

AFTER *ECONOMICAL V. RUSHTON*: HOW TO SECURE SECTION B MEDICAL & REHABILITATION EXPENSES BEYOND FOUR YEARS

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1 INTRODUCTION

In *Rushton v. Economical Mutual Insurance Co.*, [2008] N.S.S.C. 237 (S.C.) (“*Rushton v. Economical*”), Justice Gerald R.P. Moir provided the most recent interpretation of the four-year temporal limitation found in Section B of the Standard Automobile Policy. This decision is important because it provides further clarification on when a court may deem expenses to be “incurred” before the expiry of the four-year limitation. This paper reviews the development of the “incurred” cases from the 1980s to the present. It discusses the key points that can be drawn from the “incurred” cases and outlines practical strategies for how counsel can secure Section B benefits beyond four years from the date of the accident. Appended are various precedents including, the Appellant’s and Respondent’s Appeal Briefs from *Rushton v. Economical* and sample pleadings.

2 THE TEMPORAL LIMITATION FOR SECTION B – MEDICAL AND REHABILITATION EXPENSES

2.1 Nova Scotia, Prince Edward Island and Newfoundland and Labrador

Nova Scotia, Prince Edward Island and Newfoundland and Labrador share the same version of the Standard Automobile Policy, Section B, Subsection 1 – Medical, Rehabilitation and Funeral Expenses. This subsection provides that the claimant is entitled to payment for expenses “incurred within four years from the date of the accident”:

Section B – [Mandatory]¹ Accident Benefits

The Insurer agrees to pay to or with respect to each insured person as defined in this section who sustains bodily injury or death by an

¹The word “mandatory” appears in the Nova Scotia policy, but not in the Prince Edward Island and Newfoundland and Labrador policies.

accident arising out of the use or operation of an automobile:

Subsection 1 -- Medical Rehabilitation and Funeral Expenses

(1) All reasonable expenses **incurred within four years from the date of the accident** as a result of such injury for necessary medical, surgical, dental, chiropractic, hospital, professional nursing and ambulance service and for any other service within the meaning of insured services under the *Health Services and Insurance Act*² and for such other services and supplies which are, in the opinion of the physician of the insured person's treatment occupational retraining or rehabilitation of said person, to the limit of \$25,000 per person.

2.2 New Brunswick

A couple of years ago, the Province of New Brunswick amended its Standard Automobile Policy to remove the word “incurred”. New Brunswick’s new policy states as follows:

Section B – Accident Benefits

Subsection I – Medical, Rehabilitation and Funeral Expenses

(1) The insurer will pay with respect to each insured person who sustains bodily injury as a result of an accident reasonable expenses resulting from the accident within the benefit period set out in clause (2) for,

...

(2) The benefit period commences on the day of the accident and ends four years after the day of the accident.

This amendment results in a strict, time-focused benefits period that expires four years from the date of the accident. The purpose of this amendment was to remove the word “incurred”, which courts interpreted broadly in favor of claimants. The obvious result is that *Rushton v. Economical*, and the other “incurred” cases, are not applicable to New Brunswick’s new Standard Automobile Policy. However, there are still claims being adjudicated under the old “incurred” policies, so New Brunswick counsel should determine on a case-by-case basis if the “incurred” cases would apply.

²This is the legislative reference for Nova Scotia. For Prince Edward Island replace with “*Health Services Payment Act* R.S.P.E.I 1988, Cap. H-2 or the *Hospital and Diagnostic Services Insurance Act* R.E.P.E.I. 1988, Cap. H-8”. For Newfoundland and Labrador replace with “*The Newfoundland Medical Care Insurance Act*”.

3 CHRONOLOGY OF THE ‘INCURRED’ CASES

There are a series of cases, beginning in the 1980s and going to *Rushton v. Economical*, which have interpreted the phrase “incurred” that appears in Section B, Subsection 1. For the purposes of this paper, I refer to these cases collectively as the “*incurred*” cases. Following is an overview of the “incurred” cases.

3.1 1980 – 1989

Stokes v. State Farm, Ontario County Court (unreported, October 25, 1982)

Stokes v. State Farm is perhaps the earliest case to consider the meaning of the word “incurred” as it appeared in Section B of the Standard Automobile Policy. The claimant required dental work because of a car accident. Some of the dental treatment was provided immediately, but by necessity, the remaining the treatment could not be provided until after the four year limitation period. The Ontario County Court held that the expenses for future dental work were “incurred” before the four year limitation date, even though the work would not be carried out until after the four year period. The court was satisfied that the nature and cost of the future work was known before for years from the date of the accident.

MacDonald v. Travellers Indemnity Co. of Canada, [1987] I.L.R. 1-2220 (Ont. HC)

This case involved the interpretation of a Michigan Accident Benefits statute, which required a determination of when the injured claimant “incurred” medical expenses. This case is important because the court reviewed competing dictionary definitions of the word incurred and opted for the broad definition of “to run into” as opposed to the narrow definition of “render oneself liable for”. This case did not refer to *Stokes*, *supra*.

Hobbs v. General Accident Assurance Co., [1989] 38 C.C.L.I 234 (P.E.I. C.A.)

This is a very important decision for two reasons. First, it is the only appellate decision on the meaning of the word “incurred”. Second, it is the only decision to adopt the narrow meaning of the word incurred (i.e., to actually pay, or to become liable to pay for). It interpreted “expenses incurred” to mean expenses the claimant had actually paid out-of-pocket or expenses to which the claimant had become committed to pay or otherwise rendered himself liable to pay for.

This decision is weak in that the Court of Appeal did not review or distinguish any case law to support its position – it simply cited a dictionary definition of the word “incurred”. Also, this case appears to be at odds with a subsequent decisions by the Supreme Court of Canada³ and the New Brunswick Court of Appeal⁴, which established principles for interpretation of the Standard

³*Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405 (S.C.C.)

⁴*Rolfe v. Axa Insurance Co.*, [2004] NBCA 14

Automobile Policy.

The *Hobbs* decision is odd in that it was an appeal from a trial decision that awarded the Mr. Hobbs the full \$25,000 for medical and rehabilitation expenses, even though the Mr. Hobbs adduced no evidence at trial of any expenses for medical or rehabilitation. This may explain why the Court of Appeal opted for a narrow definition in the circumstances, given that it appears Mr. Hobbs provided little or no evidence about the need for future medical and rehabilitation expenses. Also, it is unclear from the decision if the four year period had actually expired. The Court of Appeal appeared to treat this claim like a special damages claim and held that Mr. Hobb's did not provide sufficient proof of these expenses. The main focus of the case is on the Mr. Hobb's entitlement to weekly indemnity benefits and the Court's interpretation of "incurred" was done in the abstract.

3.2 1990 – 1999

Placken v. Canadian Surety Co., (1990), 47 C.C.L.I. 268 (Ont. Dist. Ct.)

The insured had suffered a leg amputation in a motor vehicle accident. He had an artificial leg that would need to be replaced at regular intervals for the rest of his life. The court held that the insured was entitled to receive these future payments to for the rest of his life or to a maximum of \$25,000. At paragraph 14, the court adopted a broad definition of "incurred":

I conclude that the plaintiff "incurred" the prosthesis expenses at the time his leg was amputated because he thereupon became liable to, or subject to, such expenses during the rest of his life.

Thus, for the purposes of the liability of the defendant under s. B it is not necessary that prosthesis expenses be ascertained, actually incurred or paid as alleged by the defendant within 4 years from the date of the accident

MacLeod v. Lumberman Mutual Casualty Co. (1993), 121 N.S.R. (2d) 146 (S.C.)

MacLeod v. Lumberman is arguably the most important decision of all the "incurred" cases. It was a landmark case because Justice Goodfellow provided analysis on how to strike balance between a liberal interpretation of "incurred" and the need to give meaning to the four year limitation. The result was Justice Goodfellow's so-called "certainty requirement".

After reviewing all the previous cases, including the Ontario cases and the *Hobbs* case, Justice Goodfellow opted for a broad definition of "incurred", but held that expenses should only be deemed to have been incurred when they a "requisite degree of certainty":

In order for reasonable expenses to qualify as having been incurred within four years from the date of the accident, something more than the mere possible speculation or optional future expenses, that

do not have the certainty required to conclude they have been incurred, but the execution of such is deferred, must exist.

MacLeod v. Lumberman is also important because, upon applying the “certainty requirement” to the facts, Justice Goodfellow held that one expense met the test (i.e., injections) and the other did not (i.e., surgery in Atlanta). This case has provided the foundation for the analysis in all the subsequent “incurred” cases.

The facts of the case were as follows: Ms. MacLeod underwent a series of injections for pain relief. The injections started before, but extended beyond the limitation date. After the limitation period expired, Ms. MacLeod’s doctor recommended she extend her program of injections for longer than he had anticipated before the limitation period had expired. When the injections were completed, the doctor recommended that Ms. MacLeod undergo surgery in Atlanta. He had mentioned this briefly before the limitation period expired, but had not included it in his treatment plan. The Insurer declined to pay for any treatment provided after the limitation date, and in particular the “extra” injections that were not estimated in the treatment plan prepared before the limitation deadline. Justice Goodfellow allowed Ms. MacLeod’s claim for all expenses related to the injection therapy, noting that all the injections were a natural, highly probable extension of the programme instituted or determined prior to the limitation date. It is important to note that Justice Goodfellow did not allow expenses related to the surgery in Atlanta, noting that this treatment was only mentioned in passing and was not determined with a sufficient degree of certainty prior to the expiry of the limitation deadline.

Bridges v. General Accident Indemnity Co., [1994] N.S.J. No 297 (S.C.)

While this case does not explain or expand upon *MacLeod v. Lumberman*, it is still important for two reasons. First, it adopted and gave further support to Justice Goodfellow’s requirement for a “requisite degree of certainty”. Second, it provides another factual example of treatment being found to have the “requisite degree of certainty”.

The facts were as follows: General Accident Indemnity appealed a Small Claims Court judgement that had allowed Ms. Bridge’s claim for expenses related to psychotherapy treatments provided after the four year limitation deadline. Ms. Bridges had been receiving psychotherapy treatment for the previous three years and the Defendant had paid for these expenses up to the limitation deadline. Citing *MacLeod v. Lumberman*, Justice Scanlan upheld the Small Claims Court adjudicator’s Order that the Defendant pay the psychotherapy provided after the limitation deadline because it were “a natural, highly probably [sic] extension of treatment that originated before the limitation date”.

Wawanesa Mutual Insurance Co. v. Smith (Committee of), [1999] 42 OR (3d) 441 (Ont. Sup. Ct. Just. (Div. Ct.))

This decision is important because it adopted and expanded upon *MacLeod v. Lumberman*.

While it adopted a broad definition of “incurred”, the court appears to have held that the cost of future treatment must be ascertained before four years from the accident in order to meet Justice Goodfellow’s “certainty requirement”. The court was faced with an very difficult fact situation. The claimant had suffered catastrophic injuries and the court appears to be reaching to find a way to cover some of his expenses. Just before the four year anniversary, the claimant provided the Insurer a letter from a psychologist estimating that he needed \$9,000 in psychological services; however, the actual psychological treatment, and the physician’s referral for the treatment, were provided after the four year anniversary. The court held the psychology expenses met Goodfellow’s test for certainty because the amount of the expenditure was determined before the end of the four years.

It appears the court justified its decision by hanging it’s hat on the fact that the cost of the future treatment was known, even if there were few details about what it would involve and it had not actually been recommended by the claimant’s physician until after four years.

3.3 2000 – 2008

Chestnut v. State Farm Mutual Automobile Insurance Co., [2005] N.B.Q.B. 158

Chestnut v. State Farm is the most important “incurred” decision since *MacLeod v. Lumberman* for several reasons. First, it provides the most expansive interpretation and analysis of Justice Goodfellow’s “test for certainty”, including Justice Glennie’s own 3-step analysis. Second, it held that it is not necessary to ascertain the cost of treatment before four years – this was a significant break from the previous decision in *Wawanesa v. Smith*, which appeared to say that cost of treatment was required for certainty. Third, it applied the test for certainty to a bunch of different expenses claimed by the insured – this results in a number of examples of treatment that passes and fails the certainty requirement. Finally, it was the first case to explicitly say that it is a question of fact in each case if the requisite degree of certainty exists.

Justice Glennie held that **it was not necessary to provide the cost of treatment** before the expiry of the four year limitation period – it was **“enough to establish or determine that the program or plan of treatment was determined and required prior to the limitation date”**.

Justice Glennie then proposed the following 3-part analysis:

39 In cases of this nature where a determination is being made as to whether or not expenses were incurred pursuant to Section B prior to the limitation period, the following questions should be addressed:

- (1) Were the expenses and treatment claimed for the insured person a natural highly probably [sic] extension of a program or plan instituted or determined prior to the limitation date or is it a course of action initiated,

commenced or determined after the limitation date?

(2) Is there a sufficient degree of certainty of treatment that was determined and required prior to the limitation date so as to have been incurred within the four years from the date of the accident but the execution of treatment and its continuation was merely deferred to after the limitation period?

(3) Is there a balance of probability that the degree of certainty of such treatment was determined or required prior to the limitation date or were there just discussions prior to the limitation date that such treatment or medication could be a future option and the determination to proceed with such treatment or medication was entered into entirely after the limitation period?

Rushton v. Economical Mutual Insurance Co., [2008] N.S.S.C. 237, affirming [2007] N.S.S.M. (N.S. Small Cl. Ct, October 27, 2007)

Rushton v. Economical is important because it adopted Justice Glennie's interpretation of *MacLeod v. Lumberman*. It re-affirmed that the cost of treatment need not be known. It went a step further to confirm that the specific number of sessions of future treatment need not be known. With respect to the interpretation of "incurred", Justice Moir concluded as follows:

39 I adopt the reasoning in *Wawanesa* and *Chestnut*. The word "incurred" is to be given the broadest meaning of running or falling into some consequence, usually undesirable. In the context of Section B coverage the undesirable consequence is always an expense. In the context of the temporal limitation in the standard Section B coverage, "incurred" is not limited to receiving services or things, paying for them, or making oneself liable for them. Rather, the insured incurs the expense of obtaining a service or acquiring equipment, medication or another thing **when it is known with certainty that the service or other thing is necessary**. That is to say, when the expense befalls upon the insured.

The Facts

The facts of *Rushton v. Economical* were as follows: Rushton was injured in a motor vehicle accident on August 15, 2002. At the recommendation of her family doctor, she attended approximately 147 sessions of physiotherapy at a private clinic over the course of 16 months.

This treatment was paid for, in part, by Economical Insurance. Rushton then became a patient at the IWK Health Centre's Pediatric Pain Clinic. As part of her treatment at this clinic, she received 26 sessions of physiotherapy treatment over the course of about eight months. Economical did not pay for this treatment (it was covered by Medicare), but did pay for the related travel expenses.

In June 2007, the IWK Pain Clinic advised Rushton that she would be discharged from the IWK Pain Clinic in September 2007 because she would turn 18 years-old and would no longer meet the maximum age criteria to attend the clinic.

In a letter to our Firm dated August 9, 2006, the Medical Director of the IWK Pain Clinic, stated as follows:

As you know we have been caring for Janelle at the IWK Health Centre Pediatric Complex Pain Clinic for pain related to her motor vehicle crash. Her current status is delineated in the attached report by our team physiotherapist, Michael Sangster. Her current treatment plan involves primarily physiotherapy interventions, which should continue indefinitely. Mr. Sangster's report mentions a reassessment date of September 2006, as that is the time when we foresee transferring her to adult care.

My recommendation would be ongoing treatment with an expert in pain physiotherapy, probably including acupuncture, shoulder stability and strengthening, neural mobilization, and paced activity. I would certainly expect this to continue for the next year and probably longer.

The physiotherapist at the IWK Clinic recommended that Rushton continue to receive physiotherapy at clinic that specialized in treatment and management of chronic pain. He provided her with the names of clinics in the local area that would be suitable for her.

On August 10, 2006, our Firm provided Economical Insurance with a copy of the above letter and sought approval for reimbursement of physiotherapy expenses that would begin once Rushton began treatment at the private clinic.

Five days later, on August 15, 2006, it was the 4-year anniversary from the date of the accident. Economical declined to pay for any physiotherapy expenses after August 15, 2006.

On September 29, 2006, Rushton resumed physiotherapy treatment at the private clinic. She had attended approximately 60 sessions as of the time of trial, which had cost her approximately \$3,000.

The Trial

At trial we called both physiotherapists as witnesses – Rushton’s former physiotherapist at the IWK Pain Clinic and her current physiotherapist at the private clinic. The physiotherapists testified that the ongoing treatment was necessary to ensure that Rushton did not regress and to ensure she maintained and increased her functional capacity. They testified that the primary goal of the treatment was to manage Rushton’s chronic pain, which in turn would enable her to function at a level necessary for her to succeed at university. Rushton testified that her chronic pain made it difficult for her to concentrate and study. She believed that without such pain control, she would fail out of university.

Issue #1 - Was the treatment reasonable and necessary

With respect whether the treatment was “reasonable and necessary”, Economical Insurance did not call any witnesses to rebut the testimony of the two physiotherapists; however, it was successful in obtaining several admissions from the physiotherapists, including (1) that the ongoing treatment would not cure Rushton’s pain; (2) it was unlikely that further treatment would reduce her pain more than what they had already achieved; and (3) it was fair to characterize the treatment as “maintenance” because the primary goal was to maintain the level of pain control Rushton had achieved.

Economical argued that the Rushton’s treatment was simply “maintenance” and therefore should not be covered under the Section B policy. It pointed out that she had received over 200 sessions of physiotherapy over the course of several years. It argued the sheer number of sessions and length of time involved made any further treatments unreasonable. On the other hand, we relied on cases from Ontario which have held: (1) that treatment will be reasonable and necessary when the program of treatment has reasonable goals and the ongoing frequency, cost and duration of the specific treatment sessions are reasonable and necessary to meet the defined goals and (2) Pain relief, in and of itself, can be a legitimate treatment goal, provided that does not encourage inappropriate or indefinite dependence or interfere with other aspects of rehabilitation, and is supported by the person’s health care team. We argued that, based on these criteria, the number of sessions or passage of time was irrelevant. The Adjudicator accepted our arguments and held that the ongoing physiotherapy treatment was both reasonable and necessary.

Issue #2 – Was the treatment “Incurred” within four years of the accident

Borrowing language from Justice Goodfellow in *MacLeod v. Lumberman*, the adjudicator found as a fact that Rushton’s physiotherapy treatment at the private clinic was a natural, highly probable extension of the physiotherapy program she had received while at the IWK Pain Clinic. He found there to be a community of interests between the two physiotherapy programs, even though the programs were delivered at different locations and the private clinic services were all provided after the four years from the date of the accident. Economical argued that it was not a continuous program, pointing out that the physiotherapist in private practice admitted that he carried out his own assessment and did not receive any of the chart notes or reports from the physiotherapist at the IWK Pain Clinic.

The Appeal

The Appeal focused on the requirements for Justice Goodfellow's "requisite degree of certainty". Economical Insurance argued that certainty required that the exact cost and frequency of the future treatments be known before the expiry of the four year period – in this case the number of future treatments was indefinite and the cost was unknown. We argued that costs and frequency of treatment are not essential for certainty to exist, rather they are simply factors to be considered by the trial judge in determining whether certainty exists. With respect to the interpretation of "incurred", Justice Moir said as follows:

39 I adopt the reasoning in *Wawanesa* and *Chestnut*. The word "incurred" is to be given the broadest meaning of running or falling into some consequence, usually undesirable. In the context of Section B coverage the undesirable consequence is always an expense. In the context of the temporal limitation in the standard Section B coverage, "incurred" is not limited to receiving services or things, paying for them, or making oneself liable for them. Rather, the insured incurs the expense of obtaining a service or acquiring equipment, medication or another thing when it is known with certainty that the service or other thing is necessary. That is to say, when the expense befalls upon the insured.

In denying the Appeal, Justice Moir concluded as follows:

40 I do not think the adjudicator's attempt to formulate a test based on *MacLeod* was very helpful to the decision-making process. As has been seen, the jurisprudence has become more clear since *MacLeod*. However, the adjudicator's findings make it clear that he applied the terms of the temporal limitation provision just as they have been interpreted since *MacLeod*.

41 As the adjudicator found, physiotherapy stopped at the IWK because Ms. Rushton turned eighteen, not because the treatment was no longer required. The IWK treatments and the recommendations "that this treatment should be continued" justified the adjudicator's inference that treatment remained necessary. I do not agree that he lost sight of the need for certainty. He found the treatment to be "a 'natural, highly probably extension' of the treatment instituted prior to the limitation date."

42 In my assessment, Adjudicator Parker applied the correct interpretation of the temporal limitation on Section B coverage,

although his exclusive reliance on the *MacLeod* decision and his attempt to formulate a test based on it may have obscured his reasons slightly.

43 The appeal will be dismissed with costs to the respondent at the limit prescribed in the legislation.

4 KEY POINTS FROM THE “INCURRED” CASES

4.1 Ruston v. Economical continues the trend of Courts taking a large and liberal interpretation of “incurred”

Rushton v. Economical is the most recent in a series of cases, that adopt a large and liberal interpretation of “incurred”. The large and liberal approach is in line with the interpretive principles set out by the Supreme Court of Canada in *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405 (S.C.C.). These principles of interpretation were adopted by Chief Justice Drapeau in *Rolfe v. Axa Insurance Co.*, [2004] NBCA 14, in the context of interpreting the word “medical”, also found at Section B, subsection 1 of the Standard Automobile Policy. At paragraphs 25 and 39 Chief Justice Drapeau noted:

25 It is axiomatic that courts are not at liberty to ascribe to contractual wording a meaning that it cannot reasonably bear. The same holds true with insurance policy wording, including no-fault auto insurance wording. That said, whenever the wording of an insuring provision, whether legislative or contractual, is open to more than a single reasonable interpretation, courts should opt for the one that benefits the insured (see *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405 (S.C.C.)). [emphasis added]

4.2 Justice Goodfellow’s requirement for a “requisite degree of certainty” continues to be the dominant approach applied by the courts

All decisions since *MacLeod v. Lumberman*, have applied and built upon Justice Goodfellow’s analysis and requirement for a “requisite degree of certainty” for expenses to be deemed “incurred” before the expiry of the four year limitation period. In *Rushton v. Economical*, Justice Moir held that certainty exists “when it is known with certainty that the service or other thing is necessary. Unfortunately this definition continues to be somewhat circular. In oral argument we suggested that Justice Moir could solve the “certainty” confusion by providing a non-exhaustive list of the factors a judge should look for when determining if “certainty” existed. These factors or indicia of certainty could include such things as the degree to which the program or treatment was documented by

health professions, the degree to which the cost is known, whether course of treatment or program was, in fact, implemented before four years from the date of the accident. Justice Moir did not adopt this approach.

4.3 It is not necessary to determine the exact cost of treatment and number of sessions before expiry of four years from the accident

A key issue in the “incurred” cases is whether the cost of treatment and the number of session of treatment must be determine before the expiry of the four year limitation period. In *Wawanesa v. Smith*, the Court appears to say that exact cost of future treatment must be known before the four year anniversary. In *Ruston v. Economical*, Economical Insurance argued that the cost and number of sessions of future treatment were essential elements for there to be “certainty” before the expiry of the four year limitation. We argued that cost and number of sessions were merely factors to be considered by trial judge in determining whether the requisite degree of certainty exists. Justice Moir followed *Chestnut v. State Farm* in holding that the exact cost of future treatment need not be determined within four years from the date of the accident.

4.4 The extended Limitation period is no longer available in New Brunswick

Rushton v. Economical has limited application in New Brunswick. It will apply to older policies still in use that contain the word “incurred”; however, the word “incurred” no longer appears in the wording of the Standard Automobile Policy (New Brunswick). Counsel should determine on a case-by-case basis if your client’s policy is based on the old or new wording.

4.5 The extended limitation is likely available in Prince Edward Island

While *Ruston v. Economical* continues the judicial trend of applying a large and liberal interpretation of “incurred”, it remains the case that Court of Appeal of Prince Edward Island adopted the opposite approach. While the *Hobbs* decision stands alone as the only case to adopt the narrow definition of incurred, it remains the law in Prince Edward Island. Given the more recent decisions of *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405 (S.C.C.) and *Rolfe v. Axa Insurance Co.*, [2004] N.B.C.A. — which set out principles of interpretation of statute-based automobile policies — it seems likely that the PEI Court of Appeal would reverse its earlier decision in *Hobbs*.

5 PRACTICAL STRATEGIES TO SECURE BENEFITS BEYOND FOUR YEARS

5.1 Win the battle to have ongoing treatment declared “reasonable and necessary”

At four years after the accident, the biggest challenge for counsel is to prove that ongoing treatment meets the Section B definition of “reasonable and necessary”. It is often necessary to prove this before moving on to determine if payment for the treatment should extend beyond the four year limitation period. While it is beyond the scope of this paper to review the law on what constitutes “reasonable and necessary” treatment, counsel should not buy into the standard insurance industry

position that treatment must be curative, in order to be reasonable and necessary. The common statement from the insurer is: “we don’t have to pay for treatment that is simply maintenance”; however, courts have held that treatment aimed at pain relief can be reasonable and necessary as long as it is goal directed and aimed at improving or enabling function in activities of daily living. In *Rushton v. Economical* the adjudicator held that ongoing physiotherapy, of indefinite duration, was nonetheless reasonable and necessary because it was goal directed and enabled the claimant to maintain a level of function required to be a successful university student. The adjudicator accepted our argument that it was irrelevant that the treatment would not cure Rushton’s chronic pain and was largely aimed at maintaining her function at a level already achieved (i.e., maintenance).

In order to win this battle you will need detailed reports from treatment providers, which set out the treatment plans, goals and objectives. The ultimate outcome of treatment must be to improve or enable your client’s performance of specific activities or roles. For example, it is not enough to say the treatment provides pain relieve. You must go a step further to clarify what the relief from pain enables your client to do, which they otherwise would not be able to do but for the pain relief.

5.2 Certainty of treatment is a question of fact, so get evidence to support your position

While it may not be necessary to predict the exact cost and duration of treatment before four years from the date of the accident, the more specifics you can provide, the better. I encourage counsel to think in terms of the indicia of certainty.

Your goal should be establish the necessity of all treatment, in writing, before the expiry of the four year limitation period. As much as possible, you should make sure your client is actively pursuing all such treatment is in progress as of four years from the accident. There should be a strong rationale for delaying the implementation of any treatment or program beyond four years from the date of the accident. This may be appropriate in some circumstances, such as with the future dental treatment in *Stokes v. State Farm*.

5.3 Long-term prescription medications or medical devices

Long-term prescription medications (e.g., Celebrex, Lyrica, etc) or medical devices (e.g., prosthetics, assistive devices, etc) are perfect examples of future expenses that should be covered beyond four years. In these cases, the need is well documented in that the claimant has been using the drug or device for several months or years before the expiry of the four year deadline. All that is needed is confirmation from the claimant’s physician that such expenses continue to be reasonable and necessary and that the duration is indefinite or for the remainder of the claimant’s life. Once this is done, we take the position that the insurer obligated to pay these future expenses to the limit of the policy \$25,000 or \$50,000 limit. We send a Form to the family physician or specialist to have them confirm the necessity and duration of future medications or medical devices.

Given that prescription medications can change in the future because of advances in medicine, or because of adverse side-effects, we get the physician to confirm the claimant will need the specified drug, or some equivalent drug, for the rest of his or her life. The goal is to establish certainty of the general need for prescription medication to treat the symptoms, rather than the need for a specific drug (which may then change in the future).

In several cases, my clients have simply received a letter telling them their prescription drugs are no longer covered by Section B because “the four year prescription period has expired.” In these cases, I send a *Bad-Faith-Caution Letter* to the Insurer, which advises them that their characterization of the law (i.e., strict four-year prescription period) is not consistent with the existing caselaw. I advise them that their duty of good faith requires them to investigate the claim to determine if the ongoing prescription drugs meet the “test for certainty” required to be deemed to be incurred within the four years.

5.4 Enforce your client’s rights by filing an Action

In my experience, filing an Action is the most effective means of getting payment for medical expenses beyond four years. You should use the most cost-effective means available. For example, we prosecuted *Rushton v. Economical* in the Nova Scotia Small Claims Court. *Wawanesa v. Smith* and *Chestnut* were prosecuted by way of an Originating Notice (Application). I have attempted to use the Originating Notice (Application) in Nova Scotia without success – our Civil Procedure Rules (1972) required an agreed statement of facts. It is easy for the defendant to simply refuse to agree with all facts. I tried to use it in cases involving long-term prescription drugs which the insurer paid until the deadline of the four years from the accident. In these cases I attempted to argue the fact they paid up until the deadline demonstrated the insurer agreed the drugs were reasonable and necessary. Nova Scotia’s New Civil Procedure Rules provide greater opportunity for plaintiffs to pursue lower cost Section B litigation.

6 CONCLUSION

While all but one of the authorities favors a liberal interpretation of “incurred”, there continues to be no compelling appellate authority on point. The lone appellate authority (i.e., *Hobbs. v. General Accident*), is weak in its analysis and would likely be overturned based on subsequent authority from the Supreme Court of Canada and the New Brunswick Court of Appeal, which set out principles for interpreting the Standard Automobile Policy. Counsel should seek to obtain documentation to support any ongoing treatments or programs, in advance of the four year deadline. While it appears that costs of treatment and rigid schedules of treatment are not required, counsel should try to get as much clarification as possible on potential costs and duration of treatment.