

BRAIN INJURY SERVICES OF HAMILTON

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ADVOCATING FOR THE BRAIN-INJURED INDIVIDUAL:

**A STEP-BY-STEP APPROACH TO NAVIGATING THE INSURANCE MAZE
AND TO OBTAINING JUSTICE
FOR THE BRAIN-INJURED SURVIVOR AND HIS OR HER FAMILY**

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It is a great honour to represent brain-injured individuals and their families and to help them live a better life. Catastrophic injury cases and serious brain injury cases, in particular, present unique challenges to the legal, medical, and rehabilitation team. As a lawyer with over 20 years' experience in representing brain-injured individuals and their families, I hope that my comments will lend a helping hand to those who care for a brain-injured individual. In offering you comments today, I approach my task humbly and with a full realization that no one, not any lawyer, case manager, physician, occupational therapist, or physiotherapist will ever know what a brain-injured victim and their family experiences or can ever endure what they endure. All we can do is strive to emulate their courage.

What follows below are my observations, impressions, and experience in seeking justice for brain-injured individuals and their families. My topic will focus both on the tort system and on obtaining and accessing statutory accident benefits.

The key questions that family members of brain-injured individuals have are as follows:

1. What compensation am I entitled to and how long will it take to settle my case?
2. What funds are available as the tort case makes its way through the litigation process? (*e.g., How can we live on \$400.00 a week and how can our legal team improve our quality of life?*)

3. What is the role of the lawyer? (*i.e., empowering the brain-injured individual and his family*)
4. What accident benefits are we entitled to?

THE TORT SYSTEM

In Ontario, anyone who suffers injury as a result of another's negligence can sue in tort. Whether the injury is caused from a malpractice, from a slip and fall, from playing hockey, from diving in a pool or lake, or from a car crash, the following fundamental principles apply:

1. The injured victim has a right to sue the wrongdoer in tort. Tort means civil wrong. If the victim is not entirely at fault for the incident, the victim can obtain compensation under the following categories:

A. *Damages for Pain and Suffering:*

In Canada, since 1978, there has been a "cap" or limit on the amount of compensation awarded for what is known as non-pecuniary general damages. In 1978, in a series of three cases known as the "Trilogy", the Supreme Court of Canada set an upper limit or "cap" on the amount that could be awarded. In 1978, the cap was set at \$100,000.00 for the most catastrophic injuries. In subsequent cases, the Supreme Court of Canada said that the cap is to be increased by the amount of annual inflation. In November 2005, the cap for non-pecuniary general damages was approximately \$303,000.00.

What is the rationale for limiting pain and suffering damages. In *Andrews v Grand & Toy Alberta Limited*, [1978] 229, Mr. Justice Dickson, of the Supreme Court of Canada (as he then was, he later became Chief Justice of Canada), underlined the rationale for pain and suffering damages as follows:

“But the problem here is qualitatively different from that of pecuniary losses. There is no medium of exchange for happiness. There is no market for expectation of life. The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one.”

The purpose of damages for pain and suffering is to provide the injured person “with a reasonable solace for his misfortune”. “Solace” in this sense is taken to mean physical arrangements which can make his life more endurable rather than “solace” in the sense of sympathy. Money is awarded because it will serve a useful function in making up for what has been lost in the only way possible because what has been lost is incapable of being replaced in any direct way.

In catastrophic brain injury cases, therefore, you can expect that the award for non-pecuniary general damages will likely approach the maximum award or “cap”.

Since October 1, 2003, the method of compensating car accident victims has changed. Bowing to the dictates of the insurance industry, the government imposed a deductible on claims for pain and suffering. This deductible applies only to those cases in which the pain and suffering will be assessed at under \$100,000.00. Injury

claims which involve fractured arms or legs could be assessed at under \$100,000.00 and will bring with them a deductible of \$30,000.00. The deductible “vanishes” on cases where the pain and suffering claim would be assessed at greater than \$100,000.00. Every serious brain injury will likely be assessed at over \$100,000.00.

The largest or most significant component of awards in catastrophic cases is not, therefore, the amount awarded for pain and suffering; rather, it is made up of damages for loss of income and future loss of income and what are known as future care costs.

B. *Determining Future Lost Income:*

In a serious brain injury case, the quantification or calculation of the amount for future loss of income is not difficult, as it is clear that the injured person is not returning to gainful employment. Where, however, the injury involves a mild or moderate brain injury, building the case and establishing a foundation for an award for loss of future income is often more difficult. In order to establish a claim for future lost income, we arrange for our client to be seen by appropriate vocational and rehabilitation experts, i.e. those experts who have experience in dealing with brain-injured individuals. These experts who have wide experience on the critical issue of employability will administer a battery of aptitude, work-related, and vocational tests to the brain-injured individual. It is not uncommon for someone with a brain injury to make an excellent recovery and to return to work. As we all know,

unfortunately, there is such a thing as discrimination in the workforce. People with brain injuries will likely face difficulty in being promoted and, indeed, the upward momentum which characterized their career before the accident may very well be curtailed. To that end, it is important to assemble documentation consisting of the following:

- i. work evaluations prior to the accident;
- ii. reports of co-workers, friends, and family pertaining to how the injured person functioned at home and on the job prior to the accident;
- iii. reports and assessments carried out by leading vocational and rehabilitation experts, as well as physiatrists or rehabilitation consultants with expertise in brain injury.

Once this information is assembled, then it would be wise to retain an economist to prepare a report outlining the affect of the accident on employability and to calculate, based on the information provided as much as possible, different scenarios as to the likely loss of income that the injured person will sustain.

C. *Future Care Costs:*

In any catastrophic case, it is essential to have a future care costs consultant, (such as an occupational therapist experienced with the assessment and treatment of brain-injured individuals) prepare a future care or life care report. These reports outline the long-term care needs that the brain-injured victim will require. Depending on the severity of the brain injury, the report may very well focus on attendant care needs, the costs of

occupational therapy, physiotherapy, medications, and modifications to the home and/or vehicle. In the most catastrophic brain injury cases, where 24-hour daycare is required, the future care report will focus on the various attendant care options, i.e.,

- i. whether the injured person should be at home and the costs of any modifications to the home or whether the brain-injured individual should be in a home or hospital;
- ii. the cost of having 24-hour a day attendant care, i.e., whether to be provided by parents or other family members or purchased at commercial rates from nursing and/or other rehabilitation companies;
- iii. the cost of medications;
- iv. the cost of any appliances and assistive devices, such as wheelchairs, in-house elevators, and the like;
- v. whether any vehicle modification is required, i.e., if the person is wheelchair-bound, whether the family requires a wheelchair accessible van.

These are just some of the issues involved in representing the brain-injured individual.

D. *The Problem of Insufficient Policy Limits:*

In a tort claim, however, where there is insufficient policy limits to fully compensate the brain-injured individual, the case should be settled promptly and without undue delay. What do I mean by that? In a car case where the

person at fault only has \$1 million of coverage, the tort claim should be settled, certainly within the first year. There is not any more money. The at-fault motorist may have a house or other assets but, to attach those assets, unless they are substantial, is expensive, time-consuming, and will likely prove ineffective. For that reason, a demand should be made to the insurance company to pay to their counsel the policy limits. Insurers have an obligation of “good faith” owed to their insureds. That means, for example, that the insurance company must protect its insureds from any claims above the policy limits and behave reasonably by settling claims within the policy limits.

We have recently settled catastrophic brain injury cases in less than a year after being retained. There were insufficient insurance policy limits to fully compensate our clients. After being retained, we issued a Statement of Claim, obtained appropriate medical, hospital, and other reports, sent them to the insurance company, and made a demand for the full policy limits, which were then paid to our client. It is far better, and indeed advisable, that counsel for the brain-injured individual are proactive and aggressively pursue their clients’ interests by ensuring the policy limits are paid without delay. The money is much better working on behalf the injured person than being kept by the insurance company.

HOW LONG DO CASES TAKE?

Catastrophic brain injury cases should rarely take no more than three to four years to resolve. This is a lifetime of time for brain-injured individuals and their family members, where every day is like a month, every month is like a year, and every year is like a decade, yet it takes that long to settle a complicated brain injury case.

1. What Must Be Done?

Within six months of being retained and after a full and thorough investigation is carried out, we start the lawsuit by issuing the Statement of Claim. Thereafter, once the Statement of Claim is issued, we will then set up what are called examinations for discovery. We hope to have the discoveries arranged sometime within six months following the issuance of the Claim. After the discoveries are completed, we will set the matter down for trial and request a pre-trial conference. We should obtain a trial date within two years of setting the matter down for trial, an inordinate length of time but the reality today in Toronto. Everything is geared so that the whole process is accomplished in three or four years. How do we do that? During the interim between issuing the Claim, discoveries, and setting down the matter for

trial, we will arrange for our client to be seen by numerous specialists. These specialists are not treating doctors but simply examine our client for the purpose of litigation and include:

- A. physiatrists with experience in brain injury (they comment on the affect of the brain injury on employment and on future care);

- B. vocational and rehabilitation specialists to comment on employability (in a mild or moderate brain injury, these experts are absolutely critical to obtaining a just result for a brain-injured individuals). Brain-injured victims often have difficulty processing information, interacting with their peers at work or with friends outside of work. For that reason, a recognition of the effect that the accident had on employability and social interaction must be addressed and appropriate experts retained to comment on these issues;
- C. future care consultants to discuss the healthcare expenses that the brain-injured individual may incur. In a mild or moderate brain injury case under Bill 198 (the car insurance legislation that took effect on October 1, 2003), every individual can sue for healthcare expenses. Every brain injury case, mild to severe, should bring with it a future care cost care report prepared by an experienced consultant.

If all these arrangements are made and if everyone does their duty with courage, determination and skill then I believe that the life of a brain-injured individual will be made better. That is the great honour that motivates us, that impels us to move forward, and which empowers us to work as hard as we do.

2. Obtaining Payment While the Case is Ongoing:

Section 258.5(1), (2), (3), and (5) of the *Insurance Act* reads as follows:

(1) Duty of insurer re settlement of claim - An insurer that is defending an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile on behalf of an insured or that receives a notice under clause 258.3(1)(b) from an insured shall attempt to settle the claim as expeditiously as possible.

(2) Advance payment - If the insurer admits liability in respect of all or part of a claim for income loss, the insurer shall make payments to the person making the claim pending the determination of the amount owing.

(3) Amount of payments - The amount of payments under subsection (2) shall be based on the insurer's estimate of the amount owing in respect of the claim for income loss, having regard to any information provided to the insurer by the person making the claim.

(5) Failure to comply - In an action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile, the insurer's failure to comply with this section shall be considered by the court in awarded costs.

If liability is not in issue and, even where it is not formally admitted, it is my opinion that insurers have an obligation to make advance payments. The advance payments are simply pre-payments on their obligations under the claim. The intent of the law is not to have insurers "starve out" injured victims so that they settle unreasonably. If clients need money, then their counsel should bring a motion in court to compel an advance payment. I have done so in the past and I will continue to do so in the future, in order to obtain money for my clients, while the case makes its way through the long litigation process. These advance payments are important and their importance should not in any way be underrated. As you perceive, I advocate a very proactive, determined, and aggressive approach to ensure that my clients' lives are improved. We never stand still. We are always considering what can be done to improve our clients' lives.

Each of you today should be empowered to do the same. As I stated earlier, none of us will ever know what a brain-injured individual experiences on a day-by-day basis. None of us will ever know what a family member of a brain-injured individual endures but all of us can emulate their courage.

3. Statutory Accident Benefits Schedules:

The one we are concerned with are the Regulations which took effect after October 2003. Many of you are already aware that an injured person is entitled to “income replacement benefits of up to \$400.00 a week”. In some cases, enhanced accident benefits have been purchased and those who are earning more than \$60,000.00 or \$70,000.00 a year should speak to their insurance broker about paying a slightly higher premium and obtaining enhanced benefits of up to \$1,000.00 a week.

4. Medical, Rehabilitation and Attendant Care Benefits:

A. Medical and Rehabilitation Benefits:

- i. In the non-catastrophic cases, \$100,000.00 of medical and rehabilitation benefits are available to an injured person. In a moderate or mild brain injury case, this \$100,000.00 is not enough. However, if the brain injury took place after October 2003, the brain-injured individual could sue for healthcare expenses as part of the tort claim.
- ii. In catastrophic cases, there is \$1 million of medical and rehabilitation benefits available to brain-injured individuals, regardless of fault.

There is no lifetime or time limit imposed: \$1 million will be paid as long as the insured requires it.

B. *Attendant Care Benefits:*

- i. In the non-catastrophic cases, \$72,000.00 in attendant care benefits is the limit.
- ii. In the catastrophic cases, a maximum of \$1 million is available.

5. Housekeeping:

- i. In the catastrophic cases, \$100.00 a week for life is paid to the injured victim.

6. Accessing Accident Benefits:

It is very important that these benefits are paid on a timely basis and that injured victims and their families are aware that the insurance company must provide benefits that make their lives better.

The avowed purpose of the rehabilitation benefit is enumerated in Sections 14(1)-(2) and 15(1)-(3) of the Statutory Accident Benefits Schedule as follows:

Section 14

- (1) The insurer shall pay an insured person who sustains an impairment as a result of an accident a medical benefit.
- (2) The medical benefit shall pay for all reasonable and necessary expenses incurred by or on behalf of the insured person as a result of the accident for,
 - (a) medical, surgical, dental, optometric, hospital, nursing, ambulance, audiometric, and speech language pathology services;

- (b) chiropractic, psychological, occupational therapy, and physiotherapy services;
- (c) medication;
- (d) prescription eyewear;
- (e) dentures and other dental services;
- (f) hearing aids, wheelchairs, or other mobility devices, prostheses, orthotics, and other assistive devices;
- (g) transportation for the insured person to and from treatment sessions, including transportation for an aide or attendant;
- (h) other goods and services of a medical nature that the insured person requires.

Section 15

- (1) The insurer shall pay the insured person who sustains an impairment as a result of an accident a rehabilitation benefit.
- (2) The rehabilitation benefit shall pay for reasonable and necessary measures undertaken by an insured person to reduce or eliminate the effects of any disability resulting from the impairment or to facilitate the insured person's integration into his or her family, the rest of society and the labour market.
- (3) Measures to integrate an insured person into the labour market include measures that are reasonable and necessary to enable the person to:
 - (a) engage in employment that is as similar as possible to employment in which he or she engaged before the accident;
 - (b) or lead as normal a work life as possible.

Benefits must be paid every 14 days. If not, the insurance company must pay interest. It is important, therefore, that everyone in this room recognize that the Statutory Accident Benefits Schedule, known as the no-fault schedule, provides a full array of benefits to injured persons and their families. Accessing those benefits should not be the responsibility of the injured person but of their legal team. The benefits must be accessed on a prompt basis. Never hesitate in asking for updates on a regular basis as to the status of unpaid benefits.

If the insurer is not paying benefits in a timely fashion or is disputing entitlement to benefits, it is up to the lawyer to file for mediation, which is the pre-requisite to either suing in court or arbitrating before the Financial Services Commission of Ontario. Time is of the essence. Each of you should be empowered to ensure that the lawyers and the rest of the legal team are on top of matters, that regular reports and updates are provided, and that the benefits are being accessed. If they are not, then the insurer should be brought to account. Accountability is the hinge upon which everything turns. You must require accountability from the treatment team, from the legal team, and from the insurance company.

The keys to a better life do not just materialize. Great work, dedication, and determination are required, not only from the team of care-givers and healthcare professionals, but also from the legal team. Injured victims and their families must be empowered to advocate on behalf of themselves. If they cannot, then the social workers, physiotherapists, occupational therapists, personal support workers, and others must not be fearful of

advocating and, indeed, must insist upon those benefits which the law provides being provided to injured victims and their families.

All of you today should be proud, determined, and committed to ensuring that injured victims and their families receive what they are entitled to. In my office, there is a plaque which is called "The Creed for the Lawyer" and it contains several biblical phrases. One which motivates us and I think should resonate with all of you today is Psalms 106:3: "Happy are they who maintain justice and do righteousness at all times."

Thank you.