The Automobile Tort Insurers' Settlement Obligations[1]

BY CHRISTOPHER OBAGI

Sections 258.5 and 258.6 of Ontario's *Insurance Act* provides a framework that encourages timely settlements of motor vehicle tort claims. These sections require insurers to attempt expeditious resolution of claims, to provide advance payment in certain circumstances, and to participate in mediation.[2] These provisions "are a clear expression of the legislature's intention to promote the early settlement of claims" and "failure to comply shall be considered by the court in awarding costs."[3] The difficulty however is that the current bar for insurers to satisfy these obligations is so low, that only in the rarest of circumstances are any sanctions ordered against an insurer on account of a breach. Indeed, of the two dozen reported cases we found where the plaintiff sought an enhanced cost award, courts granted the award

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in only two.[4] In practice, timely settlement of such claims is the exception, not the rule. Much has been written about these provisions in both caselaw and articles, including from this association.[5] The following is a summary which provides further ideas for how these provisions can be utilized by plaintiffs.

Settle Expeditiously

258.5 (1) An insurer….shall attempt to settle the claim as expeditiously as possible.

On the specific requirement to settle expeditiously, courts have found that an insurer is not obligated to make any monetary offer in an attempt to settle.[6] Mere settlement "discussions" may be viewed as evidence of an attempt to settle expeditiously.[7] Even very late admissions of liability may not constitute a failure to attempt to settle expeditiously.[8] The prevalent theme is that the requirement to make efforts to settle does not deny an insurer's right to have issues determined at trial.[9] The courts have made it clear that this right will not easily be disturbed by awarding a penalty of

enhanced costs when settlement could have occurred at earlier stages. The result however is that insurers who may not wish to make any genuine attempt to resolve the action can more easily pay lip service without facing any sanctions. This is inconsistent with the clear expression of the legislature to promote early settlement of claims.

Advance Payments

258.5(2) 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.

If the "settle expeditiously" requirement is a low bar for insurers, the "advance payment" requirement is even lower. This is because the latter obligation is only triggered upon an admission of liability. These admissions are given in rare circumstances and usually only where the plaintiff has agreed to reduce their claims to the policy limits. Arguably, the most desperate claimants requiring advance payments are those who have above-limits claims.

In his article "Advance Payments", however, Brian Cameron suggests that, while unlikely that insurers will ever make an advance payment, "simply making the request and getting the denial can benefit your client in other meaningful ways."[10] For one, it can advance a position later in the litigation, as it relates to financial hardship. If a request is denied, the plaintiff may ask for recovery of interest where they were forced to take out a loan. Furthermore, a request for advanced payment to cover vocational retraining or continued treatment can demonstrate that a plaintiff is willing to mitigate their losses and improve treatment outcomes.[11]

Requirement to Mediate

258.6 (1) A person making a claim…and an insurer that is defending an action…shall, on the request of either of them, participate in a mediation of the claim in accordance with the procedures prescribed by the regulations.

The final requirement – to mediate – is the most clear and unequivocal provision of the three. The provision uses the term "shall"; it is not optional upon request by any party. Indeed, one of the few cases we could find where such an enhanced cost award was granted was *Keam,* where the insurer refused to mediate. This is no surprise since much clearer and objective evidence can be tendered in these situations.

In *Keam,* the Court of Appeal reiterated the obligations of section 258.6 imposed on insurers defending motor vehicle claims, and the cost consequences which apply for non-compliance.[12] The court stated, *"The legislature has provided no exceptions...to the obligation to mediate...the insurer has no option whether or not to participate."*[13] Here, the plaintiff requested mediation twice before trial, but the defendant's insurer refused. The trial judge found the refusal to be an available position and did not apply cost consequences. The Court of Appeal overturned the decision, stating that failure to comply with such a request can lead *"to a claim not being settled as soon as it might otherwise have",* thus adding time and expense.[14] The panel ruled that the cost sanctions provide a remedial penalty which compels compliance by insurers, provides compensation for costs

unnecessarily incurred, and provides a meaningful consequence to an insurer that elects not to comply.[15] The plaintiffs were awarded an additional $40,000 for costs, which was 35% more than the original cost award before sanction.

It is also important to note that under the *Insurance Act,* the Regulation requires the insurer to pay for mediation.[16] The term "shall" within the regulation is clear and indisputable. Where mediation occurs in one of Ontario's mandatory mediation regions, confusion may arise about which statute prevails or dictates procedure. One apparent contradiction queries which party covers the cost of mediation. The *Rules* stipulates that the parties share the cost,[17] while the regulation contained in the *Insurance Act* requires the insurer to pay for the mediation.[18]

In *Cioffi v. Modelevich,* the plaintiff in a motor vehicle action requested a mediation under the *Insurance Act,* while residing in one of Ontario's mandatory mediation regions.[19] The defendant insurer took issue with the plaintiff's request that they cover the cost of mediation, suggesting it could be dealt with during the cost proceeding. The judge found that s. 258.6 provides that *"where a plaintiff requests mediation, the insurer shall pay full cost"* and ordered costs to be paid immediately.[20]

Some defence counsel have argued that a much earlier decision by the Court of Appeal in *McCombie* stands for the proposition that a court order compelling compliance is not an option under s.258.6.[21] The decision addresses an Order against a potential plaintiff, prior to litigation, to compel her attendance at a medical examination. The Court of Appeal stated that the *Act* does not provide for enforcing compliance; rather failure to comply becomes a relevant factor in the award of costs. The case is distinguished on this issue because it is addressing the right to a medical examination which is provided for in the *Rules* and *Courts of Justice Act* once litigation commences. Those provisions provide a framework for how medical examinations are to be scheduled and conducted within the litigation to ensure fairness to both parties.

More importantly, the comments in paragraph 17 of the *McCombie* decision, which discuss section 258.6 and the requirement to mediate, are in *obiter* and do not address jurisdictions where mediation is mandatory. *McCombie* is not reflective of the more relevant and recent decisions that specifically address procedural issues arising from the requirement to mediate in section 258.6.

Should counsel require that the mediation be paid by the defence, it is best practice to advise defence counsel as early as possible that the mediation is being conducted under the *Insurance Act*. This ensures that the defendant is on notice. As such, the parties are able to iron out any dispute on the mediation costs well in advance of the mediation. The mediation under the *Act* does not prevent the mediator from filing the required form with the court, pursuant to the *Rules,* once the mediation is complete.

Some plaintiff's counsel refuse to apply this cost obligation out of fear that the mediator may favour the defendants who are the ones paying the bill. We find the risk quite low, given that all parties must agree on a mediator both under the *Rules* and under the *Insurance Act.*[22] Any bias by the mediator favouring the paying party would cause prejudice to the mediator more than anyone, as business would drop drastically. Others argue that these costs will eventually be recovered in a future settlement, and as such, should not be argued at this stage. While this may be true, cases often settle as rounded all-in numbers. If the cost of mediation was previously covered as a separate item, it increases the likelihood of a slightly higher apportionment to damages in the all-in number.

Family Protection Endorsement - OPCF-44R

None of the cases or articles discussed above address these provisions in the context of a claim against the OPCF-44R insurer. The OPCF-44R is an endorsement paid for by the plaintiff. It is a claim made by a plaintiff under its own policy of insurance. In this context,

an insurer is responding to a claim made by its own insured. Arguably, good faith obligations cannot be ignored as it is a first party claim. While the insurer has a right to contest damages and liability pursuant to the endorsement, the insured should be treated fairly in the process, as in the case with any other first party insurance claim.[23]

The above may be akin to the obligations of an estate trustee, who are bound by the even-hand rule requiring that all beneficiaries be treated equally.

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In the same vein, an OPCF-44R insurer should treat their insured with an even-hand, not placing their financial interest above those of the insured when adjudicating the claim. A premium is paid for this "Family Protection" by the insured, and as such, they should be treated fairly by their insurer when this coverage is triggered.

Given that the claim against the OPCF-44R insurer is a first party claim, allegations of breaches by the insurer of ss. 258.5 and 258.6 could be plead in seeking enhanced costs. These breaches should garner a higher level of scrutiny by the courts, given the direct relationship between the two parties. In essence, the *Insurance Act* codifies a portion of the OPCF-44R insurer's duties of fairness towards its insured. This can then be used to examine the insurer on these obligations. These may include: the efforts and investigations done to satisfy itself of the requirement to settle expeditiously, evidence supporting its position to maintain a denial of liability, reasons why it has chosen not to make any advance payments despite the plaintiff's inability to fund care and treatment recommendations, etc.

Conclusion

We have seen that the provisions discussed above are seldom utilized and the courts rarely rely upon them to impose cost sanctions. At a minimum, an insurer should be required to demonstrate what cogent and genuine attempts are being made to comply with its obligations. Regardless, plaintiff's counsel should make use ss. 258.5 and 258.6 during the course of the litigation in an attempt to expedite resolution for their clients. Should the automobile tort insurer ignore such requests, a properly papered file can be used to seek further sanctions at trial, such as higher costs and interest awards.

Christopher Obagi *is an OTLA member and practices with Connolly Obagi LLP*

NOTES

[1] Special thanks to Sher Molloy and Moataz Mohamed for their invaluable assistance.

[2] *Insurance Act,* RSO 1990, c 1.8, s 258.5 and 258.6 [*Act*].

[3] *Ross v. Bacchus*, 2015 ONCA 347 at para 41; see also *Insurance Act,* RSO 1990, c 1.8, s 258.5(5) and 258.6 (2)

[4] The two cases are *Williston v. Hamilton (Police Service)* 2013 ONCA 296 and *Keam v. Caddey,* 2010 ONCA 565 [*Keam*].

[5] *See* Brian Cameron, "Advance Payments", *The Litigator* (September 2014) 14 [*Cameron*]; Robert Findlay, "Relying Upon the Statutory Framework for Mediation in Automobile Injury Claims", *The Litigator* (December 2014) 54; and Lisa A Neil, "Section 258.5(1) of the *Insurance Act*: the Statutory Duty to Settle", *The Litigator* (Fall 2005) 58.

[6] *Dimopoulos v. Mustafa,* 2016 ONSC 4119 at para 30 [*Dimop*] and *Dawod v. Jasey,* 2016 ONSC 7427 at para 69 [*Dawod*].

[7] *MacDonald v. Duncan,* 2015 ONSC 7263 at para 13 [*MacDonald*].

[8] *Robichaud v. Constantinidis,* 2020 ONSC 310 at paras 8 and 22 [*Robichaud*].

[9] *Nyarko v. Abshir,* 2022 ONSC 2867 at para 12 [*Nyarko*].

[10] *Cameron, supra* note 4 at 16.

[11] *Ibid* at 17-18.

[12] *Keam, supra* note 3 at para 20.

[13] *Ibid* at paras 21 and 22.

[14] *Keam, supra* note 3 at para 27.

[15] *Ibid* at para 28.

[16] O Reg 461/96, s 3.

[17] Mediators' Fees (rule 24.1, *Rules of Civil Procedure*), O Reg 451/98, s 4(2).

[18] Court Proceedings for Automobile Accidents that Occur on or After November 1, 1996, O Reg 461/96, s 3(6).

[19] *Cioffi v. Modelevich,* 2018 ONSC 7084 (CanLII) at para 1 [*Cioffi*].

[20] *Ibid.* See also *Thomson v. Portelance,* 2018 ONSC 1278 at para 12.

[21] *McCombie v. Cadotte,* [2001] 53 O.R. (3d) 715 at paras 16 and 17 [*McCombie*].

[22] *Rules of Civil Procedure* at Rules 24.1.08(2) and 24.1.09(4), O Reg 453/98, s 1; *Ins Act, supra* note 1, s 258.6(1), O Reg 461/96, s 3(1) and (2).

[23] *Carroll v. Aviva Canada Inc. and Pilot Insurance Company,* 2020 ONSC 6388.