



# LUNCH & LEARN

**YORK CENTRAL HOSPITAL**

Thursday, June 21, 2012

12 noon - 2 p.m.

## MAKING THE SABS WORK FOR YOUR TRAUMA PATIENTS - AND - PREVENTING CAREGIVER BURNOUT

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PERSONAL INJURY LAWYERS

# OUTLINE OF PRESENTATION

- Basic overview of the *SABS*
- Post-2010 changes: Pitfalls and Pointers

# OVERVIEW OF THE SABS

- *Statutory Accident Benefits Schedule* (“SABS”)
- Doesn’t matter if claimant was:
  - Pedestrian/cyclist/passenger/driver
  - Insured
  - At-fault
- SABS claims  $\neq$  tort claims
- Theme of September 1, 2010 changes:
  - Fewer benefit entitlements
  - Less funding per benefit

# OVERVIEW OF THE SABS *CONT.*

- Four “Big Ticket” Benefits:
  - Medical & Rehabilitation Benefits
  - Attendant Care Benefits
  - Housekeeping & Home Maintenance Benefits
  - Income Replacement/Non-Earner/Caregiver Benefits

# OVERVIEW OF THE SABS *CONT.*

- Catastrophic\* (“CAT”): *highest*
  - Para/quadruplegia
  - Amputation/permanent loss of use of arm or leg
  - Total vision loss in both eyes
  - GCS 9 or less
  - 55% whole person impairment (“WPI”)
  - Class 4 or 5 marked impairment (AMA Guides)

\*changes likely on the horizon!

# OVERVIEW OF THE SABS *CONT.*

- Minor Injury Guideline (“MIG”): *lowest*
  - Sprain
  - Strain
  - Whiplash
  - Contusion/abrasion/laceration
  - Subluxation
  - Partial thickness tears

# OVERVIEW OF THE SABS *CONT.*

- Other Injuries: *middle*
  - Fractures
  - Non-CAT brain injuries
  - Full thickness tears

# 2010 CHANGES – PITFALLS & POINTERS: MED-REHAB

- Pre-changes:
  - CAT: 1 mil over life
  - Other: \$100K over ten years
  
- Post-changes:
  - CAT: 1 mil over life (same)
  - Other: \$50K over ten years
  - **MIG: \$3,500**



# 2010 CHANGES – PITFALLS & POINTERS: MED-REHAB *CONT.*

- Scenario:
  - 55 year old female
  - whiplash, headaches, low back strain, subluxation of right ACL
  - 2 years prior, cervical fusion for DDD
  - administrative assistant

# 2010 CHANGES – PITFALLS & POINTERS: MED-REHAB *CONT.*

- Pointer #1: Section 18(2) of the SABS

Despite subsection (1), the **\$3,500 limit** in that subsection **does not apply** to an insured person if his or her **health practitioner** determines and provides **compelling evidence** that the insured person has a **pre-existing medical condition that will prevent the insured person from achieving maximum medical recovery** from the minor injury if the insured person is subject to the \$3,500 limit or is limited to the goods and services authorized under the Minor Injury Guideline.

# 2010 CHANGES – PITFALLS & POINTERS: MED-REHAB *CONT.*

- Pointer #2: Tort Claim
  - Out-of-pocket expense claim
  - Advance payment
  - Litigation financing
  - Assessments & services as assessable disbursements

# 2010 CHANGES – PITFALLS & POINTERS: CAREGIVER BENEFITS

- Pre-Changes:
  - CAT: \$250 /week+ \$50/week
  - Other: \$250 /week+ \$50/week
- Post-Changes:
  - CAT: \$250/week +\$50/week (same)
  - **Other: N/A**
  - **MIG: N/A**
- Duration: disability test + age of person (same)

# 2010 CHANGES – PITFALLS & POINTERS: CAREGIVER BENEFITS *CONT.*

- Scenario:
  - Stay at home mom of 3 kids
  - Mild brain injury
  - Femoral fracture
  - Fractured right (dominant) ulna

# 2010 CHANGES – PITFALLS & POINTERS: CAREGIVER BENEFITS *CONT.*

- Pointer: Section 16(1)(1) – Rehabilitation Benefit  
“basket clause”
  - Nanny expenses

# 2010 CHANGES – PITFALLS & POINTERS: ATTENDANT CARE AND HOUSEKEEPING

## Attendant Care

- Pre-Changes:
  - CAT: \$6K/mo to \$1 mil max for life
  - Other: \$3K/mo to \$72K max over two years
  
- Post-Changes:
  - CAT: \$6K/mo to \$1 mil max for life (same)
  - **Other: \$3K/mo to \$36K** max over two years
  - **MIG: N/A**

# 2010 CHANGES – PITFALLS & POINTERS: ATTENDANT CARE AND HOUSEKEEPING *CONT.*

## Housekeeping & Home Maintenance

- Pre-Changes:
  - CAT: \$100/week for life
  - Other: \$100/week for two years
  
- Post-Changes:
  - CAT: \$100/week for life (same)
  - **Other: N/A**
  - **MIG: N/A**



# 2010 CHANGES – PITFALLS & POINTERS: ATTENDANT CARE AND HOUSEKEEPING *CONT.*

- AC/HH Pitfall: section 3(7)(e) - “incurred” expense:

For purposes of this regulation, subject to section (8), an **expense** in respect of goods or services referred to in this Regulation is **not incurred** by an insured person **unless**,

- (i) the insured person has **received the goods or services** to which the expense relates,
- (ii) the insured person **has paid the expense, has promised to pay the expense or is otherwise legally obligated to pay the expense, and**

# 2010 CHANGES – PITFALLS & POINTERS: ATTENDANT CARE AND HOUSEKEEPING *CONT.*

*Cont.* AC/HH Pitfall: section 3(7)(e) - “incurred” expense

- (iii) The **person who provided the goods or services**,
  - (A) **did so in the course of the employment**, occupation or profession in which he or she would ordinarily have been engaged, but for the accident, or
  - (B) **sustained an economic loss** as a result of providing the goods or services to the insured person.

# 2010 CHANGES – PITFALLS & POINTERS: ATTENDANT CARE AND HOUSEKEEPING *CONT.*

- Scenario:
  - Husband works; wife accountant in between jobs
  - Pre-mva, housework split 50-50
  - Husband suffers brain injury + pelvic fracture
  - **Wife providing extra AC + HH**

# 2010 CHANGES – PITFALLS & POINTERS: ATTENDANT CARE AND HOUSEKEEPING *CONT.*

- Pointer #1:
  - Think out of the box for “economic loss”
    - Delayed entry into workforce?
    - Third party hired to help out?
    - Value to lost household services?
- Pointer #2:
  - Family/friend a nurse, housekeeper, PSW?
- Pointer #3:
  - Option relating to tort claim

# OUTLINE OF PRESENTATION

- This presentation will review:
  - How to start a claim for Accident Benefits
  - The lesser known Accident Benefits that can be of immediate assistance to your patients and how to claim them
  - The online Trauma Resource Directory

# CLAIMING ACCIDENT BENEFITS

- You are required to notify the insurer of your claim for Accident Benefits within 7 days of the accident
- The insurer must provide a copy of the Application for Accident Benefits (OCF-1)
- The completed OCF-1 is to be signed and submitted to the insurer within 30 days of receiving the form

# WHAT HAPPENS IF I AM LATE?

- These are NON-RESTRICTIVE time lines
- You only need to have a “reasonable explanation” for the delay
- Arbitrators and Courts alike loathe to remove an injured person’s rights simply due to a procedural error

## *S.R. and State Farm Mutual*

- FSCO Arbitration Decision of Arbitrator Alves
- The insured (Mrs. R) was involved in a motor vehicle accident on July 17, 2005. She did not notify the insurance company until December 17, 2007.
- Mrs. R explained that at the time of the accident she was providing 24 hour care to her husband, who suffered a brain injury in a motor vehicle accident in 2001.
- Mrs. R was suffering from depression, anxiety and sleep disruption, which prevented her from having the mental/emotional ability to pursue her claim for Accident Benefits or even her own treatment until her husband's claims had settled



## *S.R. and State Farm Mutual*

- After reviewing the applicable legal principles, the Arbitrator ruled that Mrs. R was entitled to benefits as her explanation was reasonable in the circumstances and there was no harm to the insurance company as a result of the delay
- Despite this decision, patients should always be encouraged to immediately contact their insurance company and apply for accident benefits to protect their rights
  - In some cases, this will be a family member or even the appropriate staff member at the hospital

# WHO DO I APPLY TO FOR ACCIDENT BENEFITS?

- My automobile insurance company?
- What if I don't have insurance?
- The other driver's insurance company?
- WHO?!?!?

# WHO DO I APPLY TO FOR ACCIDENT BENEFITS?

- In respect of an occupant of an automobile,
  - i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,
  - ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,
  - iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose,
  - iv. if recovery is unavailable under subparagraph i, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund. (s. 268(2)1. of the *Insurance Act*)

# WHO DO I APPLY TO FOR ACCIDENT BENEFITS?

- In respect of non-occupants,
  - i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,
  - ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,
  - iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any automobile involved in the incident from which the entitlement to statutory accident benefits arose,
  - iv. if recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund. (s. 268(2)2. of the *Insurance Act*)

# WHO DO I APPLY TO FOR ACCIDENT BENEFITS?

- Scenario #1

- 35 year old cyclist struck by a motor vehicle
- Cyclist does not own a vehicle and is not a dependent living with anyone who has motor vehicle insurance
- The striking driver is uninsured

- Scenario #2

- 17 year old passenger in friend's vehicle suffers injury when the vehicle is struck by another vehicle
- The friend has automobile insurance
- Passenger lives with his parents who have automobile insurance

# THE LESSER KNOWN (but practical!) BENEFITS

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PERSONAL INJURY LAWYERS

# EXPENSES OF VISITORS (S. 22)

- The insurer must pay for “reasonable and necessary” expenses incurred not more than 104 weeks (i.e. 2 years) after the accident by certain people as a result of the accident in visiting the insured person during his or her treatment or recovery
- Persons entitled to claim include:
  1. The spouse, children, grandchildren, parents, grandparents, brothers and sisters of the insured person.
  2. An individual who was living with the insured person at the time of the accident.
  3. An individual who has demonstrated a settled intention to treat the insured person as a child of the individual’s family.
  4. An individual whom the insured person has demonstrated a settled intention to treat as a child of the insured person’s family.

# EXPENSES OF VISITORS

- Where the insured person suffers catastrophic impairment as a result of the accident, expenses of visitors are available for life
- While expenses of visitors can be as simple as costs of parking at the hospital and mileage, they can also be as complicated as airfare and hotel accommodations, depending upon the specific circumstances of each case
- Submit expenses of visitors early!!!



# MED-REHAB BASKET CLAUSES

- Medical Benefits Basket Clause (s. 15(1)(h)):

**15.** (1) Subject to section 18, medical benefits shall pay for all reasonable and necessary expenses incurred by or on behalf of the insured person as a result of the accident for,

...

(h) other goods and services of a medical nature that the insured person requires, *other than goods or services for which a benefit is otherwise provided in this Regulation.*

# MED-REHAB BASKET CLAUSES

- Rehab Benefits Basket Clause (s. 16(3)(1)):

16. (1) Subject to section 18, *rehabilitation benefits shall pay for all reasonable and necessary expenses incurred* by or on behalf of the insured person in undertaking activities and measures described in subsection (3) that are reasonable and necessary *for the purpose of reducing or eliminating the effects of any disability* resulting from the impairment or to *facilitate the person's reintegration into his or her family, the rest of society and the labour market.*

# MED-REHAB BASKET CLAUSES

(3) The activities and measures referred to in subsection (1) are,

...

(1) other goods and services that the insured person requires, except,

(i) services provided by a case manager,

(ii) *housekeeping and caregiver expenses, and*

(iii) *any goods or services for which a benefit is otherwise provided in this Regulation.*

# *G.B. v. Pilot Insurance Company*

- FACTS

- 22 year old woman (“Mrs. G”) was injured in a car accident in 1998 – she was childless at the time
- She had her first child in 2004
- She claimed nanny services in 2004 from the accident benefits insurer – insurer denied the claim
- She was declared catastrophically impaired in 2006

- FSCO

- Arbitrator agreed with Mrs. G and ordered Pilot to pay the costs
- On appeal, the Directors Delegate overturned the Arbitrator’s decision and ordered that Pilot need not fund nanny services as they could be obtained under section 13 of the *SABS* (caregiver benefits) and therefore, were not claimable under section 15 (rehabilitation benefits)

# *G.B. v. Pilot Insurance Company*

- Ontario Divisional Court

- The Court reinstated the original FSCO decision granting Mrs. G the right to nanny services funded by the insurer
- The Court held that there was no logic to the argument that as it was available under the caregiver benefit it could not be claimed as a rehabilitation benefit
- The Court further stated that the Arbitrator had made an important finding of fact that in Mrs. G's case, nanny services was rehabilitative in itself for Mrs. G
  - Thus, it was appropriate to claim under section 15 for people where the nanny services aren't simply to fund childcare but are rehabilitative in nature for the applicant

# MED-REHAB BASKET CLAUSES *CONT.*

- The Mrs. G case has long been relied upon by Applicants to claim nanny expenses (where children were born post-accident) under the rehabilitation benefit
- It is unclear how the September 2010 changes to the rehabilitation benefit basket clause will impact the ability of claimants to follow in Mrs. G's footsteps
  - This issue has not been ruled upon by FSCO or the Courts since the September 2010 changes

# MED-REHAB BASKET CLAUSES *CONT.*

- Drop in med-rehab benefits cap from \$100,000 to \$50,000 for non-cat means that it will be in a patient's interest to extend their hospital stay as long as possible since the benefits may be inadequate to pay for their needed care and treatment
  - This will be important in cases where the injury is borderline CAT and the injured patient will need to wait until the 2-year anniversary to gain access to the CAT limits
- Trauma workers need to be aware of this as it will change the manner in which patients respond to hospital care and discussions surrounding discharge

# TRANSPORTATION EXPENSES

- Medical and rehabilitation benefits permit payment of only “authorized transportation expenses”
- Unless the injured person is CAT, only transportation expenses incurred after the first 50 km of a trip are reimbursable (eligible in MIG as well)
- Transportation Expense Guideline (FSCO document)
  - The mode of transportation is to be the “most economical and practical for the distance to be travelled, and be appropriate under the specific circumstances”
  - Taxi accounts – where it is “reasonable and practical” to take a taxi (or where the person doesn’t own a car or drive), subject to the same 50 km deductible



# DAMAGED ITEMS

- “Can I get reimbursed for my damaged smartphone?”
- “What about my designer sunglasses?”
- The *SABS* are very particular as to what items are reimbursable
  - (s. 24) The insurer must pay for all *reasonable* expenses incurred by or on behalf of an insured person in repairing or replacing the following:
    1. Clothing worn by the insured person at the time of the accident that was lost or damaged as a result of the accident.
    2. Prescription eyewear, dentures, hearing aids, prostheses and other medical or dental devices that were lost or damaged as a result of the accident.

# LOST EDUCATIONAL EXPENSES

- When the injured person is a registered student, their school expenses that were incurred *before* the accident can be reimbursed
  - Includes: tuition; books; equipment; and room and board
  - Have to be enrolled at the time of the accident AND the expenses must be related to the program the injured person is unable to continue
- Reimbursement is available to a maximum of \$15,000.00
- You will need receipts for items and confirmation of enrolment from the school

# HOW DO I CLAIM ONGOING BENEFITS?

## “Expenses Claim Form (OCF-6)”

- OCF-6 is used to claim for medical and rehabilitation treatment, lost educational expenses, caregiver/attendant care/housekeeping and home maintenance benefits, transportation expenses, expenses of visitors and the cost of repairing/replacing damaged items
- It is best if you can attach bills and receipts but this is not mandatory
- In claiming benefits, you will often do so in accordance with the rates recommended by the occupational therapist (in most cases) that performed the in-home assessment

# THE TRAUMA RESOURCE DIRECTORY

- <http://www.traumaresourcedirectory.com>
- A comprehensive listing of all qualified health care providers throughout Ontario – FREE!!
- Intended to assist social workers and discharge planners in finding the appropriate treatment providers at the time of discharge
- As many as 48% of victims of serious trauma accidents are discharged home without support