

**FSCO PRACTICE & SETTLEMENT OF ACCIDENT BENEFITS CLAIMS**

**Accident Benefits - Background**

No-fault benefits have been a compulsory part of the Ontario automobile insurance package since 1972. The value of these benefits increased substantially in 1978, 1990, and 1994. In November of 1996 the benefits were decreased as part of the Bill 59 insurance scheme enacted by the former Progressive Conservative government. Further restrictions were put in place in October of 2003, and yet further restrictions took effect in April 2004, and March 2006. In spite of these changes (reductions) the resolution of accident benefits claims can still demand a substantial time of a lawyer's practice.

**The purpose of this article is to:**

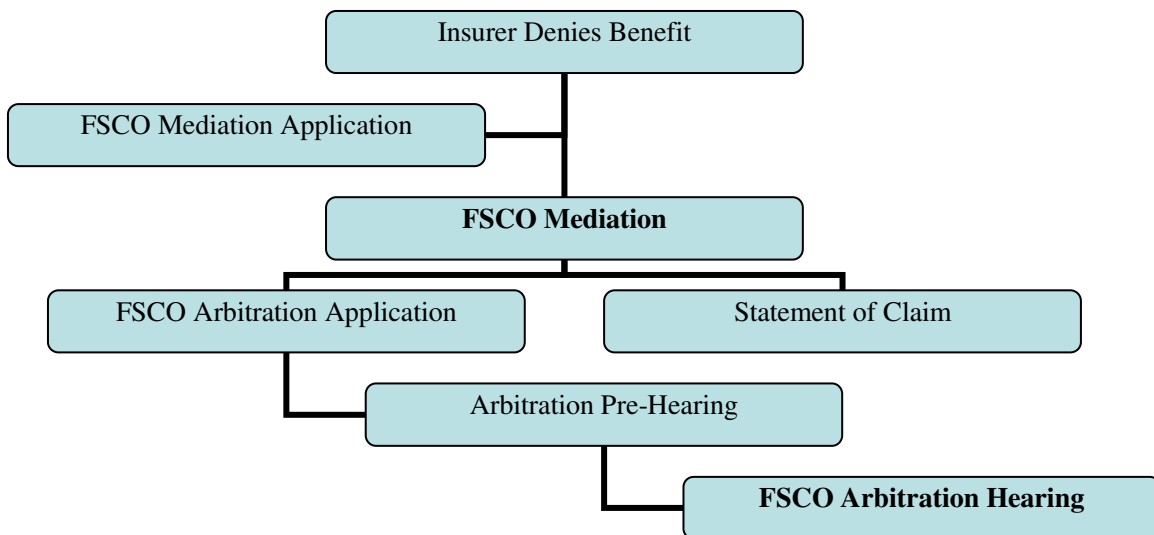
1. Discuss the pros and cons of the litigation process at the Financial Services Commission of Ontario;
2. Review the accident benefits settlement process; and,
3. Hopefully, to alert lawyers about potential pitfalls in this process.

**Financial Services Commission of Ontario (FSCO)**

The Financial Services Commission of Ontario (FSCO) was created on July 1, 1998, as an arm's-length agency of the Ministry of Finance. FSCO integrated the operations of the former Ontario Insurance Commission (which was created in May of 1990) Pension Commission of Ontario, and Deposit Institutions Division of the Ministry of Finance.

The Financial Services Commission of Ontario (FSCO) is responsible for overseeing and resolving disputes between motorists and their insurers.

**FSCO Litigation Process**



## Arbitration versus Court

After the FSCO Mediation hearing has been conducted the parties will receive a Report of Mediator which will detail the issues that were mediated and whether those issues were resolved. You will want to review the Report of Mediator carefully in order to ensure that it is accurate with respect to the issues that failed at mediation.

Upon receipt of the Report of Mediator the claimant has a choice: prepare an Application for Arbitration or issue a statement of claim. It is important to note that it is the claimant's choice -- the insurer has no input as to which litigation forum will be chosen.

There is no determining factor or set of factors for which an arbitration or court action would be better suited. Often the choice will be influenced by whether there is an ongoing tort claim or LTD claim, as the claimant/applicant may prefer to join all claims into one action.

There are a number of advantages in proceeding with FSCO arbitration proceedings;

**Time** - A significant advantage is speed - it is reasonable to assume that you will be before an arbitrator approximately one year after filing the arbitration application.

**No Discovery** - Another advantage of the FSCO arbitration process is that there are no examinations for discovery. This is usually advantageous to the applicant as it prevents insurer's counsel from drowning the applicant in a sea of undertaking requests. Of course you may want to conduct examinations for discovery, especially if you believe there is a solid foundation for a bad faith claim.

The functions of the discovery process and the pre-trial are met essentially through the conducting of a pre-arbitration hearing. If the applicant resides outside the Greater Toronto Area, he or she can opt to conduct the pre-arbitration hearing via telephone or in person. Should the applicant reside within the Greater Toronto Area the pre-arbitration hearing will take place at the FSCO offices. The conference call or meeting is facilitated by an arbitrator for the purpose of resolving any disclosure disputes, and to investigate the possibility of settlement. Another important function of the pre-arbitration hearing is to select dates for the arbitration hearing.

**Fixed Hearing Dates** - What I appreciate most about the FSCO arbitration process is that a fixed date is set for the hearing. In my experience, arbitration hearings have always commenced on the date scheduled at the pre-arbitration hearing. FSCO has yet to adopt such trial scheduling strategies as the "running list" or the "blitz". This makes scheduling much easier especially considering that doctors are often required to testify at these hearings.

A potential drawback of the FSCO arbitration process is that arbitrators do not have authority to award punitive damages. Arbitrators, however, do have authority to order a Special Award, but this is restricted to a maximum of 50% of the amount of total benefits and interest owing. This could be an important consideration if you have solid evidence of bad faith conduct, but the distinction is rather small.

## **To Settle or not to Settle?**

If you have just begun practicing in the area of accident benefits you will quickly discover that there are strong forces involved in trying to get an injured person to come to a full-and-final resolution of his or her accident benefits claim.

The first thing to consider (and to inform the client about) is that a claimant is not required to settle her accident benefits claim. This may sound trite, but often clients do not understand - and lawyers may overlook – the simple fact that claimants do not have to settle. If you want to ensure that your client obtains a good settlement of her claim ... make her understand one thing ... she does not have to settle!

Too often I speak with individuals who believe that they are required to settle their accident benefits claim. *Often the greatest bargaining chip in the settlement process is your client's willingness not to settle ... unless a fair figure is achieved.*

If your client has suffered catastrophic injuries, you also need to ensure that the client (and his or her family) has considered who will handle the day-to-day management of the healthcare claims should a lump-sum settlement be achieved. Prior to settlement, the adjuster is performing this service in that he or she is, supposedly, ensuring that all invoices are paid. This is a task that family members may not be willing or able to take over. If your client settles his or her claim, who will take over such responsibilities as paying the bills, arranging appointments, ensuring that services paid for were provided, etc.? These tasks can take a significant amount of time. It is prudent to ensure that there is someone willing to take on these tasks. I urge my clients to offer this person some remuneration as it helps to ensure that the job is taken seriously.

## **Is there a Dispute?**

Your chances of reaching a reasonable settlement are greatly enhanced if your client is involved in a dispute with the insurer. The dispute, and looming hearing, increases the insurer's motivation to settle the claim. The impending arbitration or court date helps focus the parties, and ensures that settlement opportunities are taken seriously. I do not set out with the goal of creating a dispute for the purposes of ensuring serious settlement discussions. I do, however, ensure that all disputes are mediated through FSCO. I have wasted too much time preparing for, and participating in, settlement discussions where the insurer has walked in realizing that we were seeking a reasonable amount (as opposed to some ridiculously low figure).

## **Who Makes the First Offer?**

Most adjusters are interested in settling an accident benefits claim ... but for what amount? I frequently receive inquiries from adjusters about whether clients are interested in settling. The adjuster will usually suggest that I prepare an offer for his or her consideration which can be a long and expensive process, especially if the claimant has been seriously injured. Why spend the time and effort in preparing a comprehensive

settlement proposal only to be greeted by the insurer's ridiculously low-ball counter-proposal?<sup>1</sup>

If possible, let the insurer demonstrate its' intention to negotiate in good faith by putting forth a reasonable first offer. Why spend significant time and money negotiating with an insurer who has no intention of reaching a reasonable settlement? The insurer's first offer will send a clear message as to whether it is serious about trying to resolve the claim.

With less seriously injured individuals I am usually not reluctant to put forth the first offer. I strive to ensure that the offer encompasses all available benefits with respect to my client's future needs (i.e., past and future chiropractic, massage, physiotherapy treatment, and medication expenses, past and future income replacement benefits, past and future housekeeping and home maintenance expenses, etc.). The more benefits addressed the better as they aid in ensuring that your client receives a fair settlement for his or her claim. It will also assist your client in assessing whether the amount offered by the insurer will reasonably cover his or her past and future expenses.

### **Use a Mediator**

If your client's injuries are serious, and his or her claim is substantial, insist that the insurer agree to conduct the settlement meeting with a mediator. Frequently, insurers will invite counsel and their client to attend a settlement meeting hoping to resolve the claim on a full and final basis. If the claim is substantial, surely the insurer will concede that it is money well spent to have a mediator conduct the settlement meeting. An insurer's refusal to spend money on a mediator speaks to the degree of seriousness with which the insurer approaches the claim.

### **Work Your Way up the Food Chain**

If your client's claim is significant you must consider who will be representing the insurance company. If the insurer's representative is an entry-level adjuster who has had the day-to-day handling of the file, chances are very good that you will be unable to achieve a reasonable settlement. It often becomes readily apparent that the adjuster who has managed the file often has a pre-determined, ridiculously-low authority for settlement.

As the litigation progresses you will most likely be dealing with insurance representatives that have more experience and authority. The likelihood of attaining a reasonable settlement figure will be greatly enhanced with an experienced and prepared adjuster.

### **Create a Shopping List**

In essence, your job is to do the adjuster's job for him or her. You need to educate the adjuster about the potential past and future exposure that the insurer may face with the

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<sup>1</sup> A true story: 34-year-old paraplegic client has received Weekly Income Benefits at \$600 per week since 1993. Client has ongoing medical and rehabilitation needs. In 2002 insurer inquires as to whether client is interested in settling accident benefits claim. Client expresses interest, and, fortunately, asks the insurer what it has in mind. Insurer offers \$80,000!

claim. I create a "shopping list" of goods and services that the claimant will likely require and obtain the estimated costs for these services. Often this list is prepared with the assistance of medical care consultants (depending on the significance of the client's injuries).

Remember that, with an accident benefits claim, the adjuster is not too concerned about your client's pain and suffering and the impact the injuries have had on his or her quality of life. The adjuster is concerned with the insurer's future exposure (e.g., Income Replacement Benefits, Medical and Rehabilitation Benefits, Housekeeping & Home Maintenance Benefits, Expenses of Visitors, Caregiving Expenses, etc.).

### **Beware of Improvident Settlement Argument**

Assuming you have a tort claim, ensure that you and your client are aware of the implications of subsection 267.8(22)(c). This subsection stipulates that a defendant may be permitted to obtain an increased set-off for accident benefits if the defendant can demonstrate that the injured person settled his claim in bad faith, to the detriment of the defendant.

Before you enter into a discussion about full and final settlement (especially involving Income Replacement Benefits) make sure that the insurer has denied your client's claim for these benefits. The defendant will likely be barred from arguing that your client would have been entitled to more Income Replacement Benefits if the claim was denied. In *Stante v. Boudreau* (1980), 29 O.R. (2d) 1, the Court of Appeal held that "entitlement" requires an unequivocal right to the benefits. The principles in *Stante* were reinforced by the Court of Appeal in *Bannon v. McNeely* (1998), 38 O.R. (3d) 659, where the Court also held that the onus of establishing entitlement to future payments of no fault benefits rests with the defendant.<sup>2</sup>

### **Request a Printout of Benefits Paid**

If your client's claim is significant and their claims have the potential to reach category limits, you must request a detailed claim history from the insurer. A summary of the benefits paid under each section is not sufficient! A review of the detailed payment history may reveal expenses which have been incorrectly classified (e.g., expenses of visitors being classified as medical expenses, IME assessments being classified as medical expenses, interest on overdue payments being classified as IRB payments, etc.). Accurate categorization of expenses can result in more funds becoming available for medical and attendant care benefits.

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<sup>2</sup> See also *Chrappa v. Ohm* (1998), 38 O.R. 3d (C.A.): "A strict construction is to be given to the concept of entitlement to insurance benefits where that entitlement is the basis for a reduction in the plaintiff's recovery". Also see *Brown v. Bouwkamp* (1976), 12 O.R. (2d) 33 (C.A.) addressed the issue of whether for the purpose of s. 237(2) of the Insurance Act, the plaintiff was "entitled" to no fault benefits where his entitlement had been disputed by the insurer. The Court stated: "Nor, in our opinion, can a person whose claim has been rejected [by the no-fault insurer] be stated unequivocally to be a person who is "entitled" to the benefits. To so describe him would be to prejudge the merits of the grounds on which the insurer had rejected his claim."

### **Are there any Outstanding Accounts?**

You want to avoid a situation where your client has settled all claims for past, present, and future accident benefits, and later discover that over \$10,000 is owing to a chiropractor for past treatment. Just because the insurer may have approved the Treatment Plan many months before mediation does not mean that the healthcare provider has submitted an invoice for payment.

Prior to the mediation contact the various healthcare providers to ensure that there are no outstanding accounts. Alternatively, negotiate a term of the settlement which stipulates that the insurer will pay all healthcare expenses incurred prior to the date of settlement. Insurers will sometimes agree to this term if you agree that it applies only to pre-approved treatment expenses

### **Get Updated Medical Documentation**

It goes without saying that you need to get up-to-date opinions from your client's healthcare providers before you can settle the claim. Ask healthcare providers about whether there is a reasonable possibility that your client will require future treatment, and the estimated cost of this treatment. In addition to getting updated reports, encourage your client to speak to his or her healthcare providers and explain the potential settlement of his or her accident benefits claim. The healthcare provider's opinion is obviously an important consideration in this process.

### **Involve a Structured Settlement Broker**

If your client's claim is significant involve a structured settlement broker. Brokers are often willing to attend settlement meetings, or at least be available by phone. The broker's assistance is invaluable as they can break down lump sum figures into more meaningful monthly payment amounts.

I contact the broker well in advance of the mediation so that he or she can meet with my client beforehand. An experienced broker can assist the client in understanding the advantages of a structured settlement, how insurers value claims, and how to maximize settlement proceeds. Like most aspects of this process, the more the client understands the issue the better able he or she will be to make the right decision for himself or herself.

### **Consider a Future Care Cost Assessment**

If your client's claim is significant, hire an expert to prepare a future care cost report. Not only will this report ensure that adequate money is obtained for your client's future needs, it will also help immensely in justifying your settlement request to the adjuster. The insurance industry is, without question, paper-driven. In essence an adjuster is seeking your assistance in quantifying the claim and providing documentary evidence to justify the payment. The future care cost report goes a long way in fulfilling this need.

**Involve Family Members in the Decision**

I encourage clients to attend the mediation (or settlement meetings) with people who are important to them, and whose advice they seek. Why spend the energy in reviewing the issues with your client, and explaining positions only to go through the same process with his or her family afterwards ... possibly after the settlement has been entered into? Having a spouse or significant other involved in the mediation process will go a long way in avoiding future grief for yourself and your client.

**Discuss "Bottom Line" before Negotiations**

I prefer to meet with my client approximately one month before the scheduled mediation hearing. The purpose of this meeting is, frankly, to discover any holes which need to be plugged prior to the mediation. Examples of such "holes" include requiring updated medical information; obtaining a printout from the insurer showing benefits spent to date; obtaining employment or LTD income information; and, requesting an updated accident benefits file.

Approximately one week before the scheduled mediation I meet with my client in order to discuss "numbers". I will typically have the draft settlement proposal prepared for this meeting, along with the rationale for the amounts that I am seeking. At this meeting I tell my client three things: (1) the amount which I would be happy to obtain on his or her behalf; (2) the amount which I would still reluctantly recommend to him or her as a settlement figure; and, (3) the "bottom line" figure under which I would be unwilling to recommend settlement to him or her.

I stress to the client, of course, that the final decision is theirs. In the area of accident benefits, clients may have numerous reasons as to why they may accept a figure less than what the lawyer has recommended. Sometimes there is a high value placed on the desire to divorce oneself from his or her insurance company. Similarly, I sometimes have claims where a client refuses to accept an insurer's offer even though it is significantly higher than the "bottom line" figure that I have proposed. These clients often place a high value on the security of knowing that the insurance claim will remain open in the event of some unforeseen medical condition occurring in the future.

I am a believer in utilizing computer programs in order to assist in assessing the reasonableness of offers. Specifically, I usually prepare an Excel chart using the following format.

<b>Benefit</b>	<b>Rationale</b>	<b>Amount</b>
Housekeeping & Home Maintenance Benefit	Denied July 15, 2008 -- entitlement until March 16, 2009 @ \$100 per week (35 weeks)	\$3,500
Income Replacement Benefits	\$400 per week for 52 weeks	\$20,800
Massage Therapy	\$70 per session - 52 sessions for 2 years	\$7,000
Psychological Treatment	Future Anticipated	\$5,000
Injections	Radiofrequency Rhizotomy -- Botox injections - - trigger point injections	\$2,500
Pain Management Program Medication	Recommended by Dr. Jones	\$6,000 \$2,200

Gym Membership	\$850 per year for 5 years		\$3,000
			<b>\$50,000</b>
Less Legal Fees		20%	-\$10,000
Less GST on Fees		5%	-\$500
Less Disbursements	Estimate		-\$1,000
	<b>NET RECOVERY TO CLIENT</b>		<b>\$38,500</b>

This format permits the client to see what his or her net recovery will be. It can also be relied upon later should the breakdown of the settlement become important with respect to the tort claim. I provide the insurer with a similar table that will obviously remove any references to legal fees.

**Settlement Regulations**

You must become familiar with the various statutes and regulations that pertain to accident benefits settlements. In particular, Regulation 664 under the Insurance Act has a number of provisions pertaining to accident benefits claims and settlement (a summary of this Regulation is set out below). It is beyond the scope of this paper to review the settlement regulations in detail; however, below are the “highlights” of **Regulation 664**:

1. The insured person may rescind the settlement within two business days after the later of the day the insured person signs the disclosure notice and the day the insured person signs the release.
2. The insured person may rescind the settlement by providing written notice of her intention to do so, and returning any money received from the insurer as part of the settlement.
3. The insurer and the insured person are prevented from entering into a full and final settlement of accident benefits claims within one year of the accident (unless an arbitration proceeding has been commenced and the prehearing conference has been conducted).

**Last but not Least - It should not be about Trust**

A settlement should be acceptable not because the client trusts me, but because the settlement makes sense ... to the client. The client should not be strong-armed into accepting a settlement. Each client has his or her own comfort level. One client may be fed-up, and want nothing more to do with the insurer – they want a settlement ... now! Another client, on the other hand, may be nervous about settling with the insurer (as they should be) and would rather have an open claim in case something unanticipated occurs in the future. Is it in this client’s best interests to settle the claim?

Remember that sometimes the best result is a failed mediation.