Complete Inability Test under the SABS

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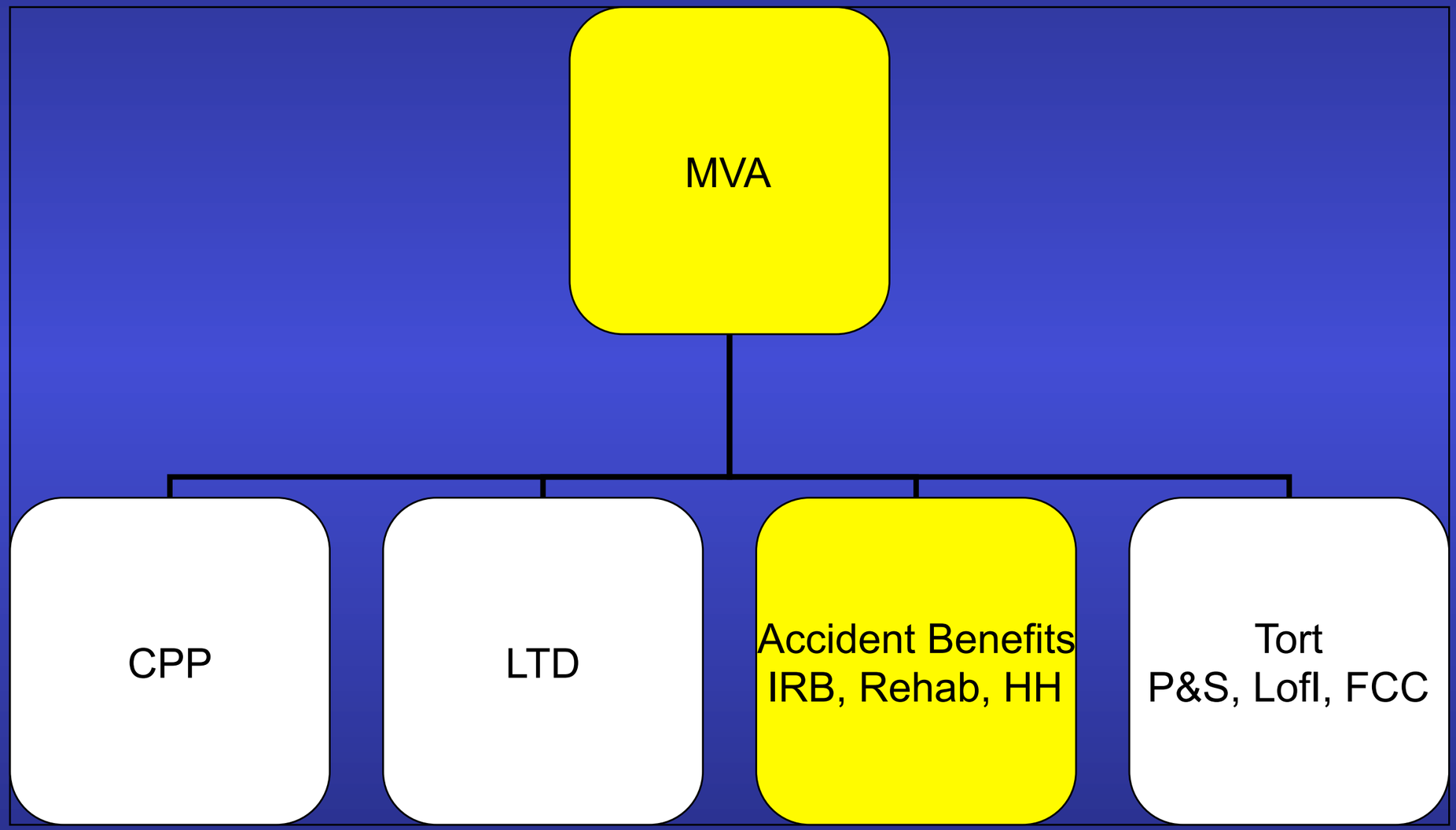
MOTOR VEHICLE ACCIDENT
Scheme



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Chronic Pain and Disability

Martin ats. Nova Scotia (SCC)

- Martin was injured in N.S.
- WCB system limited chronic pain claims
- Challenged under s.15(1) which protects the disabled from discrimination

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Chronic Pain and Disability

Martin (cont)

- SCC stated as follows:
  "there is no authoritative definition of chronic pain. It is, however, generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques. *Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real*"

Chronic Pain and Disability

Shubrook ats. Lombard (FSCO)

- Arbitrator Kominar commented on Martin as follows:

"The Implications of the Supreme Court's decision is that it is not morally acceptable or legally justifiable to stereotype individuals whose disabilities happen to be "less visible" than others. Even though pain is subjective, not directly perceivable by outside observers, or difficult to verify or quantify, it is nonetheless real."

Causation/Crumbling Skull Theory

Munk ats. ING Insurance (OCA)

- Three motor vehicle accidents
- After first accident returned to work
- After second accident suffered pain and numbness in both arms
- Narrowing of the spinal canal
- Surgery not required but future risks with any other injuries

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Causation/Crumbling Skull Theory

Munk ats. ING Insurance (OCA)

- After second accident settled accident benefits for over a million dollars
- Returned to work after second accident
- After third motor vehicle accident numbness in arms and legs
- After two surgeries her condition is worse – incomplete quadriplegic

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Causation/Crumbling Skull Theory

Munk ats. ING Insurance (OCA)

- OCA found as follows:
  - Determined causation using material contribution test applies to accident benefit claims
  - Crumbling skull principle has no application in a first party system

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Post 104 IRB Claims

- "The insurer is not required to pay an income replacement benefit…(b) for any period longer than 104 weeks of disability, unless, as a result of the accident, the insured person is suffering a complete inability to engage in any employment for which he or she is reasonably suited by education, training or experience;"[sec 5(2)(b)]

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Terry and Wawanesa

- FACTS:
- MVA May 22/97
- Applicant in paving business for 13 years prior to MVA(Seasonal)
- Soft tissue injuries: neck, back, and headache pain
- Attempts to return to work as a taxi dispatcher
- Unable to complete the job as a taxi dispatcher

Terry and Wawanesa (Continued)

- Arbritrator Palmer Found:
- The applicant does not have to prove that he is unable to do more than 50% of any suitable employment.
- “Somehow the ability to engage in a reasonably suitable job, considered as a whole, including reasonable hours and productivity must be addressed.”
- Therefore the applicant was entitled to ongoing IRBs.

Horne and CIBC

- Define “Suitable employment”

FACTS

- Mr. Horne 47 years old at time of accident
- Welder for 25 years
- Grade 9 education
- Annual salary 40,000 per year
- After Accident:
  - Returns to work as a car jockey
  - Works overtime
  - Makes 22,000 per year

Horne and CIBC (Continued)

- Arbitrator Sone found that suitable employment must be identified with reference to the following points.
  - •Suitable employment is a question of fact
  - •The work must be suitable to the individual applicant
  - •The work must be realistic considering the applicant background
  - •Suitable employment should be related to the applicant's previous experience
  - •However, employment is not suitable just because the applicant has done a stint in the past

Horne and CIBC (Continued)

- To determine suitable employment one must consider such factors as the nature and status of the work compared with what the applicant did before, including:
  - Hours of work
  - Level of remuneration
  - Applicant's employment experience
  - Length of time spent in different jobs
  - His or Her age
  - His or Her qualifications

Horne and CIBC (Continued)

- The primary focus is on an applicant's functional limitations; however job market considerations are relevant in determining suitable employment.
- Employment will not be considered suitable if the injured person requires further training in order to qualify for the position.

Burtch and Aviva (OCA)

- Pre accident could do physical labour
- Trial Judge found after accident plaintiff could still do light to medium physical work
- Plaintiff and O.T, thought he could probably do long haul truck driving
- Could not afford school/licensing requirements
- Trial Judge found plaintiff disabled because no truck driving license

Burtch and Aviva (OCA)

- OCA reversed the Trial Judge stating: "It is not necessary that the insured person be formally qualified and able to begin work immediately in order for a particular employment to be considered a reasonably suitable alternative. A job for which the insured is not already qualified, may be a suitable alternative if substantial upgrading or retraining is not required."

Non-Earner Benefits

- "The insurer shall pay an insured person who sustains an impairment as a result of an accident a non-earner benefit if the insured person…suffers a complete inability to carry on a normal life as a result of an within 104 weeks after the accident and does not qualify for an income replacement benefit." [sec 12(1)1]

Walker v. Wawanesa

- Stephanie was 17 years old at the time of accident
- Prior to the MVA she was most interested in soccer, socializing and school (in that order)
- Suffered a serious brain injury in the MVA accident
- Following the MVA she attended Seneca College
- With assistance she was capable of living in residence and passing her courses

Walker v. Wawanesa (continued)

- Mr. Justice Brockenshire found that most previous cases compared a "shopping list" of the injured person's pre and post accident activities
- Old decision are wrong
- "[Before the accident] I cannot see her [Stephanie] as listing the pouring of orange juice and making of toast in the morning as something she would regard as the 'activities' in her like."
- "Purposive approach"

Walker v. Wawanesa (Continued)

- Stephanie's pre accident activities were:
  - Soccer, socializing and school
- Mr. Justice Brockenshire found that Stephanie:
  - Could not play soccer
  - Would not socialize
  - Was barely able to complete school with assistance
- Therefore Stephanie was entitled to non-earner benefits

Maria Da Ponte and MVACF

- Before the accident Mrs. Da Ponte was responsible for her own home maintenance
- One month before her accident she was complaining to her rheumatologist that she was having difficulty negotiating stairs because of back, neck and thigh pain
- Suffered a compound comminuted fracture of the right leg in a pedestrian MVA
- On going pain and reduced range of motion in the right ankle
- Only capable of light household cleaning after the accident

Maria Da Ponte and MVACF

- Arbitrator Sandomirsky found:
  - •Activities must be viewed as a whole
  - •Activities should not be broken down into individual tasks
  - •An Applicant who is “merely going through the motions” is not “engaging in” the activity

Maria Da Ponte and MVACF (Continued)

- Arbitrator Sandomirsky found:

"In cases where pain is the primary factor that allegedly prevents the insured from engaging in his or her former activities, the question is not whether the insured can physically do these activities, but whether the degree of pain experienced, either at the time, or subsequently, is such that the individual is practically prevented from engaging in those activities."

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