MASTERING THE MVA JUGGLING ACT: GETTING THE BEST AB AND TORT SETTLEMENTS FOR YOUR CLIENT

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I N D E X

INTRODUCTION

Beginning with the OMPP back in 1990 and certainly continuing through to the current Bill 198, motor vehicle litigation demands that the accident benefit file and the tort action be coordinated, "hand in glove", with one another. This paper explores some of the current considerations I bring to my own plaintiff practice.

WINNING STRATEGIES TO COORDINATE AB AND TORT PROCEEDINGS[1]

On any accident benefit file, large or small, my goal is to ensure that my clients receive the benefits that they are entitled to, in a timely way, and that they continue for so long as they remain entitled. Accident benefit files can be very time-consuming, so getting the benefits paid efficiently is not only in my clients' best interests, but also my own. Often, it need not be an adversarial experience to get the benefits paid; often all that is required is careful completion of the appropriate paperwork and submission of all necessary documents to the accident benefit adjuster.

The most successful accident benefit files that I can manage are those which do not proceed to litigation or arbitration. The most successful AB files in which I am involved support the tort file. The opinions are complimentary to the arguments that I am trying to advance in the companion tort action. The corollary to keeping AB benefits in pay is "Do no harm to the tort case".

Along the way, I have developed a number of strategies that assist me in achieving my primary directive. In no particular order, here is what I find works for me.

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1 A large portion of this section of my paper is a reprint of a paper I produced for an earlier conference hosted by a different organization.

Communication, Communication, Communication

With my tort files, usually the adjusters and defence counsel that I deal with are from my own local area in and around London, Ontario. It is easy to establish a rapport and credibility with these individuals because I am dealing with the same people time and time again. While there are a few accident benefit adjusters that I deal with routinely, I find that has been changing lately with the merger of insurers and the consolidation of the industry in Toronto. More and more often, I am now dealing with an accident benefit adjuster with whom I have little or no previous track record. With a new adjuster, I try to do the following:

- I call the adjuster to introduce myself.

- I explain that, as far as possible, my practice is to be cooperative and collaborative. I ask the adjuster if there are any documents in particular that would assist the adjuster in handling the file, and then follow-up by promptly sending those documents along to the adjuster.

- I explain to the adjuster that I understand they are very busy, with probably too many files on their desk, and that I don't wish to add to their workload, if it can be avoided. I tell the adjuster that I see ourselves as being two different parts of the same team, as we are both there to ensure that the injured accident victim receives access to all accident benefits appropriate for his or her needs. Basically, I seek to diffuse, right from the outset, the adversarial aspects of the relationship, with the hope that my client and I might be given the benefit of the doubt on grey issues that crop up later on during the life of the file.

- Sometimes I share some personal, perhaps self-deprecating anecdote about myself, and certainly remain respectful with the adjuster. Simply put, I start out from a position of trust and mutual respect and wait to be proven wrong, rather than start out with suspicion and condescension. Admittedly, I have been burned on a couple of occasions, but, on the whole, I have found my strategy successful and my working relationships with the hardworking men and women who fill the role of AB adjusters more satisfying.

- With some of my catastrophic cases, I try to make arrangements for the primary accident benefit adjuster to meet with my client and me, in order to get a sense for who the person was before the injury, put a face to the name, and foster a collaborative environment.

Demonstrative Evidence

When I talk to many of my colleagues, I don't get the sense that they send along photographs to the accident benefit adjuster, but I have found it helpful, in the appropriate case, to do so. Obviously, it would be meaningless to send along a photograph of someone who suffers from chronic pain or soft tissue injuries or Fibromyalgia, but burns, scars, orthopaedic injuries, amputations, spinal cord injuries, etc., are all examples of a picture being worth a thousand words.

Maintaining Reason

Yes I am an advocate for my clients, but, as an advocate, I also need to explain to my clients, very carefully, the difference between appropriate expenses and inappropriate expenses. If my client is suffering from an accident-related ingrown toenail, I am not

going to let him put in a request for a $10,000.00 hot tub so that he can soak his toe, even if he does find someone who is prepared to fill out the Treatment Plan for him. I suppose another way of saying it is that, in order to manage the AB file, I also need to manage my clients. I need to manage their expectations, I need to manage the documentation, and I need my clients to understand that, once either they or I have lost credibility, we both then face a road of uphill battles for the life of the file.

Quality Experts

A big part of maintaining credibility with the adjuster is having solid opinions in support of those accident benefits that you do seek. I always strive to hire well-accredited, well-respected, unbiassed experts because their opinions mean something. Invariably, I will seek opinions on the tort side of the file. There is no OCF-22 or OCF-18 involved because I simply hire the individual directly and pose my questions. One of the standard questions that I will ask a physiatrist or orthopaedic specialist, or neurologist, etc., reads something like this:

> Are there any further medical or rehabilitative options available to this gentleman, whether they be referrals to other consulting specialists, further diagnostic testing, pharmacological intervention, exercise programs, or otherwise, that you suggest be implemented in order to improve this gentleman's quality of life or assist him with his efforts to return to the workplace? In this regard, it is my intention to share a copy of your report with the accident benefit insurer that is responsible for funding my client's care, with the request that it consider funding any of the initiatives that you might suggest.

Once upon a time, I could collaboratively arrange, directly with the AB insurer, for immediate funding of many of the initiatives outlined by my specialist. Now, I find that I

have to go through the cumbersome exercise of having a formal Treatment Plan prepared. Usually, with the report in hand, however, I can more easily get the treating family doctor to prepare a Treatment Plan, based loosely or sometimes specifically on the recommendations that have come from my specialist.

Of course, it goes without saying that the physiotherapists, massage therapists, occupational therapists, chiropractors, etc., who are involved with the care of my clients, need to fully understand the accident benefit regime. I avoid a lot of problems by having treatment providers involved who understand that they have to get pre-approval for the work that they are about to complete, if they expect to be paid. I do not enjoy getting involved in disputes where the treatment has already been provided and then someone seeks to go back and ask the insurer to pay for it. If necessary, I will take the time with a treatment provider to explain the accident benefit regime, so that there is no misunderstanding about how the process is meant to work.

Take the Lead with Rehab

Everyone knows that the test for an income replacement benefit is going to change 104 weeks following the date of the car accident. It does not assist my client if I bury my head in the sand and hope that the insurer might not notice the change in the definition for entitlement. On a file by file basis, I assess the likelihood of my client being back to work at his old job, at some new occupation, or not at all. Where there is a potential for a return to work, I always encourage my clients to make their best effort at getting back into the workforce. Not only are they ultimately much happier people, if they can return to some kind of productive employment, but it helps with their credibility and assists me with the tort file. There are several possible things that can happen by an attempted

return to work, but any of the consequences can generally only assist the tort file. If the attempted work return fails, I will have better evidence about my client's limitations, and no one will be left wondering what they could have done if they had simply tried. If my client gets back to work, but now makes less money than what could be earned before the car accident, I have a solid future income loss claim that I can present, without the criticism that my client is a whiner or malinger, or someone who is just trying to milk the system. If my client should get back to work doing exactly what he or she had done before, there is no question that the income loss claim, on the tort side of the file, is diminished, but I may have other arguments for future care costs that are necessary if we are to keep my client as a productive member of the workforce. Any of my clients who can get back to work are better off for it, and I'm the first one to shake their hand if they simply step back into their old life and continue on, notwithstanding a minor, moderate, or devastating injury.

By taking the lead with rehabilitation, you have more of a say in when, how, and by what means the rehabilitation will be implemented. If you develop your own plan, it may well be more to your own client's liking. Accident benefit adjusters have a lot of work to do, and, if you come up with a reasonable plan that is appropriate given the rest of the evidence on the file, an adjuster will be hard-pressed to refuse it.

I have brokered deals to initiate vocational retraining, shortly before the two-year change in the definition for entitlement, whereby the accident benefit insurer agrees to fund a one or two-year program of retraining, while simultaneously continuing to pay income replacement benefits, with the understanding that, at the conclusion of the retraining, the income replacement benefit will be terminated. This proactive approach

inoculates my clients from much of the criticism that tort defence lawyers might otherwise lob their way.

Watch the "Burn Rate"

Nearly every accident benefit file in which I am involved has the potential to be lumped out at some moment in time. Successful lump sum settlement negotiations are usually laid on a strong foundation that includes a cooperative working environment and clear exposure on the part of the insurer to pay benefits on an ongoing basis. I know that many insurers think that, once the tort file has been resolved, the demands on the accident benefit side of the file will taper off. I believe that any insurer that has dealt with me more than once will be aware that I remain involved in the accident benefit files, doing what is necessary to continue to ensure that my client receives all benefits to which he or she is entitled. The recognition that future AB claims will remain ongoing, and not simply vanish into thin air, creates an appropriate environment for lump sum settlement discussions.

More importantly is ensuring that the "burn rate" for medical, rehabilitative, housekeeping, or attendant care expenses persists. If I allow a file to languish for a couple of years with very little activity on the accident benefit side of the file, I would properly be met by the argument that my client is clearly getting by with a very modest level of assistance, such that only a modest amount of money would be offered to lump out the file. This, of course, has implications for tort actions, as it can also eviscerate the future care claim on the tort side, if a client had access to the SABS but made no use of these benefits.

Similarly, if I want to make a claim for future housekeeping expenses in the tort action, but there were never any housekeeping expenses claimed on the AB side of the file, I will surely face huge obstacles in persuading the tort adjuster or counsel to accept the legitimacy of the claim. If housekeeping was provided throughout the first 104 weeks, it really helps set up this claim on the tort side.

If I get a future care cost report prepared on the tort side of the file, it is incumbent upon me, I believe, to make arrangements for funding requests, which would probably include the preparation of Treatment Plans, for all of the initial outlay expenses identified by the future care cost assessor that are not otherwise already being provided by the insurer. If one or two or more years goes by, and none of those initial costs identified by a future care cost assessor are implemented, it makes it pretty hard for me to legitimately argue, far down the road, that those expenses were necessary or reasonable.

Remember the Big Picture

Every time there is some dispute on the accident benefit side of the file, I have to remember that, at some point in time, the paperwork that is generated in connection with that dispute will be shared with the defence lawyers in the tort action. I might not want to double the number of unhelpful reports in the file by tangling with the accident benefit insurer. Sometimes, I am content to simply accept the denial for payment of certain benefits, particularly if their value is reasonably modest, and seek to recover those items in the tort action instead. Obviously, you must diarize every single denial separately, so that you are properly managing your various limitation dates. I like to keep a running list of the various items that are outstanding, if there are any at all, and then bring them back into discussion, should I reach the point of having lump sum

discussions. At that moment in time, I would make it a pre-condition for any lump sum settlement that the various items that had been previously denied, that I thought were reasonable expenses, be factored in to the lump sum settlement number.

In this fashion, I don't just forget about expenses and the need for reimbursement, but I manage the ebb and flow of the dispute and the timing of recovery in such a way so as to minimize the risk that a series of unfavorable reports will be produced in the accident benefit file.

I also have to remain conscious of the needs of my individual client, of course, and, if something is required, or if it sets up further arguments on the tort file, then, of course, the dispute must proceed. This is what I mean when I say that I need to remember the "big picture". Many of my clients get "assessment fatigue", so I have to balance off the benefit of pursuing a claim against the physical and psychological harm caused by assessment after assessment.

Employ Capable, Well-Trained Staff

Because I need to be out of the office on trials, Examinations for Discovery, pre-trials, or to meet with new clients at the hospital (or speaking engagements!), I am not personally available to respond to each and every accident benefit inquiry from each and every one of my clients. I doubt that any personal injury lawyer personally manages every single aspect of the accident benefit side of the file. I am fortunate to have a dedicated, intelligent clerk who is able to respond to calls, prepare Applications for Mediation, and otherwise keep adjusters and clients on their toes. I don't think the value of a well-trained assistant can be over-estimated. Rather than creating further headaches

through a lack of understanding of the system, proper help will head-off problems before they develop, and will draw to your attention those specific matters which truly require intervention by the acting lawyer. Once you have taken the time to explain the accident benefit regime, your personal philosophy, red flags, and acquaint your assistant with your expectations, you will have a second set of eyes and ears available to respond to upset clients, ensure that all of the voluminous paperwork is properly completed, and that there is compliance with the rigid timelines imposed by the current AB regime. As a quarterback who is considering the interaction between the AB and tort files, you will be freed-up to focus on the big picture rather than running to stamp out one fire after another. This is invaluable for your own sanity, for your clients' well-being, and for the smooth and efficient management of a multitude of AB files.

WORKING UP THE CLAIM TO MEET THE THRESHOLD

This paper is being delivered two hours after a panel discussion that includes the Bill 198 threshold test in motor vehicle accident cases. Without wanting to encroach on that separate presentation, my own thoughts on this point include:

1. I try to avoid the threshold issue altogether by picking winners and avoiding losers. On the most serious of cases, there is no discussion about the threshold because the answer is self-evident. I do my best to discard from my file load those cases where there really seems to be no prospect that the client will make the threshold. Typically, other elements in the file are also modest, such as economic losses, so that the client is best served by simply being told that the rather modest injuries suffered in the collision do not appear to merit a full-blown court action. I have at times been successful in persuading adjusters, who have

their own supervisors looking over their shoulder, to pay a somewhat more enriched economic loss claim with my concession, on behalf of my client, that the plaintiff simply does not meet the threshold. This would typically be in one of the cases which became weaker as time went on, and turned out to fall into the pile of losers rather than winners. Even careful file selection can go awry at times.

2. There are, of course, cases that are in the grey zone, which could go one way or the other, and it is here where a good advocate must do proper service for the plaintiff. There is no substitute for a sound medical opinion - indeed, it is mandated by regulation. I would never rely simply upon a family doctor, with the hope that he or she would be sufficient to make the threshold.

3. Through the accident benefit side of the file, it should be possible to have an occupational therapist complete a physical demands analysis of the plaintiff's employment. This coupled with a functional abilities evaluation is an important evidentiary method for demonstrating, more objectively, that the plaintiff does suffer from occupational impairments. In my view, at least for any employed plaintiff, this is essential in establishing a threshold claim.

4. The plaintiff who was not employed prior to the accident is always somewhat more challenging. Here, lay witness evidence does assume a more prominent role. It is important to properly paint the picture for the adjuster, defence lawyer, or judge, that you are dealing with a likable, credible plaintiff who truly is suffering from significant and permanent impairments. You will, of course, need to highlight the multiple ways in which the plaintiff's lifestyle - even though the

plaintiff was not an employed individual - has been altered, in and around the house, from a leisure perspective, with social interactions, or otherwise.

5. I can honestly say that I don't think that threshold issues are a huge barrier to the plaintiffs in the majority of the files in which I am involved, but, of course, knowing when to fight and when to settle is a crucial skill-set that cannot be overlooked.

THE RIGHT TIME TO SETTLE

> *To fight and conquer in all your battles is not supreme excellence; supreme excellence consists in breaking the enemy's resistance without fighting.*
>
> Sun Tzu, The Art of War

In my practice, I settle cases directly with adjusters, with defence counsel before or after Discoveries, with defence counsel on the eve of trial, and even occasionally mid trial. There is no single rule of thumb that can be applied to every single case, as each case depends on its unique facts and the cast of characters with whom you are dealing. That being said, there are some general principles which must always be considered. In no particular order, I offer the following observations:

- I am always very reluctant to settle any personal injury action or accident benefit file before my client has plateaued with his or her recovery. I would rather hold on to a case too long and find that my client has made a heroic recovery than settle a case too early, only to find that my client has suffered a tragic deterioration.

- Cases at the limits or near the limits must be distinguished, however, from those cases where there are ample policy limits available to respond to the claim. No

client is well-served by dragging out a case that could be settled at the limits or with a small discount off the limits.

- I do what I can to accelerate the exchange of information with my opponent, knowing that, if I hold all my cards to my chest, I will be unable to persuade anyone of the need to pay my client. I hope to flood, if not bombard, the adjuster or the defence counsel with whom I am dealing, with information about my client that fits into the overall thematic approach I have adopted, so that no question can be left unanswered about the legitimacy and seriousness of the problem. If my opponent starts to feel like I only have one file that I am working on, all the better, as solid preparation and a trusting relationship lay the foundation for effective settlement discussions.

- One must always remain mindful of the various collateral benefit carriers. I am cautious about settling a file and having my client bear all the risk that a particular stream of collateral benefits will continue. I would prefer to have that party also in the room in the context of a settlement meeting, so that a precise dollar value can be put on that party's commitment to fund economic losses or rehabilitation initiatives. Consequently, I don't turn my back on LTD carriers and accident benefit insurers when dealing with a potential settlement of the tort action. On the other hand, it has been my experience with serious claims where there is little risk that the accident benefit insurer is going to be able to avoid paying income replacement benefits, attendant care benefits, housekeeping, or ongoing medical and rehabilitation expenses, that the settlement that I can achieve on behalf of my client is actually larger, if I complete the settlement in a two-stage process,

whereby I settle the tort file first, separate and apart from the AB file, and then take my time to settle the AB claims on a full and final basis. I always try to be cautious not to overwork the small files or underwork the large files. There is a proper equilibrium, and you must find it for each particular file. Some insurers will simply have a tolerance for a particular number, no matter how many disbursements have been put into the file, such that continued work-up of the case actually results in a smaller recovery for the client. If the serious claims are not documented with proper medical legal opinions, economic loss reports, and thorough lay witness preparation, those claims will end up being settled at a discount, inappropriately so, to the detriment of your client.

- As plaintiffs' counsel, I never lose sight of the particular needs of my individual client. If there are personal reasons, such as a return to work effort, a self-employment venture, explosive family problems caused by ongoing litigation, depression or anxiety, etc., that would suggest that an earlier settlement is desperately needed, I will of course approach the file somewhat differently. I generally try to ask myself the question, "If this were my mother or sister, how would I want to see the settlement discussions approached?"

CONCLUSION

I want to keep my clients' accident benefits being paid. At the same time, I want to enhance the position that I will advance on the tort side of the file. In large measure, my strategy for accomplishing these tasks is to create and maintain positive working relationships with the men and women who have the unenviable task of handling accident benefit files for an insurance company. By completing paperwork properly,

showing respect, maintaining reason and balance, and engaging in the occasional, firm but fair, arm wrestle, 80% of the AB issues unfold fairly and as they should.

I try not to let accident benefit issues consume my day. I do this by delegating a heavy degree of responsibility to my clerk, by always considering the big picture, by managing my own clients' expectations, and by trying to ensure that I always have high-quality, unbiassed experts.

While a client might think that he or she wants the proverbial "day in court", I see little evidence of this actually being true when it comes time for intense trial preparation. All clients want the case resolved fairly and as quickly as possible. I seek to run my AB and tort files in a way to ensure one complements the other and gets to the end point in litigation as quickly as is practicable. Along the way, I spend as much time as is needed with my clients, to ensure that they understand what is going on, where we are headed, and my general plan.

No doubt, if you talk to others, you might get a much different perspective, but I have been pleased to share a perspective that I believe has been successful for me over the last fifteen years.