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Everything An Accident Benefits Adjuster Needs To Know About A Tort Claim But Were Afraid To Ask

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Your comments are appreciated and if there are any accident benefits or tort topics that you would be interested in reading about, please feel free to email us and we will certainly explore the possibility of writing an article.

There are fundamental differences in the adjusting for an accident benefits claim compared to that of a bodily injury claim. In the accident benefits world often an adjuster will have direct contact with the claimant at the outset of a claim and perhaps have developed a relationship with the insured. In the tort world, for the most part the only contact with the claimant is through his lawyer. Whereas there is a set of rules (the *Schedule*) that sets-out how an accident benefits claim is supposed to proceed from beginning to end, the tort claim is much less structured. An understanding of the fundamentals of tort claims will helps us adjust our files better and set the stage for more effective negotiation strategies.

Duty Of Good Faith v. Adversarial Relationship

First and foremost, an accident benefits carrier is in contractual relationship with its' insured and is obligated to address a claim in good faith. If an insurer is found to have acted improperly vis-à-vis the insured then there is a real possibility that a special / punitive damages award will be found. In the tort claim, the insurer is defending the driver/owner who has been sued by the claimant. There is no requirement to treat the claimant in any special way. There is really no viable punitive damages claims in tort.

Procedural

Prior to the upcoming changes in the accident benefits world, if there was a dispute over benefits the claimant was entitled to commence a claim in litigation (court) or commence an Application for Arbitration. In the accident benefits world, I estimate that 75-90% of all claims proceed by way of Arbitration. In tort, the claimant must proceed by way of litigation.

If a tort or accident benefits claim proceeds by way of litigation, then there are a number of procedural steps to which the parties are entitled to pursue including: (1) an examination for discovery, (2) defence medical assessments, (3) a mandatory mediation (if the claim is commenced in Toronto, Ottawa, or Windsor), (4) a pre-trial and a (5) trial by Jury or Judge. From the time that a statement of claim is commenced to the time that trial proceeds it is not uncommon for between 3-5 years to have elapsed.

In the Arbitration world there is no right of discovery (on occasion an EUO is conducted) or an entitlement to defence medical assessments. The pre-hearing serves as both a mediation and a pre-trial. The Arbitration proceeds much quicker than the trial process as typically from the time that an Application for Arbitration is commenced to the time of an Arbitration can be anywhere from 1-2 years.

General Damages Claims (non-pecuniary losses)

In the accident benefits world, the types of claims available are set-out in the *Schedule* including income replacement benefits, non-earner benefits, attendant care (proof of incurred), medical benefits (including the MIG), and issues revolving around catastrophic determination. While as the language in the *Schedule* has been interpreted in various ways by Arbitrators, there is at least a set of rules that we for the most part are able to follow. The various claims in tort are less rules centric and more "touchy feely".

A claimant is entitled to a claim for general damages to be compensated for his pain and suffering. The maximum amount a claimant can receive for this head of benefits based on the law is about $350,000 (subject to annual inflation). All claims for general damages are subject to a deductible of $30,000 if the value of the claim is worth $100,000 or less. That means if the value of someone's pain and suffering is worth $95,000 that they only get $65,000. However, if the value of the claim for general damages is worth $100,001 or more then there is no deductible. For this reason there is often a fight over whether the value of the general damages is plus/minus $100,000 as there is a $30,000 differential hanging in the balance.

There is a $30,000 deductible for each accident to which an accident was commenced. As such, if the claimant was involved in two losses then there is a combined $60,000 in deductibles for general damages; and so on. If the Plaintiff was involved in an accident but did not commence a lawsuit then a deductible does not apply for that loss.

There is no "meat chart" in Ontario to determine what the value is for pain and suffering. A person suffering from soft tissue chronic pain can range anywhere from a value of nil - $150,000. We must take multiple things into consideration when assessing the value of such a claim including their credibility, ability to return to work, impact on day-to-day activities, the types of treatment they have undergone, suicide attempts, and other ways in which their lives have been effected. A credible Olympic athlete claimant who has been rendered a couch potato on account of her legitimate pain levels is worth more than a construction worker who misrepresents the extent of his injuries and returns to work at his heavy labor job.

In addition to the deductible, a claimant must also prove that their general damages crosses the "threshold" in order to receive compensation under this heading. A Plaintiff must prove that she has suffered a "permanent serious disfigurement or a permanent serious impairment of an important physical, mental or psychological function". In short, it is not enough that a person is in pain, but rather that there is an impairment which is serious and permanent. If you cannot prove that the injuries cross the threshold, then a claimant is not entitled to any compensation for general damages. While as the language of the threshold sounds quite onerous, Judges in Ontario rarely dismiss a claim on the basis of this test. Most of the success for insurers in threshold defence cases deals with claimant with poor credibility and good surveillance.

While as a Jury decides the value of the general damages the Judge makes the decision as to whether someone's injuries cross the threshold.

Special Damages (Pecuniary Losses)

In tort, a Plaintiff is also entitled to make a claim for their past and future pecuniary losses. While as in accident benefits a claimant is only entitled to benefits up until the date of the Arbitration, in tort an award of future benefits may be made. While in accident benefits a file will continue after an award is made at Arbitration, in tort once the trial verdict is rendered the claim is over.

The main claim for special damages in tort is for income loss. A claimant is entitled to 70% of gross income for past income loss and 100% of gross for future income loss. While as in accident benefits the cap for IRBs is $400 weekly, there is no such cap in tort. In tort a Jury will award a verdict for past income loss which accounts from one week post loss to the date of trial. A Jury may then assign a quantification for future income loss / loss of competitive advantage from the date of trial until sometime into the undefined future. A Jury does not provide an explanation as to how they have arrived at their quantifications; they simply assign a number in a box. While as lawyers we will suggest to a Jury that certain contingencies be considered, provide them with fancy calculations, and make brilliant submissions; at the end of the day a Jury is under no obligation to follow sort of formulae or explain their reasoning.

While as there is some dispute over the case law, for the most part a tort defendant is entitled to deduct collateral benefits paid for income loss including IRBs, STDs, LTDs, and CPP.

A common head of benefits on the tort side also includes claims for housekeeping benefits. A claimant may be found entitled to housekeeping benefits whether they are paying someone to clean their home or not. There is not the

same sort of statutory requirement to prove an "incurred expense" that is found in the accident benefits world.

A claimant may also be able to prove an entitlement to health care expenses in the tort world over and above what has been paid in accident benefits. This would include claims for medical treatment and attendant care. Not only may a claimant be found entitled to past health care expenses, but for potential future health care expenses as well. For this reason claimants often obtain future care cost reports which attempt to show all of the future expenses to which a claimant may possibly require. With respect to claims for attendant care, a claimant will potentially advance a claim for such benefits based on: (1) market rates as opposed to the reduced *Schedule* rates and (2) for in excess of the capped monthly rates on the accident benefits side. Once again, the statutory requirement of an incurred expense for attendant care benefits does not apply on the tort side.

Family Law Act Claims

A family member of an injured claimant is entitled to compensation for their "loss of guidance, care, and companionship". For instance, if a wife is significantly injured in an accident that has resulted in her husband providing for her personal care needs; then the he may be entitled to compensation. There is a $15,000 deductible for these sorts of claims if the valuation is $50,000 or less; anything above $50,000 there is no deductible. These sorts of claims become more significant when dealing with fatalities and catastrophically injured claimants.

Liability

Accident benefits are known as "no fault" benefits as liability is entirely irrelevant to an assessment of the entitlement to benefits. In tort, the claimant's entitlement to damages is reduced by his percentage of contributory negligence.

The "UIM" Claim

In the tort world there are also claims against the insured's own insurance company when dealing with an uninsured motorist, unidentified motorist, or under-insured motorist (collectively referred to UIM claims). This is one of the trickiest provisions in the *Insurance Act* to follow. The uninsured motorist claim deals with a claim in which the third party defendant does not have insurance. The unidentified motorist claim involves accidents such as a "hit and run" where the third party leaves the accident scene without anyone determining their identity.

In both of these cases the claimant must sue in order of priority: (1) the insurer for the vehicle to which is in an occupant (2) if there is no insurance on the vehicle that he is an occupant / or he is not in a vehicle (such as pedestrian knock down) his own insurance company. When there is a claim against an uninsured or unidentified motorist claim the claim is limited to $200,000 in tort.

The under-insured motorist claim (otherwise known as the OPCF-44 claim [family protection endorsement]) also has two parts to it. First, if the third party defendant has policy limits that are less than the claimant's own policy limits then we are dealing with a potential under-insured claim. For instance, if the claimant is seriously injured when he was rear-ended by a third party who only has minimum policy limits of $200,000, then he may not be able to receive full recovery for his damages. This is a situation in which the injured party get penalized twice: (1) he is hurt in a motor vehicle accident and (2) he may be undercompensated for his injuries. In these situations the law allows the claimant to sue the third party driver for his policy limits and then his own insurance company for the balance up until his own policy limits. So, if the third party has $200,000 in limits and the claimant has policy limits of $1,000,000 then the claimant may recover up to a maximum of $800,000 from his own policy ($1,000,000 own policy minus the $200,000 that he may receive from the third party's policy).

Secondly, an underinsured claim may arise as a result of an accident involving an uninsured or unidentified motorist claim. As set-out above, in the latter two claims the maximum that a claimant is entitled is $200,000. Again, the claimant may very well be undercompensated through no fault of their own if he has suffered from significant injuries. The claimant is entitled to sue his own insurance company for compensation for the shortfall between the minimum limits of $200,000 and his own policy limits (ie $1,000,000).

This gets a little more complicated. If the accident occurs as a result of an unidentified motorist then the claimant may only sue his own insurance company if there is objective evidence (as set-out in *Insurance Act*) that the accident occurred as a result of an unidentified motorist. If this objective evidence test cannot be proven, then the claimant is not entitled to make a claim pursuant to the under-insured provisions and is restricted to claim for the $200,000 minimum limits.

If a claimant is involved in an accident involving an uninsured / unidentified motorist and there is no automobile insurance available at all, (ie hit and run of a pedestrian who does not have auto insurance), then the lawsuit is against the Motor Vehicle Accident Claims Fund (the Fund). The Fund is known as the insurer of last resort and the maximum that may be claimed is up to $200,000.

Conclusion

Tort adjusters / lawyers for the most part develop ringing headaches when thinking of the intricacies of addressing accident benefits claims. The multitude of laws, tight timelines to reply, and seemingly complicated procedures can be quite intimidating for someone not immersed in this world. The reverse can be true for an accident benefits adjuster / lawyer peering into the tort realm. The lack of structure, subjectivity in assessments, and complicated nature of apportioning damages from various accidents is very different from what is involved in assessing accident benefits.

An understanding of the fundamentals of tort litigation is essential for an accident benefits adjuster. It is important to understand what sorts of claims are available to a claimant in tort as this will help us understand the mindset of a claimant when negotiating accident benefits. For instance, a claimant may not pursue post-104 IRB benefits too vigorously if he has a strong claim in tort. This is because whatever he receives by fighting with the accident benefits carrier he has to give credit to the tort defendant by way of a deduction for income loss. However, if the claimant is liable for the accident, and therefore does not have a viable tort claim, then he will likely pursue IRBs full steam ahead as there is no other pocket he can pursue.

Despite the differences in the intricacies between accident benefits and tort claims, there is one overriding theme that permeates adjusting both types of claims – the claimant's credibility. If a claimant is credible then he will just as likely be able to prove entitlement to accident benefits claims such as IRBs and medical benefits as he will for tort claims such as general damages and income loss. The assessment of a claimant's credibility is key to all aspects of motor vehicle litigation.

The Beard Winter Defender Past Issues

What You Need To Know About An Incurred Expense

One of the most significant changes to the *Schedule* post September 1, 2010 revolves around the question as to what constitutes an incurred expense. Gone are the days in which a family member / friend would be compensated for providing attendant care assistance to a claimant for love. Now they must show they did it for money.

The New Summary Judgment Rules and Insurance Law: A New Weapon in the Arsenal of Litigation (tort and accident benefits)

As an insurer, there is perhaps nothing more frustrating then getting dragged into years of litigation when there is no legal exposure.

What is an Economic Loss? The Appeal Courts Have Spoken

Slowly but surely the changes to the Statutory Accident Benefits Schedule are being interpreted by the Courts and Arbitrators. The Court of Appeal decision of *Henry v. Gore* (2013) and The Director's Delegate decision of *Simser v. Aviva* (2014) provide us with some guidance as to what an Economic Loss means.

The Law of Damages In Motor Vehicle Accident Cases (Tort): 101

The law with respect to the burden of proof in motor vehicle accident cases is often overlooked until it is too late. We need to know what we need to prove when assessing cases, advancing a position at a mediation, and well before we step inside a courtroom.

Need To Know: Four Recent And Key Accident Benefits Decisions

Knowledge of the law is important for both adjusting claims and negotiating settlements. This is all the more pronounced in the realm of accident benefits where the new changes to the Schedule have resulted in a host of unanswered questions.