



## **MOTOR VEHICLE ACCIDENT GUIDE**

Updated on March 1, 2018

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## **Introduction**

This Guide was updated on March 1, 2018 and is intended to provide general information to persons who have been injured in car or motor vehicle accidents and to members of their families. **It is not intended as legal advice** or to replace the advice you might expect to get from legal counsel.

## **First Steps**

Make sure that you or someone you know gets the name, contact information, and insurance particulars of any driver of a vehicle involved in the accident. Get the same information from any witnesses.

If you are interviewed by the police be as accurate as possible with your answers. Do not guess and do not provide an answer to a question if you do not understand it. If you are seriously injured advise the officer that you need to get immediate medical attention and that you will meet with them once your injuries have been looked after. Get the names and contact information of any police officer you speak to. They should be able to give you their business card. You should get in touch with the police department and get a copy of the accident report as soon as it is available.

While this may seem self-evident, it is very important that you seek immediate medical attention for your injuries. Don't be a stoic and stubbornly refuse to go to the hospital by ambulance if this is what the first responders recommend. If you do not seek immediate medical attention, but begin to experience symptoms later in the day or overnight, make arrangements to see a doctor as soon as possible. Often injuries to the underlying tissues of the body ("soft-tissue" injuries) do not become apparent or symptomatic until days, or sometimes weeks, after the accident. It is very important to seek immediate medical attention when these symptoms first arise.

Be careful with any information about the accident or your injuries or treatments that you post on social media. Insurance adjusters and insurance defence lawyers are known to scan social media for posts by people making insurance claims. If you become a party to a lawsuit you may be required to provide a copy of these posts to the opposing party. It is best to avoid posting anything regarding the accident, your injuries and your subsequent treatments on any social media. If litigation is pursued your lawyer will probably recommend that you close your social media accounts in order to prevent other people making postings to them that are prejudicial to your case.

## **Finding and Hiring a Lawyer**

One of the most important steps to take after an accident is to find and hire the right lawyer to advance your interests. This should be done at an early stage because under the law you are required to put the party who is responsible for your injuries on notice of your potential claim. The mandatory notice period for some claims against a municipality is 10 days of the accident while other notice periods are 30 for the provincial Ministry of Transportation and 120 days for other drivers. You may also benefit from legal advice in dealing with your own insurance company when accessing medical and income replacement benefits.

In deciding who to retain as your lawyer it is important to consider the following factors, in addition to other factors that may be of particular importance to you:

- (i) the general level of experience of counsel and whether they have experience dealing with the specific injuries that have been caused by the accident;

- (ii) whether counsel is approachable, caring, compassionate, sympathetic, and committed to your case;
- (iii) whether counsel is straightforward and informative;
- (iv) whether counsel answers all of your questions and takes the time to explain things to you in language that you understand;
- (v) whether counsel is forthright regarding the opportunities and risks in your case;
- (vi) whether you feel you will be able to place your trust and confidence in counsel;
- (vii) whether counsel answers his or her phone calls personally and whether you will be able to get in touch with him or her when you feel you need to, instead of being made to speak with his or her law clerk or a paralegal;
- (viii) whether counsel is prepared to represent you with respect to both your Accident Benefits claim (described below), any disability insurance claim you may have, and your claim for bodily injury against the at-fault driver, which is also known as the tort claim.

When you meet with counsel for the first time you should ask them questions that will allow you to evaluate each of these criteria and determine whether they will be able to meet your needs.

## **Financial Arrangements**

### Retainer Agreements

Motor vehicle accident cases are usually taken by counsel on a contingency fee basis, meaning that the fee counsel is paid for their services is contingent or dependent on the results that are obtained. This means that your lawyer does not get paid until the case settles or an award of damages is made after a trial. The fee that is charged by counsel will usually be expressed as a percentage of the settlement amount or the amount obtained after trial.

While the specific fee that is charged may vary slightly from lawyer to lawyer, it is important to keep in mind that there are real risks associated with “shopping” for counsel who charges the lowest fee, particularly when this is done at the expense of the above noted factors. If any of these factors are sacrificed for the sake of trying to reduce legal costs, then there is a real risk that the lawyer you hire will not be a “good fit” for you or for your case. If the lawyer is not a “good fit” then your relationship may break down and you will be required to find another lawyer. This may delay your claim and will likely result in unnecessary costs to you that will undermine the very cost advantage you sought to secure in the first place when you hired the least expensive counsel.

Once you have made the decision to hire counsel, you will be asked to sign a Retainer Agreement. It should clearly identify the parties to the agreement and describe the type and amount of fees and costs you will be expected to pay. It should also describe how the agreement may be terminated and what happens if there is a termination.

You should carefully review the Retainer Agreement before you decide to hire counsel. If you have any questions after reviewing the agreement, then you should speak to counsel and seek further clarification of the issues you want addressed. Do not sign the agreement until you understand it and you are satisfied that the terms of the agreement are acceptable to you.

### Disbursements

In addition to the fee that is paid to counsel for their services, you will be expected to pay for all out-of-pocket costs which are incurred on your file. These costs are called “disbursements” and they include such things as photocopying costs, court filing fees and the cost to obtain medical

records and reports, among others. Most law firms will undertake to pay these costs on your behalf as they arise and then seek to be reimbursed for these costs from the other party when the case settles or after you are awarded damages at trial. It is usually the case that these costs will be recovered in a settlement or court award from the at-fault driver or his or her insurer.

Before you agree to hire counsel, it is important to verify whether his or her law firm will pay for the disbursements as they arise and carry them until the case settles or until after a trial. The written retainer agreement should clearly indicate when disbursements are to be paid by the client. This is an additional consideration to keep in mind when you are looking for the “right” lawyer to represent you.

## **Your Claims**

### Types of Claims

There are two possible claims that may arise for people injured in a motor vehicle accident. The first claim is for Statutory Accident Benefits (SABs) and is often referred to as the claim for no-fault benefits (you can find out more about this claim by obtaining a copy of the handbook “Your Legal Rights if You are Injured in an Auto Collision” from Mann Lawyers LLP). Every injured person has a right to apply for Statutory Accident Benefits regardless of who was at fault for the accident. The second claim is fault-based and is often referred to as the bodily injury or tort claim. The damages recoverable by an injured person in this claim depend on the extent to which the accident was the fault of another driver (the “at-fault” driver).

### The Tort Claim

The objective of the tort claim (and Accident Benefit system) is to put the injured person (you) in the same position you would have been in had the accident not occurred in the first place. That is, it is intended to compensate you for the losses you suffered due to your injuries from the accident and your ongoing limitations.

It is important to note that in Ontario this claim must usually be commenced by the issuance of a Statement of Claim or Notice of Action within 2 years of the date of the accident. Although there are circumstances under which the running of the limitation period can be delayed, it is safest to assume that the time starts to run on the day of your accident.

### Types of Damages

There are several types of damages that may be claimed and recovered in a tort action, although they have largely been classified into one of the two following categories of damages: pecuniary and non-pecuniary. Pecuniary damages are damages that represent a financial or out-of-pocket loss to an injured person while non-pecuniary, or General damages, compensate a person for his or her pain and suffering and loss of enjoyment of life or loss of function.

You may only make a claim for damages for pain and suffering and loss of enjoyment of life if you suffered a serious permanent impairment of an important physical, mental, or psychological function, or are left with a permanent serious disfigurement, such as extensive scarring.

### Limits on General Damages

It is important to know that there is an upper limit on this type of claim in Canada which was

established by the Supreme Court of Canada in 1978 at \$100,000. This upper limit is revised to account for inflation and is presently in the range of \$375,000. In order to qualify for the upper limit of damages for this claim you would have to suffer devastating injuries, such as a severe spinal cord injury or traumatic brain injury.

It is also important to note that, in the event your claim for damages for loss of enjoyment of life is equal to or less than \$125,000, then it will be subject to a \$38,000 reduction in favour of the at-fault driver and his insurer. So, for example, if a court determines that you should receive \$90,000 in damages for loss of enjoyment of life, then the at-fault driver and his insurer will only be ordered to pay you \$52,000 after the deduction.

### Pecuniary Damages

Pecuniary damages include a claim for such things as loss of income and earning capacity, loss of competitive advantage, loss of the ability to perform household services, the cost of medical and rehabilitation services, and the cost of future care.

A loss of income and earning capacity occurs when your ability to earn income from employment or self-employment is compromised as a result of your accident-related injuries. It is not necessary for your ability to earn an income to be completely destroyed in order to have a loss of income claim. If your ability to work full time has been compromised, or if you are required to return to a position that pays less than the position you held before your injury, you can make a claim for your partial loss of income.

If you were employed, your income loss calculation is based on your salary or average wages at the time of the accident, otherwise it will be calculated with reference to your historical earnings and/or possibly your educational achievements. This calculation will be divided into two time periods. The income loss from the date of the accident to the date of trial (or settlement) is referred to as the "past loss" of income and the income loss from the date of trial or settlement until your anticipated retirement date is referred to as the "future loss".

There is no claim for any income loss suffered in the first seven days after the accident and the past loss of income claim is limited to 70 percent of the gross income which is lost during the relevant period. There is no limit on the future loss of income claim. Damages awarded for loss of income are not subject to income tax.

The point of the loss of income claim is to replace your lost earnings. As such, the future loss calculation will be determined using your actual salary or assumed income and adjusting this figure by the expected rate of inflation or average wage increases realized in the field in which you are employed or were likely to find employment in.

Regardless of whether you suffered an actual loss of income as a result of your accident-related injuries, you may have a claim for loss of competitive advantage. This claim will arise when the limitations you continue to experience place you at a competitive disadvantage in the workplace or labour market compared to others. The size of this claim will depend on the extent of the disadvantage which, in turn, will depend on the severity of your limitations and their ongoing impact on your ability to work. The claim is based on the income you may lose as a result of the loss of the opportunity for advancement in your workplace or industry.

### Loss of Housekeeping/Home Maintenance Capacity

If, as a result of your accident-related injuries, you are unable to contribute to household activities, such as cleaning and home maintenance, to the same degree as before the accident, then you

will have a claim for loss of housekeeping/home maintenance capacity. This claim arises even where the affected services are taken over by a spouse, family member, friend or neighbour. It is calculated with regard to the replacement cost in the marketplace of the lost services. It is important to keep track of the services performed by other people who volunteer their time as you are entitled to be compensated for the replacement cost even if you have not paid it.

### Medical and Rehabilitation Expenses

If you do not have third party medical insurance (for example through your employer) and will incur medical and rehabilitation costs as a result of your injuries, then you have a claim against the at-fault driver for these costs. This claim is divided into the same time periods as the income loss claim. The past cost of medical and rehabilitation services is based on the actual expenses that were incurred while the future cost is determined based on the expected expenses of these services from the date of trial for your life expectancy.

### Attendant Care Expenses

If, as a result of your injuries, you need ongoing assistance with your personal care, then you have a claim for the cost of attendant care. The claim for future attendant care is often the most significant component of the damages awarded to a person who suffers serious or catastrophic injuries. It is calculated by evaluating your present and expected future needs and by using the appropriate market replacement cost of the services you will require for the balance of your life.

### Family Law Act Claims

In addition to claims for pecuniary and non-pecuniary damages, certain family members (spouses, parents, children, siblings) may have a claim for the loss of your care, guidance and companionship. This is commonly referred to as the *Family Law Act* or FLA claim because it is authorized by subsection 61(2) of the *Family Law Act*.

The amount of this claim will ultimately depend on the severity of your injuries and level of impairment. In the event that this claim does not exceed \$63,000, then it will be subject to a \$19,000 deduction. So, for example, if the court were to award your family member \$30,000 in FLA damages, then the other driver and his insurer would only be required to pay \$11,000.

### **Documenting Your Claim**

It is important to keep a copy of every document pertaining to your accident (such as the Motor Vehicle Accident Report and your completed Application for Accident Benefits) and to turn these documents over to your lawyer, who will also request your medical and treatment records from your family doctor, physiotherapist, chiropractor, massage therapist and any hospitals you may have visited or specialists you may have seen. It is also important to keep records that will support your loss of income claim and your claim for lost household services and to keep receipts that will back up your claim for reimbursement for medical and rehabilitation expenses. Your lawyer will ask you for a copy of these records and receipts and he or she will also obtain your permission to obtain other relevant records, such as your complete employment file and income tax filings.

Your private medical and business records will only be shared with your lawyer and the lawyer on the other side and these documents may only be used for purposes connected with the lawsuit or litigation over the accident.

## **Parties to the Claim**

Since you were the one injured in the accident, you will be the primary plaintiff in any court proceeding (or “action”) that is commenced. Anyone with a significant *Family Law Act* claim may also be included as a plaintiff in the action. If a *Family Law Act* claimant is a minor then he or she must be represented by an adult litigation guardian who will be responsible for making decisions on behalf of the minor. It is customary for one of the parents of the minor to be appointed as litigation guardian.

The driver responsible for the accident and his or her employer (if the driver was working at the time of the accident) will be the defendants. It is possible that the city or municipality in which the accident occurred or the Province may also be defendants in a case where the accident occurred in part as a result of a failure to properly maintain the roadway or highway, or in a case of negligent design of the roadway or highway.

## **Litigation Process**

You may have heard from speaking with others that a lawsuit or litigation proceeds at a slow pace. This is particularly true of motor vehicle accident litigation when there have been serious injuries. This litigation is often not commenced until around the two-year anniversary of the accident (the limitation period). The reason for this is that it often takes a great deal of time for the injured person to recover from an accident or to reach maximum medical recovery. It is difficult for counsel to evaluate an accident claim before the injured person progresses to the point where there is little prospect for further recovery. After it is commenced, a car accident lawsuit can take 3 or 4 years to get to trial.

### Starting a Lawsuit

The first step in the litigation process involves the filing and issuance of a court document known as a Statement of Claim, which outlines how the accident occurred, the nature of your injuries, treatments, and ongoing symptoms, and summarizes your financial losses. This claim is then served personally on the defendants and is defended by their insurer, who will file a Statement of Defence, usually within 20 days.

### Examinations for Discovery

After the Statement of Claim and Statement of Defence have been exchanged, counsel will schedule something called examinations for discovery. This is an out of court process where both the plaintiff(s) and defendant(s) will be asked questions under oath by the opposing lawyer. The defendant is usually questioned about how the accident occurred, while the plaintiff's examination will be focused on his or her injuries, treatments, recovery, ongoing limitations and financial losses.

### Medical Assessments

Under the Civil Procedure Rules in Ontario, the defence has the right to have the plaintiff assessed by medical experts of its choosing in order to obtain experts' reports on the plaintiff's injuries, treatments, and ongoing limitations for use at trial. Likewise, the plaintiff will obtain and produce its own experts' reports.

## Mediation

After any necessary medical examinations have been completed, and the parties have exchanged experts' reports, the usual next step is to arrange for independent, third-party mediation of the claim. Mediation is an out of court process that is mandatory in Ottawa. The goal of mediation is to settle the claim. Counsel typically agree on the appointment of an independent party skilled in mediation whose sole role is to facilitate settlement discussions between the parties. The mediation session is scheduled by the mutual agreement of counsel and attendance of the parties is mandatory. Many cases are resolved at mediation.

## Judicial Settlement Conference

If the claim does not get resolved at mediation, then the parties will request a "settlement conference" or "pre-trial" before a member of the Judiciary, either as Judge or a Master. The pre-trial is the first time in the litigation process that the parties are required to attend court. The primary purpose of the pre-trial is to see if a settlement can be reached with the benefit of the input of a Judge or Master. If settlement is not possible then the pre-trial will be used to ensure that the parties are ready for trial and to schedule a trial date.

## **Settlement**

Settlement of your claim can occur at any time during the litigation process. It is more likely than not that, if your case settles before trial, it will settle at mediation or the pre-trial. Some cases do not settle until the eve of trial, or even during the trial, but the fact is that the vast majority of cases do settle before trial.

Once the case settles you will be asked to sign a Full and Final Release that will release the defendant from any further liability for the injuries you sustained in the accident. The release usually provides that the defendant will obtain an order on consent to dismiss the action. However, if a lawsuit was commenced on behalf of one or more minors, then you will be asked to obtain the order dismissing the action since the settlement will have to be approved by a judge.

## **Trial**

If the case remains unresolved then it will proceed to a trial on the date agreed to by the parties at the pre-trial.

In Ontario, most car accident cases are tried by a jury of six persons rather than a judge alone because the defendant often elects for the case to be tried by a jury. Trials are very time consuming and even a relatively straightforward car accident trial can take between two to four weeks to be heard. Complex cases in which liability is an issue, or where the plaintiff is claiming the need for extensive future care, can last between 6 and 8 weeks.

At the end of the trial the jury will render its verdict and, if all went well, will make an award of damages in your favour that will reflect your lawyer's advice.

If you were involved in a car accident, or know someone who was involved in an accident, then you should contact a personal injury lawyer at Mann Lawyers for a no-fee, no-obligation consultation.

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