

# Brain Injured Clients and the Litigation Process

Presented by:

**Matthew J. Sutton**

Associate

T: 416-868-3187

E: [msutton@thomsonrogers.com](mailto:msutton@thomsonrogers.com)



**Thomson Rogers**



# Let's Work Together as a Team!



# When does the litigation process start?



The injury?



Retainer?



Issuance of a  
Court Document?

# What type of events give rise to litigation?

1. **TORT**: Latin for “Harm”
2. Harm is usually caused by someone’s **NEGLIGENCE**: Latin for “disregard”
3. Possible tort has been committed any time a person has been injured or ‘harmed’ due to someone else’s actions that they knew or ought to have know would cause the injury
4. Did the person (a.k.a. the “defendant”) act reasonably in the circumstances?
5. 4 components to tort in Canadian law:
  - Duty of Care
  - Standard of Care was breached
  - Breach caused harm
  - Damages



# Examples of negligence and injury:

1. Motor Vehicle Accident
2. Slip and Fall
3. Fire
4. Social Host Liability
5. Assault
6. Municipal Liability
7. Any time somebody did something to cause someone to get hurt



# Why does insurance matter?

Without it, the injured person might not get compensated.

Examples include:

1. Liability Car Insurance
2. Commercial General Liability Policies
3. Home Insurance, Rental Insurance

Plaintiffs will want to avoid an unenforceable judgment.



# Where do Statutory Accident Benefits come into play?

1. Motor vehicle accidents only
2. Ontario only (some provinces have other versions)
3. Contract for insurance – not negligence. “No Fault”
4. Pay a premium, receive benefits (should you meet the required parameters)
5. Don’t go to Court but to the Licence Appeal Tribunal: the “LAT”



# What does the lawyer do during the litigation process?

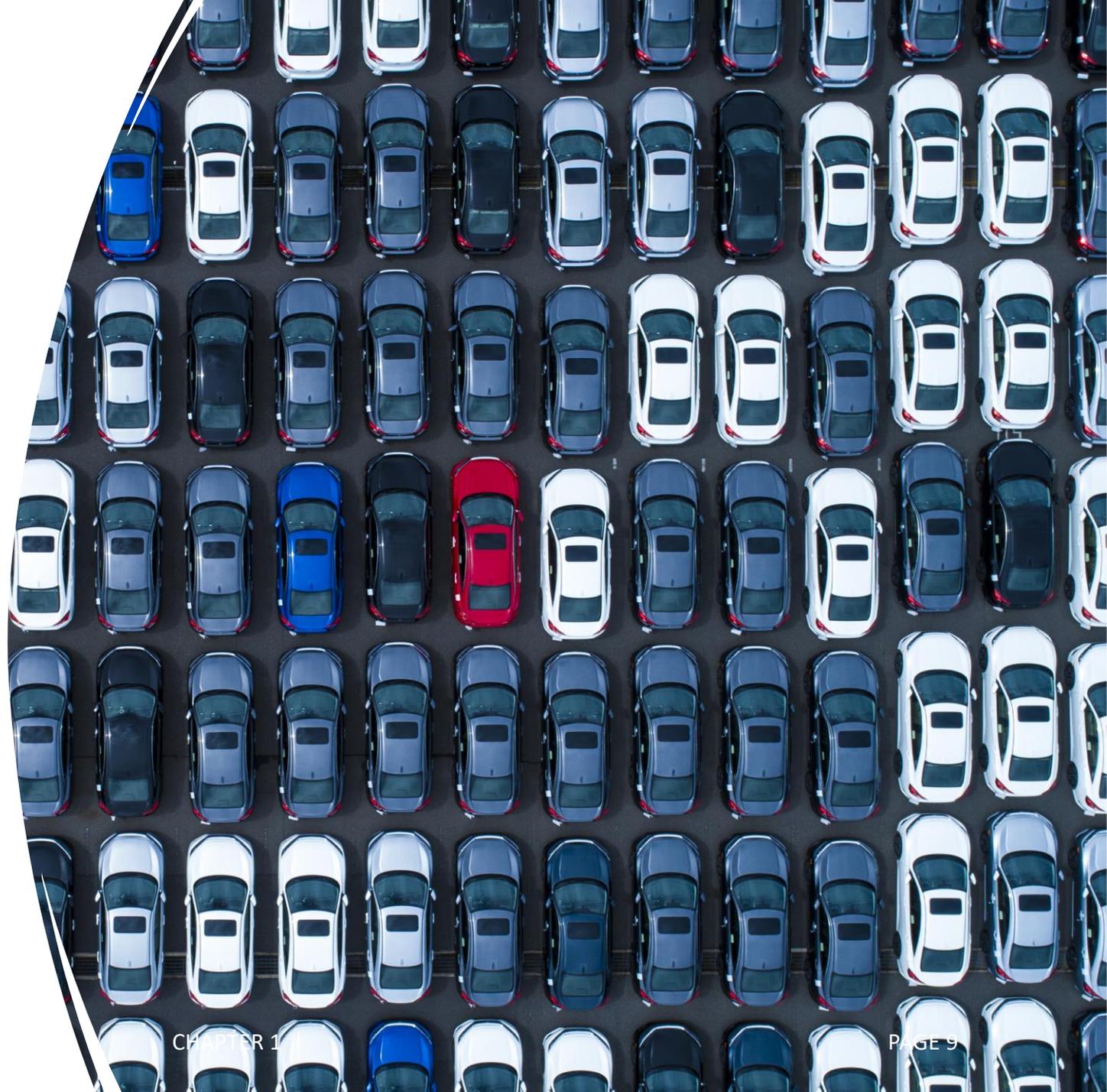
1. Investigate
2. Issue court documents (Statement of Claim)
3. Examinations for Discovery
4. Interlocutory Motions
5. Mediation
6. Pre-trial
7. Trial
8. Strategy: timing/evidence/experts/services/etc.
9. Weigh the evidence
10. Evaluate damages
11. Recommend settlement: negotiate and make offers



# What does the lawyer do when retained for Statutory Accident Benefits?

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- Determine eligibility
- Determine quantum
- If possible, turn denials into approvals
- Ensure proper service providers give advice
- Apply for adjudication before the License Appeal Tribunal
- If possible, try to resolve
- Consider impact on the client's life, and on the tort claim
- Consider whether the client's injuries are minor, non-CAT, or CATASTROPHIC (CAT)



# What about other collateral benefits?

Examples:

- OHIP
- CPP
- Ontario Works/ODSP
- WSIB
- STD/LTD (work and private)
- Umbrella/personal policies, etc.

All will play a role in the numbers to prevent double dipping.



# Result for TORT?

1. General Damages: “Pain & Suffering”
2. Income: Past & Future
3. Treatment and Care: e.g. services/treatment/medications/housekeeping/PSW
4. Out of Pocket Expenses
5. Partial Indemnity Costs
6. Disbursements
7. Punitive Damages (rare and exceptional)

Damages are only in relation to the happening of the injury and the impact on the person’s future.

Only intended to bring the injured person to where they should have been had the accident not occurred.



# Result for Accident Benefits?

1. The insurance company meets its contractual obligations: they do not care about pain & suffering, etc.
2. Treatment is approved
3. Specified benefits are paid
4. CAT?
5. Insurer does not deny treatment
6. The injured party can use the entitlement to reasonable and necessary treatment sooner than resolving the tort claim
7. A LAT hearing ONLY IF last case scenario
8. No costs
9. No disbursements
10. Settlement? Only if in the best interest of the client

Only what the contract allots in terms of benefit and quantum. Reduced from tort.



# What does the lawyer need?

- Information
- Instructions from the client
- Trustworthy experts
- Service providers who care for the client
- To know who best speaks for the client (i.e. witnesses)
- Time
- Trust

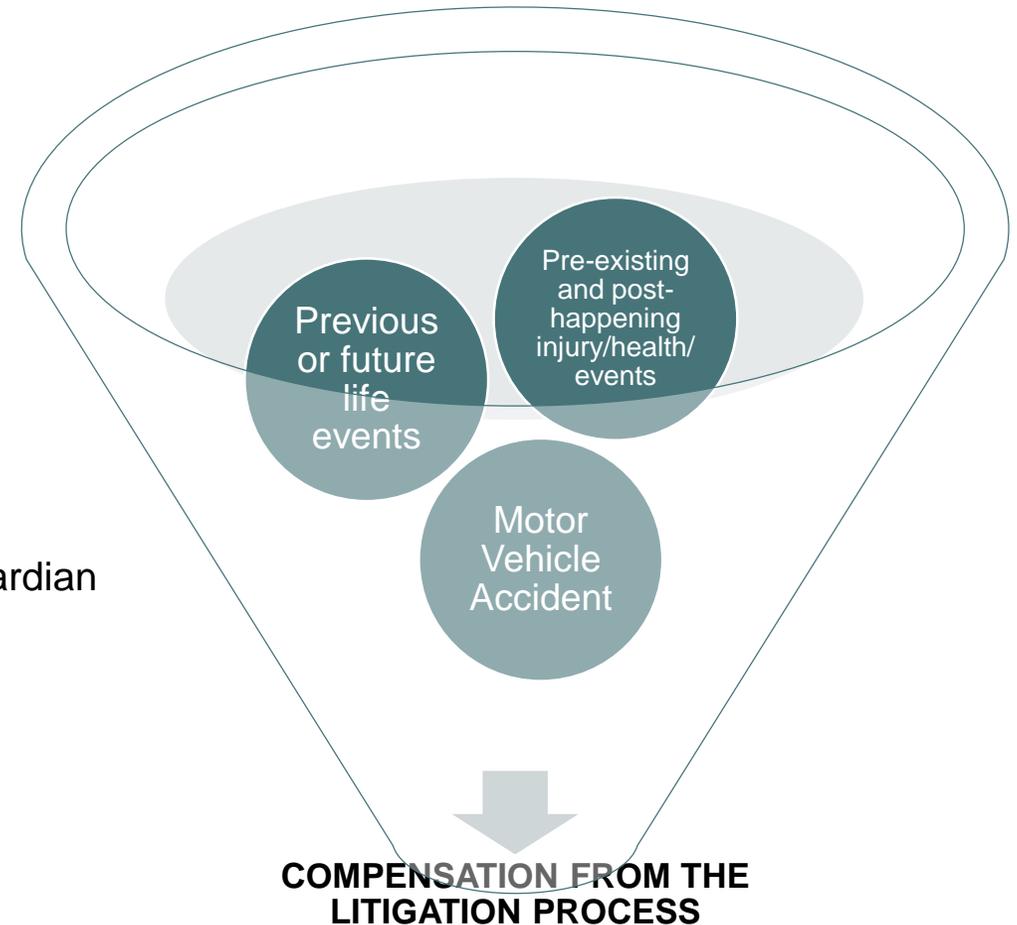


# How does a brain injured client impact what the lawyer needs?

- Information
  - Instructions from the client
  - Trustworthy experts
  - Service providers who care for the client
  - To know who best speaks for the client (i.e. witnesses)
  - Time
  - Trust
1. Lack of Coherency. Tangential. “The whole bucket”
  2. Difficulties include: lack of comprehension, isolation of litigation event from other life events. Acknowledgment of TBI, TBI vs. psych issues. Inconsistency. Emotional responses. E.g “But the claim said \$10 million”
  3. Need ABI experience: not to dabble. Need to educate the insurer. i.e. loss of consciousness in mTBI. Surveillance
  4. This one is not our problem. Issue is funding – need time with client to understand needs. Need to educate the insurer. i.e. function – variability of days. CUING AND PROMPTING. Prepare notes. Access and trust of the client. Ability for them to advise what they need vs what service provider thinks they need. Constant discussions between each other to support approach
  5. Lack of family and friends. Self interest in the litigation. When client cannot speak for herself
  6. Most difficult part for a lawyer: funds needed asap. System does not allow for it
  7. Most difficult part for the client: repetitive instructions, etc.

# How does brain injury impact the process?

1. The Discovery Process
2. The Mediation Process
3. Pre Trial
4. Trial
5. Capacity Assessment
6. Role of Litigation Guardian and/or POA and/or Public Guardian and Trustee
7. Court Approval
8. Structure
9. Previous lawyer dilemma
10. Defining our roles as service provider and personal injury lawyer



# The litigation process: Telling your story

In relation to the court mandated events:

1. Emotion and appearance
2. Education
3. Function
4. Cuing and prompting
5. What can the insurance lawyer relate to?
6. The future
7. Highlighting where help needed. e.g. income
8. Function is king

What will a jury think?



# Capacity and Litigation Guardian

1. Litigation guardian can be many people: relative, other lawyer etc. No adverse interest
2. *Substitute Decisions Act* and *Rules of Civil Procedure*
3. Mentally incapable means a “*Person under disability*”: *Rules of Civil Procedure* require a LITIGATION GUARDIAN
4. Capacity assessor is a qualified professional to make a determination on capacity. How will the brain injured client respond?
5. Section 16 assessment under *Substitute Decisions Act*
6. Property
7. Continuing Power of Attorney prior to capacity
8. Court Appointed Guardian
9. Public Guardian & Trustee (typically if no family relative can do it). Rule 7.04 of *Rules of Civil Procedure* allows for PG&T to be appointed by the Court
10. Section 42 *Substitute Decisions Act* Order of Passing of accounts



# Court Approval

1. Rule 7.08 *Rules of Civil Procedure*
2. If a litigation Guardian is used, court approval must be obtained upon settlement
3. Upon court approval money paid into court or subject to order from the Judge
4. The Court is protecting those who are a party under disability
5. Process takes time



# Structured Settlement

1. A plaintiff receives compensation for their injuries in installments over a fixed period of time. Available to those injured and receiving personal injury settlements only
2. Duration, installments, quantum, and interest are chosen
3. Once completed it cannot be changed
4. Provided by one of two insurance companies
5. Owned by the insurance company. Protection from creditors, not an asset owned by the plaintiff, accrues interest, tax-free
6. Often used in Statutory Accident Benefit cases as imposed by the insurer
7. What will the brain injured client's reaction be to a further imposition on settlement?



# Questions?

# Thank you for attending.

Please feel free to call or email with questions:

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