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ACCIDENT BENEFIT REPORTER

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In this issue:

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OUT OF PROVINCE MOTOR VEHICLE ACCIDENTS – AM I COVERED?

One of the biggest concerns for Ontario motorist travelling outside of Ontario, is the question of whether there will be insurance to cover their claims should they become involved in an accident in another Province or the United States.

This is a significant concern, because most states in the USA do not require motorists to carry a minimum amount of liability insurance, unlike Ontario which requires motorists to carry a minimum of $200,000.00 of liability coverage. The effect is that many motorists in the USA ride around with little or no insurance coverage whatsoever.

If you are operating a motor vehicle outside of Ontario, you are covered as long as you have insurance coverage on your own vehicle. The standard Ontario motor vehicle policy contains several important safeguards in the event of a motor vehicle operator or passenger being injured outside of Ontario.

Firstly, the Standard Ontario Motor Vehicle Policy includes a fixed collection of "accident benefits", also known as "no-fault benefits" which are available to the insured Ontario motorist, whether the accident occurs in Ontario, another province of Canada, in the United States of America, or on a vessel plying between ports of Canada or the USA. These benefits include:

1. Income replacement benefits, non-earner or caregiver benefits
2. Medical/rehabilitation benefits
3. Attendant Care Benefits
4. Lost Educational Benefits
5. Death and Funeral Benefits
6. Expenses of Visitors
7. Reimbursement for damaged clothing, glasses and medical devices
8. Depending on the severity of the injury, potential benefits for housekeeping and home maintenance expenses.

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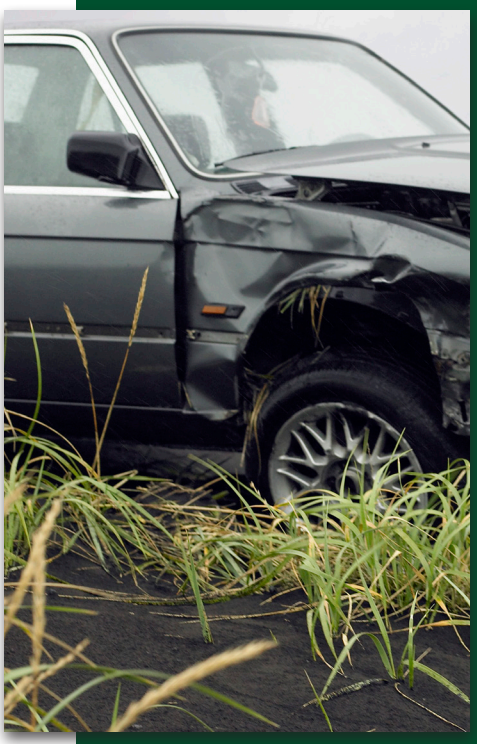

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Out of province motorcycle accidents – am I covered?
Continued from cover story

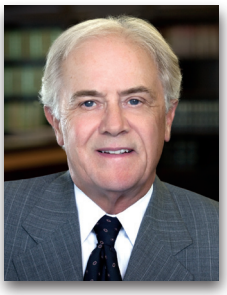
What this means is that an Ontario motorist has recourse to their own policy of insurance to cover these types of expenses following an accident outside of Ontario, irrespective of who is at fault for the accident. In certain cases, if the Ontario motorist has purchased the "optional" enhanced accident benefit coverage, more funds may be available under this accident benefit coverage.

The second major protection contained in all Ontario motor vehicle policies is the "Uninsured Automobile Coverage". This coverage protects the injured Ontario motorist, up to the limits of their own insurance policy liability coverage, in the event that the accident is caused by a motorist without any insurance.

The final protection which is often included in Ontario motor vehicle policies (the premium is very low and is therefore included in most policies) is the Family Protection Endorsement. This coverage provides the insured Ontario motorist and certain family members who may be injured in an accident outside of Ontario, with coverage up to their own liability insurance limits, in the event that the driver causing the accident does not have sufficient insurance to cover the claims of the injured Ontario motorist or their injured family members.

It is therefore readily apparent why it is important to have sufficient liability coverage on your own car, not only to protect yourself against claims of others who may be injured through an accident you cause, but also to protect yourself, should you become injured through the negligence of a driver who has insufficient or no insurance coverage to cover your claims.

If you have a valid comprehensive motor vehicle policy on your Ontario motor vehicle, with sufficient insurance limits, you can drive anywhere in Canada or the USA with confidence that there will be some degree of insurance to cover your injuries, should you become involved in an accident outside of Ontario. ■■■



David R. Neill
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THE CONTINUING INTERPRETATION OF SABS

The interpretation of the provisions of the various statutory accident benefit schemes continues to evolve. In this issue of the accident benefit reporter, we examine two recent decisions, one from the Ontario Court of Appeal and the other from the Office of the Director of Arbitrations – FSCO.

HENRY V. GORE MUTUAL INSURANCE CO.

On July 16, 2013, the Ontario Court of Appeal released its reasons for judgment in *Henry v. Gore Mutual Insurance Company* [2013] O.J. #3792, upholding a lower court ruling that *"economic loss was a threshold for entitlement to, but not a measure of, reasonable and necessary attendant care benefits".*

Justice Hoy, writing for the majority, stated the issue as follows:

> *"The issue is whether an expense was incurred by the respondent, with respect to the attendant care services provided by his mother outside of her normal hours of work."* (para 5)

Gore's argument here and in the court below was that an insurer was only required to pay attendant care equivalent to the economic loss sustained by the person providing that care. In this case the injured plaintiff's mother provided the attendant care, and *Gore* argued that the attendant care benefit was limited to the economic loss sustained by the mother (i.e. her

loss of wages), who left a full-time employed position to provide full-time attendant care for her son.

The court ruled that the issue turned on the interpretation of the word "incurred" as defined in section 3(7)(e) of SABS – 2010. The court relied on the well-known rules of insurance contract interpretation which provide that *"insurance coverage provisions are to be interpreted broadly, while coverage exclusions or restrictions are to be construed narrowly in favour of the insured"* (para 21).

The court agreed with the conclusion of the judge below that since economic loss is not defined in SABS – 2010 and if the amount of the economic loss sustained by the caregiver was to be a relevant consideration then the regulation should have provided a mechanism to measure that amount. Since the legislation does not, no such calculation is relevant beyond a finding that the person has sustained an economic loss.

The amount of the attendant care is determined in accordance with a Form 1 completed by an occupational therapist or nurse under SABS - 2010. It is still open for the insurer to question the reasonableness and necessity of such care and to require verification that a family member has sustained an economic loss.

In arguing its position *Gore* identified some concerns of the *IBC*, that attendant care benefits were being provided where they were not needed, that benefits are sometimes paid when no care has been provided by a family member and that the Form 1 was sometimes prepared by those without the expertise to do so.

Justice Hoy observed at paragraph 35:

> *"In my view, the requirement adopted (that the family caregiver has sustained economic loss) provides a rough check on attendant care costs."*

Although the phrase economic loss remains undefined in the schedule, the law is now clear that family members are entitled to an attendant care benefit if they are indeed providing care in accordance with a Form 1 and have suffered an economic loss as a result of doing so.

As a footnote, a FSCO decision of Arbitrator Lee, that predated the court of appeal's decision in *Henry*, in *Simser and Canada Inc.*, held that economic

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The Continuing Interpretation of SABs

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loss was a financial or monetary loss but that a single out of pocket expense such as a gasoline expense, or a restaurant meal would not satisfy the requirement of "economic loss". This suggests that the financial or monetary loss of the family member must be more meaningful than a single out of pocket cost.

ECONOMICAL MUTUAL AND LEROY PRIES

In the matter of *Economical Mutual Insurance Company and Leroy Pries*, Appeal P.12-00036, the meaning of the word "payment" in section 47(3) of the SABS – 1996 was reconsidered by Director's Delegate Evans, whose reasons for decision were released on or about July 8, 2013.

Pries was involved in a motor vehicle accident on September 3, 2007. He applied for and received an IRB from Economical and when this benefit was suspended, he applied for CPP disability benefits.

This case concerned a retroactive lump sum payment of past CPP disability pension benefits for the period between November 2, 2008 and May 2, 2010. The application of *Mr. Pries* for CPP disability benefits was accepted in March of 2010. Economical gave notice of its repayment request to *Mr. Pries* on April 27, 2010.

In this decision Delegate Evans held that *Economical* was entitled to a re-payment of the IRB benefit to the extent of CPP benefits received for the 12-month period preceding April 27, 2010, the date of its notice to the insured requesting repayment. In the decision appealed from Arbitrator Wilson held that *Mr. Pries* did not have to repay the IRB benefit received to the extent that those payments should have been reduced to reflect CPP disability benefits.

Section 47(3) provides that the obligation to repay a benefit does not apply unless the notice required by sub-section 2 is given within 12 months after "the payment" was made.

The issue on appeal was whether "the payment" in section 47(3) referred to the CPP lump sum payment (the collateral benefit) or the statutory accident benefit, in this case the IRB.

In an earlier decision, *Trottier and Royal Sun Alliance Insurance Company of Canada* (FSCO) PO3-00019, December 15, 2003, it was held that "the payment" was a reference to the statutory accident benefit, i.e. the IRB and not the payment of the collateral benefit. Delegate Evans' followed *Trottier*.

Economical argued that "the payment" referred to the collateral benefit and not the statutory accident benefit. Delegate Evans was not prepared to accept that interpretation and pointed out that the repayment is not repayment of the collateral benefit, but repayment of the IRBs to the extent that the collateral payment is deductible from the IRB.

In the result, *Economical* was entitled to repayment of the income replacement benefits for the 12-month period ending May 2, 2010, to the extent that those payments would have been reduced by the CPP disability payments.

Economical was able to recover approximately 12 months of overpaid benefits, rather than a full 16 months from November 2, 2008.

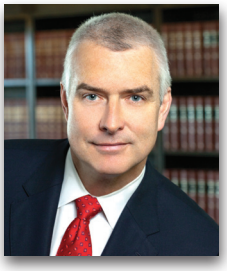
Arbitrator Wilson in deciding the issue below came to the conclusion that the 12-month notice had to be given within 12 months of the first payment made in error, (i.e. November 2008 when the IRB was calculated before CPP benefits were found payable). *Economical's* notice was given on or about April 27, 2010, long after the 12-month notice period in 47(3) had expired.

Director delegate Evans' reversal of arbitrator Wilson's ruling is consistent with *Trottier* and provides an interpretation of the repayment provisions that is fair for the insurer and the insured.




Those persons entitled to accident benefits under SABS – 1996, should be aware of the repayment provisions contained in section 47 and should be prepared, if subsequently in receipt of collateral benefits, to have their income replacement benefit clawed back in accordance with section 47(2)(b), i.e. 20% per month. The duration and extent of the overpayment will be determined after consideration of the date when the collateral payment was made and the delivery of the notice of repayment set out in section 47(3).

The comparable section under SABS -2010 is s.52. The wording of the notice provision in s.52(3) is somewhat clearer since "the payment" is clearly linked to the amount that is to be repaid, i.e. the IRB and not the collateral payment. ■■■



LITIGATING OUT-OF-PROVINCE MOTOR VEHICLE ACCIDENTS IN ONTARIO

David R. Tenszen
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With leaves turning color and a chill in the air, Ontario "snowbirds" will be packing up their cars and heading "down South" to the United States to escape our cold, harsh winters. In addition, many Ontarians take advantage of our close proximity to the United States border to cross-border shop, take in a Buffalo Bills football game or get away for a ski weekend in Ellicottville.

Statistics Canada Data for December of 2012 to April of 2013 show that Ontarians made, on average, approximately 900,000 car trips per month to the United States.

With this volume of traffic leaving the Province it is inevitable that Ontarians will be injured in car accidents in the United States. Once injured, usually after a relatively brief period of treatment in the United States, accident victims return to Ontario to undergo the bulk of their rehabilitation and to resume what they can of their normal lives. It is also in Ontario where they make their claims to their own Ontario no-fault benefit insurers (see accompanying article by Len Kunka).

In these circumstances, the most convenient forum in which to litigate

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Litigating Out-Of-Province Motor Vehicle Accidents in Ontario

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motor vehicle accident claims is almost always Ontario. Ontario is not only the residence of the Plaintiff but also his or her family members, friends and relatives, teachers or employers, treating doctors, rehabilitation therapists and others, all of whom will have to testify to prove the Plaintiff's damages. Also, often family members or friends are witnesses to the accident as they were also in the car when the accident occurred. However, sustaining damages in Ontario, and Ontario being the most convenient forum, are not sufficient to allow Ontario Courts to have jurisdiction over these claims.

Just over one year ago in *Club Resorts Ltd.* v *Van Breda*, [2012] S.C.J. No. 17, the Supreme Court of Canada set out four presumptive factors that would allow an Ontario Court to assume jurisdiction for foreign accident cases (subject to a Defendant's ability to rebut any presumption). These four factors; the Defendant is resident in Ontario, or carries on business in Ontario, or the tort was committed in Ontario, or a contract connected with the dispute was made in Ontario, may well be absent in many car accident cases. Therefore, if an American Defendant does not voluntarily submit to the jurisdiction of an Ontario Court, the Plaintiff may well be forced to bring his or her claim in the United States.

Ontario Courts have recently had the opportunity to consider the effect of *Van Breda* with respect to two car accidents which occurred in New York State.

In the first case, *Paraie* v *Cangemi*, [2012] O.J. No. 5390, an Ontario motorist was struck from behind by a car owned and operated by a New York resident. The Ontario Plaintiff brought a claim against the New York motorist and also his own Ontario automobile insurer with respect to uninsured and underinsured motorist coverage. The Plaintiff argued that the claim against his own insurer was with respect to a contract that was connected with the dispute which was made in the Province and, therefore, the Ontario Court should accept jurisdiction.

Justice Lederer held that a Plaintiff should not be able to "boot strap" American Defendants into an action in Ontario by relying on a contingent claim against their own insurer who just happens to be resident in Ontario. The action was therefore stayed.

In the second case, *Cesario* v *Gondek*, [2012] O.J. No. 5644, an Ontario motorist had the misfortune to be involved in two motor vehicle accidents four weeks apart. The first accident occurred in New York State and the second accident occurred in Ontario. The Plaintiff sued the New York and Ontario motorists but, also, his own insurer all in the same action, claiming that the injuries received in the two accidents could not be separately identified and assessed.

Justice Edwards held that as long as one Defendant was domiciled in the Province, Ontario would have jurisdiction. Significant to this finding was Justice Edwards' finding that if Ontario did not assume jurisdiction then the Plaintiff might be forced to litigate three separate actions, one in New York State and two in Ontario. This course might result in the "unjust prospect of inconsistent verdicts". Justice Edwards also considered as a significant factor that the New York Defendant's insurer had registered in Ontario with the Financial Services Commission of Ontario. It should be noted that hundreds of American Insurers have registered with FSCO. Therefore, in this case, the Ontario Court remained seized of the claim.

Practically speaking, once injured in an American accident, an Ontario resident should first retain an Ontario lawyer. The Ontario lawyer, once retained with respect to an American accident, should immediately retain a lawyer in the State where the accident occurred. This American lawyer will have to advise with respect to the foreign jurisdiction's substantive law. In *Tolofson* v *Jensen*, [1993] 3 S.C.R. No. 1022, the Supreme Court of Canada held that, generally, the substantive law of the State where the accident/tort occurred will be applied to the case, even when the case is litigated in Ontario. However, the procedural rules of Ontario (where the case is proceeding) will govern all procedural steps. American States

can have very different substantive laws that govern car accident cases. Substantive laws include limitation periods, heads of damages recoverable and liability for, and the amount of, interest payable. Especially with respect to limitation periods, Ontario lawyers must be fully informed so that they do not inadvertently miss a State limitation period (which as a substantive matter of law would be applied in the Ontario action).

Additionally, Ontario lawyers may well want to instruct counsel in the American State to issue a claim in that jurisdiction. This American claim would only be served and prosecuted if the Ontario Court does not accept jurisdiction. This American claim would also be prosecuted if the American Defendant refused to submit to the Ontario jurisdiction and it was anticipated that there may be difficulty enforcing an Ontario Judgment in that American State.

In any event, with winter on its way, Ontario lawyers should be prepared to be retained to prosecute claims with extra-jurisdictional complications.

(An earlier version of this Article originally appeared in the May 3, 2013 issue of The Lawyers' Weekly published by LexisNexis Canada Inc.). ■■■

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  Should you have any questions, please contact Joseph Pileggi at **jpileggi@thomsonrogers.com**.

UPCOMING EVENTS

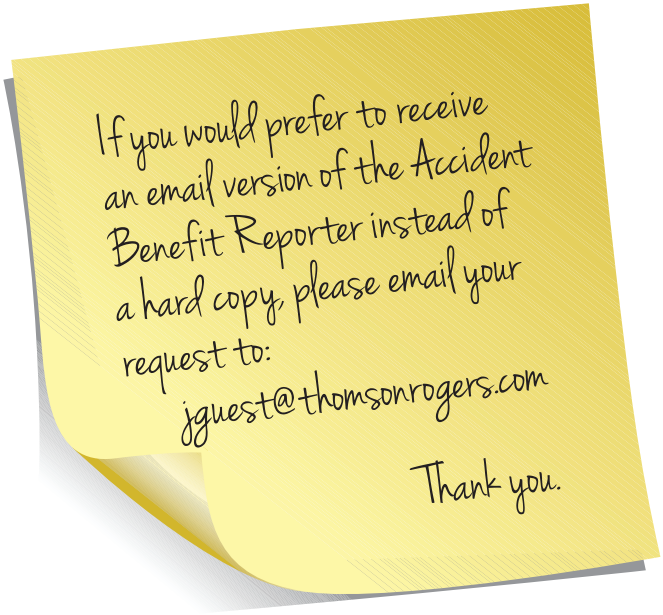
Thomson, Rogers will be in attendance at the following events - drop by and say hello.

- **2013 Acquired Brain Injury Provincial Conference**
  We will be raffling off a set of Leafs tickets.
  November 13 - 15, 2013 | Sheraton on the Falls Hotel | Niagara Falls

- **HBIA 7th Annual Fundraising Dinner**
  November 27, 2013 | Royal Botanical Gardens | Burlington

For more information on the conferences, please visit:
http://www.thomsonrogers.com/upcoming-events-seminars.

Thomson, Rogers holds various *Lunch & Learn seminars* throughout the year to assist health care providers, and other interested parties, in understanding the automobile insurance system. If you would like to arrange a *Lunch & Learn seminar* with Thomson, Rogers, please contact Joseph Pileggi at **jpileggi@thomsonrogers.com**.



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