



# Accident Benefit REPORTER

## Auto Insurance Changes

### *In this issue:*

- ◆ *Proposed Changes to Catastrophic Definition*
- ◆ *Access to Treatment and the Treatment Plan Process.*
- ◆ *DACs and Section 24 Assessments*
- ◆ *The Right to Sue for Health Care Expenses and the \$15,000 Deductible*

**E**arlier this year, the Minister of Finance, Janet Ecker, appointed a committee to review auto insurance legislation, on behalf of the Ontario Government. The committee consists of Mr. Ted Chudleigh, MPP (Chair), Mr. Rob Sampson, MPP, and Mr. Wayne Wettlaufer, MPP. Over the course of the past year, the Committee has consulted with stakeholders in order to prepare and recommend changes to Bill 59 and the Statutory Accident Benefit Schedule. On September 16, 2002 the Chair of the Committee released draft proposed changes.

On September 24, 2002, Thomson, Rogers and the Toronto Acquired Brain Injury Network sponsored an Information Forum to discuss these proposed changes, at the Toronto Rehabilitation Institute. More than 190 Health Care Professionals from across the province attended, as well as representatives from the insurance industry and government.

Speakers and panelists addressed the September 16 changes and discussed alternate solutions. Four major areas of concern were identified and conference attendees formed groups to consider each of these areas:

1. The definition of catastrophic impairment.
2. Access to treatment and the treatment plan process.
3. Section 24 and the DAC assessment process.
4. Tort access to health care expenses and the \$15,000.00 deductible for health care expenses

The results of the groups' consultations and proposed solutions are summarized in the articles that follow.

Auto Insurance Review Committee representative, Rob Sampson spoke at the Forum, answered questions and addressed concerns related to the September 16 proposals. He advised that the government intends to move forward quickly and would like to have changes in force by 2003.

Our mutual challenge is to continue consultations with the government in order to address the issues raised by the proposals and to obtain practical and fair solutions for injured persons.

The September 16 proposals, conference information and speaker summaries are available under the "What's New" icon of our web site at [www.thomsonrogers.com](http://www.thomsonrogers.com).

We will continue to provide information updates on our web site as they become available.

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# Proposed Changes to Catastrophic Definition

In her cover letter that accompanied the proposed changes, Minister Ecker stated that "the package of proposed reforms contains measures to expand the definition of catastrophic impairment." The specific changes:

1. Restrict availability of catastrophic impairment status to those having a Glasgow Coma Scale test result of 9 or less, as well as requiring a period of post-traumatic amnesia (PTA) of at least 7 days.
2. Replace the Glasgow Outcome Scale outcome with Extended Glasgow Outcome Scale.
3. Allow the use of analogous measures for children if the existing scales cannot be applied.

## **Recommendation Regarding Proposed Use of PTA (Proposal No. 1):**

The group recommended that Proposal No. 1 be abandoned. This recommendation was made for several reasons, specifically:

- (a) the PTA criteria was never recommended by the Committee formed at the request of David Young MPP to address changes to the catastrophic definition;
- (b) Health Care Professionals do not generally chart post-traumatic amnesia;
- (c) there is a high degree of subjectivity in determining when a patient first begins to recall events continuously, after a brain injury; and
- (d) the proposal is unworkable.

Since PTA is not routinely measured or charted in clinical practice, a CAT DAC evaluation would have to conclude in all but the most rare cases, that the person had not provided sufficient or credible evidence to demonstrate at least seven days of PTA. As such, the person with an agreed "severe" brain injury based on applicable Glasgow Coma Scale criteria, would not be designated as having sustained a catastrophic impairment.

The group recommended that the current catastrophic designation, based upon a Glasgow Coma Scale score of nine or less, remain in its current form.

## **Recommendation Regarding Use of Extended Glasgow Outcome Scale**

### **(Proposal No. 2):**

Health care professionals are familiar with the Glasgow Outcome Scale and indicate that while the Glasgow Coma Scale Extended Version (GOSE) is more favorable than the Glasgow Outcome Scale, the GOSE reliance upon a structured interview for determination of impairment does not provide sufficient objective and observational data. Neuropsychological and occupational therapy assessments should be the primary determinants for catastrophic designation, in accordance with current CAT DAC protocol.

The GOSE was derived by dividing the Glasgow Outcome Scale's three highest levels (severe disability, moderate disability and good recovery) into six levels, which are more descriptive and clearly indicated. As such, the GOSE is a more practical tool for categorization of impairment.

The group recommended that if an injured person scores five or worse on GOSE testing, he or she will be deemed catastrophically impaired.



*David F. MacDonald,  
Partner*



### Group Recommendations Regarding Inapplicability of Current Catastrophic Impairment Criteria for Children (Proposal No. 3):

The group recommended that children be deemed catastrophic in all cases and therefore entitled to an enhanced levels of benefits including case management, attendant care to a maximum of \$6,000.00 per month to a lifetime maximum of \$1,000,000.00 and medical and rehabilitation benefits to a lifetime maximum of \$1,000,000.00.

### Comment: Effect of Court/Arbitration Decisions Upon Assessment of Catastrophic Impairment and Reasonable and Necessary Treatment

Discussions continue about which approach should be taken in assessing the significance of non-accident related factors in determining benefit entitlements. Decisions such as *Athey* and *Stargratt* have established the principle that, if the injured person satisfies the DAC, arbitrator or a judge that the injuries sustained in the accident materially [significantly] contributed to the accident victim's overall condition, the injured person is entitled to full compensation. If the injured person's overall condition is deemed to be one of catastrophic impairment, the injured person may be entitled to catastrophic designation and enhanced benefits.

*David F. MacDonald, Partner*

## Access to Treatment and the Treatment Plan Process

*T*he September 16 changes propose replacing the current "pay pending" treatment approach with an assessment and treatment guideline process. This process would apply to certain, "less serious" injuries and would not require prior insurer approval.

- a) The Committee which is to be assembled by the Superintendent of the Financial Services Commission of Ontario (FSCO) to develop a fee and treatment protocol ("the Guidelines") must include input from Health Care Professionals.
- b) The Guidelines should not be clinical guidelines. The Guidelines should simply be an entry point into the system for uncomplicated injury by specifying treatment which can be provided without prior approval of the insurer.
- c) The Guidelines should specify a clear and cost-efficient mechanism for people to move from inside to outside the box, where the injuries would initially put them "inside the box", but they do not respond to the "in the box" approved treatment.
- d) In creating the "Guidelines Process", the Superintendent of FSCO should review and consider the "utilization guidelines" published by many of the Colleges who regulate Health Care Professionals.



- e) The proposed amendment for one comprehensive treatment plan in any 30 day period during the first 6 months following injury, is unworkable. Certain treatment which is immediately required may be delayed because of the need to wait for other treatment providers to be consulted in order to prepare a comprehensive treatment plan. In addition, while treatment is progressing, often further deficits/disabilities become apparent and further treatment plans need to be created to address these further injuries.
- f) The proposal that treatment plans which are not responded to by an insurer within 7 days are deemed to be "approved", is welcomed.
- g) There is a conflict between proposal 1d and proposal 3 of the Proposed Regulation Changes (SABS). 1d suggests that disputes over assessments would go directly to mediation, whereas proposal 3 suggests they would go to a DAC. Sending such a dispute to a non-binding mediation or to a DAC will not resolve the dispute quickly and will only serve to possibly delay treatment to the victim.
- h) The overall consensus was that for injuries which fall "outside of the box", treatment providers should be entitled to conduct assessments as necessary, without the need to obtain prior approval from the insurer for the assessment. Alternatively, the amendments should provide for a simple process of direct approval between the treatment provider and the insurer. Should this procedure not resolve the issue, a quick and simple resolution process for disputes involving assessments is necessary.



*Leonard Kunka  
Partner*

*Leonard Kunka, Partner*

## DACs and Section 24 Assessments

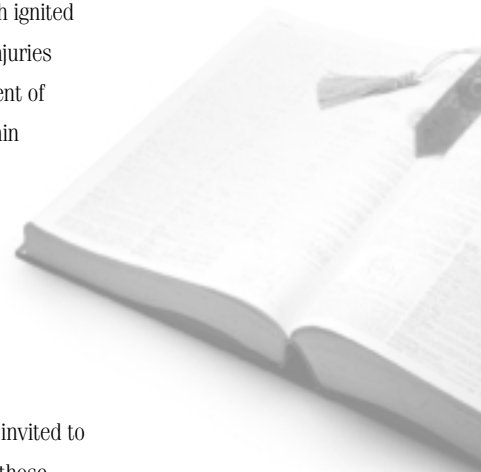
There are several legislative and regulatory changes concerning DACs and Section 24 assessments which have been proposed by the Automotive Insurance Review Committee. The proposal which ignited most of the discussion in our breakout group concerned the recommendation that less serious injuries (presumably of the soft tissue variety), will be governed by guidelines issued by the Superintendent of Financial Services and developed by a committee assembled, as required. If the injuries fall within these proposed guidelines, the details of which have not been made known, no treatment plan, no independent medical examination and no DAC examination will be conducted.

The two issues most frequently raised in our discussions can be summarized as follows:

- (a) what injuries will be determined to be "inside of the box" and therefore governed by the guidelines?
- (b) who is to be included in the "committee as assembled", to establish the guidelines?

It was the consensus of the break-out group that Health Care Professionals should be invited to assist in the development of clear criteria relating to the assessment and treatment required for those injuries that will fall within the guidelines.

It was generally agreed that in some cases the elimination of Section 24 assessments for injuries falling within the treatment guidelines, will not lead to the most responsible assessment, thereby rendering the proposed treatment ineffective.



In more serious cases, i.e. those accident victims who have suffered injuries falling "outside of the box", it is proposed that disputes involving treatment and assessments under \$1,500.00, and not governed by the guidelines, go directly to mediation. It was the concern of the break-out group that mediation may not be the most effective dispute resolution mechanism to resolve disputes of this sort. It was suggested that in such a situation the innocent accident victim deserves an impartial and timely decision rather than the uncertainty of mediation. This proposed change to refer to mediation disputes over treatment and assessments of injuries falling outside of the guidelines was thought to be unworkable and that a mechanism more responsive to the immediate needs of the insured was required.

It would appear that the proposed changes add yet another category of injury, the assessment and treatment of which will be governed by guidelines yet to be developed. Appropriate assessment guidelines and treatment protocols will likely result in cost saving to the insurer which can be passed along to the general public by way of lower auto insurance premiums. It is, therefore, imperative that health care professionals from all of the regulated health professions are consulted before the guidelines are implemented.



*David Neill*  
*Partner*

Other proposed amendments include:

- (1) The establishment of maximum DAC fees, after consultation with the insurance industry and DAC operators.
- (2) DACs would be prohibited from using assessors who conduct other medical/legal exams on auto accident victims. An exception may apply if there is a shortage of qualified assessors. Short of the exception, this proposal begs the question of who will conduct these examinations?
- (3) DAC assessments are to be received by the court and arbitrators as prima facie evidence. Therefore, unless the evidence which is used to support the DAC opinion is disproved or rebutted, the DAC opinion will be accepted. Should the DAC opinion be given more weight than opinions from treating physicians?
- (4) Membership on the Minister's DAC Committee to be restricted to individuals who do not work or own a DAC, except a representative from the Association of Designated Assessment Centres will serve on the Committee.

*David Neill, Partner*

An open book with white pages and a dark cover, lying flat on a light surface. The pages are slightly blurred, suggesting a shallow depth of field.

## The Right to Sue for Health Care Expenses and the \$15,000 Deductible

*U*nder the current auto insurance law, an injured person is not entitled to sue the person(s) at fault for the accident, unless they have suffered a catastrophic injury. The draft legislation proposes to allow all injured persons to sue for health care expenses, where they have suffered a permanent and serious injury. Allowing a person to sue for health care expenses is an important change and should be supported. It

addresses a significant deficiency in the existing legislation for non-catastrophically injured persons. Currently, non-catastrophically injured persons have limited access to health care expenses from their no-fault policy and at the same time are prevented from claiming any shortfall from a wrongdoer.

However, the draft auto insurance reform also includes a proposal to apply a \$15,000 deductible against health care expense claims. Therefore, all innocent accident victims who can sue for their legitimate health care expenses, will not be permitted to collect the first \$15,000 of their claims.

Applying a \$15,000 deductible to health care claims is patently unfair and unjustifiable.

The auto insurance regime in Ontario already places a number of restrictions on the right to sue for health care expenses:

1. The accident victim must suffer a permanent and serious injury;
2. The Health Care expense must be accepted by a Court as both reasonable and necessary; and
3. The accident victim will likely have exhausted \$100,000 in medical/rehabilitation benefits available from his/her no-fault insurer before seeking reimbursement through the Court.

There is no justification for depriving accident victims of \$15,000 for medical and rehabilitation services that they clearly require. In most cases, victims with permanent and serious injuries are disabled from work. How will they pay the first \$15,000 of their medical expenses?

Accident victims have often had their world turned upside down – they are not working, their home life is in disarray, their future is uncertain – economic pressures can be great. The proposed deductible will only add greater pressure.

No deductible should be applied against health care costs. They are legitimate, out-of-pocket expenses that are only claimed in serious cases of permanent injury.

*Wendy Moore Johns, Partner*



*Wendy Moore Johns  
Partner*

### Up-coming Conferences

NOVEMBER 21 – 22, 2002 CONFERENCE

*The Toronto Acquired Brain Injury Network is sponsoring a conference on November 21 – 22, 2002 at the Toronto Hilton, which will include a presentation on the significance of the Athey and Stargratt decisions and other topics of key importance to seriously injured persons and health care professionals involved in their treatment. To register, contact Shenade Walker at TRI at 416-597-3422, extension 3961.*

DECEMBER 9, 2002- ADVANCE NOTICE

**Current Issues in ABI Rehab** - *In conjunction with the Peel Halton Brain Injury Association at the Credit Valley Hospital in Mississauga. Details to follow.*

JANUARY 23, 2003- ADVANCE NOTICE

**Issues in Community Re-Entry** - *In conjunction with the Four Counties Brain Injury Association and the Brain Injury Association of Quinte District at the Best Western Hotel in Cobourg. Details to follow.*

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