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

- 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.
- 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.
- 41 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.
- 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

-2 -

Judges Chambers

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.
- 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.

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Justice P. B. Hockin

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Defendants

Court File No.

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# ONTÁRIO SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT LONDON

## NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE DIVISION COURT

### **LEGATE & ASSOCIATES**

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Solicitors for the Plaintiff

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