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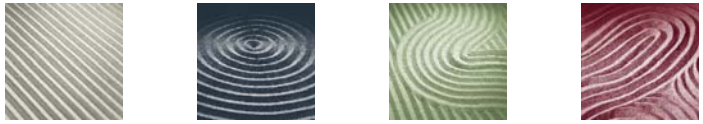
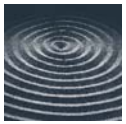
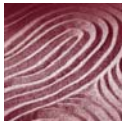
Current Issues in Accident Benefits, Loss Transfer and Priority Disputes



By
•Helen D.K. Friedman
•Nick de Koning

Current Issues in Accident Benefits



1. Guideline imposed benefit limits – PAF your gone.
2. DACetty DAC don’t come back – unless you are CAT.
3. Reading down exclusions.

Guideline Imposed Benefit Limits:

- Impairments falling within the Guidelines
  - WAD I
  - WAD II
- Guidelines for WAD I and WAD II
  - #01/03 as amended by #06/03 (WAD I)
  - #02/03 as amended by #07/03 (WAD II)
  - Guidelines will be subject to review and revision Recall – Guidelines are for treatment purposes derived from Quebec Taskforce (1995) which are treatment focussed.

Guideline Imposed Benefit Limits:

- If impairment falls within PAF Guideline
  - No IRB after 12 (WAD I) or 16 weeks (WAD II), s. 5(2) (d), (e).
  - No Attendant Care benefits, s. 16.1.
  - No med/rehab other than 37.1 and 37.2
- No reported FSCO or Court decisions on interpretation of these limits.

Guideline Imposed Benefit Limits:

- Out of PAF

a) s. 3 (b) Superintendent's Guideline:

"An insured person's impairment does not come within this guideline if: …b) despite being assessed within 28(21) days of the injury…there are specific pre-existing occupational, functional or medical circumstances of the insured person that:

i. Significantly distinguish the insured person's needs from the needs of the other persons with similar impairments that come within this guideline; and,

ii. Constitute compelling reasons why other proposed goods or services are preferable to those provided for under this guideline."

Insurer can require a DAC to determine if impairments fall within PAF.

Guideline Imposed Benefit Limits:

- Out of PAF

b) Guideline states:

> "....nothing prevents an insured person, while receiving goods and services under this Guideline, from submitting a Treatment Plan applicable to a period other than the period covered by this Guideline….
>
> May still get access to med/rehab benefits outside PAF if they fall within the exceptions.

Guideline Imposed Benefit Limits:

- Challenges:
  - Initially WAD II ⟶ chronic pain, is it still subject to Guideline?
  - Does not return to work in 12 or 16 weeks.
  - Concurrent symptoms requiring separate treatment.
  - Psychological treatment

Guideline Imposed Benefit Limits:

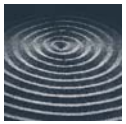
- Guideline states:

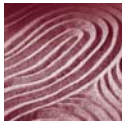
  "An insured person who has sustained an impairment covered by this Guideline may exhibit other common symptoms including: shoulder pain; referred arm pain (not from radiculopathy); dizziness; tinnitus; headache; difficulties with hearing and memory acuity; dysphagia; and temporomandibular joint pain. These additional symptoms would not exclude an impairment from this Guideline unless they require separate treatment from that provided under this Guideline.

Guideline Imposed Benefit Limits:

- Constitutional Challenges: Martin v. Nova Scotia (Workers' Compensation Board) 231 D.L.R. (4th) 385, S.C.C.
  - Chronic pain treatment/benefit guidelines found to discriminate on grounds of physical impairment.
  - Does not provide for individual assessments. Paints all individuals with the same brush.

Guideline Imposed Benefit Limits:



- Impact of Desbiens v. Mordini:
  - Limits are to be expanded
  - Exclusions read down.
  - Remedial legislation
  - Interpreted in favour of insured – “innocent victims in need of benefits.”

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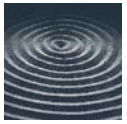
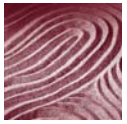
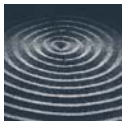
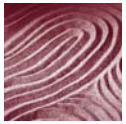
DACetty DAC



DACetty DAC



- <u>Dacetty DAC don’t come back</u>
  - Unless you are CAT.

DACetty DAC

- Multiple CAT DACs
  - No specific time limit under Schedule s. 40 for CAT DAC Applications.
  - No prohibition on multiple applications for separate impairments.

DACetty DAC

- Assessments based on categories
  - (a) – (e) (i) are usually brought immediately.
  - (e) (ii) Glasgow outcome scale 6 months post accident.
  - (f) & (g)
    - **Pre Oct. 1/03** – condition stabilized and not likely to improve or 3 years post accident.
    - **Post Oct. 1/03** – unlikely to cease to be a cat impairment or 2 years post accident.

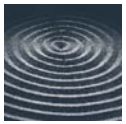
DACetty DAC

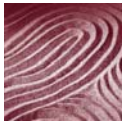
- Assessments based on categories cont'd.
  - If you fail on (a – e (i)) initial assessment, try again 2 or 3 years later.
  - Or if you fail at 2 or 3 years on (f) & (g) try again if significant deterioration or material change or if you now want to add psychological impairments to (f).
    - e.g. accident-related surgery rendering claimant paraplegic 4 years after the accident.
    - gives counsel time to build the file.

DACetty DAC

- S. 40(1) states:
  - "An insured person who sustains an impairment as a result of an accident may apply to the insurer for a determination of whether the impairment is a catastrophic impairment." If you fail on (a – e (i)) initial assessment, try again 2 or 3 years later.
  - Separate applications for each impairment.

DACetty DAC



- Baptiste v. Pilot (Jan. 25, 2005 FSCO A04-B000446)
  - "there is no provision in the SABS for an insurer or an insured to require more than one CAT DAC."
  - "there is nothing in the Insurance Act that expands the obligation of the insured person to attend a CAT DAC."
  - "the FSCO Designated Assessment Centre Information Sheet contains the following statement: "if new information emerges and the parties agree that the review of the new material may change the DAC's opinion, then the new DAC Assessment should be arranged. Neither party should request an updated report from the DAC."
  - "the information sheet recognizes that where the parties consent they have some latitude to tailor the Dispute Resolution Process…it does not have the effect of giving an Arbitrator jurisdiction that is not found in the SABS or the Insurance Act."

DACetty DAC

- Reassessment based on: Desbiens v. Mordini 2004 CAN LII 41166 (Ont. S.C.)
  - Appeal abandoned.
  - Catastrophic Impairment is inclusive rather than exclusive.

DACetty DAC

- Clinician has discretion/clinical judgement to increase or decrease whole person impairment to account for pre-accident condition.
  - Loss of one eye - total loss of vision in both eyes.
  - Vulnerable insureds, magnifies effect of MVA related impairments.
  - How else does a paraplegic (before the accident) without a head injury after the accident be determined catastrophic?

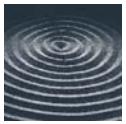
DACetty DAC

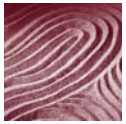
- Can ADD physical and psychological impairments to arrive at total percentage of whole person impairment for (f).
  - Prior to this it was either/or unless there was a brain injury in which case would go to nervous system impairment

DACetty DAC

- Commissioners Guideline – 4
  - Once a DAC is completed addendum can be provided clarifying recommendations or correcting errors.
  - If there is new material which may alter the DAC's opinion and both parties agree, a new DAC should be arranged.

DACetty DAC



- Two or more kicks at the CAT.

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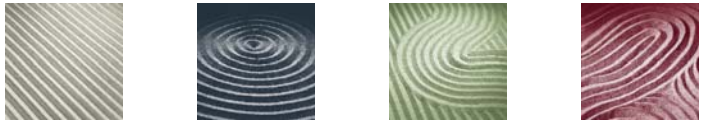
Reading Down Exclusions



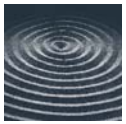
Reading Down Exclusions

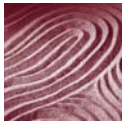
- Section 30(1)(b) of the SABS says:

  "the insurer is not required to pay an income replacement benefit, a non-earner benefit or a benefit under section 20, 21 or 22 in respect of a person who was the driver of an automobile at the time of the accident,

  b) If the driver was driving the automobile without a valid driver's licence;"

Reading Down Exclusions



- OAP 1 Policy, section 4.4 says:

"Limitations on Your Coverage"

- "You or other insured persons are not entitled to Income Replacement Benefits, Non-Earner Compensation for Other Expenses if you or they:
  - Were driving an automobile while not authorized by law to drive."

Reading Down Exclusions

- Query: Why the different language?
  - "without a valid driver's license" (SABS)
  - "not authorized by law to drive" (OAP 1)
  - Language of OAP 1 same as old Bill 68 OMPP Schedule and Bill 164 Schedule.
  - Any meaningful distinction?
  - If different meaning, then SABS take priority. (Prasad v. GAN [1997] O.J. No. 1907 (Court of Appeal)).

Reading Down Exclusions

- Question: What constitutes “driving without a valid driver’s license?”
  - Driving in violation of G1 conditions?
  - Driving in violation of prescription eye wear condition?
  - Driving in violation of hand controls condition?
  - No definition of “valid driver's license” in SABs.
  - Reg. 340/94 under Highway Traffic Act says “valid driver’s license”= “not suspended, cancelled or expired.”

Reading Down Exclusions

- Until recently, FSCO arbitral jurisprudence indicated that operating a vehicle in breach of novice license conditions amounted to “driving without a valid driver’s license.”
- By implication, the same reasoning would apply to breach of conditions relating to eyewear and hand controls.

Reading Down Exclusions

- Sesay v. Certas Direct Ins. Company [2003] O.F.S.I.D No. 19.
  - Breach of G1 license conditions by operating vehicle on 400 Series Hwy.
  - Exclusion found to apply
  - A restricted driver's license is valid only under limited conditions.
  - Operating a vehicle in breach of those conditions = driving "without a valid driver's license."
  - Emphasis on safety and public policy.

Reading Down Exclusions

- Sesay followed in: King v. Dominion of Canada [2003] O.F.S.C.I.D. No. 126
  - Claimant's operation of an 11000 kg Freightliner transport truck while only in possession of a G2 license.
  - Arbitrator Kominar found exclusion applied.
  - King argued for adoption of HTA O. Reg. 340/94 definition of a "valid driver's license" but this argument was rejected.
  - Emphasis on public policy – drivers should be encouraged to act in accord with specific terms of their licenses.
  - Discourage unauthorized and possibly dangerous actions.

Reading Down Exclusions

- Sesay followed in: Manzanares v. Pembridge [2003] OFSCJP No. 87.
  - Violation of G1 license condition (fully licensed front section passenger).
  - SABS s. 30(1)(b) exclusion applied.
  - Emphasis on driving as a privilege and discouraging novice drivers from violating conditions.
  - Arbitrator rejects adopting HTA 340/94 definition of “valid driver’s license” for SABS purposes.

Reading Down Exclusions

- Arbitral decisions in: Sesay, King and Manzanares overruled in Gipson v. Pilot [2005] O.J. No. 239 (Superior Court of Justice).
  - 19 year old Claimant severely injured in single vehicle accident (no plausible tort defendant).
  - Technical breach of G2 “zero-tolerance” condition on alcohol consumption (but not impaired as “over80”).
  - Justice Belch held exclusion did not apply.
  - Application of HTA O. Reg. 340/94 to SABS.
  - Rejection of notion that applying exclusion would recognize and protect Ontario system of graduated licenses.
  - Emphasis on strict construction of exclusions and resolution of any ambiguity in favour of insured.
  - Not being appealed.

Reading Down Exclusions

- Appeal decision in: Manzanares (April 11, 2005).
  - Delegate Draper followed Gipson and moved away from Sesay, King and arbitral decision in Manzanares.
  - Public safety is a legitimate consideration but is not necessary to enforce all licensing rules through SABS.
  - Delegate Draper suggests s. 30 (1)(b) interpretation in King and Sesay would lead to unnecessarily harsh results.
  - Consider application of exclusion to merely technical breaches of license conditions.

Reading Down Exclusions

- Lesson:
  - Manzanares and Gipson must be presumed correct for time being.
    - License must be cancelled, suspended or expired (or non-existent) prior to applying s. 30(1)(b) exclusion.

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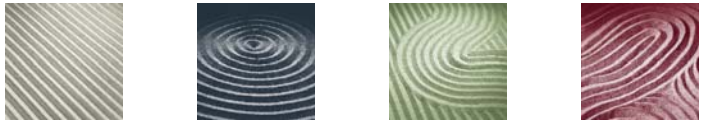
Current Issues in Loss Transfer



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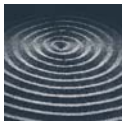
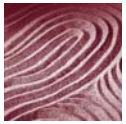




- Current Issues in Loss Transfer
  1. Rolling Limitation Periods
     - Keep right on rolling along
     - A rolling claim gathers no moss
  2. Recovery of Expenses
     - Med DACs
     - I.E.s

Current Issues in Loss Transfer

- State Farm v. Dominion (Superior Court of Justice, Court File:04-CV-266015CM2). May 4, 1998
  - 1992 accident
  - Arbitration commenced December 20, 2000.
  - If hard and fast 6 year limitation period – expired May 4, 1998.
  - 6 year limitation period derives from old Limitations Act, 6 years from when the cause of action arose.

Current Issues in Loss Transfer

- At Arbitration, Guy Jones relying on: Kirkham v. State Farm [1998] O.J. 6459 and York Fire v. Coop [1999] O.J. 4172 finds in favour of a hard and fast 6 year limitation period.
  - 6 years from commencement of payment by first party insurer.

Current Issues in Loss Transfer

- Upheld in Superior Court by Madame Justice Backhouse, without substantial reasons.
- Focus on finality of fault apportionment rather than nature of indemnity
- Currently under appeal.

Current Issues in Loss Transfer

- New Limitations Act applies to accidents after January 1, 2004. Applying Arbitrator Jones' reasoning a hard and fast 2 year limitation period would apply.

Current Issues in Loss Transfer

- In absence of a rolling limitation period first party insurer would automatically have to commence loss transfer arbitrations two years after making the first benefit payment.
  - Whether or not its investigation is complete.
  - Whether or not there was actually a dispute.
  - Whether or not they had been reimbursed up to that point.
  - Whether or not the claim was ongoing.

Current Issues in Loss Transfer

- Arguments for a rolling limitation period.
  - Claim is one of indemnity
    - Indemnity does not arise until loss has been quantified.
    - Loss is quantified once each payment is made.

Current Issues in Loss Transfer

- Kirkham dealt with interpretation of 281(5) of Insurance Act.
  - Specifically bars an insured's claims 2 years after insurer's refusal to pay a benefit.
  - No similar language in s. 275.

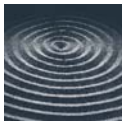
Current Issues in Loss Transfer

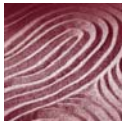
- Neither Jones nor Backhouse had Arbitrator Holland's decision in York Fire and misinterpreted Mr. Justice Somer's appeal decision.
  - Holland states at Arbitration:
    - Payment of the benefit starts the operation of the limitation period "for any such benefit paid." Each payment triggers a limitation period for that payment.

Current Issues in Loss Transfer

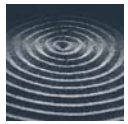
- Arbitrator Holland finds in favour of a rolling limitation period.
  - All claims prior to 6 years before the Arbitration were barred, but those within 6 years prior to the Arbitration were allowed.
  - York Fire in context of initial Arbitration decision supports a rolling limitation period.

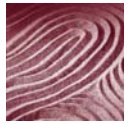
A Rolling Claim Gathers no Moss

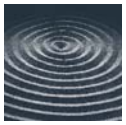


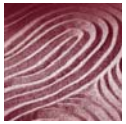
- Recovery of Expenses
  - Med DACs
  - I.E.s

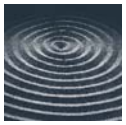


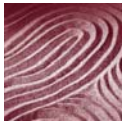
- Jevco v. Prudential (1995) O.R. (3rd) 779. OMPP case
  - Loss control efforts never intended to be indemnified.
  - Are not payment of benefits.
  - Are efforts to limit payment of benefits.

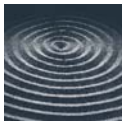


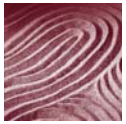
- Since then Bulletin 11/94
  - Provides for loss transfer for “all assessments” under the Schedule.
    - As a result of New Schedule
      - DAC system
    - What is “an assessment”?

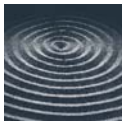


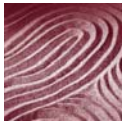
- Bills 164, 59, 198
  - All provide under s. 24 equivalent that Insurer shall pay cost of all DACs.
  - Section 24 expenses are benefits and can be loss transferred.
  - Why not DACs?



- Allstate v. Axa (1999), Robinson
  - Allows for loss transfer of IEs, dual purpose.
  - Intention of legislature that all payments made by 1st party insurer should be reimbursed except where it involves direct overhead, office overhead, such items as surveillance.



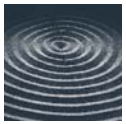
- State Farm v. ING (Brown Feb. 16, 2005)
  - IEs and Med DACS not recoverable.
  - These are loss control and not benefits.
  - Bulletin 11/94 not binding so as to change law
  - Jevco binding.
  - No appeal ($6,000.00 in issue).

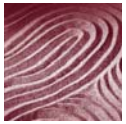
Current Issues in Priority Disputes

Current Issues in Priority Disputes

- Current Issue in Priority Disputes: The Duty to Investigate Promptly and Ask all the Right Questions, or
- “Don’t Believe Everything You Are Told”

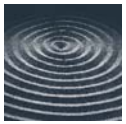
Current Issues in Priority Disputes

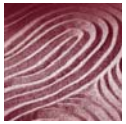





- Background:
  - Section 268(2) of *The Insurance Act* sets out the priority scheme for accident benefits.
  - However, section 2 of Ont. Reg. 283/95 (“Disputes between Insurers”) requires the first insurer who received a completed Application for Benefits to pay pending resolution of any dispute with another insurer.
  - 90 day window (from receipt of completed application) to give written notice to another insurer that it has priority.

Current Issues in Priority Disputes



- O. Reg. 283/95 says:

1. All disputes as to which insurer is required to pay benefits under section 268 of the Act shall be settled in accordance with this Regulation. O. Reg. 283/95, s. 1.

2. The first insurer that receives a completed application for benefits is responsible for paying benefits to an insured person pending the resolution of any dispute as to which insurer is required to pay benefits under section 268 of the Act. O. Reg. 283/95, s. 2.

3. (1) No insurer may dispute its obligation to pay benefits under section 268 of the Act unless it gives written notice within 90 days of receipt of a completed application for benefits to every insurer who it claims is required to pay under that section. O. Reg. 283/95, s. 3 (1).

(2) An insurer may give notice after the 90-day period if,

a) 90 days was not a sufficient period of time to make a determination that another insurer or insurers is liable under section 268 of the Act; and

b) the insurer made the reasonable investigations necessary to determine if another insurer was liable within the 90-day period. O. Reg. 283/95, s. 3 (2).

(3) The issue of whether an insurer who has not given notice within 90 days has complied with subsection (2) shall be resolved in an arbitration under section 7. O. Reg. 283/95, s. 3 (3).

Current Issues in Priority Disputes

- Note the saving provision in section 3(2), allowing extension of the 90 day notice period if:
    1. 90 days insufficient to determine another insurer his priority under s. 768 of the *Act*; and
    2. Insurer made reasonable investigations necessary to determine if another insurer liable within 90 days.
- An insurer must satisfy BOTH requirements to extend the 90 day notice period!

Current Issues in Priority Disputes

- The insurer that first receives the completed Application for Accident Benefits need not determine with certainty that another insurer is liable before putting that other insurer on notice.
- If the first insurer has determined another insurer “may” have priority, it must give notice.
- Axa v. Cooperators (May 1, 2000) Private arbitration decision of Arbitrator Rudolph.

Current Issues in Priority Disputes

- The insurer is not held to a standard of perfection, but is held to a high standard and is expected to do a thorough investigation.
- Federated Insurance of Canada v. CGU (Arbitrator Malach):
  - 90 day notice period extended due to Failure of Claimant/Claimant's solicitor to give information related to priority issue (identity of Claimant's separated spouse) and respond to five letters from adjuster.
  - Held that the investigation done was reasonable even though no AutoPlus, credit searches, or writ searches done.
  - **Lesson**: Paper your file with correspondence and notes of phone calls.

Current Issues in Priority Disputes

- CGU v. Zurich (decision of Arbitrator Jones):
  - Insurer made some dependency inquiries shortly after receiving Application and met with Claimant's stepfather to discuss dependency issue
  - However, Insurer aware of stepfather's vehicle, but did not make any inquiry or effort to ascertain insurer.
  - Arbitrator found that additional info would have been easy to obtain (Claimant's solicitor cooperative, as distinct from Federated v. CGU).
  - Arbitrator held adequate inquiries were not made until after 90 day window, and insurer not entitled to extended notice period.

Current Issues in Priority Disputes

- Most recent Superior Court decision on priorities and 90 day window: (Primmum Insurance Co. v. Aviva Ins. Co. of Canada [2005] O.J. No. 1477
  - April 7, 2005, decision.
  - Dismissal of appeal of decision of Arbitrator Parmega.
  - Primmum failed to serve Notice within 90 days and arbitrator ruled Primmum failed to bring itself within exceptions in s. 3(2).

Current Issues in Priority Disputes

- Facts in Primmum v. Aviva:
  - 17 year old Claimant, catastrophically injured in September 11, 1998, MVA.
  - Passenger in stolen vehicle, insured by Aviva.
  - Claimant living with her mother, Ms. M. and stepfather, Mr. w.
  - Mr. W. insured by Primmum.
  - October 19, 1998 – Primmum advised of AB claim.
  - October 22, 1998. Primmum retains independent dispute familiar with priority scheme.

Current Issues in Priority Disputes

- Facts Cont'd.
  - October 28, 1998. Primmum adjuster wrote to Claimant's counsel advising of priority issue.
  - November 4, 1998. Primmum adjuster met with Claimant and her counsel, Ms. M., and Mr. W.
  - Mr. W. and Ms. M. advise Primmum adjusters are on welfare, Claimant lived with them, and Claimant financially dependent on them for several years.
  - Adjuster was advised that Claimant had a part-time job before MVA but does not pursue any questions on Claimant's source of income.
  - Adjuster helps Claimant fill out Application, leaving "welfare" question blank.

Current Issues in Priority Disputes

- Facts cont'd.
  - Adjuster did not ask if Claimant, personally, received welfare.
  - Jan 14, 1999. Primmum advises Claimant they accept she is a dependant of M. and W. and Primmum is to pay benefits.
  - Many months later, Primmum reviews medical reports indicating that Claimant was living away from home with her boyfriend at the time of MVA and collecting welfare.
  - September 8, 1999. Primmum puts Aviva on Notice. (If Claimant not dependant on M. and W., then Aviva has priority as insurer of the vehicle in which the Claimant was an occupant).

Current Issues in Priority Disputes

- Primmum v. Aviva: Arbitrator's Decision
  - Only issue was whether Primmum could fit within s. 3(2) to get over 90 day hurdle.
  - Primmum adequately investigated M. and W. common-law relationship and Claimant enrolment in high school.
  - Primmum failed to investigate Claimant's hours of work, rate of pay, and other sources of income.
  - No attempt made to determine M. and W.’s income or contribution by Claimant to household.

Current Issues in Priority Disputes

- Result at Arbitration:
  - Primmum had relied too readily on information from M. and W., Claimant's mother and stepfather.
  - Primmum should have done more to investigate/confirm information related to dependency.
  - Primmum barred by section 3(1) from trying to transfer responsibility to Aviva.

Current Issues in Priority Disputes

- Appeal Decision of Justice Ducharme in Primmum v. Aviva.
  - Primmum argued that 90 day period insufficient due to inaccurate information received from Claimant's family.
  - Disagreement by Primmum and Aviva over whether misrepresentation intentional, but agreement that Claimant's family did misrepresent facts.

Current Issues in Priority Disputes

- Aviva's argument on appeal:
  - Possibility of incorrect information is the rationale for 90 day window, in any event.
  - The accurate information was available to Primmum when it did its investigation, if only it had asked the right questions.

Current Issues in Priority Disputes

- Justice Ducharme's Decision:
  - Wording of section 3(2)(h) suggests reality that insurers must often verify information given by insured or insured's family.
  - Not important if misrepresentation by insured intentional or unintentional.
  - Such a misrepresentation may mean that 90 days is inadequate and allow insurers to extend 90 day notice period.

Current Issues in Priority Disputes

- Justice Ducharme's Decision:
  - It is appropriate to take the accuracy of Claimant information into consideration in assessing sufficiency of time taken to notify priority insurer.
  - BUT, in this case, Primmum's adjuster's efforts fell far short of the mark.
  - Insurer held to standard of reasonableness, not perfection.

Current Issues in Priority Disputes

- Justice Ducharme’s Decision:
  - Primmum’s failure to obtain all (or any) information about Claimant's employment, and source of income, and place of residents: unreasonable.
  - Reliance on Claimant's family members without actually verifying with Claimant: unreasonable.
  - Primmum told by counsel that Claimant and family “unsophisticated” and therefore an enhanced duty to seek out all information.
  - Result: Arbitrator’s decision upheld as coming to right conclusion.

Current Issues in Priority Disputes

- Lessons:
  - Verify all info given by family members with the Claimant, and elsewhere if possible.
  - If you must assist with preparation of Application for Accident Benefits (good faith duty), take great care to fill it out completely.
  - Enhanced duty to obtain all relevant information when insurer discovers Claimant “unsophisticated.”
  - Non-disclosure/misrepresentation by Claimant will not excuse insurer if it is feasible to verify that information in a timely way.

Current Issues in Priority Disputes

- Lessons:
  - Red Flags:
    - Claimants in their teens or early 20's (dependency questions, especially relating to place of residence).
    - Rental car.
    - Public Transit.
    - Employees and company cars.
    - Pedestrians.
    - Pursue all sources/amounts of income to establish/refute dependency.
    - Missing info on Application for Accident Benefits.