



Welcome to the Beard Winter Defender - reporting on legal issues related to the insurance industry.

The Beard Winter LLP Insurance Litigation Group acts for numerous insurers, ensuring that their claims are resolved promptly and economically, or proceed to trial quickly when necessary.

- \* **What Every Tort Adjuster Should Know About an Accident Benefits File**
- \* **The Pitfalls of Settling Claims with Self-Represented Claimants**

## WHAT EVERY TORT ADJUSTER SHOULD KNOW ABOUT AN ACCIDENT BENEFITS FILE

James V. Leone

It goes without saying that an early accurate assessment goes a long way towards a favourable resolution in a Tort file. Generally speaking, by the time a Tort Feasor's insurer is put on notice, there has been significant activity with the claimant through their Accident Benefits Carrier. With the advent of Bill 198, I am seeing heavy concentration on the Accident Benefits aspects of a motor vehicle accident given the \$30,000.00 deductible imposed under this Regime. If an Accident Benefits file is active, there is a wealth of information within that file which will provide a Tort Adjuster at an early assessment of their claim.

To make a long story short, as soon as you are presented with a Notice of Intention to Commence Legal Proceedings, request the Accident Benefits file and if you do not receive it quickly, request it again.

In the Application for Accident Benefits you will have some general information about the claimant as well as a brief description which will help you in your initial liability assessment.

If the claimant is pursuing a claim for Income Replacement Benefits, an Employer's Confirmation Form (OCF-2) will not only list his gross weekly income prior to the accident but will also indicate whether or not there is a benefit from other Collateral Benefits from other insurers. The OCF-2 will also have details regarding the claimant's employment and have their employer information inclusive of a contact person.

Often in Accident Benefits files, a first party insurer will meet with the claimant for the purposes of a Statutory Declaration or an Interview Statement. These documents are extremely helpful in providing a laundry list of extremely pertinent questions which will delve into the mechanics of the accident inclusive of liability as well as delineate the claimant's injuries, their current treatment, housekeeping tasks and other information regarding the claimant's post-accident and pre-accident condition.

It goes without saying that the medical reports generated in the Accident Benefits file from the various healthcare practitioners are of significant help. Given the current legislative framework, it is quite common for numerous rebuttal reports to be generated at an early stage in an Accident Benefits file which will give an indication as to the validity of the claimant's claim and also serve as an indicator of the willingness of the claimant to pursue legal action.

Key Benefits the claimant can receive are that of Housekeeping, Attendant Care, Income Replacement Benefits and Medical / Rehab Benefits.

Tests for a claimant to receive Income Replacement Benefits prior to 104 weeks following the date of the motor vehicle accident is that of being substantially disabled from performing the pre-accident employment duties. Following the 104 weeks the test moves to any occupation test

where the claimant will have to be deemed unable to perform any employment duties. The length of the Income Replacement Benefits received from the claimant will serve as a very good indicator as to whether or not a valid income loss claim can be generated.

Attendant Care Benefits will also serve as a substantial indicator as to the severity of the claimant's injury in a more significant collision.

In summary, it is extremely important to request the Accident Benefits file and update that file from an early point in a Tort proceeding. A Summary of Benefits paid by an Accident Benefits insurer will serve as an excellent gauge as to the significance of the potential Tort claim.



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## THE PITFALLS OF SETTLING CLAIMS WITH SELF-REPRESENTED CLAIMANTS

Cary N. Schneider

When an insurance adjuster or lawyer settles a claim with a self-represented claimant in either the accident benefits or tort side, trouble may be brewing. You may do everything right such as obtain an executed release and explain the provisions of the release but still have a Judge rescind the settlement. This is what happened in the recent decision of *Williams v. Condon* (2007). In that case the claimant was involved in a motor vehicle accident in October, 2002 when he was struck as a pedestrian resulting in him suffering from an ACL tear which required reconstructive surgery approximately 1.5 years post-accident. He was entitled to receive accident benefits and sue in tort as against the same insurance company. The Plaintiff was employed as a high-rise window cleaner earning approximately \$1,000.00 on a weekly basis and was entitled to \$400.00 weekly for income replacement benefits as well as a top-up from the tort defendant insurer. He was receiving cheques from both without commencing an action.

The claimant was self-represented. As a result of his injuries he was off-work, became depressed, and began consuming alcohol at a rate of 10-12 "king" cans of beer on a daily basis commencing at 6:00am. His primary concern throughout the initial time period was the replacement of his income as he had no source of financial support other than his job. Within two-three months of the accident the claimant inquired from the insurer as



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## THE PITFALLS OF SETTLING CLAIMS...(CONTINUED)

to whether he could settle both the accident benefits claim and tort claim. The claimant attended at the office of the insurer (both the accident benefits and tort adjusters worked at the same office) and settled the accident benefits claim for a further 12 weeks of income replacement benefits as well as a gym membership while as the tort claim for another 12 weeks for the past income loss shortfall. In monetary terms the accident benefits carrier agreed to pay \$5,300.00 for a full and final release and the tort defendant \$2,400.00. Nothing was paid for general damages. The releases were executed that day.

Sometime thereafter, he retained a lawyer.

The claimant moved to rescind only the tort release. Although this particular case revolves around only the rescission of the tort release, the same principles apply for an accident benefits settlement. The claimant attempted to rescind the settlement on the basis that he was drunk at the time of the execution of the release (lack of capacity) and that the settlement was unconscionable.

The drunkenness defence was not accepted.

The key issue was whether or not the settlement was unconscionable. The allegation that a bargain is unconscionable revolves around the principle of (1) an unfair bargaining advantage and (2) that the settlement was grossly improvident. Essentially the stronger party (i.e. an insurance company) overreached to obtain a bargain which is highly beneficial to the insurer to the detriment of the weaker claimant.

In many cases involving self-represented claimants, (this includes claimants represented by a family member or friend), the insurance company will have an unfair bargaining advantage. In the Williams case the claimant had completed high school, had previously worked as a real-estate agent for some years negotiating the sale of homes, and at the time of the settlement he was in precarious financial circumstances and was entirely dependant on the cheques that he received from the insurer in order to survive. On the flip side of the coin, he was faced with two experienced adjusters with many years of experience. The typical David vs. Goliath scenario. The Court therefore found that there was unequal bargaining power.

The second part of the test is to determine whether the bargain struck was improvident. In this case the claimant had not completed his course of physiotherapy, had yet to attend his scheduled appointment with an orthopaedic specialist, had expressed concern about his ability to return to work, and the adjusters proceeded on the mistaken assumption that the Plaintiff had suffered a knee sprain as opposed to a tear (although this has been diagnosed within the materials available to both adjusters). The Court found that the settlement of the tort claim for \$2,400.00 was clearly unfair to the Plaintiff based on what was known and still undetermined at the time.

I expect that the Court would have set-aside the accident benefits settlement if so asked as well.

Firstly, there is no obligation on an insurer to insist that a self-represented claimant obtain counsel. Secondly, if a claimant is represented by a lawyer or an experienced paralegal (on the accident benefits side) an insurer should not hesitate from entering into a great deal for the insurance company.

When dealing with claimants who are representing themselves, or have inexperienced agents (non-lawyers) representing them, an insurer should be wary. In the Williams case, nothing was paid for general damages and only \$2,400.00 was paid for income loss. The main concerns for the Court were that the claimant's future health remained uncertain and that he was desperate for money. Although there is no obligation on the insurer to ensure that such a claimant obtains a reasonable settlement, there appears to be an obligation to ensure that he is not taken advantage of.

This is especially true of claimants who have limited education, low-paying jobs, have suffered potentially disabling injuries, and are looking for a quick resolution because they need the money. Judges will undoubtedly feel sympathy for such individuals and likely be inclined to rectify what they perceive to be a wrong. The better the deal for the insurer, the more likely it is open to rescission.

Although there are many more accident benefits settlements with self-represented claimants than on the tort side, tort adjusters should also be cautious about settling files with paralegals. Unlike accident benefits claims in which a paralegal can represent a claimant at the Financial Services Commission of Ontario, a claimant must be represented by a lawyer in a court proceeding (or be self-represented). As such, a Court may question the advice and expertise of a paralegal's representation of a claimant in a tort matter if the insurer achieves an excellent settlement. Indeed, a Judge may question whether the paralegal settled the file not in his client's interests but rather to get paid himself as opposed to referring the file on to a lawyer.

My advice is that when you are dealing with self-represented claimants that you attempt to achieve a resolution that is on the lowest end of the reasonable settlement range, with an eye on whether you will be able to defend such a settlement on the witness stand in Court.



**Cary N. Schneider** is an associate at Beard Winter who specializes in accident benefit and tort defence claims. He focuses on being effective and efficient in his law practice with the goal of achieving excellent results for his clients in a timely matter. For more information please visit <http://www.beardwinter.com/people/profile.asp?259>

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