**DUTTON BROCK** ***BULLETIN*** *June 20, 2013*

## Accident Benefits – No Disclosure Notice Required for Litigation Files - *Chauvette v. Massey* 2013 Ontario Superior Court of Justice

In *Chauvette v. Massey*, 2013 ONSC 4146 (released June 18, 2013), the Ontario Superior Court of Justice confirmed that a settlement disclosure notice is not required—and may in fact become problematic—upon settlement of Accident Benefits claims which are in litigation as opposed to arbitration.

The Plaintiff was involved in a motor vehicle accident on July 2, 2009. When a dispute arose with his first-party automobile insurance carrier, Gore Mutual Insurance, regarding his entitlement to Accident Benefits, a mediation application was filed with FSCO. Prior to mediation being scheduled, the Plaintiff issued a Statement of Claim against Gore on June 21, 2011, in which he claimed entitlement to various Accident Benefits. A Statement of Defence was filed on October 13, 2011. Negotiations to settle the Plaintiff's Accident Benefits claim on a full and final basis began in June 2012. A FSCO mediation started on July 5, 2012 but was adjourned to July 9, 2012 due to the advanced stage of the parties' settlement negotiations. A full and final settlement was reached on July 9, 2012 and the FSCO mediator was advised of the settlement upon resumption of the mediation. In the package of settlement documents it sent to the Plaintiff, defence counsel included a settlement disclosure notice at the request of Gore. On July 11, 2012, counsel for the Plaintiff advised that the Plaintiff was unable to effect settlement and relied on the 48-hour "cooling off" period as outlined in the settlement disclosure notice to rescind the settlement. Gore brought a motion to enforce the settlement pursuant to Rule 49.

In her written decision, Madam Justice Vallee granted Gore's motion and confirmed the principle held by the Ontario Court of Appeal in *Igbokwe v. HB Group Insurance Management Ltd.* (2001): once an insured person chooses to pursue their Accident Benefits claim through litigation, offers to settle are governed by Rule 49 of the *Rules of Civil Procedure*; Regulation 9.1 of the *Insurance Act, Automobile Insurance R.R.O. 1990* is no longer applicable. Madam Justice Vallee stated in *Chauvette*:

> The most important factor to consider is the purpose of section 9.1 and the settlement disclosure notice. As the Court of Appeal stated in *Igbokwe*, the notice is designed to protect self-represented parties, not parties who have counsel. A party who has counsel, such as the plaintiff in this matter, does not require a two day cooling off period in which he or she can rescind acceptance of an offer.

As a matter of practice, this decision serves both as an affirmation and as a caution to insurers. Even though Gore was successful on the motion, Madam Justice Vallee ordered no costs in Gore's favour, stating that "they were the author of their own misfortune in sending the notice which was unnecessary. Had they not sent the notice, the motion likely would not have been required." When the costs of bringing a settlement enforcement motion like this one are considered, it becomes clear that it is just not worth it for insurers to unnecessarily request that a Plaintiff execute a settlement disclosure notice upon settlement of an Accident Benefits claim that is in litigation. It is unclear at this time whether or not this decision will be appealed. Dutton Brock will keep you up to date.

*If you would like more information on motor vehicle insurance, please do not hesitate to call.*

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