

Cashing in Bill 59 First Party Benefits can be Dangerous

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In November 1996, the latest of three motor vehicle reparation systems came into force. Just when lawyers and insurance adjusters were getting comfortable with the provisions of Bill 68 and Bill 164, a whole new set of regulations was thrust upon them. These new rules that have provisions that are potential minefields that may catch the unsuspecting lawyer.

Catastrophic and Non-Catastrophic

For instance, the difference in benefits between a 'catastrophic' injury and one that is not, is:

- \$172, 000 vs. \$2 million
- no case manager vs. the right to choose your own case manager; and
- no right to claim for excess medical, rehabilitation and attendant care benefits vs. the right to sue for all reasonable and necessary services in excess of the no-fault coverage

Often, it is not readily apparent that a person has sustained a catastrophic injury. The lawyer must examine all the facts, review the medical records, interview all witnesses and obtain a proper history from their client. This should be done before referring the case to the appropriate expert for an opinion. In other situations, it may take several years before a final determination of 'catastrophic' is known.

Pursuing benefits when denied

When a benefit is denied, there is a limitation period of two years from the date of denial. On the other hand, if the injuries are 'catastrophic', although the caselaw states that after a denial it is not necessary to pursue the first-party insurer before claiming benefits in tort, it is dangerous not to do so.

If the claimant doesn't pursue a benefit that has been denied and the policy limits of the third party are not sufficient to satisfy the claim, the claimant may suffer a deficiency in their loss of income, medical, rehabilitation and/or care costs. The lawyer should pursue all first-party benefits that have been denied, but which, in their opinion, are reasonable and necessary. Pursuing first-party benefits can be extremely labour intensive. However, if the lawyer is not constantly monitoring the benefits, the first-party insurer will retain its own specialists to examine and treat the client, a situation that is not ideal.

Cashing in or commuting benefits

This area is where the lawyer is most vulnerable to having a claim made against them. Most insurance companies are anxious to commute the future benefits provided that they are able to settle for an amount substantially less than the amount they feel they will eventually have to pay out. It is common practice under Bill 164 for large settlements to be paid out on the basis of the commuted value of the benefits, less a discount for

contingencies. Although some of the same dangers apply to cashing in benefits under Bill 59 as applied under Bill 164, the dangers are far greater under the new law. The lawyer has to be aware that clients, especially those under a disability, may be able to pursue a claim for an improved settlement. Therefore, the lawyer's file must be well-documented with sufficient medical evidence for the lawyer to give a proper opinion in their application for court approval of the settlement.

In a brain injury case especially, the lawyer should, if they are not seeking court approval, obtain an opinion from an appropriate expert as to the client's capacity to understand the settlement and to give meaningful instructions. To avoid the risk of unnecessary distress in all first-party cases, the lawyer should take great care in explaining the statutorily required disclosure statement. Otherwise the client will feel grossly under-compensated when they feel see the full amounts of the available benefits.

Another area of concern is when the defence in the tort action (where the injury has been declared catastrophic) alleges that the settlement of the first-party benefits was improvident. In that case the tortfeasor will want to deduct the full amount of the present value of all future or available benefits. If the amount of the benefits cashed in is substantially less than the amount to which the judge determines the client should have been entitled, the client may have a claim against the lawyer. Also, if the amount for rehabilitation and/or attendant care is commuted, unless the claimant actually partakes in the recommended treatment and expends the money necessary for attendant care, the tortfeasor will raise additional arguments that the plaintiff failed to mitigate the loss or that there is no claim for any excess benefits. Unfortunately, once the benefits are commuted, clients seldom expend substantial amounts for the recommended treatment. This is why insurers are able to convince claimants to discount the benefits substantially on a settlement.

Summary

There have been a number of [LPIC](#) claims under Bills 68 and 164 arising out of improvident settlements of first-party claims and missed limitation periods. It is anticipated that there will be many more claims arising under Bill 59. Some of these claims may not arise for many years following what the lawyer thought was a reasonable settlement. Another problem that the lawyer may face is the denial of coverage by LPIC for late reporting, insurability and/or premium increase.

The answer to the lawyer's dilemma is not clear. Once retained, the lawyer must monitor the no-fault benefits as well as the tort claim. This involves a concerted effort and an expenditure of disbursements far in excess of what a lawyer's responsibility had been in the past. The law that interprets the various provisions is constantly changing. What was proper advice yesterday may not be today. Along with the new provisions to expedite claims, we now have [case management](#). The lawyer can no longer wait for things to happen. A proactive approach must be taken. On the other hand, moving too quickly may result in compromising the client's claim. The specialist in personal injury litigation must

be more knowledgeable and be prepared to expend more effort and funds than ever before.

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