Personal Injury “Cold Case” Eligibility Guide

CAMPISI LLP
Personal Injury Lawyers

CHAMPIONS WITH HEART.

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This guide has been prepared to provide accident victims, their loved ones, and their healthcare providers with a thorough overview of the criteria used to determine if they are catastrophically impaired.

This pamphlet is not nor is it intended to be legal advice, but merely conveys general information related to legal issues commonly encountered. Legal advice requires knowledge of your personal circumstances, and can only be obtained through a personal interview with a lawyer

Introduction

When you are injured in a car accident in Ontario, your own auto insurer provides you with “no-fault” accident benefits including rehabilitative treatment, income replacement, and attendant care. We are often approached by accident victims like you who still require ongoing benefits but have been led to **believe that they are no longer entitled to claim these benefits** from their insurance company. Reasons for this belief include failing to dispute a benefit that was denied, settling your accident benefits claim prematurely, or just giving up when faced with multiple insurer examinations and other obstacles.

Regardless of how long ago your accident happened, you might still be entitled to ongoing accident benefits. We call these older claims “Cold Cases ”. If you or somebody you know was involved in a car accident in the 32 years since no fault benefits were introduced and believe that you have a Cold Case, we strongly encourage you to discuss your potential claim with us. We are pleased to offer a free, no-obligation consultation so that you can understand your rights and options going forward. At Campisi LLP, our areas of expertise include accident benefits law – from our founding partner, Joseph Campisi (a professor of insurance law at Osgoode Hall), to our exceptional lawyers and accident benefits team. We specialize in cracking Cold Cases for our clients.

What is in the Eligibility Guide

We have prepared this brief guide as a resource for accident victims to determine whether they are potentially eligible for ongoing treatment, care or assistance. If you are someone who continues to struggle with your injuries from an accident long ago, you might still have access to statutory accident benefits or even a lump sum settlement from your auto insurer.

You are not alone. Many Ontarians are suffering needlessly from the long-term impact of their car accident injuries when they could still be entitled to receive ongoing funding from their auto insurers. We are consulted regularly by accident victims like you who were led to believe that they were out of time and there was nothing they could do to access ongoing benefits.

Put Campisi LLP’s experts to work for you.

General Time Limitations

Ontario auto insurance law establishes time limits to take certain steps when you have been injured in a car accident. Failure to comply impacts your rights and entitlements or can permanently deprive you of these rights.

For example, you must let your insurer know that you were injured within 7 days of the accident. Once you receive an application package, you must apply for accident benefits within 30 days. If you miss either of these deadlines, you will have to fight to receive any benefits, and provide a satisfactory explanation for the delay.

Most importantly, if your insurer reduces, cuts off or denies a benefit, **you have two years** to start an application disputing the decision with the Licence Appeal Tribunal (LAT). Generally, missing these deadlines acts as a bar to challenging the decision.

Determining if you are Eligible

Even if you fail to meet the General Time Limitations, there are four exceptional circumstances that might allow you to fight for the right to ongoing accident benefits or a lump sum settlement. Despite what you have been told, you might still have a right to accident benefits in these or similar situations:

 **You were a minor**	You did not file a claim for benefits or challenge a denial within the time limit under the Statutory Accident Benefits Schedule (SABS) but were a minor (under 18 years old) at the time of the accident;
 **You were incapable**	You did not file a claim or challenge a denial within the time limit but lacked capacity to make decisions;
 **Your claim was not clearly and unequivocally denied**	Your insurer gave inadequate reasons when it denied an accident benefit you submitted, and you did not dispute the denial within two years or at all; or
 **You settled, but your needs for care changed**	You recognized the need for ongoing accident benefits after you settled your claim, but your insurance company failed to properly disclose their obligations

See below for more detailed descriptions of each scenario to help determine whether you qualify.

Detailed Descriptions of Eligibility Circumstances

YOU WERE A MINOR 

Under s. 6 the *Limitations Act, 2002*, the two-year limitation **does not run** at any time the claimant is under the age of 18 **and** is not represented by a litigation guardian (usually a parent, appointed by the court to represent the minor in a lawsuit). As a result, in many cases, you (or your child) might still be able to commence proceedings against your accident benefits insurer even if several years have passed – depending on your age at the time of the accident, as many as **twenty** years post-accident.

Example: In *Azzeh v. Legendre*, (2016 ONSC 3937) the plaintiff had suffered a brain injury in a 2007 car accident when he was a newborn. His mother was also injured in the collision. She started a lawsuit on her own behalf in early 2008, but only issued a claim for the minor plaintiff in 2014, appointing herself as his litigation guardian. In 2015, the plaintiff tried to add the City of Sudbury to the claim. While it acknowledged that the plaintiff was still a minor, the City argued that the limitation period to add it as a defendant had expired 2 years after the collision, since the minor plaintiff had a litigation guardian. However, the evidence showed that the plaintiff's mother was only appointed as litigation guardian around the time his lawsuit was commenced. As a result, the limitation period to add defendants had not yet expired. These limitation principles also apply in accident benefits claims.

YOU WERE INCAPABLE 

Under s. 7 of the *Limitations Act, 2002*, the limitation **does not run** at any time you are incapable of commencing a proceeding in respect of the claim because of your physical, mental, or psychological condition **and** you are not represented by a litigation guardian.

Capacity is a legal test, and there is a strong presumption that you have capacity to make your own decisions. Generally, you will have legal capacity if you can understand the information that is relevant to making the decision and are able to appreciate its reasonably foreseeable consequences.
Proving physical incapacity is relatively straightforward and usually involves a coma or other devastating physical condition. Mental and psychological conditions are more challenging and will be considered through a variety of factors including:

(a) A person's ability to know or understand the minimum choices or decisions required to make them;

(b) An appreciation of the consequences and effects of his or her choices or decisions;

(c) An appreciation of the nature of the proceeding;

(d) A person's ability to choose and keep counsel;

(e) A person's ability to represent himself or herself;

(f) A person's ability to distinguish between relevant and irrelevant issues; and

(g) A person's mistaken beliefs regarding the law or court procedures.

If you (or a family member) suffer from a physical, mental or psychological condition that might make you incapable of commencing a proceeding, or have previously suffered to this extent, you might still be able to fight for your accident benefits.

Example: In *Enns v. Goertzen*, (2019 ONSC 4233), the plaintiff had a pre-collision history of depression and bipolar/schizo-affective disorders. She suffered a mild traumatic brain injury and soft-tissue injuries following a 2011 car accident. Approximately one month later, she experienced a left-sided stroke resulting in right-sided paralysis, loss of speech and significant cognitive impairment. She did not issue a claim against the defendants until 2015, more than 4 years after the collision. The defendants brought a summary judgment motion seeking to have the lawsuit dismissed for failing to meet the two-year limitation period. By this time, the plaintiff had been declared catastrophically impaired by her accident benefits insurer, and the Office of the Public Guardian and Trustee (PGT) had been appointed as her guardian of property and litigation guardian.

On the evidence before the court, the judge was unable to determine when, if ever, the plaintiff had legal capacity to commence a lawsuit. He therefore held that a genuine issue for trial relating to the limitation period existed and allowed the lawsuit to proceed.

YOUR CLAIM WAS NOT CLEARLY OR EQUIVOCALLY DENIED

Under the Statutory Accident Benefits Schedule (SABS), you must start proceedings against your insurer within two years after a benefit was denied or reduced. This seems to draw a bright line for challenging denied claims for benefits. However, as the Supreme Court of Canada held in Smith v Co-operators General Insurance Co., the denial must be "clear and unequivocal" and must include reasons capable of justifying the decision. This means that if your insurer denied your benefits claim without providing adequate reasons or leads you to believe that the denial was not final or had been revoked, your two-year limitation **has not started** to run, no matter how long ago you received the written notice. The Licence Appeal Tribunal (LAT) has consistently applied these principles, as did its predecessor, the Financial Service Commission of Ontario (FSCO).

Until recently, insurers often viewed the written denial notice as a formality, and the denials they provided did not give explicit reasons related to the individual's claim. Repeatedly before the LAT, such denials have been found inadequate. If you have ever had a claim for accident benefits denied by your insurer, no matter how long ago the denial took place, you might still be able to fight for the amounts owed with interest.

Important Note: This will be the case even if the claim was made under **an earlier version** of the accident benefits regulation. If a claim involves income replacement, caregiver, non-earner, attendant care or housekeeping benefits, the claimant could be entitled to retroactive payment with interest for **the entire period** since the inadequate denial letter.

For a discussion of the earlier versions of the SABS see our Cold Case Benefits guide.

Example: In S.*R. v. Aviva Insurance Canada*, (2018 CanLII 13157), the claimant was injured in a December 28, 2014, car accident and received accident benefits including income replacement benefits (IRBs) from Aviva. The IRBs were terminated on February 25, 2015, when the claimant returned to work. Aviva explained that that should she, "be off work again due to the injuries sustained on the accident, we would require an *updated Disability Certificate* (OCF-3) to determine your eligibility" and that, "there is no entitlement to benefits for any period before the updated OCF-3 is submitted". It also provided standard language descriptions of the procedure for challenging the decision and a warning that she had two years from the date of the insurer's "refusal to pay" to commence a proceeding.

The claimant stopped working again in May 2015 but did not submit an updated *Disability Certificate* (OCF-3) until June 2017, more than two years after the IRB denial. She commenced an appeal of the denial in July 2017. Aviva argued that she had missed the limitation period and her claim was statute-barred from proceeding.

Adjudicator Ferguson allowed the appeal to proceed, finding that Aviva's denial letter did not constitute a clear and unequivocal refusal to pay further IRBs. He explained that the letter clearly informed the claimant that she remained eligible if she submitted an updated OCF-3 and failed to state that such an OCF-3 would only be considered within two years of the denial letter. Further, it was unclear that the "decision" in the letter was confined to the denial. It could reasonably be interpreted as a decision that it would reconsider her IRBs following submission of a new OCF-3, and that any future decision concerning IRB entitlement would be excluded from the current denial. Since the letter was ambiguous, it had to be read in favor of the claimant.

Discretion to extend two-year limitation

On April 1, 2016, the Licence Appeal Tribunal assumed responsibility for adjudicating accident benefits disputes. Section 7 of the *Licence Appeal Tribunal Act* provides discretion to extend any limitation of time fixed by or under any Act for giving notice requiring a hearing by the tribunal if it is satisfied that there are reasonable grounds. Recently, in *Fratarcangeli v. North Blenheim Mutual Insurance Co*. (a trilogy of related judicial review applications, one of which was successfully argued by Campisi LLP), the Divisional Court of the Superior Court of Justice confirmed that this discretion applies the two-year limitation to dispute a denied or reduced accident benefit.

YOU SETTLED, BUT YOUR NEEDS FOR CARE CHANGED

Ordinarily, your accident benefits insurer will want to settle your claim for a final amount in exchange for a release from further obligations to you related to the accident that caused your injuries. While these settlements are considered final and binding, the courts will rescind a settlement if the insurer did not comply with its disclosure obligations under the Automobile Insurance Regulation (O. Reg. 664). These obligations include providing you with a Settlement Disclosure Notice describing the **benefits that may be available** and/or the **consequences** of settlement on these available benefits. If the Settlement Disclosure Notice was deficient, you can challenge the settlement. In our experience, many older Notices (pre-2016) were deficient, and can provide opportunities for successful challenges.

Recently, in *JT v. RBC General Insurance Company* (2019 CanLII 83585) before the LAT, the claimant wanted to rescind settlement agreements for two accident benefits claims with RBC. Following settlement, his condition deteriorated, and he wanted to apply for a determination of catastrophic impairment, which would give him access to greatly enhanced and ongoing coverage. The claimant intended to argue that RBC had failed to give him proper notice that he would be unable to seek a determination of catastrophic impairment if he settled his claim. He was allowed to proceed with this argument on the condition that he **pay back** all settlement amounts to RBC.

If you settled accident benefits claim, and now require ongoing benefits because of your accident-related impairments, you might be entitled to rescind the settlement agreement.

Determining Your Benefits

The purpose of this guide is to help you determine whether your "cold case" is eligible to be reopened and you can apply for ongoing treatment, care or assistance, or potentially receive a lump-sum settlement. If you are eligible, and want to find out what benefits you may be entitled to, please see our Personal Injury Cold Case Benefits Guide, or speak to one of our lawyers.

In Conclusion

The general rules governing your entitlement to accident benefits and right to challenge a denial or unfair settlement are often presented as written in stone and impossible to challenge. As this guide has explained, this is not the case – several exceptions exist and can be argued successfully, no matter how long ago you were in the accident. If you were seriously injured in a car accident and continue to suffer from your accident-related injuries but believe you do not have access to necessary accident benefits, you might still qualify under one of the exceptions listed above. We are pleased to offer a free, no-obligation consultation to discuss these matters with you. Trust the experts at Campisi LLP – Clients First, Excellence Always!

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Campisi LLP Team

Our team has more than 50 years of combined experience helping clients through the complicated personal injury and accident insurance claims processes. Our founding partner Joseph Campisi teaches insurance law at Canada's larges law school. We all benefit from his cutting-edge knowledge and understanding.

> I am so pleased with Cesar and the team at Campisi Law. Going into my case I was nervous and didn't know what to expect. I am beyond grateful to Joseph Campisi. He is exceptionally educated when it comes to personal injury law and because of that, he always acts in the best interests of his clients. He acts with integrity, knowledge and care. Qualities I believe are very hard to find in this industry. I would recommend Campisi LLP to anybody that is looking for their best interests to be represented with solid results. His staff are welcoming, professional and patient. They actually empathize with what you have been through and support you through it.
>
> **~ Leonard Reardon**

Contact Us

At Campisi LLP, we represent clients the way we would want our families to be represented – with true caring and support. We make ourselves available 24/7, even on evenings and weekends, to answer questions, provide advice and help clients and their families at a difficult time.

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