

COURT FILE NO.: 55748

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: CALEIGH TURNBULL, by her Litigation Guardian, Deborah Turnbull
(Plaintiff) – and – THE PERSONAL INSURANCE COMPANY and DINA
VAGA (Defendants)

BEFORE: JUSTICE P. B. HOCKIN

COUNSEL: Brian Murphy, for the Plaintiff

Ryan M. Naimark, for the Defendants

HEARD: April 22, 2009

ENDORSEMENT

[1] This is the plaintiff's motion for leave to appeal the February 2, 2009 order of Jenkins J. refusing the plaintiff's request to amend the Statement of Claim to plead particulars of bad faith which relate to the defendant insurer's setting of its reserve for the ongoing accident benefit claim of the infant plaintiff.

[2] The record before the motion judge was that the child meets the criteria for the payment of benefits under the Catastrophic Impairment coverage prescribed or provided for under Regulation 403/96 of the *Insurance Act*. The coverage provides, *inter alia*, for the payment of expenses for "attendant care" to a maximum of \$6,000.00 per month. The record included evidence that the defendant pays approximately \$4,500 per month and that the dispute turns on whether the parents should be paid for listening for the child through the night. This is what the motion judge had, in the way of evidence, on the motion.

[3] The facts fall four square, in my view, within the ratio of Blair J. in *Osborne v. Non-Marine Underwriters*, [2003] O.J. No. 5500, and Jenkins J. was guided by his reasons and the result.

[4] Counsel for the plaintiff, in his factum and in argument pointed to a number of decisions from arbitrators acting under the SABS legislation and the Financial Services Commission of Ontario.

[5] Under Rule 62.02(4)(a), for leave, I must be satisfied that there is a conflicting decision "by another judge or court in Ontario....on the matter, involved in the appeal." Decisions from

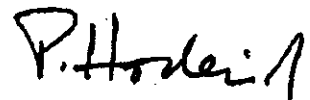
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the 'FSCO' do not qualify. If there is a conflicting case here, it is the decision of Brockenshire J. in *Samolia v. Prudential*, 50 O.R. (3d) 65. I do not consider this case as applicable. It is a production case. The particulars of the reserve were ordered on the issue of damages but not liability. It was considered by Brockenshire J. to have some potential as evidence. There is no declaration or statement by Justice Brockenshire which overcomes or is in conflict with the simple but powerful statements of Blair J. in *Osborne, supra* at paras. 14, 20, 21, 22, 23 and 24 of his reasons.

[6] For these reasons, the plaintiff fails on the R.62.02(4)(a) – conflicting decision test.

[7] Likewise, I am not satisfied that there is any reason to doubt the correctness of the order of Jenkins, J. On the record before him, there was no semblance of relevance or, to borrow from the criminal law, any 'air of reality' to any connection between the insurer's reserves and this dispute. In the context of this action, any amendment to include a reference to reserves may "prejudice or delay the fair trial" of this action.

[8] For these reasons, this motion is dismissed. Failing agreement on costs, submissions, short, by mail c/o Office of the trial coordinator at London, first from the defendant and then the plaintiff – defence by June 12, 2009 – plaintiff by June 26, 2009.



Justice P. B. Hockin

DATE: May 11, 2009

(A)

11
 May 11, 2009 This is the plaintiff's
 motion for leave to appeal the
 February 2, 2009 order of Justice J.
 refusing the plaintiff's request to
 amend the Statement of Claim to
 plead particulars of bad faith which
 relate to the dependent
 insurer's setting of its
 resume for the ongoing
 dependent benefit claim of the infant
 plaintiff. The records before the motion
 judge was that the child meets the
 criteria for the payment of benefits
 under the Catastrophic Impairment
 coverage prescribed or provided
 for under Regulation 403/96 of the
 Insurance Act. The coverage
 provides, inter alia, for the
 payment of expenses for "attendant
 care" to a maximum of \$6000
 per month. The record included
 evidence that the dependent
 pays approximately \$4500 per

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 MOTION \$127.00
 ***TOTAL \$127.00
 VISA \$127.00
 CHANGE \$0.00

month and sent the day's note
turns on whether the parents should
be paid for listening for the child
through the night. This is
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in the way of evidence, on the
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within the ratio of Blair
in Osborne v. Nor - Marine
Underwriters [2003] 2 S.C.R. 590.
and Justice J. was guided by
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CALEIGH TURNBULL, by her Litigation Guardian, Deborah Turnbull -and- THE PERSONAL INSURANCE COMPANY et al
Plaintiff Defendants
Court File No. 55748

ONTARIO
SUPERIOR COURT OF JUSTICE
PROCEEDING COMMENCED AT LONDON

NOTICE OF MOTION FOR LEAVE TO
APPEAL TO THE DIVISION COURT

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Solicitor's for the Plaintiff

(c) Counsel for the plaintiff, in his factum and in argument pointed to a number of decisions from arbitrators sitting under the FRS legislation and the Financial Services Commission of Ontario. Under Rule 62.02(4)(a), for leave, I must be satisfied that there is a conflicting decision "by another judge or court in Ontario... in the matter involved in the appeal. Decisions from the 'FSCO' do not qualify. If there is a case here, it is the decision of Brooker J. in Jamolie v. Pucentia, 50 OR (3d) 65. I do not consider this case as applicable. It is a production case. The particulars of the reserve were raised on the issue of damages not liability. It was considered by Brooker J. to have some potential

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For these reasons the plaintiff
 fails on the R.O.L. or (4) (a) - conflicting
 decision test.

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 connection between the insurer's reserves
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 this action, any amendment to include
 a reference to reserves may
 "prejudice or delay the fair trial" of
 this action.

(E) For these reasons, this motion is dismissed. Filing agreement on costs, submissions, short, by mail c/o office of the trial coordinator at London, first from the defendant and then the plaintiff - defense by June 12, 2009 - Plaintiff by June 26, 2009.

P. Hodgins.