APPENDIX 2A Sample Initial Letter

Dear [*name*]:

Re: Motor Vehicle Accident

Please read this letter carefully and retain it in your file, as it contains important information about your claim and the basis of our statement of account to you. When you have read the letter, please sign the duplicate copy where indicated and return the duplicate to us.

Information and documentation we require from you

Information and documents we need from you are as follows:

- a detailed curriculum vitae using the precedent we gave to you at the initial interview as a guide;
- if and when you hear about a court date for the *Highway Traffic Act* offence against [*name of defendant*], please advise us of the date, time, place and courtroom number;
- [*list chronologically the balance of the to do list given to the client at the initial interview.*]

Categories of damages in the negligence (tort) claim

In a negligence claim (sometimes referred to as a tort claim) for damages against the defendant(s), an injured person has three and possibly four potential categories of damages. These are as follows:

(i) non-pecuniary general damages (damages for pain and suffering, loss of enjoyment of life, and loss of amenities);
(ii) loss of income;
(iii) loss of household and handyman capacity;
(iv) possibly a fourth category of damages called future cost of care, which depends on whether an injured person has suffered a ‘‘catastrophic injury’’ as defined in the *Insurance Act*.

In addition, an injured person is entitled to make a claim for some, not all, of the expenses that the injured person incurs that are not covered by no-fault expenses. The complicated legal name for this category of damages is ‘‘other pecuniary losses’’. The amount claimable under this category is usually insignificant compared to the other potential categories of damages.

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Non-pecuniary general damages

Before anyone can successfully sue for this category of damages, a person must prove that the injury ‘‘meets the threshold’’. This can only be done if the person can show that one of two types of injury has been sustained:

(i) permanent serious impairment of an important physical, mental or psychological function; or
(ii) permanent serious disfigurement.

If it is proved that a person’s injury meets the threshold, there is a $15,000 deductible from the amount of non-pecuniary damages the injured person would otherwise receive. In other words, if a person’s injuries meet the threshold, and the person’s non-pecuniary general damages for pain and suffering and loss of enjoyment of life are assessed at $100,000, after imposing the $15,000 deductible, the net amount of the non-pecuniary general damages is $85,000.

The requirements of meeting the threshold and deducting the deductible apply only to the extent that an injured person’s injuries were caused by the negligence of other drivers and owners of vehicles. The principles of ‘‘meeting the threshold’’ and deducting the $15,000 deductible do not apply to non-automobile defendants such as municipalities (for negligently maintaining roads), taverns (for serving alcohol to a person who was obviously becoming impaired), mechanics (for not properly repairing a vehicle when asked to do so) or manufacturers (for the defective design or manufacture of a product).

Loss of income

With respect to a claim for loss of income, you should know the following:

- The ‘‘meeting the threshold’’ principle that applies to non-pecuniary general damages does not apply to a loss-of-income claim.
- The $15,000 deductible that applies to non-pecuniary general damages does not apply to a loss-of-income claim.
- A person cannot receive any loss of income for the first seven days after the collision.
- A person can only receive 80% of the person’s net (after-tax) loss of income before trial (less any accident benefits which are received). After trial, a person can receive 100% of the gross (before tax) loss of income. Most cases settle out of court without a trial and this provision in the *Insurance Act* does not mean that your case is necessarily going to go to trial. A way to understand this provision of the *Insurance Act* is to consider that an injured

person can only receive 80% of net (after-tax) loss of income before trial or the date of settlement and 100% of gross loss of income after trial or the date of settlement.

Loss of household and handyman capacity

If, because of injuries suffered, a person is unable to do such things as vacuuming, lawn cutting, gardening or snow shovelling, or if, when attempting to perform these kinds of chores, a person suffers an unreasonable degree of pain during the particular chore or for a period of time after the chore is completed, a person may be entitled to claim for loss of household and handyman capacity.

Under this category of damages, the ‘‘meeting the threshold’’ principle does not apply and there is no $15,000 deductible.

Future cost of care

Examples under this potential category of damages are as follows: if it is anticipated that after the date of trial or the date of settlement, a person will incur expenses because of the injuries suffered, such as expenses for medication or for modifications to a vehicle, then these can be claimed.

To be able to make a claim under this category of damages, a person must have suffered a ‘‘catastrophic injury’’ as defined by the *Insurance Act*.

Under this category of damages, the ‘‘meeting the threshold’’ principle does not apply and there is no $15,000 deductible.

Categories of damages of family members in the negligence claim

Close family members of an injured person have a right to advance what are referred to as *Family Law Act* claims. The claim of each family member is subject to a deductible of $7,500. The main categories of damages of a family member of an injured person advancing *a Family Law Act* claim are as follows:

- loss of guidance, care and companionship;
- the value of nursing, housekeeping and other services the family member has performed or will perform for or on behalf of the injured person;
- loss of income; and
- reasonable expenses incurred on behalf of the injured person.

There is no record-keeping involved with the first category of a family member’s damages noted previously (loss of guidance, care and companionship), but record-keeping is involved with the other three categories.

With respect to record-keeping to determine the value of nursing, housekeeping and other services a family member performs for an injured person, it is absolutely imperative that the family member keeps two lists. The first list is new chores or services the family member performs for the injured person. These kinds of chores include going to the pharmacy to buy medication, taking over vacuuming duties that the injured person performed exclusively before the accident and so on. The second list is chores the family member used to do before the accident, but now has to do more of. For example, before the accident a family member may have helped the injured person with lawn and garden maintenance, but after the accident, either for a period of time or permanently, the family member must perform all of the work required for lawn and garden maintenance. In addition to keeping these two lists, a record should be kept of the hours spent per week by the family member performing new chores or additional hours of chores that the family member must now spend more time doing. Without these two written lists and a written estimate of the hours involved on a weekly basis, it is very difficult for us to present an accurate claim on behalf of a family member for this aspect of the family member's *Family Law Act* claim.

With respect to record-keeping for loss of income, a family member who loses income because of an injury to a family member should try to ensure that an employer knows the reasons for absences from work and any resulting loss of income or sick day credits.

With respect to record-keeping for reasonable expenses incurred on behalf of the injured person, without receipts for these expenses, a family member will not be able to obtain reimbursement.

Potential no-fault benefits (accident benefits)

An injured person is entitled to receive weekly income replacement benefits for up to the first 104 weeks (excluding the first week) after a collision in the following circumstances:

- If the injured person was employed on the date of the accident and thereafter suffers a substantial inability to perform the essential tasks of employment.
- If an injured person was not employed at the time of the accident, but worked at least 26 of the 52 weeks before the accident (or was receiving employment insurance benefits at the time of the accident) and thereafter suffers a substantial inability to perform the essential tasks of the employment in which the person spent the most time during the 52 weeks before the accident.
- If an injured person was entitled to start work within one year under a legitimate written contract of employment that was made before the accident and as a result of the accident suffers a substantial inability to perform the essential tasks of that employment.

An injured person can still receive income replacement benefits after 104 weeks if the person suffers a complete inability to engage in any employment for which the person is reasonably suited by reason of education, training or experience. One of the reasons we have requested a detailed and comprehensive curriculum vitae from you is so that we will have precise details of your education, training and experience.

An injured person receives no income replacement benefits for the first seven days after a collision, and thereafter, as long as a person qualifies, receives 80% of net weekly income (after deducting taxes), after deducting any benefits he or she may be entitled to from other sources such as a disability plan at work. The maximum that can be received is $400 per week, unless optional coverage was purchased, and if it was, the maximum that can be received from the auto insurance company is $1,000 per week.

These benefits are available to you up until age 65 and then they start to decrease on a gradual basis.

Non-earner benefits

An injured person who was not working at the time of an accident and who does not qualify for income replacement benefits is entitled to receive $185 per week if the person suffers a complete inability to carry on a normal life. Nothing, however, is payable for the first 26 weeks after the accident. If a person was a student at the time of the injury or had been a student within one year of being injured and was not yet employed, these benefits increase to $320 per week starting 104 weeks after the accident.

Medical and rehabilitation benefits not covered by OHIP or other medical plan

A person is entitled to receive up to $100,000 of medical and rehabilitation benefits for expenses that are not covered by OHIP or some other health or disability plan, incurred up to 10 years after the accident. If a person's injury is catastrophic as defined by the *Insurance Act*, such as a serious brain injury or spinal cord injury, or some other kind of catastrophic injury, a person is entitled to receive $1,000,000 in medical and rehabilitation benefits and these are payable over the person's lifetime and not limited to 10 years. If optional increased coverage was purchased by an injured person, the payments discussed in this paragraph may be higher.

Attendant care benefits

An injured person can receive up to $3,000 per month for two years (which is a maximum of $72,000) for attendant care benefits. In a catastrophic case, an injured person can receive up to $6,000 per month to a maximum of $1,000,000 and there is no time limit. If optional increased coverage was purchased, these benefits may be higher.

Visitors' Expenses

A person who visits an injured person during the injured person's treatment or recovery is entitled to payment of all reasonable and necessary expenses incurred as a result of the accident. These expenses are limited to family members and other individuals who were living with the injured person at the time. There is no payment after 104 weeks unless the injury is catastrophic.

Housekeeping and home maintenance benefits

An injured person can receive $100 per week for reasonable expenses incurred for housekeeping and home maintenance, if the injured person suffers a substantial inability to perform these services and the injured person performed these services before the accident. These expenses are paid for 104 weeks unless the injury is catastrophic, in which case they are payable for longer.

Non-payment of accident benefits by accident benefits insurer

In a case like this, you will be submitting claims for accident benefits to the accident benefits insurer and, in many cases, payment of specific claims will be denied in whole or in part by the accident benefits insurance company. If a claim is denied, you then have a right to make an application for mediation over the unpaid claim at the Financial Services Commission of Ontario and, if the unpaid claim is not resolved at a mediation, to proceed with the next steps thereafter. We will not explain these additional steps at this time.

In most cases, if you can provide us with precise details of the claim for accident benefits that was submitted and denied, we will know immediately whether the denied claim is something that the accident benefits insurance company should or should not pay. There will be some situations, however, where we will not be able to advise you definitely whether the denied claim is something that should have been paid by the accident benefits insurance company.

In those cases where an expense you submitted for accident benefits should have been paid by the accident benefits insurance company but was denied, or where we feel there is a good chance that the particular expense will ultimately be paid by the accident benefits insurance company, an application for mediation should be prepared and delivered to the accident benefits insurance company and to the Financial Services Commission of Ontario. We can prepare an application for mediation on your behalf only if we have all the details of accident benefits expenses which are paid and unpaid. So that you can keep precise track of all accident benefits expenses you submit and those which are paid and unpaid, we have prepared a form, the Schedule of Accident Benefits Paid and Unpaid, which is enclosed with this letter. We ask that you use the Schedule of Accident Benefits Paid and Unpaid in the following manner:

1. Fill in the various blanks on the form every time you submit an expense.
2. Attach to the form copies of all the documents you submit to the insurance company requesting that a particular expense be paid (your covering letter to the insurance company, expense forms, invoices, receipts, etc.).
3. Attach to the form copies of the insurance company's response to each claim you submit, which usually will be a form called Explanation of Benefits Paid.

If you do not fill out the Schedule of Accident Benefits Paid and Unpaid in detail and attach all the necessary attachments, several things will happen. First, we will not be able to figure out how much the accident benefits insurer owes you. Secondly, if the attachments are not attached to the form, we will not be able to prove the expense you submitted and the fact that the insurance company denied payment of a particular expense. For these reasons, it is imperative that the Schedule of Accident Benefits Paid and Unpaid be completed accurately and that all attachments we have requested be attached to the form in the proper order.

Surveillance by insurance company or defence lawyer

Often, the insurance company or defence lawyer will take surveillance photographs or films of an injured person without that person's knowledge. You may think this is a nuisance and, perhaps, an invasion of your privacy, but the insurance company is entitled to do this. You have absolutely nothing to worry about if you are honest and truthful, and if you remember one very important factor. That is, there is a big difference between:

- not being able to engage in a certain physical activity at all; and
- Being able to engage in the activity, but with difficulty and with pain and discomfort, not only during the activity, but for a period of time after the activity.

What do I mean by this? If, for example, you say you cannot carry groceries, cannot shovel snow or cannot do your gardening, and the insurance company has surveillance photographs or video of you doing one of these things, you are going to look like a liar and, in fact, you will be a liar. On the other hand, if you tell anyone who asks (your family doctor, physiotherapist, defence lawyer, etc.) that you try to carry groceries, shovel snow or do gardening and that you can do the activity for short periods of time, but it is difficult and it causes you pain and discomfort, then the surveillance photographs or video the insurance company or defence lawyer has will be of no use to them. Not only will the photographs or video be of no use to the insurance company or defence lawyer, but also the surveillance photographs and video will be helpful to your claim for two reasons. First, the insurance company or defence lawyer

will realize that you are an honest and truthful person. Secondly, the insurance company or defence lawyer will see that you are a motivated individual trying to work through your pain. Without knowing it, you will impress the insurance company with your honesty and motivation.

Photographic and video surveillance is widely used by insurance companies and defence lawyers, and usually surveillance is conducted by very skilful investigators who can conduct surveillance without you being aware it is being carried out. However, if you are honest and truthful at all times and remember the distinction between ‘‘cannot do’’ and ‘‘try to do’’, you have nothing to worry about.

Our statement of account

Factors we take into account

The factors we will be taking into account in determining our fee to you include the following:

- the time expended by us;
- the legal complexity of the matters we have to deal with on your behalf;
- the degree of responsibility assumed by us in prosecuting your claim;
- the monetary value of the matters in issue;
- the degree of skill and competence demonstrated by us;
- the results achieved;
- the reasonable expectation of you, the client, as to the amount of our fee (in this regard we have included in this letter a written explanation of the fees we have discussed with you);
- the degree to which we have to finance the case; and
- The risk we assume.

The calculation of our statement of account in the negligence claim

If we are successful on your behalf, our fee in the negligence claim (or tort action, as it is often called) will approximate the costs you receive from the defendant(s) plus 10% to 15% of damages and interest on damages. In addition to our fee, our statement of account will include both disbursements and goods and services tax not covered by costs. As you can see, our total statement of account to you will consist of three parts: our fee, disbursements and GST.

The term ‘‘costs’’ requires some explanation. In addition to an award of damages and interest, a defendant is almost always required to pay costs to a successful plaintiff. Costs represent only a contribution to legal fees, disbursements and GST. Costs never provide full indemnification for an account a lawyer sends to a client. As a result, that portion of our statement of account not covered by costs has to be paid out of the damages and interest you receive.

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As an example of how our statement of account will work in a successful case, assume a client receives the following amounts in a final settlement:

Damages and interest	$300,000
Costs	25,000
GST on costs	2,500
Disbursements	10,000
Total	$337,500

In this example, if our fee were costs plus 10% of damages and interest, our statement of account would consist of the following:

The total of the costs, GST and disbursements noted previously	$37,500
Approximately 10% of $300,000	30,000
GST on $30,000	2,100
Disbursements traditionally not paid for by way of costs[1]	750
Subtotal	$70,350

The statement of account the client would receive in the preceding example would be as follows:

Total fee (costs received, plus approximate percentage of damages and interest)	$55,000
Total GST on total fees (GST on costs received + GST on the approximate percentage taken from damages and interest)	4,600
Total disbursements (disbursements received in costs + disbursements not covered by costs)	10,750
Total	$70,350

The total net amount then payable to the client in this example would be $267,150 ($337,500 – $70,350 = $267,150).

What if we proceed to trial and for some reason are not successful on your behalf, but still make some recovery? This can occur if, before trial, the defence lawyer delivers a formal offer to settle your case for a certain amount and you proceed to trial,

[1] For example, telephone charges, fax charges, police report, etc. We are using an arbitrary figure for purposes of this example.

and the judge or jury (who are not allowed to know anything about the formal offer to settle delivered by the defendant(s)) awards you less than the defence lawyer offered in the formal offer to settle. What will our fee be in these circumstances? In these circumstances, our fee to you will be based on an hourly rate. The hourly rates that we use in the office are as follows:

[*insert various hourly staff rates*]

These rates will increase approximately 5% per year. If we start processing a claim on your behalf and for some reason you decide to discontinue the claim or change lawyers, our fee to you will be based on the preceding hourly rates.

The calculation of our statement of account in the no-fault claim

With respect to no-fault benefits, there is no satisfactory way of fixing a fee that will give you some certainty as to what our fee will be unless the insurance company cashes out your accident benefits (that is, offers you a lump sum instead of paying weekly benefits, medical/rehabilitation benefits, etc.). If the insurance company does cash out your accident benefits, an estimate of our fee will be costs that are paid by the insurance company plus 10% to 15% of the amount of the cash-out value.

If the no-fault insurance company does not cash-out your accident benefits or you decide to change lawyers, then we will charge you by the hour for work we do with respect to the accident benefits aspect of your claim at the same hourly rates noted previously. As mentioned, these rates will increase approximately 5% per year starting January 1, 2001.

The timing of payments to us

Accounts will be rendered to you before the conclusion of your claim only in the following circumstances: if an advance payment is made to you by any insurance company in the negligence claim; or if, through our efforts, payments are made by the no-fault insurance company. Other than these two circumstances, the only account you will receive from us is at the end of the negligence claim and, if you are fortunate, if the no-fault insurer agrees to cash out no-fault benefits owing to you. [*Depending on the arrangements with the client add:* As we have discussed with you, no account for fees will be rendered to you in the negligence claim if your claim is dismissed and no recovery is made. We will, however, render an account for disbursements that we incur on your behalf.]

We will bear disbursements and expenses during the course of the proceedings [other than the retainer we have discussed with you [*give details, if any*] and unless payments are made as discussed in the preceding paragraph].

The only time we will not bear disbursements and expenses as discussed with you is if we make a recommendation to you regarding settlement and you reject our

recommendation. In these circumstances, we will either request a significant retainer from you or ask you to seek other counsel.

Our office procedure

We utilize a team approach in the office and many tasks are delegated down the line. For example, a lawyer will not be preparing the first draft of a document called a statement of claim, which is the document that will start the lawsuit on your behalf. A lawyer will certainly review the statement of claim and make whatever changes may be necessary, but the first draft will be done by a clerk with expertise in drafting statements of claim. On the other hand, I personally will be making all decisions regarding tactics, strategy and what experts are to be retained, and I will be the lead counsel at all important attendances such as examinations for discovery, pretrial conferences and trial.

Often, I am out of the office for extended periods of time. I have an extremely competent legal assistant and staff who can answer most questions you may have. If you have a question my staff cannot deal with, I am available to answer it. If I am not in the office, you can leave a message on my voice mail giving a number where you can be reached, and I will get back to you as soon as possible.

How long will it take to resolve your claim?

The three questions we are asked most frequently are:

- How much is the case worth?
- How much is it going to cost?
- How long will it take to settle the case?

We cannot say how much a case is worth at the time of our initial interview with you because we do not know what the various doctors and other health professionals are going to say is the medical prognosis. A case cannot be settled without a medical prognosis on what the future condition of an injured person will be, and it usually takes a minimum of two years from the time of an injury to obtain a prognosis, because generally an injury will improve over this period of time and sometimes considerably longer.

We have done our best to tell you what the case will cost to prosecute on your behalf. While we have little idea what the actual amount of our statement of account will be to you, we have tried to explain in detail how our statement of account will be calculated.

How long your case will take to resolve is also very difficult to determine. Some of the factors that go into determining how long your case will take to resolve are as follows:

- How quick you are to respond to our requests for information and documentation.

- The degree of co-operation we receive from the defence lawyer(s) in arranging and conducting examinations for discovery.
- How long it takes for us to obtain a medical prognosis from the doctors involved in the case.
- The degree of co-operation we receive from the doctors and other health
- Professionals in providing us with copies of their clinical notes and records when we request these records.
- The degree of co-operation we receive from the doctors and other health professionals in providing us with detailed and comprehensive medical-legal reports when we request them.
- The degree of co-operation we receive from other people and institutions from whom we may request records, such as a request for police notes and records behind the police report from the investigating police force, a request for school records from schools and colleges, personnel and employment records from past employers, income tax returns from Revenue Canada, OHIP records from the Ministry of Health, and so on.
- How long it takes for various assessments to take place after we receive medical prognoses from your physicians, as well as how long it takes for the various assessors to deliver reports to us. Such assessments can include a functional capacity assessment (to determine the effects of your injuries on your ability to perform various day-to-day functions), a psycho-vocational assessment (to determine to what extent your injuries have affected your ability to earn income), a future cost of care assessment and, in many cases, an assessment to determine whether your injuries are serious enough to meet the definition of ‘‘catastrophic impairment’’ based on something called the 55% rule using the American Medical Association’s *Guides to the Evaluation of Permanent Impairment,* 4th ed., 1993, which can only be determined three years after the accident.
- How long it takes for the defence lawyer to arrange various defence medical examinations, which are usually arranged after the various assessments of you have been conducted and reports delivered. These defence medical examinations can include the same kinds of assessments referred to in the preceding paragraph, the difference being that they are arranged by assessors chosen by the defence lawyer.
- How long it takes us to obtain an economic loss report, which is the last expert’s report we receive and which is only requested by us after all other assessments (not including the defence medical examinations) have been completed and reports delivered.
- How long it takes — after we have completed examinations for discovery — for the Superior Court of Ontario pretrial conference scheduling office to contact us with a date and time for a pretrial conference.
- How long it takes for the Superior Court of Ontario trial scheduling office to contact us for a date to appear in trial scheduling court and arrange a date for

the trial of your claim. When we actually appear in trial scheduling court to pick a trial date, the important determining factors are the anticipated length of the trial (the shorter the length of trial, the sooner the court has available trial the case. Keep in mind that about 1 in 20 cases actually go to trial, but of the other 19 cases that settle out of court, many are settled the week before the trial is scheduled to start.

You can see that there are many factors that can affect the timing of resolution of your claim that are out of our control. With respect to information and document gathering, we can say that we have a well-organized and efficient system of reminders, so if we do not receive a document after an initial request, a reminder will go out as soon as is reasonable and further reminders will follow.

Every person in the office is compensated based on performance and every person in our office involved in your case will do his or her very best to achieve the very best results for you. If at any time you are not totally happy with the way your claim is progressing or the way we are keeping you up to date on what is going on, please let us know immediately. The staff is extremely experienced and competent and we have regular training meetings to keep staff current on the latest developments in the law. The only way we can learn if the staff or the lawyers are not meeting your expectations is if we hear from you.

Sign a duplicate of this letter

So that we will know that you have read this letter carefully and understood it, and so that there will be no misunderstanding about our statement of account, we ask that you sign a duplicate of this letter and return it as soon as possible. If you have any questions you wish answered before signing the letter, please feel free to contact the undersigned.

Yours very truly,

McLEISH ORLANDO LLP

I acknowledge receipt of two copies of the within letter acknowledging that I have read it carefully and understand the contents, and I agree to the terms and conditions of your retainer and the basis of your statement of account as set forth in this letter.

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[*Name of client*]