

INSURANCE LAW BULLETIN

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By Alexander Neaves

The CAT Limitation Period: Round and Round We Go (A Discussion of *Machaj v. RBC*)

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At both levels of FSCO and at the Divisional Court, it was held in *Dong Do v. Guarantee*¹ that, because catastrophic impairment (“CAT”) is not a benefit per se, the two-year limitation period in section 281.1(1) of the *Insurance Act* does not apply. That is to say, because CAT is not a *benefit*, it cannot be captured by the triggering words of the limitation period in that section—the insurer’s “refusal to pay the *benefit* claimed”.

A more recent decision from the Superior Court of Justice has now entered the discussion: *Machaj v. RBC*². The facts of *Machaj* were for all practical purposes identical to *Do* with one all-important exception, according to Justice Whitten. In *Do*, Guarantee’s letter denying the insured’s CAT application merely communicated to the insured the fact that his CAT application was being denied. There was no reference to benefits or a refusal to pay benefits. RBC, however, in its denial letter stated the following:

“That the assessors have formed the consensus opinion that you have not sustained a catastrophic impairment and therefore you do not qualify for the increased benefits.” [emphasis added]

This, Justice Whitten held, was “quite different” than the refusal in *Do*. Because of its better choice of language, RBC provided the “mandatory link between a limitation period and a denial of benefits”. The letter thus met the “clear and unequivocal” test, unlike the denial in *Do*. The court therefore granted RBC summary judgment as the insured brought her application for mediation more than two years after RBC’s denial of catastrophic impairment.

It should be noted that *Machaj* is under appeal to the Ontario Court of Appeal. We would expect a decision sometime before the end of 2016.

¹ *Do v. Guarantee Company of North America*, 125 O.R. (3d) 585, 2015 ONSC 1891 (Div. Ct.)

² *Machaj v. RBC General Insurance*, 127 O.R. (3d) 395, 2015 ONSC 4310 (Sup. Ct. Jus.)

Analysis

How the Court of Appeal will see this issue is difficult to predict. The trouble, in our view, with the analysis in *Machaj* is that it essentially sidesteps the difficult question in *Do* of whether the CAT designation is a benefit. Without explicitly saying so, the court essentially treated RBC's denial letter as though it was a blanket denial of all CAT-contingent benefits. It is not clear, however, that requests for any of the CAT-contingent benefits had actually been made. This raises the concern whether a limitation period runs when an application for the particular benefit has not yet been made. In *Do*, Director's Delegate Blackman found it to be "an absurd consequence that the limitation period would begin to run before a benefit was even claimed". However, it is equally absurd that an insured would apply for CAT with no intention of pursuing the higher level of funding potentially available.

Perhaps the answer to this concern is that, by making an application for the CAT designation, one is in essence applying for all reasonable and necessary CAT-contingent benefits. This argument may find favour with the Court of Appeal, particularly in light of the strong stand the Court has taken with respect to limitation periods in decisions such as *Sietzema*,³ *Sagan*⁴ and *Bustamante*⁵.

Best Practice in the Meantime

In the meantime, how should insurers go about denying CAT? Based on *Machaj*, an insurer's letter denying a CAT application should go beyond simply stating that the insurer has determined that the insured has not suffered a catastrophic impairment. At the very least, it should be stated, as in *Machaj*, that, as a result of being found not CAT, the insured is not entitled to any of the enhanced benefits that the CAT designation affords. The insurer should likely go a step further and attach a page outlining the enhanced benefits potentially available.

Until the Court of Appeal either upholds or over-turns *Machaj* (which will necessitate deciding the correctness of *Do*), it serves as a judicial precedent for enforcing a limitation period for a refused CAT application, so long as the denial letter is worded appropriately. A standard precedent for such a letter should be developed and used uniformly.

³ *Sietzema v. Economical Mutual Insurance Company*, 2014 ONCA 111

⁴ *Sagan v. Dominion of Canada General Insurance Company*, 2014 ONCA 720

⁵ *Bustamante v. The Guarantee Company of North America*, 2015 ONCA 530