

**WINNING STRATEGIES FOR SUCCESSFULLY
MANAGING THE AB FILE
IN ANTICIPATION OF LITIGATION**

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THE PRIMARY DIRECTIVE: KEEP THE BENEFITS PAID AND DO NO HARM TO THE TORT CASE

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 in not only my clients' 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.

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 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, unbiased 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 many of the initiatives outlined by my specialist to simply be funded. 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.

TRY THE OMBUDSMAN

Again, in keeping with my strategy that the best accident benefit file is one that simply continues to get paid, and does not need to progress into litigation, I will make judicious use of the Ombudsman appointed for each of the insurers to help resolve disputes where I believe that I am clearly in the right. For example, if I have written half a dozen letters to an adjuster, without a response, there is not much more that I can do to be cooperative. Sometimes rather than file an Application for Mediation, I will simply contact the Ombudsman for that particular insurance company. With a surprisingly high frequency, my problems get resolved and I don't need to go to the time and delay of filing an Application for Mediation. The problem with an Application for Mediation is that, while it too may ultimately resolve some silly dispute, no one is going to seriously look at that file until the day or two before the mediation, which means two months might go by. Those are two months where my client will begin to fester, so that, when the insurer ultimately does what it should have done in the first place, my client is so unhappy that he wants even more, and I then have a divide that cannot be bridged. (See my comments above about managing client expectations.)

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 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.

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, 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.

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, unbiased experts.

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.