

Accident Benefit Reporter

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THE TROUBLE WITH BAD FAITH CLAIMS IN THE CONTEXT OF STATUTORY ACCIDENT BENEFITS

Insurance companies have a duty to deal fairly with the claims of the people they insure. However, if you are in a car accident you cannot sue your insurance company for bad faith in connection with their decision to deny your statutory accident benefits.

In 702535 Ontario Inc. v. Non-Marine Underwriters, Lloyd's of London, the Supreme Court of Canada made it clear that the duty to act fairly applies to both how the insurance company investigates and assesses a claim and to its decision whether or not to pay. An insurance company must not deny payment to take advantage of a person's economic situation or to gain bargaining leverage in negotiating a settlement.¹

If an insurance company fails to meet its duty of utmost good faith and refuses to pay an insured person's claim, the courts may award punitive damages. In *Whiten v. Pilot Co. and Fidler v. Sun Life Assurance Co. of Canada*, the Supreme Court of Canada set out what courts should consider in determining whether punitive damages should be awarded:

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- Punitive damages are meant to address retribution, deterrence and denunciation, not compensation.
- They are awarded only where compensation is insufficient to meet the goal of deterring or denouncing the insurance company's conduct.
- The insurance company's conduct must depart markedly from ordinary standards of decency as conduct that is malicious, oppressive or high-handed.
- Failure to pay insurance benefits on its own is not enough. There must be proof that the insurance company breached its contractual duty to act in good faith.²

Unfortunately, in the context of statutory accident benefits, insurance companies cannot be held to account with punitive damages. In *Arsenault v. Dumfries Mutual Insurance Co. and Mader v. South Easthope Mutual Insurance Co.*, the Ontario Court of Appeal held that any and all disputes about an insurance company's refusal to pay statutory accident benefits, including disputes which allege the insurance company acted in bad faith in connection with that

refusal, must follow the dispute resolution procedure set out in the Act³, which requires an insured person to apply to the Licence Appeal Tribunal.

The Licence Appeal Tribunal can act to punish insurance companies for their misconduct. If the Licence Appeal Tribunal finds that an insurance company has unreasonably withheld or delayed payments, it may award a lump sum of up to 50% of the amount to which the person was entitled at the time of the award in addition to awarding the benefits owed (with interest).⁴

In cases where there is a dispute over significant benefits owed – for example 24-hour attendant care to a brain injured accident victim – a large special award can have the same effect as a punitive damages award.

The difficulty starts where an insurance company acts in bad faith in cases where the benefit denied is for a small monetary amount. For example, a limited number of physiotherapy or chiropractor sessions. In these circumstances, the reality is that a penalty of 50% of the amount that the person is entitled is unlikely to be enough to make an insurance company think twice about its bad behaviour. ■■■

¹702535 *Ontario Inc. v. Non-Marine Underwriters, Lloyd's of London* [2002] S.C.J. No. 19, 2002, S.C.C. 18

²*Fernandes v. PennCorp Life Insurance Company*, 2014 ONCA 615; *Whiten v. Pilot Co.*, 2002 S.C.C. 18;

Fidler v. Sun Life Assurance Co. of Canada, 2006 SCC 30

³*Mader v. South Easthope Mutual Insurance Co.*, 2014 ONCA 714

⁴Ontario Regulation 664, R.R.O. 1990, Section 10

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Over the past several weeks we've been asking for your help to decide how to allocate an \$80,000 donation for our 80th anniversary. This donation was based on which of 5 stories of perseverance and recovery inspired you the most.

Your votes resulted in the following distribution of our donation:

- Tina for Spinal Cord Injury Ontario: **\$30,000**
- Zoe for the War Amps – CHAMPS Program: **\$15,500**
- Scott for the Brain Injury Association Peterborough Region: **\$9,000**
- Fere for West Park Healthcare Centre – Prosthetics and Orthotic Services: **\$9,000**
- Anthony for Ontario Brain Injury Association: **\$9,000**



In addition to these very deserving groups, many of our clients submitted stories about other inspiring groups that will also receive a charitable donation. Rounding out the remainder of Thomson Rogers' 80K giveaway are:

At the request of Garth Holding – **Tobermory Hyperbaric Medicine Group** – \$500

At the request of Tammy Kirkwood – **Orillia Soldiers' Memorial Hospital** \$500

At the request of Frank Mangiardi – **War Amputees of Canada** – \$500

At the request of Nick Morihovitis – **Parkinson Foundation of Canada** – \$500

At the request of Nancy Ryan – **Loyalist Humane Society Picton** – \$500

In memory of Scott Southwell and Tom Leonard – **Community Head Injury Rehabilitation Services (CHIRS)** – \$4,500

We would like to thank you for voting and helping raise the awareness of these 5 charities.

We look forward to another 80 years of helping clients.

UPCOMING EVENTS 2016



SAVE THE DATE

May 4 & 5, 2017 2017 Hamilton ABI Conference - Hamilton Convention Centre, Hamilton.

For more information, click [HERE](#)

FOR MORE INFORMATION ON THE EVENTS LISTED ABOVE, PLEASE VISIT:

<https://www.thomsonrogers.com/news/upcoming-events/>

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