



Accident Benefit REPORTER

Changes to Ontario Auto Insurance

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As most of our readers are already aware, there have been significant changes to the laws governing automobile accident insurance claims in Ontario. Many of these changes came into effect October 1, 2003. During the consultation process Thomson, Rogers has made submissions to the Conservatives and resisted those changes that are detrimental to the welfare of persons injured in auto accidents.

Since our last issue, Thomson, Rogers has continued efforts to promote the interest of people with injuries caused by auto accidents before Government and opposition MPP's. On July 10, 2003, the Conservatives and the Liberals released "White Papers" setting out their respective plans for changes to the tort and accident benefit components of the automobile insurance law. The White Papers can be found on our website.

Our efforts have included:

- On July 10th, Thomson, Rogers met with and made submissions to the Minister of Finance concerning the Tory White Paper.
- Thomson, Rogers also made submissions on July 10th, about the Liberal White Paper to the Liberals at the first Liberal Auto Insurance Hearing.
- A Thomson, Rogers representative was appointed by the Minister of Finance to the Superintendent of Auto Insurance's Auto Reforms Steering Committee on July 16th, to advocate to the Superintendent on behalf of injured persons.
- On July 23rd, a Thomson, Rogers representative appeared before the Superintendent of Insurance's Committee Reviewing the DAC process.
- On July 30th, Thomson, Rogers representatives appeared before then M.P.P. Sampson to comment on the Tory White Paper.
- Also on July 30th, a Thomson, Rogers representative met with Senior Policy Advisors in the Office of the Premier to express concern about changes encroaching on the rights of persons injured in auto accidents.
- On August 19th, a Thomson, Rogers representative met with Ministry of Finance representatives concerning further proposed changes to the verbal threshold to limit the right to sue for persons injured in auto accidents.
- On September 10th, Thomson, Rogers representatives met with Liberal M.P.P. Smitherman to discuss needed auto insurance reform initiatives for tort and accident benefits.
- Also on September 10th, Thomson, Rogers representatives met with the Minister of Finance, requesting that any further contemplated changes to the auto insurance legislation and regulations be delayed until following the election to allow some consultation and further consideration.

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- On September 16th, Thomson, Rogers representatives met with M.P.P. Bryant and Liberal candidate Davidson, to discuss auto insurance reform.
- On September 22nd, Thomson, Rogers representatives met with Liberal M.P.Ps Smitherman, Bryant and Sorbara to discuss auto insurance reform.

Thomson, Rogers is continuing its efforts with the new Liberal Government.

The changes contained in the new legislation are numerous and complex. Inevitably, they will lead to frustration and confusion as medical and legal practitioners attempt to familiarize themselves with the new legislation. During this period, it is particularly important to maintain effective channels of communication in order to minimize treatment delays to injured persons. In addition to our newsletter and web site, Thomson, Rogers continues to be involved in workshops and conferences across the Province that are designed to provide health care professionals with information about the changes and identify strategies to effectively cope with the new procedures. We suggest that you contact our firm if you or your organization is interested in organizing such an event.

In this issue of the Accident Benefit Reporter, we have attempted to summarize the major changes as they pertain to the Statutory Accident Benefits Schedule (SABS), the definition of Catastrophic Impairments and changes with respect to an injured party's Tort claim.

It is too soon to know what additional changes to the auto insurance legislation may be brought about as a result of the recent change in the Provincial government. Liberal Party representatives had previously indicated that they would be prepared to roll back increased deductibles for pain and suffering awards. They have also expressed dissatisfaction with the current DAC system and have stated that they are prepared to "revisit the fee schedule for health care providers' fees." It is our intention to remain involved in further consultations on these important issues and to keep you informed of further changes as soon as we become aware of them.

Overview Of Regulatory Changes

A number of new Regulations under the Insurance Act were made on July 2, 2003 and came into force on October 1, 2003. Subsequent to July 2, 2003, two more Regulations were introduced which also came into force on October 1, 2003.

These new Regulations include:

- a) Major changes to the Statutory Accident Benefits Schedule (SABS)
- b) Changes to the DAC Referral Process
- c) An increase of the monetary deductible which reduces pain and suffering claims by \$30,000 – an increase from the current \$15,000 deductible
- d) An Unfair or Deceptive Acts or Practice Regulation which could impose sanctions on Treatment Providers (in force November 1, 2003)
- e) Restrictions on the right to settle an accident benefits claim within one year of the accident and on persons who may represent injured persons
- f) Further restrictions on who may sue, with definition of what constitutes a "permanent serious impairment"

The new SABS will pose challenges as a result of a delayed assessment process that can lead to delayed treatment; additional DAC assessments; and more complex forms.





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Important changes to the SABS include:

- Injured automobile drivers, passengers and pedestrians risk delayed treatment and benefits if they fail to give notice to the Accident Benefit Insurance Company within seven (7) days of the accident
- Injured persons have greater obligations not only to provide notice but to participate in examinations under oath by a representative hired by the insurance company
- There are limits on assessments without prior approval of the insurer
- There are fee restrictions for professionals who conduct assessments and provide treatment
- A pre-approved treatment framework (PAF) has been developed for modest injuries which are defined as WAD I or WAD II injuries
- A complete set of new forms for all accident benefit purposes has been introduced for any accidents on or after November 1, 1996
- Insurers can give verbal approval for assessments to prepare treatment plans
- Insurers are prevented from obtaining insurer examinations (I.E.s) for medical and rehabilitation benefits until a dispute resolution process is commenced (s.20(1) amends s.42(1))
- Changes to the definition of Catastrophic Impairment (most importantly for children).

Changes to the DAC process include:

- In accordance with the new DAC Referral Process, individuals will no longer be assessed by the closest qualified DAC. Instead, insurers can suggest a DAC and if the individual agrees, that DAC will conduct the assessment. If the individual does not agree, the Financial Services Commission will appoint a DAC.
- DACs can now become involved in determining the reasonableness of a request for an assessment.

Important changes to the right to sue (the Tort claim) include:

- An increase in the monetary deductible on pain and suffering claims from \$15,000 to \$30,000 where the claim is assessed at \$100,000 or less.
- An increase in the monetary deductible on all claims of family members from \$7,500 to \$15,000 where cases assessed at \$50,000 or less.
- For accidents on and after October 1, 2003 a Regulation took effect which further restricts the right to sue and defining the verbal threshold (permanent serious impairment of an important physical, mental, or psychological function).

In addition to the changes that will be in force on October 1, 2003, there is much discussion about further automobile insurance changes, especially in light of the results of the recent provincial election.

A "Fee Guideline" has been introduced by the Superintendent of Insurance which regulates the fees that can be charged by Health Care Providers. This fee schedule is effective November 1, 2003 and on average reduces fees by 30%. We understand that the Superintendent of Insurance is also in the middle of a DAC review process – looking at issues of cost saving, credibility and the future role of DACs.

This fall and winter will be an extremely challenging time for Health Care Professionals and injured drivers, passengers and pedestrians. We look forward to working with all affected parties in order to help those with serious injuries find their way through this increasingly complicated process.

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Changes to The Definition of “Catastrophic Impairment”



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Ontario Regulation 281/03 amends the definition of Catastrophic Impairment in subsection 2(1) of Ontario Regulation 403/96, for accidents which occur on or after October 1, 2003. The previous definition remains for accidents occurring up to that date Section 2 (1.1).

A. Section 2 (1.2) contains the new definition of “catastrophic impairment”, which has the following additions:

i Total and permanent loss of use or amputation of both legs is added.

This modest change addresses one of the shortcomings of the previous legislation, which only dealt with loss of both arms as a catastrophic impairment.

ii) An amendment which indicates that amputation or total loss of use of one or both arms and one or both legs will be considered catastrophic.

The troublesome aspect of this change is the question of whether the word “and” is to be read conjunctively or disjunctively. This subsection is poorly drafted and, on a plain reading appears to add absolutely nothing to the definition of catastrophic.

The argument against such an interpretation is that the plain reading of this section suggests a conjunctive reading. In addition, if the government intended single limb amputation or loss of use to pass the definition of catastrophic, the government could have used much simpler and clearer language.

B. Another change to the definition of catastrophic impairment is the treatment of children under 16 years of age where the GCS, GOS, 55% whole person impairment test, or marked or extreme impairment due to a mental or behavioural disorder test, cannot be applied due to the age of the injured person.

In these circumstances, the amendment states that where an impairment to a child is reasonably believed to be a catastrophic injury, the injury shall be deemed to be the impairment that is most analogous to, impairments which cannot be applied taking into consideration the developmental implications of the impairment.

It is difficult to understand how the government believes that this definition clarifies the application of catastrophic impairment in the case of injured children.

The one aspect of the new definition which is useful is that it permits a consideration of the developmental implications of the impairment. This allows the medical assessor some latitude in determining whether a child’s injuries are catastrophic, by allowing the medical practitioner to take into account their clinical experience, as well as the normal progression of certain serious injuries.

The classic example of where this new definition will assist injured children is in the case of a child who has suffered a mild to moderate brain injury. Often such an injury may appear not to be catastrophic initially, because the child is still capable of functioning relatively well, using the existing fund of knowledge which the child had prior to the accident. However, as the child gets older, and more demands are put on the child’s brain, the severity of the brain injury becomes apparent. This section would allow doctors to take such developmental implications into account in assessing whether the child has suffered a catastrophic impairment.



For serious orthopaedic injuries, the future effects of early arthritis, the need for further surgeries, joint replacements, etc. will also be able to be considered by the medical assessor.

- C. Another change to the definition is contained in section (2.1)(a) which relates to when the 55% whole person impairment test (1.2) (f) or the marked/extreme mental or behavioural (1.2)(g) tests may be applied.

Section 2.1(a) reads as follows:

(2.1) Clauses (1.2) (f) (g) do not apply in respect of an insured person who sustains an impairment as a result of an accident that occurs on or after October 1, 2003 unless,

- (a) the insured person's health practitioner states in writing that the insured person's condition is unlikely to cease to be a catastrophic impairment; or
- (b) two years have elapsed since the accident.

The resulting change from 3 years to 2 years fills the gap for those catastrophically injured persons whose conditions were not stable at the 2 year point (ie. the point when the accident benefits ran out for non-catastrophic injury) and the previous 3 year limit for assessing catastrophic injury. In those situations, a person who was catastrophic, but whose condition had not stabilized, could be caught without benefits for one year.

As well, the medical practitioner only needs to determine and state in writing, that the insured's person's condition is likely to remain catastrophic, rather than finding that the condition is stable and not likely to improve.

- D. The final point to note about the definition of catastrophic impairment is that the proposed legislation continues to reference the 4th Edition of the AMA Guidelines to Permanent Impairment. The 5th Edition is the current edition and significantly updates the old edition. The 5th Edition is also the edition used by most Workers Compensation Boards.

Many of the flaws which were identified as part of the 4th Edition, have been corrected in the 5th Edition.

- E. The balance of the definition for catastrophic impairment contains no changes. Paraplegia, quadriplegia, loss of use of both arms, loss of use of an arm and a leg, total loss of vision in both eyes, a head injury with a GCS of 9 or less or a head injury with a GOS of 2 or 3 (more than 6months post accident), 55% whole person impairment, and marked or extreme mental or behavioural disorders will still be considered catastrophic injuries.

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Regulatory Changes: The Claim Against The At-Fault Driver (The Tort Claim)

*T*he former Conservative Government recently passed Ontario Regulation 312/03 (amending Ontario Regulation 461/96) which will increase the monetary deductible for pain and suffering awards under the Insurance Act from \$15,000.00 to \$30,000.00 for persons injured in motor vehicle accidents on or after October 1, 2003. The monetary deductible for claims of family members under the Family Law Act will also increase from \$7,500.00 to \$15,000.00.

The increase in the deductible will have a significant impact on the rights of persons injured in

motor vehicle accidents to claim compensation for their injuries.

In Bill 198, the government proposed a “vanishing deductible”, which meant that the monetary deductibles would not apply to injured people whose pain and suffering damages exceeded \$100,000.00 or to Family Law claimants whose claims were valued in excess of \$50,000.00. The Government has now proclaimed s. 120 and the vanishing deductible will be in effect for all accidents on or after October 1, 2003.

Further, in Bill 198, the government proposed to change the test for suing for health care from catastrophic to permanent serious impairment of an important physical, mental or psychological function (the “verbal threshold”). For accidents occurring on or after October 1, 2003, s. 120 will be in effect and the right to sue for health care costs will apply to innocent accident victims who pass the verbal threshold.

The Conservative government was considering changes to available coverage that will allow people to “customize” their coverage, by choosing from a number of optional endorsements, at extra cost.

The proposal to customize auto insurance policies is not in the best interests of consumers. People will tend to decline options to keep premiums down. However, they may not realize the extent to which they compromise their interests should they become an accident victim. Consumers will not fully appreciate the rights they are giving up. The real tragedy is that they will only understand what they have given up after they or a member of their family has been injured in an accident and it is too late to purchase the coverage they require. Automobile insurance is compulsory in order to protect the public. Maintaining certain minimum coverage is needed in order to continue to provide this required protection.

The Conservative government has passed a Regulation which defines the current “verbal threshold”. The threshold allows claims to be advanced for pain and suffering where the injured party has suffered a permanent serious impairment of important physical, mental or psychological functions, or serious disfigurement. The new Regulation further defines the verbal threshold by breaking down the essential elements of the definition and defining them. The amendments read as follows:

4.1 For the purpose of section 267.5 of the Act

“permanent serious impairment of an important physical, mental or psychological function” means impairment of a person that meets the criteria set out in section 4.2.

4.2 (1) A person suffers from permanent serious impairment of an important physical, mental or psychological function if all of the following criteria are met (highlighting added):

1. The impairment must,
 - i) substantially interfere with the person’s ability to continue his or her regular or usual employment, despite reasonable efforts to accommodate the person’s impairment and the person’s reasonable efforts to use the accommodation to allow the person to continue employment ,
 - ii) substantially interfere with the person’s ability to continue training for a career in a field in which the person was being trained before the incident, despite reasonable efforts to accommodate the person’s impairment and the person’s reasonable efforts to use the accommodation to allow the person to continue his or her career training, or
 - iii) substantially interfere with most of the usual activities of daily living, considering the person’s age.
2. For the function that is impaired to be an important function of the impaired person, the function must,
 - i) be necessary to perform the activities that are essential of the person’s regular or usual employment, taking into account reasonable efforts to accommodate the person’s impairment and the person’s reasonable efforts to use the accommodation to allow the person to continue



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employment,

- ii) be necessary to perform the activities that are essential tasks of the person's training for a career in a field which the person was being trained before the incident, taking into account reasonable efforts to accommodate the person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue his or her career training,
 - iii) be necessary for the person to provide for his or her own care or well-being, or
 - iv) be important to the usual activities of daily living considering the person's age.
3. For the impairment to be permanent, the impairment must:
- i) have been continuous since the incident and must, based on medical evidence and subject to the person reasonably participating in the recommended treatment of the impairment be expected not to substantially improve.
 - ii) continue to meet the criteria in paragraph 1, and
 - iii) be of a nature that is expected to continue without substantial improvement when sustained by persons in similar circumstances.

This section applies with respect to any incident that occurs on or after October 1, 2003.

This definition adds the requirement that the impairment be "continuous", which requirement had originally appeared in the OMPP and did not appear in Bill 59.

Together with the new definition of the verbal threshold, the Regulation sets out the minimum evidence required to prove that the verbal threshold is met. The Regulation reads as follows:

EVIDENCE ADDUCED TO PROVE PERMANENT SERIOUS IMPAIRMENT OF AN IMPORTANT PHYSICAL MENTAL OR PSYCHOLOGICAL FUNCTION

- 4.3 (1) A person shall, in addition to any other evidence, adduce the evidence set out in this section to support the person's claim that he or she has sustained permanent serious impairment of an important physical mental or psychological function for the purposes of section 267.5 of the Act.
- (2) The person shall adduce evidence of one or more physicians, in accordance with this section, that explains,
- a) the nature of the impairment;
 - b) the permanence of the impairment;
 - c) the specific function that is impaired; and
 - d) the importance of the specific function to the person.
- (3) The evidence of the physician,
- a) shall be adduced by a physician who is trained for and experienced in the assessment or treatment of the type of impairment that is alleged; and
 - b) shall be based on medical evidence, in accordance with generally accepted guidelines or standards of the practice of medicine.
- (4) The evidence of the physician shall include a conclusion that the impairment is directly or indirectly sustained as the result of the use or operation of an automobile.
- (5) In addition to the evidence of the physician the person shall adduce evidence that corroborates the change in the function that is alleged to be a permanent serious impairment of an important physical mental or psychological function.
- (6) **This section applies with respect to any incident that occurs on or after October 1, 2003.**

The new definition of the verbal threshold to make the threshold test more restrictive, apparently in response to concerns of the insurance industries. The new definition adds a great deal of uncertainty to the test, such as:

- i) What are "reasonable efforts" to accommodate a person's impairment when assessing whether



- they can return to work, training for a career or their daily activities?
- ii) Will the “reasonable efforts” be based on treating practitioner’s views?
 - i) What will happen when an accident benefit insurer does not agree that a certain accommodation is necessary and as a result the accommodation is not provided? In the tort claim, the tort insurer may argue that all reasonable efforts have not been made to accommodate the person’s injury.
 - ii) Who will decide what are the essential tasks of one’s employment, training or daily activities?
 - iii) What is meant by “continue without substantial improvement when sustained by persons in similar circumstances”? No two people respond to an injury in the same manner. Two people can have virtually the same injury and one person may totally recover whereas the other person may continue to suffer indefinitely. What is going to be the standard by which each injury is measured?
 - iv) How are children’s claims affected by this definition?
 - v) What will happen with injuries that are expected to become, more debilitating in the future?
 - vi) Might cases previously considered catastrophic fail to meet the verbal threshold?

Thomson Rogers opposes any further restriction of people’s right to sue for serious and permanent injuries. The combination of the increased monetary deductible with any restriction to the verbal threshold is an unjustified and unfair reduction of innocent accident victims’ rights to seek compensation for injuries suffered in automobile accidents. In addition, any further attempt to define serious and permanent impairment will only lead to more litigation over who passes the test and who does not and therefore unnecessarily increase costs.

With the Regulation defining the verbal threshold one can envision claims which may have passed the previous test of “catastrophic”, which would not pass the test under the new proposed definition. Making the test more restrictive is directly contradictory to the Government’s originally stated intention of tightening up the procedure for smaller claims, to enable more access to the seriously injured parties to claim compensation for their injuries.

Thomson Rogers continues to be actively involved in consultations with the government to prevent further restrictions to the rights of innocent accident victims to claim fair compensation for injuries suffered in automobile accidents.

Richard C. Halpern, Partner

Please note:

1. *All of the new regulations can be found on our website at www.thomsonrogers.com under the “What’s New” button.*
2. *Thomson, Rogers has presented widely to health care professionals about the effects of the changes and has provided practical strategies to assist health care professionals. The presentation can be found on our website under the “What’s New” button.*

The material in this newsletter is provided for the information of our readers and is not intended nor should it be considered legal advice. For additional copies or information about “Accident Benefit Reporter”, please contact Thomson, Rogers.

