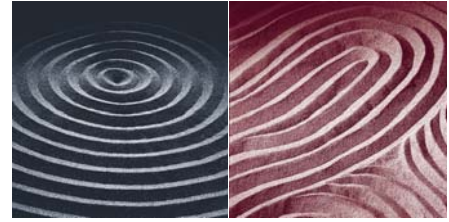


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## **“Slipping Between the Crack” – Accident Benefits for Drug Dependency**

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## “Slipping Between the Crack” – Accident Benefits for Drug Dependency

By Nicholaus A. de Koning

Two 2006 decisions, one from the Superior Court of Justice and the other at the appeal level of the Financial Services Commission of Ontario, have confirmed that a drug dependency may constitute an “impairment” compensable under the *Statutory Accident Benefit Schedule – Accidents on or After November 1, 1996* (the “SABS”).

In *McIntyre v. TTC Insurance Co.*,<sup>1</sup> a decision of Justice Somers, the plaintiff was a middle-aged woman who had been injured in an August 2001 accident, while travelling as passenger on a TTC bus. TTC Insurance Co. was the insurer liable to pay accident benefits under the SABS. The plaintiff’s injuries included pain in her hips, neck, back, and legs, and headaches.

The plaintiff had a troubled pre-accident history, including sexual and physical abuse and being homeless from age 16. She had criminal convictions related to drugs and prostitution. However, prior to the accident, the plaintiff had become involved with the Salvation Army, first as volunteer, then as a paid employee. She was returning home from work when involved in the accident. The evidence was she had not abused drugs for some years.

Following the accident, the plaintiff became depressed and lapsed into drug use. She attempted a return to work. However, her drug use became significant enough that she enrolled in a drug rehab program from November 2001 until March 2003, during which time she was unable to work. For this period, the plaintiff claimed weekly Income Replacement Benefits (“IRBs”) under the SABS. By the time of the November 2005 trial, the plaintiff had overcome her addiction and returned to full time employment.

The defence, unsuccessfully, attempted to rely on the definition of accident in section 2 of the SABS (“an incident in which the use or operation of an automobile directly causes an impairment”).

In finding that the plaintiff was entitled to IRBs for the period in question, Justice Somers emphasized the distinction between section 2 (defining an “accident”) and section 4 (which provides that an IRB would be payable where the insured person “sustains an impairment as a result of an accident”). It was obvious to Justice Somers that an “accident” occurred, involving the collision with the TTC bus. The issue was whether the drug dependency was a “result” of the accident. The medical evidence satisfied Justice Somers that this was the case. Justice Somers’ decision was consistent with previous arbitral decisions which found that the issue of whether an incident could constitute an “accident” is a different issue than that of whether the downstream consequences could be the “result” of the accident.

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<sup>1</sup> *McIntyre v. TTC Insurance Co. v. TTC Insurance Co.* [2006] O.J. No. 201 (January 20, 2006) (Quicklaw)

A similar conclusion was reached in *McMichael v. Belair*,<sup>2</sup> a decision of Delegate Makepeace of FSCO. The main issue was whether the claimant's post-accident crack cocaine addiction was a legitimate basis for a finding of catastrophic impairment. Delegate Makepeace cited Justice Somers' decision in *McIntyre* in dismissing the appeal, and affirming that post-accident drug dependency could form the basis of a catastrophic impairment determination.<sup>3</sup> Again, the issue was not whether the claimant was involved in an "accident" within the meaning of section 2, but rather whether the crack cocaine addiction was a "catastrophic impairment caused by an accident" as required by section 2(1.1) of the SABS.

Importantly, in both cases, the medical evidence led the trier of fact to a conclusion that the post-accident drug dependency was causally connected to the accident in question. Both Mr. McMichael and Ms. McIntyre were able to overcome the negative impact of evidence of pre-accident drug use. In Ms. McIntyre's case, the evidence was she had not used drugs for several years pre-accident. In Mr. McMichael's case, he had a pre-accident history of occasional cocaine use, but not crack cocaine use.

Insurers will be well advised to take these decisions into consideration when adjusting accident benefits claims. In particular, insurers should consider obtaining appropriate independent medical assessments to address these issues and obtaining as much relevant pre-accident medical history as possible, including statements from friends and family, in order to test the purported connection between any drug dependency and the subject accident.

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<sup>2</sup> *McMichael v. Belair Insurance Co.* [2006] O.F.S.C.D. No. 36 (March 14, 2006), affirming [2005] O.F.S.C.D. No. 34 (March 2, 2005) (Quicklaw).

<sup>3</sup>