18(2) sets out an exception if an insured's health practitioner "determines and provides compelling evidence that the insured person has a pre-existing medical condition *that was documented by a health practitioner before the accident* and that will prevent the insured person from achieving maximal recovery from the minor injury if the insured person is subject to the $3,500 limit or is limited to the goods and services authorized under the Minor Injury Guideline." At issue was the italicized phrase added in 2014. In February 2014, the Superintendent replaced the MIG of 2010 with another MIG — Superintendent's Guideline No. 01/14, which added the requirement for pre-accident documentation of a pre-existing injury, and that change was also reflected in the amended s. 18(2) of the *SABS*.

15 With respect to chronic pain, the Arbitrator accepted Dr. Getahun's testimony that "clinically associated sequelae" simply means "anything that is a following sequel of" in the natural course of recovery from treatment of an injury. Therefore, he concluded that the definition captured chronic pain if it was as a result of a minor injury. I note that, on appeal, Mr. Abyan agrees that his injuries fit within the minor injury definition. Further, most recently, Delegate Murray in *Aviva Canada Inc. and Sleep, Re* [2018 CarswellOnt 11921 (F.S.C.O. App.)], (FSCO P17-00034, July 10, 2018), agreed with my analysis in *Scarlett v. Belair Insurance Co.* [2013 CarswellOnt 17362 (F.S.C.O. App.)], (FSCO P13-00014, September 10, 2013) that in deciding whether a claimant's injuries fall within the MIG, an Arbitrator must address why impairments, such as chronic pain and psychological impairments, are not "clinically associated sequelae" to a claimant's minor injuries. She found it was an error to presume that a finding of chronic pain automatically removes a claimant from the MIG.

16 The Arbitrator's ultimate finding regarding s. 3 and s. 18(2) is remarkably brief:

> I am satisfied that the effect of the MIG arbitrarily discriminates against MVA victims who suffer chronic pain as a clinically associated sequelae to the MVA, in ways that those who do not suffer from chronic pain resulting from an MVA do not.
>
> The Applicant argued that the phrase "that was documented by a health practitioner before the accident" has discriminatory effect, as it means people without a doctor, without access to OHIP, who had asymptomatic pre-existing conditions, or who were involved in a MVA shortly before that provision came into effect, do not have access to the usual $65,000 medical/rehabilitation/attendant care cap, and are subject instead to the $3,500 MIG cap for medical and rehabilitation benefits simply because they did not have their conditions documented before the MVA took place. I agree that this wording clearly creates discriminatory effects, and there is no clear purpose elaborated for it.

17 The Arbitrator then went on to analyze whether these limitations on insureds' rights were demonstrably justifiable in a free and democratic society, in accordance with section 1 of the *Charter*. He found they were not.

18 The Arbitrator's remedies were to interpret "clinically associated sequelae" as excluding those who suffer chronic pain as among the sequelae, and to sever the wording "that was documented by a health practitioner before the accident" from the provision.

III. ANALYSIS

19 The Arbitrator erred in reaching conclusions about the constitutionality of these provisions in a factual vacuum: *Phillips v. Nova Scotia (Commissioner, Public Inquiries Act)*, [1995] 2 S.C.R. 97 (S.C.C.). With respect to s. 3, even if the Arbitrator initially perceived that a constitutional issue could in some circumstances become relevant to his disposition of the claim, he should have first decided whether Mr. Abyan in fact suffered from chronic pain. With respect to s. 18(2), the Arbitrator should have first determined whether or not the $3500 limit prescribed by s. 18(1) of the *SABS* would otherwise have applied and, if so, made a finding of fact as to whether Mr. Abyan had an undocumented pre-existing condition that would prevent him from achieving maximal recovery if he was subject to the $3500 limit.

20 For those reasons alone, the decision should be set aside, and Mr. Abyan's claim should be remitted back to Arbitration to be determined on its merits. Since the matter is being returned to arbitration, I will make only a few comments without discussing every submission.

21 As can be seen above, the Arbitrator can hardly be said to have done any analysis. For instance, while he cited the two-part *Withler* test, he did not apply it. Thus, the Arbitrator failed to apply the second step of the s. 15 test: Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

22 The Arbitrator also did not consider that the *SABS* does not draw a simple distinction between those who have and those who do not have chronic pain. For instance, for those who suffer a broken leg and thus are not subject to the MIG, there is no distinction drawn between those who do and do not suffer chronic pain as a result. Others who have what might be colloquially thought of as major injuries may be subject to the minor injury definition as well. For instance, while the Arbitrator noted Dr. Getahun's evidence that a subluxation of the hip could be devastating, he failed to consider that this shows the general nature of the "minor injury" definition, so it does not act solely to affect those with chronic pain. This suggests that the distinction relates to the origin of the injury, not the nature of the sequelae.

23 As to the pre-accident documentation requirement, the Arbitrator relied on several grounds — such as lacking access to OHIP or drawing a distinction based on the date of the accident — that are not protected or analogous. The Arbitrator had no evidence, so he did not consider that some symptomatic conditions go undocumented due to the insureds not seeking medical care: a lack of documentation thus does not mean the provision only affects those who were asymptomatic. Rather, there must be objective evidence that the legislation draws a s. 15 distinction in its effects, as opposed to on its face: *Taypotat*. Finally, not all distinctions made on a protected ground are discriminatory: one needs a finding that the discrimination perpetuates arbitrary disadvantage, prejudice or stereotyping. Documenting a pre-existing condition is not a personal characteristic and is easily changeable, I would think, and the distinction is temporal and not based on the nature of the sequelae.

24 As I discussed in *Francis v. Dominion of Canada General Insurance Co.* [2015 CarswellOnt 13976 (F.S.C.O. App.)], (FSCO P14-00013, August 31, 2015), upheld on judicial review, *Francis v. Dominion of Canada General Insurance Co.*, 2016 ONSC 6566 (Ont. Div. Ct.) (CanLII), the effect of the legislation on others is relevant in the context of social benefits legislation like the *SABS*. As stated in *Withler*, "Where the impugned law is part of a larger benefits scheme, as it is here, the ameliorative effect of the law on others and the multiplicity of interests it attempts to balance will also colour the discrimination analysis." Further, as was stated in *Miceli-Riggins v. Canada (Attorney General)*, 2013 FCA 158 (F.C.A.) (CanLII), "distinctions arising under social benefits legislation will not lightly be found to be discriminatory. The Supreme Court has confirmed this over and over again... Accordingly, one cannot simply conclude there is a section 15 violation from the fact that social benefits legislation leaves a group, even a vulnerable group, outside the benefits scheme." The court in *Miceli-Riggins* went on to say that "social benefits programs often are expressed in a complex web of interwoven provisions. Altering one filament of the web can disrupt related filaments in unexpected ways, with considerable damage to legitimate governmental interests."

25 Accordingly, the appeal is allowed, the Arbitrator's decision is rescinded in its entirety, and the issue of Mr. Abyan's entitlement to a psychological assessment is remitted to arbitration.

IV. EXPENSES

26 If the parties are unable to agree about expenses of this appeal, an expense hearing may be arranged in accordance with Rule 79 of the *Dispute Resolution Practice Code*. No expenses are payable to the intervenors.

Appeal allowed.

Footnotes

1 *The Statutory Accident Benefits Schedule — Effective September 1, 2010*, Ontario Regulation 34/10, as amended.

2 *The Canadian Charter of Rights and Freedoms* under *The Constitution Act*, 1982.

3 *Kahkewistahaw First Nation v. Taypotat*, [2015] 2 S.C.R. 548 (S.C.C.).

4 *Martin v. Nova Scotia (Workers' Compensation Board)*, [2003] 2 S.C.R. 504, 2003 SCC 54 (S.C.C.).