2006 CarswellOnt 7377
Financial Services Commission of Ontario (Arbitration Decision)

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Suzanne Hill, Applicant and Coseco Insurance Co./HB Group/Direct Protect, Insurer

J. Wilson Member

Heard: May 23-24, 2006
Judgment: November 10, 2006
Docket: FSCO A04-001991

Counsel: David J. Gillespie, for Mrs. Hill
Pradeep B. Pachai, for Coseco Insurance Co./HB Group/Direct Protect

***J. Wilson Member*:**

Issues:

1 The Applicant, Suzanne Hill, was injured in a serious motor vehicle accident on June 16, 2000, which resulted in significant injury to her right lower leg and ankle. While other sequelae of the accident resolved over time, the leg and ankle injuries left her with serious pain and mobility challenges.

2 At the time of the motor vehicle accident, Mrs. Hill lived in a five-level, single family house in the Whitby area, with the primary living space on four different levels plus a sunken foyer at the front door.

3 While Mrs. Hill applied for and received statutory accident benefits from Coseco Insurance Co./HB Group/Direct Protect ("Coseco"), payable under the *Schedule*, [1] she was unable to come to terms with her insurer about appropriate means of addressing her mobility challenges in the multi-level home setting.

4 Mrs. Hill referred her disputes to mediation and, ultimately, applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

5 The issues in this hearing are:

1. Is Coseco required to pay Mrs. Hill the sum of $60,291.10 pursuant to section 15(5)(i) of the *Schedule*?

2. Is Coseco required pay Mrs. Hill an amount as a special award pursuant to section 282(10) of the *Insurance Act*?

3. Is either of Mrs. Hill or Coseco entitled to an order of expenses in this matter?

Result:

6

1. Coseco shall pay Mrs. Hill the sum of $60,291.10 plus interest at the rate of 2 per cent per month, compounded monthly, commencing October 9, 2003 and continuing until such time as the order has been satisfied.

2. Coseco shall pay Mrs. Hill the amount of $25,000 as a special award. This amount is inclusive of interest to the date of the order, but shall bear interest at the rate of 2 per cent per month, compounded monthly commencing with the date of this order.

3. The matter of expenses may be spoken to if the parties are unable to agree.

Evidence and Analysis:

7 This arbitration is about Mrs. Suzanne Hill's claim for reimbursement of some $60,291.10 in expenses incurred in moving from her former home on Linden Court in Whitby to a more accessible home in the same vicinity.

8 Mrs. Hill claims that this amount is payable by her accident benefit insurer pursuant to section 15(5)(i) of the *Schedule* which reads as follows:

> The rehabilitation benefit shall pay for all reasonable and necessary expenses incurred by or on behalf of the insured person as a result of the accident for a purpose referred to in subsection (2) for, ...
>
> > (i) home modifications and home devices, including communications aids, to accommodate the needs of the insured person, or the purchase of a new home if it is more reasonable to purchase a new home to accommodate the needs of the insured person than to renovate the insured person's existing home.

9 There is no serious dispute that Mrs. Hill was involved in an accident, and that she suffered serious, ongoing injuries that affected her mobility. The only issue is whether, under the circumstances, the costs of the move are payable as:

> **15(2)**... reasonable and necessary measures undertaken by an insured person to reduce or eliminate the effects of any disability resulting from the impairment ...

10 Secondarily, there remains a procedural issue as to whether Mrs. Hill took the appropriate steps to bring forward her claim, including the provision of a "treatment plan" within the time prescribed by the *Schedule*.

11 The medical reports from both the treating physicians, and those who examined Mrs. Hill on behalf of the Insurer, are consistent as to the seriousness of her complaint. Dr. Geoffrey Lloyd, an orthopaedic surgeon who examined her on behalf of the Insurer, noted on September 25, 2001:

> When one observes her walking she has an antalgic gait. She tends to walk with her right foot externally rotated to about 20 degrees and she has a valgus deformity of the right foot. She has soundly healed scars both as a consequence of the initial injury and the surgery as I have indicated there is some warmth emanating from her right ankle. The ankle joint movements are restricted. She can just get her right ankle into the neutral position. The plantar flexion is only 20 degrees. The inversion and eversion is zero and she seems to be stuck in about 20 degrees of valgus ...

12 Dr. Lloyd outlined as well some of the consequences of this state of affairs:

> She certainly does have limited endurance. She would not be able to climb, kneel or squat and these activities requiring these activities would be compromised.

13 Dr. Ogilvie-Harris, who examined Mrs. Hill at the request of her family physician, focussed on her difficulty going up and down stairs as a result of her injuries. His follow-up report on October 8, 2002 further comments:

> In addition it does seem one of the most significant difficulty (sic) is the flight of stairs in the house. Clearly, in my opinion, from a medical point of view, she would benefit from having a bungalow without stairs. Not only will this help her at the current time but also this would be an advantage in the future as she goes on to develop increasing degenerative changes and ultimately requires an ankle arthrodesis.

14 Dr. Ogilvie-Harris as part of his second assessment had reviewed the occupational therapy in-home assessment produced by Carol Bierbrier & Associates, issued on August 15, 2002. This report observed "difficulties with weight bearing, stair climbing, kneeling and squatting remain as a result of limited ankle range of motion." The report also remarked that:

> Mrs. Hill was observed stair climbing using a slow step to gait pattern. She was also observed using the wall and railing for support and face side ways due to limited ankle flexion.

15 Mrs. Hill is clearly mobile to a certain degree. She is not restricted to a wheelchair or other mobility device. However, it is fair to state that her ability to negotiate stairs is limited. The reports note significant pain in conjunction with such activities as well as the need to hold on to walls and railings and face sideways to successfully climb stairs. Such a process is also necessarily quite slow, and inhibits carrying anything while negotiating stairs.

16 I note as well that none of the reports filed suggests that Mrs. Hill's difficulties with mobility are in any way feigned or exaggerated. They also suggest that her condition will not improve, and will, over time, worsen. Any accommodation to this disability will then not be of a temporary nature. There is also no credible suggestion in the evidence before me that Mrs. Hill's mobility impairment derives from anything but the motor vehicle accident in question. I agree with the bulk of the medical evidence that Mrs. Hill has sustained a serious impairment from the accident, one that is unlikely to disappear, and indeed will likely grow worse with time. It is also clear that her impairment has a significant impact on her mobility, especially where mobility requires the use of stairs.

17 It is clear that Mrs. Hill would prefer a living space where her contact with stairs was either limited or non-existent. It would clearly be more convenient for Mrs. Hill to have such an environment. The Insurer, on the other hand, has taken the position that renovation (or relocation) is unnecessary since modifications to stair access are "only to give the person access to areas of the home not needed for ordinary living." In the Insurer's view, however convenient the elimination of stairs may be, it is neither reasonable nor necessary, and should not be funded by their company.

18 Although this claim centres on the costs involved in moving to a new home, much of the evidence was concerned with evidence as to the manner in which the old home was unacceptable, and the potential costs involved in making it reasonably accessible to Mrs. Hill. It is important to note that section 15(8) of the *Schedule* limits the amount of the rehabilitation expense available to the lowest value of any necessary renovations to the original accommodation.

The Original Home:

19 In addition to the various Occupational Therapy assessments that commented incidentally on the home environment, two expert reports were filed which dealt directly with the home and proposed renovations to address Mrs. Hill's disabilities. A report by Aecon Renovation was filed by the Insurer, while Mrs. Hill relied upon a report by Adapt-Able Design. The Aecon report consisted of some two pages and focussed on the proposed renovation. The Adapt-Able report consisted of 34 pages plus appendices and dealt thoroughly with all aspects of the home and the proposed renovation. Its analysis of the existing home and the surrounding elevations covers some 24 pages alone, and includes photographs and architectural sketches. Given its completeness, and the fact that it differs with Aecon only on the basis of thoroughness I will rely on Adapt-Able's description of the home for my analysis. Certainly its initial description is uncontroversial:

> Ms. Hill's pre-accident home is a 5-level home with primary living space on 4 levels plus a sunken level foyer at the front door. The home has three bedrooms and is located in a residential subdivision at [] Linden Court, Whitby Ontario.

20 Adapt-Able's presentation left no doubt as to the mobility challenges raised by the Linden Court residence. These related not only to passage between the four levels of primary living space, but also access to and egress from the house, both in the context of daily usage and emergency situations such as fire.

21 Outside the house, the path leading to the front door was littered with obstacles. There was a walkway with three steps and no handrail, risers and decorative bricks that would have been a tripping hazard and a front door that opened into a foyer

on a level separate from the rest of the house. The garage entrance opened into a landing in the middle of the basement stairs, while the rear entrance had three steps down to a raised deck, with access from the front by means of a path consisting of scattered patio stones.

22 Inside, the challenges were even greater. Although the photographs provide a more telling description, I will quote from some of the descriptions to illuminate the challenges in adapting the particular house design of the Linden Court residence. There is virtually unanimous agreement by all examiners that the stairs raise perhaps the greatest mobility challenge.

> The second floor staircase is accessed from the main floor foyer and provides access to the family room level and the second floor level. There are a total of 14 risers and 2 mid-landings.
>
> From the main floor level, there are 8 risers to the family room level in an L-shaped configuration, with 6 risers leading to a landing followed by with 2 more risers. The stair width is 33". The lower mid-landing measures approximately 39" deep and 41" wide while the landing at the family room level measures 39" deep and 39" wide.
>
> From the family room level to the second floor level, the stairs have 6-risers that are 33 $^{1}/_{2}$" wide.

23 The report goes on to deal with the other staircase:

> The basement staircase is accessed from the main floor level and includes 13 risers and a 2-level mid-landing. The stairs from the main floor level include 6 carpeted risers that are 33" wide. The stairs terminate at an upper mid-landing measuring approximately 42 $^{1}/_{2}$" wide and 40" deep. An in-swing door at this level provides access to the garage. There is an 8" riser to the lower part of the mid-landing that measures 38" wide and 39" deep. The lower landing leads to stairs with 6 risers that are 33" wide and that provide access to the basement level.

24 It is not necessary to repeat the entire report to come to a conclusion that the Linden Court house had numerous, significant challenges to someone who was mobility-impaired. These challenges were due to the arrangement of the house upon many different levels, with the consequent necessity of negotiating stairs and risers to access both the house and its interior. In addition, all the reports make it clear that, unless one was to essentially camp out on only one level, entry to and from the house, as well as access to functional levels of the house, including kitchen, laundry and sleeping quarters, involved the use of stairs or risers. Consequently, the performance of basic tasks involved being able to access these stairs frequently.

25 As mentioned earlier in this decision, Dr. Lloyd found:

> She certainly does have limited endurance. She would not be able to climb, kneel or squat and these activities requiring these activities would be compromised.

26 The occupational therapy report from Carol Bierbrier & Associates, issued on August 15, 2002, also concluded:

> Mrs. Hill's abilities to perform her pre-injury activities have been significantly and permanently compromised as a result of the accident, which occurred on June 16, 2000.

27 This report observed "difficulties with weight bearing, stair climbing, kneeling and squatting remain as a result of limited ankle range of motion." The report remarked that:

> Mrs. Hill was observed stair climbing using a slow step to gait pattern. She was also observed using the wall and railing for support and face side ways due to limited ankle flexion.

28 While Mrs. Hill could negotiate steps, given time and free hands to deal with supporting herself with railings and walls, I do not accept that this equals an ability to freely access the necessary parts of her house on a daily basis.

29 The Insurer has consistently adopted the phrase cited above in the Bierbrier report from one of the Occupational therapy reports as its position in this matter. For the Insurer, if she was able to ambulate she needed no accommodation with regard to the stairs.

30 The Insurer's own doctor says, however, that "she would not be able to climb, kneel or squat and these activities requiring these activities would be compromised." The question must come to mind as to how she can move things such as laundry and groceries from level to level and floor to floor, if her arms are engaged in supporting her passage up the stairway. Indeed, is it safe to expect someone to engage in such activities, or to leave someone in a house when timely exit during an emergency could be compromised?

31 The Insurer's position has been essentially that, being capable of ambulation, Mrs. Hill is not entitled to any assistance in this field. To them, Mrs. Hill must be completely incapable of performing a particular function as a pre-condition to rehabilitation assistance. I do not read the *Schedule* in the same way.

32 Section 15(1) provides as a pre-condition the sustaining of an impairment due to an accident. Section 15(2) provides that the benefits shall be for the purpose of facilitating the insured person's reintegration into his or her family, the rest of society and the labour market. Section 15(5)(i) specifically notes home modifications as a potential rehabilitation expense, provided only that the expenses be reasonable and necessary.

33 I do not accept that Mrs. Hill must suffer undue pain and discomfort, or put her safety at risk, either from a potential fall while negotiating stairs or carry groceries or laundry. Nor should she suffer from an inability to leave her home in a timely manner in the event of a fire or smoke emergency, solely in order to spare the Insurer the expense of modifying the challenges in her home.

34 As Arbitrator Makepeace noted in *MacMaster*[2] , interpreting a similar provision in previous legislation:

> The underlying purpose of section 6 is to return the applicant to his or her pre- accident level of function, to the extent that is reasonably possible. Mr. MacMaster is not entitled to receive a "windfall" as a result of his accident. He is not entitled to hold out for a house, and accept nothing less. He must be reasonable in working with the Insurer to reach a solution which, while it may not be ideal, is workable and reasonable. Nor is he required to accept a standard of living he would not have accepted before the accident.

35 Likewise, Mrs. Hill is not obliged to accept a level of functionality far below what she is used to, especially when that limited functionality is accompanied by ongoing severe pain, and the obstacles to greater functionality are capable of being addressed in a relatively straightforward manner.

36 In this case the modification of her house to avoid the stairs and risers is an appropriate way of returning Mrs. Hill to her pre-accident functioning.

37 Having found the need to accommodate Mrs. Hill's difficulty with stairs and climbing, the question remains as to what is reasonable by way of accommodation.

38 In this matter, the Insurer relies upon a report by Aecon, a construction company, setting out what it considers to be appropriate accommodations, should accommodation be found necessary. Mrs. Hill relies on a more detailed report by Adapt-Able Design

39 The Insurer and Aecon say that a relatively modest renovation would address Mrs. Hill's mobility issue. Stairglides or stairlifts can get her from floor to floor, while a modest change to the existing porch could provide a safety haven in event of fire. Access from outside could be addressed by a ramp to the front door. The total for these modifications suggested by Aecon was $30,595.00.

40 As Mrs. Hill pointed out to her insurer, its suggested modifications just wouldn't work. Because of the multi-level concept of the house the proposed stairglide would actually block access points on the staircase, as well as take up a significant portion of the stairway itself. These critiques were confirmed by an O.T. report written by Ms. Sue Wilkinson. The DAC that later considered this report observed:

> It is felt that Ms. Wilkinson [OT] has raised sufficient doubt as to the nature of the Aecon report (i.e. limited in detail and lacking in consideration for the claimant's individual needs). As previously reported by this assessor, it is felt that a second estimate on the claimant's prior home would be beneficial.

41 The Adapt-Able design report, referenced earlier, was the result of the doubts about the Aecon report. Although the Insurer still maintained that no housing renovations were necessary, it agreed to the Adapt-Able report, as recommended by the DAC.

42 As noted earlier, I find that the Adapt-Able report is thorough, well-researched and prepared by a team with experience in both architecture and accommodation for mobility handicapped individuals. [3]

43 While the $198,200 price tag for the renovations recommended by Adapt-Able may seem steep at first glance, the report provides solid support for most of its recommendations. It considers the challenging architecture of the house before deciding on a plan that juggles the usage of space and provides for a small addition to make an interior elevator a successful key to access to the principal rooms.

44 I find that Mrs. Hill's safety and efficiency require an effective means of dealing with the challenges raised by the stairs and the multi-level arrangement of the home at Linden Court. Such accommodation would be necessary and practicable to facilitate "the insured person's reintegration into his or her family, the rest of society and the labour market."

45 I accept that, given the need to eliminate the dependence on stairways for access to the parts of the house in common everyday use, as well as access to the house itself, an elevator is the only practical solution. The stairglide is not a practical alternative, given the obstruction it would create to the stairway itself, and its limited ability to service all levels of the house, including access from the exterior.

46 Although I am not obliged to accept either expert report as definitive, I find that the recommendations made by Adapt-Able address all the accessibility issues raised by Mrs. Hill's disability and provide a reasoned and reasonable answer to the challenges raised by Mrs. Hill's disability.

47 Consequently, I find that its low cost estimate of $198,200 should be the standard by which the compensable costs for moving into a new house should be measured pursuant to subsections 15(7) and (8) of the *Schedule*.

Purchase of a New House

48 Having accepted that the design of the house on Linden Court presented specific design challenges in providing accommodation for mobility impairment, section 15(5)(i) of the *Schedule* provides for an alternative. If it makes more sense to move to a new house as part of that accommodation, then that move may be compensable. However, the purchase of a new home is modified by the following condition:

> (8) The amount of the rehabilitation benefit for the purchase of a new home shall not exceed the value of the renovations to the insured person's existing home that would have been required to accommodate the needs of the insured person. O. Reg. 403/96, s. 15 (8).

49 In the Linden Court house, the purpose of the elevator and the renovations recommended by Adapt-Able is to provide Mrs. Hill access to the important portions of her home that she uses on a daily basis without the necessity of negotiating stairs.

50 The O.T. Reports and Dr. Ogilvie-Harris all mention that having the key portions of the house on one level would be a reasonable way of addressing the mobility issues caused by the accident.

51 It is easy to see the logic of their approach. Providing an elevator or even a stairglide to avoid the stairs means not only an initial outlay of money to purchase the device. It also means annual maintenance, the cost of electricity to power it and an allowance for eventual replacement, when, as in the case of all things mechanical, it wears out.

52 The provision of the critical areas of a house on a single level is a passive mode of accommodation which is not subject to such ongoing concerns.

53 Both Adapt-Able and the Bierbrier OT report referred to a potential loss of market value if a house is "institutionalized" by renovations. Items such as the elevator, stairglide and exterior ramps would be renovations which might set a house apart from its neighbours and lessen its marketability.

54 As well, the peculiar multi-level design of the house on Linden Court tended to make dealing with access issues quite difficult. There is some simple logic in looking for another home which does not present such inherent challenges.

55 Notwithstanding the comments in the Lakeridge DAC, dated March 29, 2005, suggesting that the only advantage to be gained from moving to a bungalow with all essential services on one floor would be the ease of doing the laundry, the evidence is that Mrs. Hill is able to function in all her household duties in a single-level environment. With the kitchen, laundry and living quarters on the same floor, both the safety and mobility issues are addressed efficiently.

56 The best test of the effectiveness of any accommodation is the real world. Mrs. Hill has now purchased and lived in a "loft bungalow" for some time. Her uncontradicted testimony is that it works. While there are parts of the house that may not be easily accessible to Mrs. Hill, they are not required for her daily living. I accept that the move to a bungalow-type house is the simplest and most appropriate accommodation for Mrs. Hill's inability to negotiate stairs in a safe and effective manner.

57 In the light of the Adapt-Able assessment, which was not available to the DAC, and Mrs. Hill's own testimony about the difficulties in performing her daily household tasks on many different levels, I accept that the grouping of the essential household tasks on one level is the most effective and simplest accommodation available. Consequently, I find the purchase of a bungalow-style home to address mobility issues to be reasonable in the circumstances. I also find that it is a cost-effective alternative to renovation, both in initial capital cost, and ongoing maintenance. It should be preferred for this reason as well.

Treatment Plan

58 In its *Response*, the Insurer raised the issue of whether Mrs. Hill's application for a rehabilitation benefit to cover the costs for the purchase and move to a new house was barred because of her failure to file a treatment plan prior to incurring the expense.

59 While there is perhaps a conceptual challenge in considering the purchase of a new house to be a treatment, section 38(1.1) of the *Schedule* is quite specific in stating:

> (1.1) An insurer is not liable to pay any expense in respect of medical benefits or rehabilitation benefits that was incurred before the insured person submits an application for the benefit that satisfies the requirements of subsection (2) unless the expense is for an ambulance or other goods or services provided on an emergency basis not more than five business days after the accident to which the application relates. O. Reg. 546/05, s. 14 (2).
>
> (2) An application under this section must be signed by the insured person, unless the insurer waives that requirement, and must include, unless section 38.1 applies,
>
> > (a) a treatment plan that complies with subsection (3), prepared by a member of a health profession or by a social worker; and
> >
> > (b) a statement by a health practitioner approving the treatment plan referred to in clause (a) and stating that he or she is of the opinion,

(i) that the expenses contemplated by the treatment plan are reasonable and necessary for the insured person's treatment or rehabilitation, and

(ii) that the impairment sustained by the insured person does not come within a Pre-approved Framework Guideline. O. Reg. 281/03, s. 16 (2); O. Reg. 546/05, s. 14 (3).

60 On the face of the provisions, it seems clear that the filing of "an application for the benefit that satisfies the requirements of subsection (2)" is a pre-condition to any benefit. As noted, Coseco's position is that since no "treatment plan" was filed before the house was purchased, it is not liable for that specific expense.

61 A review of the chronology of this matter is important. The closing of the purchase of the new house took place on January 9, 2004. At that point, funds were to be advanced and the transaction completed. Arguably, this is when the major expense was incurred by Mrs. Hill and her husband.

62 The documents filed by Mrs. Hill include a letter from Mr. Gillespie, solicitor for Mrs. Hill, dated September 30, 2003. In this letter, directed to H.B. Goup Insurance (Coseco) Mr. Gillespie states:

> I am requesting that H.B. Group Insurance Management Ltd. consider the costs of my client relocating from her current residence at: [] Linden Court WHITBY, Ontario [postal code] to []Drive, WHITBY, Ontario. [postal code] (see floor plans attached)

63 Mr. Gillespie's letter continued on to incorporate by reference the conclusions of an Occupational Therapy in-home assessment prepared by Carol Bierbrier & Associates as well as a report by Dr. Ogilvie-Harris, both of which recommended the purchase of a bungalow. Both reports were attached to Mr. Gillespie's letter.

64 Coseco replied with an OCF-9 (Explanation of Benefits) dated October 9, 2003. The form starts with "we have reviewed your application for benefits." Page 2 of the form refers to a claim for medical and rehabilitation expenses, and specifically the claim for "the difference in purchase of a new home."

65 Under "Reasons why expenses are not payable", the writer states:

> Item not reasonable and necessary pursuant to sections 15(2) and 15(5) (i) of the SABS. According to page 9 of the Occupational Therapy Report dated August 15, 2002, ... Mrs. Hill was observed ambulating independently through out her home ..." Mrs. Hill was observed stair climbing using slow steps to gait pattern". Please see part 6 of this form, for information on "Applicant's Rights to Dispute."

66 There is no reference to the failure to provide a treatment plan — only a statement that she was not entitled to the benefit because she had been seen "ambulating independently through out her home."

67 There is no question that Mrs. Hill made an application for benefits. While it was not entitled "treatment plan" as such, it outlined the claim for the cost of moving to a suitable new home, and included the reports of Dr. Ogilvie-Harris, the O.T. report of Carol Brierbrier & Associates, together with the documentation of the costs of the services requested. Each health practitioner signed his or her own report and recommendations. The application is not signed by Mrs. Hill, but by her solicitor. Documentation within the application contains Mrs. Hill's signature.

68 Given that the claim entailed no treatment or medical services being provided to Mrs. Hill, it is perhaps understandable that the application contained no declaration as to conflict of interest by the medical practitioners or others involved in the claim. Indeed, applying verbatim the treatment plan requirements to the purchase of a new home verges on the absurd. However, the requirements are there in the scheme as a pre-condition to a claim for a rehabilitation benefit and they must be considered. [4]

69 What is clear, however, is that Mrs. Hill, through her solicitor, provided the detailed information which the Insurer would have required to make its determination on entitlement. Indeed, that is what the Insurer replied to. She provided all the available

relevant information for the Insurer to make a determination. Only the formal presentation of the document as a treatment plan was lacking.

70 The Insurer received Mrs. Hill's claim, evaluated its worthiness, and made a determination that the claim would not be paid, based on its assessment of Mrs. Hill's underlying entitlement. Coseco did what it should have done at the time. Since it had on hand the full details of Mrs. Hill's claim, it made its determination promptly, without insisting that the information be provided in the exact form provided for in the *Schedule*. It then suggested that Mrs. Hill proceed to the dispute resolution process if she disagreed with its determination of her claim.

71 Subsequently, in a letter dated May 6, 2004, Coseco took the position that mediation of the dispute was not possible since a treatment plan had to be submitted prior to an expense being incurred and "the new home was purchased on August 8, 2003 [5] , but the expenses for same were not received in our office until October 3, 2003, an (sic) a treatment plan was not included."

72 The Insurer's position on the date of the expense being incurred would not be so unreasonable, if it had been timely in taking that position. The time for amending the application was now long gone, the transaction having already closed in January 2004. The prejudice to Mrs. Hill caused by the Insurer's new spin on entitlement was real.

73 Considering the August 8 date as the date that the expense was incurred is not totally unrealistic. Contracts for the purchase of land are unusual in that an equitable interest can be said to pass with the acceptance of the offer to purchase, while legal title passes with the closing and the payment of the purchase monies. Arguably, Mrs. Hill at least acquired an equitable interest in the property with the acceptance of the offer to purchase. While it is not critical to this decision, I have difficulty accepting that the choice of August 8, 2003 could be supported in the light of the legal title and the payment of the proceeds of the sale to the vendor only taking place on the final closing of the sale in January.

74 Once again, the Insurer's failure to respond to Mr. Gillespie's clear understanding of January 9 as the ultimate deadline for the application for the benefit left Mrs. Hill secure in the belief that only the substantive issue of entitlement was in dispute.

75 It is of some note that the adjuster's file notes for the date of the refusal reflect only the comments shown in the OCF-9, namely that the claim was being refused because it was not considered "reasonable and necessary." There is no reference to any procedural objection anywhere in the adjuster's notes. [6]

76 It would appear from correspondence and records submitted in evidence that the procedural defence: the failure to file a treatment plan prior to incurring the expense was of relatively late invention.

77 Why should the timing of that particular defence be of concern? It is not unusual for an insurer to elaborate on, and even introduce different grounds to resist payment as the dispute progresses. It is in the nature of most claims that as the evidence is produced, more information becomes available, information that may be relied upon in either resisting or supporting the claim as the case may be. This, however, is not an ordinary claim.

78 While in most income replacement benefit claims and also ongoing treatment there is a continuum, with ongoing entitlement, a claim for a housing expense basically crystallizes at the time it is made. What is at issue is whether, at the time the determination is made by the insurer, the claim is reasonable and necessary and arises from the accident. The claim is a "one-off" benefit, fixed in time.

79 In making its determination, an insurer is under an obligation to weigh the merits of the claim fairly, and not to prefer its interests over those of an insured. It should make its decision on the whole of the information reasonably available to it at the time of the determination. Changing the reasons for refusal in such a situation should not happen in the absence of new and important information that was not available when the original determination was made. I see no evidence that the need for a treatment plan was unknown to the Insurer at the time it made its determination of entitlement.

80 When Mrs. Hill filed for the rehabilitation benefit, her injury and the resulting disability was not unknown to the Insurer. Virtually all the necessary information relevant to the claim was produced and received in the context of the claim for moving

expenses. The Insurer knew the date of closing for the house transaction. It knew the reasons Mrs. Hill wished to move, and it had the opinions of its own assessors and Mrs. Hill's treating physicians, as well as the occupational therapy reports, when it made its determination. It also knew the procedural preconditions for entitlement to a rehabilitation benefit and, by its actions, essentially waived those pre-conditions to her claim.

81 The *Schedule* is an odd sort of creature. Although it takes the form of a legislative regulation, its effect for the most part depends on its inclusion in the contract of Insurance between an insurer and its insured in Ontario. Without the underlying contract of Insurance, containing the "no fault" provisions outlined in the *Schedule*, Mrs. Hill has no claim against Coseco. Rather, any compensation for her losses must come from the wrongdoer who was responsible, the tortfeasor, and nowhere else.

82 Consequently, in addition to being a quasi-legislative document, the *Schedule* also forms part of the contractual relationship between Mrs. Hill and Coseco, and is subject to the rules that govern the enforcement of contracts.

83 Since the decision of the House of Lords in *Hughes v. Metropolitan Railway*, [7] it has been clear that actions of a party which induce the other party to not undertake an obligation under the contract can result in the first party being precluded from relying on what would otherwise be the resulting breach of the contract by the second party. Lord Blackburn cited with approval the words of Mellish L.J., stating that "I think they exactly express what I believe to be the right law." Mellish L.J. had stated:

> Notwithstanding that he did not himself intend to abandon his six months notice, yet in my judgement, if his contact was such as to put the defendants off their guard, and to lead them unreasonably to believe that the strict legal right of the six months' notice would not be insisted upon, that is enough to entitle them to relief upon equitable grounds.

84 Mellish L.J. concluded:

> A court of equity, however, would take care that the house was put in substantial repair; it would give the landlord all the relief it is entitled to, but the court would say that it was inequitable that he, having misled the defendants and allowed them to believe that he would not insist upon the strict forfeiture on account of repairs not having been made within the actual six months, should now insist upon it.

85 Since the 19th century, the position taken by the courts has been refined and become nuanced. Depending on the analysis, a person in Mrs. Hill's position may now rely on either waiver, estoppel or promissory estoppel in resisting a party insisting on full performance of all terms of the contract. As Denning L.J. stated:

> Whether it be called waiver or forbearance on his part, or an agreed variation or substituted performance, does not matter. It is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations. He made, in effect, a promise not to insist on his strict legal rights. That promise was intended to be acted on and was in fact acted on. He cannot afterwards go back on it. [8]

86 Throughout this dispute Mrs. Hill has taken the position that by dealing with the substantive claim for a rehabilitation benefit at the time of the refusal and not raising the issue of the need for a treatment plan, Coseco essentially waived the right to rely on that procedural defence at a later date.

87 While I ultimately agree with Mrs. Hill as to the result, I believe that the circumstances are such that Coseco is estopped from relying on the failure to supply a timely treatment plan by its conduct over the entire period between the filing of the claim and the filing for mediation when Coseco first appears to have dusted off its procedural defence, not just its failure to mention the procedural defence in its refusal notice.

88 In its May 6, 2004 letter to Mrs. Hill's solicitors, Coseco took the position that the expense was incurred in August 2003 but the expenses not submitted until October 2003. The August date was the date when the agreement to purchase for the new property was signed. Coseco also knew that the transaction was set to close in January 2004. Title for the property was to be transferred at that time, upon receipt of the purchase monies.

89 The importance of the January closing date, which Mrs. Hill evidently considered to be the date when the expenses were "incurred" for the purposes of the rehabilitation benefit, cannot be underestimated. Mrs. Hill started the request for consideration of the expense relatively early. Her lawyer's correspondence mentions the impending January closing date.

90 Yet in the evidence before me there is no documentation of a specific request for the claim to be presented in the form of a treatment plan prior to the closing date, nor a refusal to deal with the issues without a formal treatment plan. It is only when a treatment plan patently cannot be provided prior to the incurring of the expense, since the transaction has finally closed, that the issue of the treatment plan raises its ugly head.

91 It must also be remembered that the interim between the October and May correspondence from Coseco was filled with other activity on this claim. Notably Coseco invited counsel for Mrs. Hill to attend settlement discussions, and indeed both parties did so. On April 26, 2004, Coseco requested a further section 42 examination specifically concerning Mrs. Hill's entitlement to the rehabilitation/housing benefit. The substantive issue clearly was alive for both parties throughout this period, an observation that is consistent with Coseco's position in its refusal of benefits.

92 It has been repeatedly said that the accident benefits scheme is a form of consumer protection and should be interpreted in that light. [9] Seen in such a light, the requirement for a treatment plan set out in section 38(1.1) of the *Schedule* must be seen as a means of facilitating early and fair determination of benefits by an insurer, by ensuring that the critical information is in its hands promptly. It serves also to protect consumers against unscrupulous treatment providers and representatives, by obliging them to disclose conflicts of interest, and unjustified claims that may have downstream consequences for an insured.

93 I have no evidence that any of these consumer protection goals are served by a rigid adherence to the formulae of the treatment plan in this case. Consequently, I see no policy reasons to temper my decision barring Coseco from relying on Mrs. Hill's failure to provide a completed treatment plan, notwithstanding its conduct in this matter.

94 For the above reasons I find that Mrs. Hill is entitled to a rehabilitation benefit as claimed.

Special Award

95 Subsection 282(10) of the *Insurance Act* provides for special awards against insurers.

> If the arbitrator finds that an insurer has unreasonably withheld or delayed payments, the arbitrator, in addition to awarding the benefits and interest to which an insured person is entitled under the *Statutory Accident Benefits Schedule*, shall award a lump sum of up to 50 per cent of the amount to which the person was entitled at the time of the award together with interest on all amounts then owing to the insured (including unpaid interest) at the rate of 2 per cent per month, compounded monthly, from the time the benefits first became payable under the *Schedule*.

96 Although often compared to punitive damages in tort, a special award is as simple and basic as the statutory provision giving rise to it. It is specific to statutory accident benefit arbitrations and is mandatory once a finding of an unreasonable withholding or non-payment of benefits has been made by an arbitrator. [10] Once such a finding is made, the only element of discretion is as to the amount of the award that an arbitrator decides is appropriate to the conduct in question.

97 Neither "Reasonable" nor "Unreasonable" is defined in the *Insurance Act*. The concept of reasonableness can tend to be a bit circular. In *Arland v. Taylor*, Laidlaw J.A. attempted to outline the characteristics of the "reasonable person":

> He is not an extraordinary or unusual creature; he is not superhuman; he is not required to display the highest skill of which anyone is capable; he is not a genius who can perform uncommon feats, nor is he possessed of unusual powers of foresight. He is a person of normal intelligence who makes prudence a guide to his conduct. He does nothing that a prudent man would not do and does not omit to do anything that a prudent man would do. He acts in accord with general and approved practice. His conduct is guided by considerations which ordinarily regulate the conduct of human affairs. His conduct is the standard "adopted in the community by persons of ordinary intelligence and prudence." [11]

98 In the case of a special award, presumably an award would be made if the conduct of the insurer in refusing or withholding benefits reflected a decision-making process that ignored factors that a prudent person would have considered and "does not omit to do anything that a prudent man would do."

99 Various provisions of the *Schedule* set out the obligation of an insurer when a claim is received from an insured. According to the *Schedule*, an insurer must make a determination of the person's entitlement to benefits.

100 This use of the word "determination" in the legislation is interesting. The insurer does not merely make a choice to pay the benefit or not, but a "determination" of the specific issue referred to it, one that is binding on an insured, subject to a statutory appeal.

101 *Black's Law Dictionary* defines "determination" as follows:

> **1.** A final decision by a court or administrative agency <the court's determination of the issue>

102 While the power of "determination" granted to an individual or an office by statute is often categorized as a "statutory power of decision" [12] triggering a plethora of responsibilities with regard to natural justice and fairness, it is not necessary to go as far as that to find that an insurer has a responsibility to the parties to fairly address the issue referred to it and to make any determination on the widest information available to it. Such a conclusion is consistent with the jurisprudence in this area.

103 In *Kusalic c. Zurich, cie d'assurances*, Borenstein J. wrote, in a decision relied upon by Laskin J.A. in his dissent at the Court of Appeal level in *Whiten v. Pilot Insurance Co.*: [13]

> Le contrat d'assurance en est un "uberimma fides", de bonne foi la plus évidente. L'assureur doit agir de bonne foi et prendre consideration les interêts de son assuré aussi bien que les siens. [14]

104 The same theme was elaborated upon by Cumming J. in *Bullock v. Trafalgar Insurance Co. of Canada* [15] :

> The insurer is obliged to honour the contract unless it can bring itself within one of the exceptions. If an insured intentionally destroys his own property, there is no coverage. The insurer must have a reasonable basis for its belief that there is no coverage under the policy.

105 While not accepting that a fiduciary duty is created between an insurer and an insured, Cumming J. noted:

> There is a duty arising from the insurance contract on the part of the insurer to act fairly and refrain from doing anything to impair the contractual rights of the insured. The insurer owes a duty of fairness and a duty to be prompt in handling and assessing the loss: *Labelle v. Guardian Insurance Co. of Canada* 38 C.C.L.I. 274 at 297 [16] .

106 Clearly there is an intention on the part of the legislature, and a recognition in the jurisprudence that relations between insurers and their insureds be based on more than simple business logic. When an insurer receives a claim from an insured, there is a reasonable expectation that it will evaluate the information in a manner that is unbiased, investigate the claim fairly, and make its determination on entitlement based on factors that favour neither the interest of the insurer, nor its client.

107 When there is "a reasonable basis for its belief that there is no coverage under the policy", it should provide that basis to the insured so that the insured may respond appropriately. Moreover:

> the insurer may not treat the insured as an adversary whose interests may be disregarded. This encompasses a duty to settle claims without litigation in appropriate cases: *Plaza* at 672. This implies a reasonable and competent investigation to determine whether a claim will be honoured. [17]

108 In this matter, Coseco could have further investigated the claim. It could have conceded the disability but challenged the nature of the accommodation, but it remained firm. Instead, it kept playing hardball on this issue, bringing us ultimately to this arbitration.

109 Given the lower threshold for a special award, it would seem that conduct that would support a finding of a breach of an insurer's good faith obligations in the determination of entitlement to benefit would also support a special award when those same benefits were withheld.

110 The accepted approach to be taken to setting special awards has been described by Director Draper in *Persofsky* [18] : He visualized a step-by-step process, culminating in the determination of the amount of the special award.

> 1. Determine the benefits owing to the insured person, including interest calculated under the applicable version of the *SABS*;
>
> 2. Decide whether the insurer unreasonably withheld or delayed the payment of these benefits. If so, the insurer will be ordered to pay a lump sum amount in addition to the benefits and interest calculated in #1;
>
> 3. If the insurer did not act unreasonably in respect of all the benefits owing under #1, determine the amount of the benefits that were unreasonably

111 In this matter, the amount withheld is easily ascertainable. The bigger question is whether the Insurer conducted itself fairly in making the determination that no benefit was payable. Did it consider with an open mind the information reasonably available to it or did it proceed in a closed-minded fashion that ignored information that disagreed with its pre-conceived notions?

112 The Insurer in this matter seems to have formed an opinion quite early on. It said no. It said that no modifications were necessary since Mrs. Hill was observed to "ambulate", however marginally. It did not move from that position except to add further procedural objections as the claim evolved.

113 Mrs. Hill has claimed that, although Coseco retained an occupational therapist early on in the process, it essentially ignored any mobility recommendations and "dumped" the O.T. without explanation. While it is possible to infer motives from the Insurer's actions in dealing with the accommodation of Mrs. Hill's mobility issues, such is not necessary in a special award claim.

114 While an intent to frustrate a claim might patently be unreasonable, so can well-intentioned actions that by omission fall below what "a prudent man would do" in such circumstances in the light of the obligations owed by the insurer "to honour the contract unless it can bring itself within one of the exceptions."

115 While I do not think that there is any evidence of malice or a concentrated plan to frustrate Mrs. Hill's claim, I believe that the chronology of the claim shows a seriously problematic approach by Coseco with regard to the accommodation of the mobility issues. It shows a lack of comprehension of the requirements of such a rehabilitation benefit, and an apparent unwillingness to obtain clarification of the Insurer's obligation to provide mobility accommodation. [19]

116 Coseco also demonstrated an inexplicable tendency to seize on a pretext for refusal: in this case the out of context comments concerning "ambulation", and refusal to modify its position in the light of clarification and new information.

117 Coseco also shows a pattern of non-disclosure as to its reasoning that had the potential to severely prejudice Mrs. Hill's claim. I refer specifically to Coseco's unfortunate practice of delaying specific reference to its objection to the form of the application (treatment plan) until well after any default could have been cured. Its position on the "treatment plan" issue bordered on an abuse of the claims process, since it unnecessarily put its claimant in an impossible situation.

118 Taken as a complete process, the treatment of the claim for rehabilitation benefits demonstrates a course of action that includes delay and the preference of the Insurer's economic interest (not paying) over the interest of its insured in obtaining the necessary assistance to accommodate her accident-related mobility impairment.

119 I find that Coseco unreasonably withheld the payment of the benefit, through delay, a failure to consider its obligations and its client's interest, and a failure to bring an open mind to the claims information as it was presented to it.

120 Perhaps the above recital is not the most egregious example possible of insurer conduct. It, however, falls well below the standard of reasonable conduct to be expected of a first-party insurer. It also could have had serious financial, health and safety consequences for Mrs. Hill.

121 Notwithstanding the medical consensus that the accident sequelae had made stairs an impediment to mobility and functionality, Coseco delayed and frustrated Mrs. Hill's attempts to deal with this issue in the most cost-effective and simple manner — that is, the purchase of a new house.

122 Had the Hill family not had the independent means to take the chance and make the move to a bungalow without the guarantee of insurance funding, a serious accident could well have happened to Mrs. Hill while she attempted to cope with an impossible situation.

123 I also note that the medical reports and, indeed Mrs. Hill's own evidence, spoke of serious pain directly attributable to attempting to negotiate the stairs. The Insurer was clearly aware of these circumstances when it took an unreasonably intransigent position with regard to Mrs. Hill's claim. Consequently, any special award should take this into consideration.

124 Having considered the above, as well as the Insurer's conduct in dealing with the balance of the accident benefit claim, I have come to the conclusion that a serious award is necessary, but not necessarily a maximum one. Since the high end of the award would be 50% of the outstanding benefits and interest, I find that a lump sum award of $25,000 would be appropriate, since it would communicate the seriousness of the Insurer's default in this matter as well as the serious risk of harm to Mrs. Hill that accrued because of its unreasonable conduct, while still being less than the maximum permissible under the law.

Expenses:

125 Mrs. Hill was successful in all aspects of her claim. She should have her expenses in this matter. I leave the issue of the quantum to the parties. If they are unable to agree on a reasonable amount, I may be spoken to on that issue.

***J. Wilson Member*:**

126 Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Coseco shall pay Mrs. Hill the sum of $60,291.10 plus interest at the rate of 2 per cent per month, compounded monthly, commencing October 9, 2003 and continuing until such time as the order has been satisfied.

2. Coseco shall pay Mrs. Hill the amount of $25,000 as a special award. This amount is inclusive of interest to the date of the order, but shall bear interest at the rate of 2 per cent per month, compounded monthly commencing with the date of this order.

3. The matter of expenses may be spoken to if the parties are unable to agree.

Footnotes

1 The *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, Ontario Regulation 403/96, as amended.

2 *MacMaster v. Dominion of Canada General Insurance Co.* [1994 CarswellOnt 4976 (Ont. Insurance Comm.)] (OIC A-006025, October 26, 1994)

3 Adapt-Able team: David Wallace H.B.S.W. (social worker) and Kevin Field B. Arch. (architect). Although Coseco H.B. challenged Mr. Wallace's qualifications as an expert in accommodation, I accepted that his extensive experience in dealing with such matters, and the evident professionalism of his report more than compensated for any lack of specific academic qualifications.

4 In the absence of an estoppel, argument consideration would have to be given the interaction of s. 28(d) of the *Interpretation Act wi*th the provisions of s. 38.(1) of the *Schedule*, which suggests that the defects of form should not vitiate an application where the result is not misleading — in this case, substantial compliance with the notice provisions might well suffice.

5 Although Mr. Gillespie noted the January closing in his correspondence and clearly considered it to be the date at which the expense would be incurred, the Insurer never noted that it considered the date of offer and acceptance as the relevant trigger date, until of course it raised the technical defence in the following year.

6 It is significant that in a note dated February 24, 2004 dealing with the refusal to pay for an assessment under s. 24 by reason of a failure to obtain prior approval, the adjuster's notes spell out the procedural defence as well as the substantive issues leading to refusal.

7 *Hughes v. Metropolitan Railway* (1877), L.R. 2 App. Cas. 439 (U.K. H.L.)

8 *Charles Rickards Ltd v. Oppenheim*, [1950] 1 K.B. 616

9 *Smith v. Co-operators General Insurance Co.*, [2002] 2 S.C.R. 129 (S.C.C.)

10 Given Laskin J.A.'s comments concerning the interest provisions in *Attavar v. Allstate Insurance Co. of Canada* (2003), 63 O.R. (3d) 199 (Ont. C.A.), it is questionable whether a special award can even be considered punitive in nature either. The use of the term "special award" rather than some variance of "punitive" suggests that, like interest, it is aimed at compensating an insured for unusual delay rather than punishing an insurer.

11 *Arland v. Taylor*, [1955] O.R. 131 (Ont. C.A.)

12 *Statutory Powers Procedure Act* (*SPPA*) 1.(1) "statutory power of decision" means a power or right, conferred by or under a statute, to make a decision deciding or prescribing, (a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or (b) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether the person is legally entitled thereto or not; ("compétence légale de décision")

13 *Whiten v. Pilot Insurance Co.* (1999), 42 O.R. (3d) 641 (Ont. C.A.). Laskin J.A's dissent was in turn relied upon by the Supreme Court in overturning the decision of the Court of Appeal, and reinstating the significant award of punitive damages.

14 *Kusalic c. Zurich, cie d'assurances*, [1995] A.Q. No. 1425 (C.S. Que.), "The contract of insurance is one of 'uberrima fides' of utmost good faith. The Insurer must act in good faith and take into consideration the interests of its insured as well as its own."

15 *Bullock v. Trafalgar Insurance Co. of Canada*, [1996] O.J. No. 2566 (Ont. Gen. Div.)

16 *Bullock* (supra)

17 *Bulloch* (*supra*)

18 *Liberty Mutual Insurance Co. v. Persofsky* [2001 CarswellOnt 6149 (F.S.C.O. App.)], (FSCO P00-00041, January 31, 2003)

19 The Insurer provided no evidence of its good faith practices in dealing with this claim. More specifically the adjuster's notes reveal no interest in seeking outside clarification of the insurer's legal position nor its obligations during the adjustment period.