

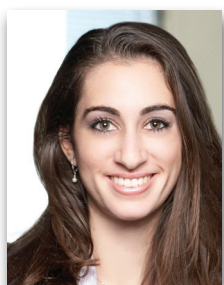
ACCIDENT BENEFIT REPORTER

UPDATER

Issue 8 | April 2013



UNCERTAINTIES IN ACCIDENT BENEFITS SCHEME COMPLICATING TORT CLAIMS



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George Cooke, CEO of The Dominion of Canada General Insurance Company, one of Canada's oldest and largest casualty insurers, recently expressed concern over the future of tort claims as a result of uncertainties surrounding the minor injury guideline ("MIG") and the definition of catastrophic impairment ("CAT"). In my view, the CAT uncertainties are of greater concern and, as such, will be the focus of this article.

When an individual is injured as a result of a motor vehicle accident, she may seek compensation through her own insurance company (an "accident benefits claim"), regardless of whether or not she is at-fault for the accident. One of the benefits to which she will be entitled is a medical and rehabilitation ("MR") benefit.

As of the September 2010 overhaul to the accident benefits scheme, there are currently three categories of injury and three associated policy limits with regards to MR benefits:

| Injury Category | *Monetary Limit |
|-----------------|-----------------|
| MIG | \$3,500.00 |
| Other Injury | \$50,000.00 |
| CAT | \$1,000,000.00 |

**Based on accidents on or after September 1, 2010 and subject to different time limits.*

In addition to filing an accident benefits claim, if the individual was not at-fault for the accident, she may also seek compensation from the driver of the at-fault vehicle (a "tort claim").

Although the accident benefits and tort claims involve two separate avenues, the two schemes can interact. *This* is where the concern lie.

The following is a common scenario that illustrates the problem:

Sue is injured in a pedestrian-motor vehicle accident.

Sue files an accident benefits claim with her own insurer. Amongst other things, she is seeking funding for MR needs. Sue's treating surgeon completes a form saying that she is CAT (i.e. MR benefit entitlement up to \$1 million). Sue's insurer denies that she is CAT. Sue's lawyer files a dispute over this denial at the Financial Services Commission of Ontario ("FSCO"). Unfortunately, due to a serious backlog, the wait time to obtain a mediation date at FSCO approximates one year. Further, if the mediation fails, the wait time for an arbitration date after a failed mediation approximates eight months.

While pursuing an accident benefits claim, Sue also issues a lawsuit against the driver of the vehicle that struck her. Amongst other things, she is seeking compensation for her future care needs. Sue's lawyer obtains a future care report, which values Sue's future care needs at approximately \$1 million.

After a year, Sue's lawyer and the driver's insurance ("tort insurer") company enter into settlement negotiations to resolve her tort claims, but run into a problem. The problem is the uncertainty as to the extent to which, if at all, the driver's insurer may be exposed to paying Sue's \$1 million future care claim. If Sue wins her CAT dispute, then her \$1 million future care needs would essentially be covered by her MR

benefits (i.e. no exposure on the tort insurer). Conversely, if she loses the CAT dispute then, assuming in this scenario that Sue falls under the "other injury" category, the tort insurer may be exposed to paying the difference between the \$50,000.00 MR benefits available to Sue and her \$1 million assessed needs.

With exposure on the tort insurer for a future care claim ranging from \$0 to \$950,000.00, the parties encounter difficulty reaching an appropriate settlement. Pending the outcome of the CAT dispute, the tort negotiations are stalled.

This means that Sue, who may have already exhausted her \$50,000.00 "other injury" MR benefits, is now stuck between a rock and a hard place. She does not have access to the additional MR funding that would flow from being declared CAT, yet she is also does not have tort settlement monies to pay for her ongoing treatment needs.

The problem is rooted in both the uncertainties surrounding the definition of CAT and the tremendous delays at FSCO for dispute resolution.

With regards to the uncertainties over the CAT definition, in recent years, there have been changes to the definition of CAT, expert studies proposing changes to the definition of CAT, and conflicting FSCO and judicial decisions as to the definition of CAT. One "hot topic", is the issue of whether physical and psychological injuries may be combined to assess whether an individual is CAT. In June 2012, the Superintendent of FSCO released his report to the government of Ontario in which he recommended that the legislation be amended to clarify that physical and psychological impairments could not be combined. Meanwhile, three months later, in September 2012, the Ontario Court of Appeal released its decision in *Pastore v. Aviva Canada Inc.*, [2012] ONCA 642 (CanLII), in which it concluded that physical and psychological injuries could be combined. It is unknown how the government will ultimately respond to the court's guidance on the issue.

With regards to the delays, on a case-by-case basis, the most seriously injured accident victims are often waiting over a year or two to have their disputes decided at FSCO.

The question you might be asking is: what can be done for Sue or any other injured person in a similar scenario?

There are a number of ways to try to get Sue the medical and rehabilitation that she needs while she waits for her CAT dispute and/or tort claims to resolve. First, Sue's lawyer can try to negotiate an advance payment from the tort insurer with regards to less contested aspects of Sue's claims (e.g. her pain and suffering claim). Second, in light of the December 2012 Court of Appeal decision in *Cornie v. Security National Insurance Company* (Order not yet released in writing), Sue's lawyer can try to "speed up" the resolution of the CAT dispute by issuing a lawsuit against the insurer 60 days after the Application for Mediation is filed at FSCO. Third, Sue's lawyer may be able to arrange for Sue's treatment providers to continue providing treatment upon the undertaking that their accounts be protected and paid out of the ultimate settlement proceeds.

In conclusion, tort claims can be complicated and delayed as a result of uncertainties in the accident benefits scheme. With that said, there are ways to overcome some of these complications and delays so as to ensure that seriously injured accident victims do not get "lost in the system."



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