Ontario Auto Insurance Five-Year Review: Access to Justice and a Balanced System

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I N D E X

I. INTRODUCTION

1. The members of the Ontario Trial Lawyers Association (OTLA) represent injured people and are well positioned to appreciate the impact of automobile insurance legislation and regulation on the rights of consumers and those compelled to access the automobile insurance product (the "product"). Since the implementation of Bill 198 nearly five years ago (and well before under earlier *Insurance Act* regimes), the members of OTLA have worked on the front line assisting individuals who have been injured in automobile collisions, in the context of both first party and third party auto-related disputes at FSCO and through the courts. Through this first-hand experience, cooperation with stakeholders and consumer groups, interaction with the insurance industry, and in-depth research, OTLA can offer valuable input for this mandatory review. OTLA's input enhances consumer protection, improves the product and protects the fundamental values of fairness and equity required of a product intended to protect all Ontarians. For these reasons, OTLA is a significant stakeholder in this mandatory five-year review and is well poised to offer its commentary and submit recommendations.

SUMMARY OF RECOMMENDATIONS

OTLA recommends the following:

- immediate repeal of the defining regulation
- elimination of the threshold
- the deductible should be:

  - reduced from $30,000.00 to $15,000.00 on awards of $100,000.00 and less;

  - reduced from $15,000.00 to $7,500.00 on *Family Law Act* awards of $50,000.00 and less;

  - eliminated in fatality claims

- the procedure for claiming, disputing, and receiving statutory accident benefits must be simplified, shortened, and delivered more efficiently
- transaction costs in accident benefits are too high. Accident benefits must be administered in a more cost-effective manner
- the principle of proportionality must be injected into the accident benefit process
- there ought to be no change in the existing definition of catastrophic impairment
- the dispute resolution process at the Financial Services Commission of Ontario ("FSCO") should be streamlined by the consolidation of mediations and pre-arbitration hearings
- for disputes less than a fixed monetary sum, a simplified summary procedure needs to be developed at FSCO
- incentives for fraud and abuse in the accident benefit system should be eliminated

II. OVERVIEW OF CONCEPTUAL GOALS

2. These submissions for the review of Part VI of the *Insurance Act* are intended to achieve fairness and efficiency in automobile insurance while also preserving fundamental rights of access to justice. We seek to ensure restoration of tort rights, while maintaining appropriately priced premiums and a healthy and viable insurance industry. This can be accomplished in a number of ways, including, but not limited to, changes to statutory accident benefits that simplify practices, drastically reduce complexity, and minimize transaction costs. Restoring an appropriate balance between access to justice (by enhancing tort rights) and accident benefits must involve savings in the latter to support the former.

3. Proportionality is another important concept which OTLA would like introduced into the statutory accident benefits scheme. The cost of the process for determining entitlement to a benefit can approach and, at times, exceed the amount of the benefit sought. Applications, reviews, assessments and ADR processes must be reduced to restore

proportionality. Improved administrative efficiency and dramatically reduced reliance on process is critical to reducing waste in the system.

4. The Honourable Coulter Osborne suggested in his Civil Justice Reform Project report of November 2007, commissioned by the Attorney General of Ontario ("the Osborne Report"):

> "Proportionality… simply reflects that the time and expense devoted to a proceeding ought to be proportionate to what is at stake."

5. Transaction costs, including assessment costs and administrative costs in particular, associated with claims under the first party benefit system, are frequently too high in relation to the benefit sought. It is wasteful and inefficient to spend more determining entitlement to a particular benefit than the actual value of the benefit claimed. With enhanced tort rights and corresponding reductions in expenses associated with the first party benefit system, dramatic reductions in transaction costs can be delivered.

6. Further restrictions on tort rights[1] affecting car accidents occurring on and after October 1, 2003 were in response to lower insurer profitability in 1999 to 2002. This decline in profitability was consistent with the historical cyclical pattern of insurance industry profitability. Insurance industry economic data establishes that these further restrictions were not required. At the time the changes were made the industry cycle had shifted and profitability was restored before the changes. This highlights the importance of avoiding changes the importance of avoiding changes that limit rights in response to cyclical or transient changes in insurer profitability. Taking the matter further, interfering with fundamental rights of access to justice should, as a matter of policy, be avoided.

7. Instability of the product is not good for consumers. Poor public perception of the insurance industry is a consequence of instability. The insurance industry has a vested interest in restoring stability to the product. In considering the appropriate reforms in this 5-year review, it is vitally important to address the issue of stability so a product can finally be developed that will stand the test of time. Limiting tort rights, experience has shown, is completely ineffective in achieving stability in automobile insurance. Specifically, the increased deductible on non-pecuniary general damages and the toughened threshold that applies to accidents occurring on and after October 1st, 2003 did not and could not provide stability to automobile insurance. Attempts to achieve stability through the erosion of fundamental tort rights are misguided. These approaches, in the end, do not serve the insurance industry and most certainly are a disservice to the public. The cycles to which instability is attributed inevitably return. Stability has nothing to do with tort rights and everything to do with appropriate pricing of the product, insurer discipline, and the rate approval process.

8. It follows, therefore, that restoring tort rights, inadvisably taken away, will in no way diminish the product, but will enhance fairness in the system, facilitate access to justice, and fulfill the expectations of most insurance purchasing Ontarians about the protection they think they are buying with their premium dollars.

9. Stability of the automobile insurance product absolutely requires a fundamental reconsideration of the Statutory Accident Benefit Schedule ("SABS"). Excessive transactional and administrative costs associated with relatively minor injuries, including out-of-control assessment costs and too much "procedure" have been the most significant contributors to instability. All those involved in the process must first

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1 In particular, the increased deductible on non-pecuniary general damages from $15,000 to $30,000; the increased deductible on *Family Law Act* awards from

acknowledge those changes that will not bring stability. We must then identify what changes will restore stability. This starts with simplifying the product and reducing all administrative and procedural hurdles impairing quick and easy access to entitlement.

III. TORT REGIME – ACCESS TO JUSTICE

A. THE THRESHOLD

10. Restoring fairness to automobile insurance and improving access to justice are the main priorities for OTLA. OTLA seeks to have the verbal threshold repealed in its entirety. This can be achieved through an amendment to the *Insurance Act*. As a preliminary matter, regulatory changes made in 2003 which imposed additional restrictions on tort rights can be easily reversed without legislative amendment. These changes included the regulation defining the verbal threshold; the increased deductible on non-pecuniary general damages of $30,000.00[2] (from $15,000.00); and the increased deductible on *Family Law Act* awards of $15,000.00[3] (from $7,500.00). The available economic data demonstrates that the changes made in 2003 were unnecessary.

11. The Regulation defining the verbal threshold brought under Bill 198 is both unduly harsh and discriminatory. Those discriminated against include: children, elderly, homemakers and the disabled. The regulation (O. Reg. 381/03) defining the threshold creates a tougher test and is so harsh as to prevent many innocent accident victims with serious and debilitating injuries from recovering fair compensation. Further, the defining regulation offends fundamental principles of justice and equality, recognized in our Charter of Rights.

$7,500 to $15,000; and, the regulation defining the verbal threshold.

2 on awards which do not exceed $100,000.00

3 on awards which do not exceed $50,000.00

12. Bill 198 brought in two new regulatory tests to define what would be considered "serious". One test applies to those who work. A different and more onerous test applies to those who do not. For employed people to be compensated for their pain or get their health care paid for, they must prove that their ability to do tasks at work has been compromised. Meanwhile, those outside of the workforce, such as homemakers, children, elderly, and the disabled must prove that they can not carry out most of their usual activities.

13. Since 1993, injured people and insurers took guidance on the interpretation of the threshold from the decision of the Ontario Court of Appeal in *Meyer v. Bright*. Neither litigants nor courts had very much difficulty applying the clear direction from the Court of Appeal on how to interpret the threshold. The introduction of the defining regulation must, therefore, have been motivated by other interests. An important issue, and a matter of considerable uncertainty for participants in the process, is whether the defining regulation alters the way courts must apply the threshold test.

14. Although the defining regulation has been in force since October 2003, there has been no guidance from our courts on its application until the April 30, 2008 decision of Madam Justice Morrissette in *Nissan v. McNamee*. The trial judge in *Nissan* pointed out the following differences between the *Meyer* interpretation and the defining regulation:

> 1. The defining regulation adds the word "most" to modify "usual activities of daily living". The trial judge found that the use of the word "most" suggests "a higher threshold where impairments affect daily living, but not working".
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> 2. With respect to resuming activities of daily living, the defining regulation modifies the test by adding "considering the person's age".
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> 3. The defining regulation introduces the concept of "accommodation" to the consideration of whether an injury is serious in the context of return to work. The trial judge finds that the reference to "accommodation" has the effect of raising the threshold "modestly" for plaintiffs.

> 4. The defining regulation does not take the analysis in the same order as Meyer. In Meyer the last question was whether the impairment was "serious". In the defining regulation it is the first question.
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> 5. The defining regulation introduces the notion of "reasonable efforts" on the part of the injured person to make use of accommodation, in the context of work. According to the trial judge, this addition imposes a positive duty on the plaintiff to lead evidence that this new obligation has been satisfied.
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> 6. The trial judge notes the addition of the word "continue" as a requirement to proving permanence.

15. Importantly, the facts and findings in *Nissan*, a case in which the plaintiff's claim was dismissed, were entirely focused on the ability of the plaintiff to work. There were serious credibility issues which ultimately defeated the plaintiff's claim. There was no evidence and no analysis of the provisions that would apply to a claimant who was not employed. The trial judge was not called upon to apply most of the changes she identified as resulting from the defining regulation to the facts of this case.

16. In particular, the trial judge did not provide any guidance on the application of the most significant change arising under the defining regulation, which is the use of the word "most" to modify daily activities. To the extent this addition raises the bar for proving the threshold is met, people who did not work at the time of their accident, for example children and retired people, will face a much tougher challenge to fair compensation for pain and suffering that employed people. In this respect, the defining regulation is discriminatory and uncertainty remains almost 5 years after the introduction of the defining regulation.

17. The Osborne Report expresses concern about the efficacy of the threshold. Even though automobile insurance was not specifically part of the Terms of Reference, The Honourable Coulter Osborne saw the threshold and deductible as matters of such considerable importance in the context of access to justice that he saw fit to address these issues as part of his Civil Justice Report.

18. Significantly, he observed the similar purposes of the deductible and the threshold.[4] Both the deductible and the threshold are designed to take less serious claims out of the system. Having both is redundant. The Osborne Report questioned the merit of excluding by the threshold those claims that exceeded the deductible and further noted the substantial transaction costs, for the parties and the courts, associated with addressing the issue of the threshold. That is, the determination of whether the injury meets the test of the threshold is not made until the conclusion of the case at trial. To reach that point, both parties must spend considerable sums and exhaust substantial resources in order to reach an uncertain

19. The *Nissan* case is an excellent illustration of the wasteful transaction costs associated with the threshold. In that case the plaintiff was found not to meet the threshold, with the result that her claim for pain and suffering damages was dismissed. That determination, however, was not made until both parties had incurred considerable expense in bringing the matter to trial, and after exhausting important court resources. As observed by the Honourable Mr. Osborne, these considerable transaction costs are entirely attributable to the threshold. It is in the public's interest to remove this inefficient, unnecessary and costly provision.

20. Importantly, The Honourable Coulter Osborne noted that a threshold has "access to justice implications". OTLA agrees with these observations and seeks to restore access to justice for innocent accident victims. The Osborne Report urged the Superintendent of Financial Services to give consideration to the concerns about the threshold and deductible. OTLA shares the concern that the public interest is not served by a threshold that excludes claims that exceed the deductible. OTLA also supports the

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4 That is, both are designed to eliminate less serious cases from the system. This makes them redundant.

observations about the discriminatory effect of excluding claims of children and the elderly by operation of the regulation defining the verbal threshold.

21. On April 29 and 30, 2008, OTLA hosted an Insurance Summit in partnership with the Ontario Bar Association and the United Senior Citizens of Ontario to discuss automobile insurance reform. Participants in the Insurance Summit included consumer groups, health care practitioners, lawyers, and other stakeholders. One of the recommendations coming out of the Summit was support for the elimination of the verbal threshold. There appears to be a wide consensus developing on this point.

22. Product stability is an important objective in automobile insurance reform. From the public's perspective, premium levels need to be predictable and should not be subject to dramatic swings. For the insurance industry, the cost of doing business needs to be reasonably predictable. Reforms that have progressively diminished the rights of innocent accident victims have failed to yield product stability. The lesson to be learned from the experience of the last 18 years is that reducing tort rights has not and never will control premium stability. Insurers will continue to face the cycles that create the risk of crisis in the industry until proper steps are taken to ensure stability. Those steps do not involve limitations in tort rights. The cyclical patterns in profitability are caused by pricing of the product by insurers resulting in a highly variable gap between costs and premiums

23. Research into the attitudes of Ontarians to auto insurance was done through Ipsos Reid in January 2008. The polling data showed that 86% of Ontarians feel the current system is unfair to accident victims; 62% of Ontarians indicated that they would be willing to accept a small increase in insurance premiums if it meant it was easier for accident victims to be compensated; and 79% of Ontarians believed the current system to be unfair to accident victims who were not at fault.

24. Restoration of tort rights requires striking the right balance with first party benefits. First party benefits must be substantially reformed to permit the cost savings needed to restore fairness to the product. OTLA acknowledges that elimination of the verbal threshold must go hand-in-hand with reform of first party benefits. Significant reform of the first party benefit system is essential to enhancing the quality of the product; however, the defining regulation can be revoked immediately, pending the review of the first party benefit system.

B. THE DEDUCTIBLE

25. Ontario courts have very soberly avoided falling into the trap of excessive awards as seen in other jurisdictions. Attached to this submission as Appendix "A" is a chart setting out an overview of specific injuries and the pain and suffering awards granted by Ontario courts before the application of the deductible.

26. O. Reg. 312/03 03 doubled the statutory monetary deductible for pain and suffering claims to $30,000.00 (from $15,000.00) and for loss of care, guidance and companionship in death claims to $15,000.00 (from $7,500.00). The unintended consequence of this Government regulation has a staggering impact on the ordinary Ontarians directly affected by an automobile accident. The deductible was meant to remove minor soft tissues injuries from the system. By doubling the deductible, more serious injuries are eliminated.

27. In the even more unfortunate event of a death, the injustice is jarring. The $15,000.00 deductible in fatality claims virtually eliminates any compensation from being awarded to grandparents making claims when they lose a grandchild, or a grandchild who loses a grandparent. The deductible also has a significant impact on claims brought for the loss of a sibling or an adult child who loses a parent. Attached as Appendix "B" is a chart

summarizing the damages awarded in recent fatality decisions before the application of the deductible.

28. The Osborne Report also recommended varying the deductible. The Honourable Coulter Osborne likened the deductible to a “tax on pain” in a speech at the Insurance Summit. At the Summit, consumers and accident victims spoke about the harshness of the deductible, particularly in fatality claims.

29. Another recommendation of the Insurance Summit was to maintain a deductible on non-pecuniary general damages, provided the verbal threshold is eliminated and that the current deductible be lowered from $30,000.00 to $15,000.00

30. With regard to *Family Law Act* claims, the recommendation was to lower the deductible and, in the case of fatal claims, eliminate the deductible entirely.

31. OTLA recommends the following:

(a) reduce the deductible on non-pecuniary general damages on awards of $100,000.00 or less from $30,000.00 to $15,000.00;

(b) reduce the deductible for *Family Law Act* awards of $50,000.00 or less from $15,000.00 to $7,500.00; and

(c) eliminate the deductible in fatality claims.

32. With regard to the deductible, the Ipsos Reid research showed that:

(a) 73% of Ontarians believed there should be no deductible on pain and suffering awards;

(b) 78% of Ontarians supported reducing the deductibles;

(c) 79% of Ontarians believed the current system to be unfair to accident victims who were not at fault; and

(d) 70% of Ontarians found the current levels of deductibles unreasonable.

C. CONSTITUTIONAL CONSIDERATIONS

33. OTLA has noted the recent Alberta decision *Morrow v. Zhang* in which a discriminatory auto insurance law has been struck down. One of the constitutional lawyers involved with the Alberta challenge has provided an opinion to OTLA that the Ontario threshold defining regulation and deductible is similarly discriminatory and also likely to be struck down. Now is the time to deal with this problem, when other changes can be implemented to ensure a balanced and fair product that is also constitutionally sound.

D. INSURANCE RATES – AFFORDABILITY AND AVAILABILITY

34. Setting automobile insurance premiums is a matter of great importance to the driving public. Avoiding precipitous swings in premiums is also a matter of considerable importance to consumers. While the current system of rate review and approval provides a level of protection to consumers, it is not as effective as it could be in maintaining consistent and predictable premiums. The decline in premiums in the last five years cannot be attributed to the provincial regulator or to the actions of insurers. The decline in premiums in the last five years is a consequence of the watering-down of

the insurance product and a significant increase in insurer profitability. At the same time consumers paid less, because they received less coverage for their premium dollar.

35. Historically, automobile insurer profitability has followed a cyclical pattern which has resulted in what the industry describes as “hard” and “soft” markets. While pricing, returns on investments and reserve setting all impact on fiscal performance, the loose underwriting practices that accompany a soft market inevitably lead to difficulties associated with a hard market and the potential for a “crisis”. Stability for the insurance product requires discipline or regulation that prevents a hard market severe enough to create a perceived “crisis”. It has been during these putative crises that tort changes limiting liability have been sought by the insurance industry and legislated by government. Inevitably, the insurance cycle repeats itself. Cycles will never be mitigated by these reforms. The solution lies elsewhere.

IV. STATUTORY ACCIDENT BENEFITS SCHEDULE

A. OVERVIEW

36. We emphasize that increased access to justice for innocent accident victims must be a precondition to reform of first party benefits. The quality of the product depends entirely on the proper balance between tort rights and first party benefits. The erosion of tort rights in Ontario has been justified in order to fund the first party system. Problems with the first party benefits system support our view that there must be a readjustment, restoring rights and a proper balance. This section considers some areas where adjustment is needed in order to have a proper balance for consumers in Ontario.

37. The interests of consumers require substantial reform of first party benefits. It is entirely unacceptable to “tweak” the system, and an incremental approach to reforming first party benefits is not in the public interest. In the last decade, attempts at tweaking the first

party benefit system have merely caused additional complexity, resulting in a more bloated and inefficient system. Further tinkering in this manner will simply perpetuate the problems we face today. OTLA suggests the return to a shorter, simpler accident benefit system reminiscent of the procedural mechanics from OMPP.[5]

38. The first priority concerns the complexity of the first party benefit system. The sheer volume and complexity of the first party benefit system contributes directly to wasteful costs. Consumers required to access the first party benefit system are compelled to access advice and services merely to begin to understand their rights. Insurers incur huge expenditures on claims staff to deal administratively with the complexity of the first party system. The number of forms required has increased, along with the cost of completing and processing the forms. Complexity also negatively impacts on the timely delivery of benefits to injured people. Delayed benefits to those in need and entitled to benefits undermines the first party benefit system and public confidence.

39. The second priority is concerned with transaction costs. The first party benefit system is simply too expensive to administer. This cannot be overstated. There are far too many assessments resulting in assessment costs being entirely out of control. Too much is being spent on relatively minor claims. The funds spent on transaction costs represent premium dollars that do not find their way to injured people. The waste in respect of transaction costs is staggering. Ontario's first party benefit system is not delivered efficiently.

40. The third priority is proportionality. As in our civil justice system, the resources devoted to a matter in terms of time and money must bear some relationship to the value and importance of what is at stake. While this priority is tied to transaction costs, it is

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5 OMPP – The Ontario Motorist Protection Plan was in place from June 22, 1990 until December 31, 1993

important to recognize that some transactions ought to be eliminated or substantially reduced simply because they do not make economic sense. This principle applies not only to the internal claims process of insurance companies, but also to the costs associated with the dispute resolution process at the Financial Services Commission.

B. COST OF EXAMINATIONS AND ASSESSMENTS

41. Determining entitlement to benefits is subject to a cumbersome and often relentless assessment process. In the case of an insurer intending to verify an insured person's entitlement to a benefit, the insurer is compelled to use an assessment process that is convoluted and enormously expensive. Many assessments done by insurers become multi-disciplinary (often involving assessment by healthcare professionals from four or more specialties), despite the fact that the matter at issue was prescribed by a single treating practitioner. In the absence of an assessment, an insurer is not at liberty to discontinue payment of a benefit.

42. The assessment process and administrative costs associated with it pay no heed to the principle of proportionality. The process does not allow for the use of discretion or the waiving of these assessments. Section 42 of the Statutory Accident Benefits Schedule ("Examination Required by Insurer") is a good illustration of an assessment process out of control. When read in combination with section 37 (Specified benefits – income replacement, non-earner, caregiver or housekeeping), section 38 (Medical and Rehabilitation), section 38.2 (Approval of Assessments) and section 39 (Attendant Care), the enormity of the transaction costs and inefficiency become readily apparent. These provisions apply without regard to the amount at stake, the importance of the benefit sought, or the relative costs between the benefit and the verification of entitlement process.

43. The complexity of the assessment process leads to inevitable delay in the delivery of benefits, further undermining the confidence of users of the system. This assumes, however, that the consumer is able to access the system. Undoubtedly, the complexity alone precludes some meritorious claims from being pursued. Understandably, consumers are both frustrated and intimidated by the process.

44. There are substantial costs savings to be had in the reform of the assessment process. Admittedly, the assessment process cannot be altered in the way it must without addressing changes elsewhere in the system. With appropriate reforms, hundreds of millions of dollars can be saved on assessments alone.

45. The savings to be had on assessments are not confined to medical assessments. Forensic accounting reports are commonly used to determined entitlement to income replacement benefits for self-employed people under Part II of the SABS. A simplified code for assessing entitlement for these claimants would likely save significant sums paid to forensic accountants engaged in was is often a paper-intensive and cumbersome job of determining entitlement.

C. CATASTROPHIC IMPAIRMENT

46. Since the introduction of the definition of “catastrophic impairment” in November of 1996, OTLA has consistently advocated for a less complicated, less costly and more insured friendly definition of catastrophic impairment. Twelve years later, the definition of catastrophic impairment remains largely as it was in 1996. The benefit of the longevity of this definition is that there is now a considerable body of jurisprudence, both at the FSCO and the Superior Court of Justice, interpreting this definition and providing some predictability in determining who will meet the definition for catastrophic impairment.

47. Stakeholders seeking to further limit those who qualify for catastrophic designation are not engaged in a medical exercise but a policy exercise. Dissatisfaction by some with the use of the Glasgow Coma Scale measurement or the practice of combining section 2 (1.2) (f) and (g)[6] to determine catastrophic have failed to address the underlying policy of the designation.

48. The learned Arbitrators of the FSCO and Judges of the Superior Court of Justice have consistently held that percentage ratings for a person's psychological/psychiatric impairments are properly combined with a person's percentage ratings for physical impairments in determining if a person has suffered a 55% whole person impairment. A review of these decisions provides reasonable and compelling arguments for the necessity of considering all impairments, including psychological/psychiatric, in arriving at a formulation for whole person impairment. Combining of these impairments is consistent with the purpose of the SABS in that it promotes fairness for victims of motor vehicle accidents and is necessary to ensure that those with the greatest needs have access to expanded benefits.

49. Using the Glasgow Coma Scale as a measurement is an arbitrary cutoff. The real issue for people with very serious injury is that of need. Having enhanced benefits of $1,000,000.00 does not establish need and result in payment. Using (f) but not combining it with (g) does not address need. It must be remembered that those injured people who seek catastrophic designation are doing so to access medical and rehabilitation benefits in excess of $100,000.00. These people have already demonstrated that the use of the first $100,000.00 of benefits was both reasonable and necessary. It follows, therefore, that their claim in excess of the first $100,000.00 is also

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6 Combining physical and psychological injury to establish 55% impairment of the whole person under the AMA Guides to the Evaluation of Permanent

likely reasonable and necessary and they are in “need” of those benefits. Attempts to limit access for these people is not a principled medical decision but strictly a policy decision that seeks to exclude some, despite the clear demonstration of need.

50. When deciding whether to further restrict the catastrophic designation, it is entirely irrelevant that a GCS score of 9 or less is “not a good predictor of outcome”. When an application is made for a benefit, the need is not a future need but an actual need at the time that is considered reasonable and necessary by a qualified assessor. Thus, the debate over the appropriateness of a GCS score of 9 or less for determining access to benefits is a policy debate used to determine which people in “need” will not get what that they need and which people in “need” will get what they need.

51. There is no principled justification for further restrictions on access to catastrophic designation. There most certainly is no compelling medical justification for additional limitations. In the final analysis, it is about policy. OTLA promotes access to benefits for seriously injured accident victims in “need”. Those who need to access benefits in excess of the levels available to non-catastrophically injured people are ordinarily objectively and profoundly affected by an injury. Other than purely based on reducing payments to these people, further limitations cannot be justified.

D. DISPUTE RESOLUTION AT FSCO

52. OTLA supports a streamlined mediation and arbitration process, including the consolidation of mediation and pre-arbitration hearings. A consolidated hearing will reduce unnecessary attendances at FSCO and reduce legal and administrative costs. At the time of filing the application for mediation, the party can elect to proceed to arbitration in the event the mediation fails.

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53. Following a failed mediation, the parties ought to be prepared to set an arbitration date, exchange production requests, and deal with issues relating to the arbitration. This will facilitate the timely hearing of disputed benefits, eliminate an additional attendance at FSCO, and ensure parties are prepared at the time of mediation. For those disputes that require a pre-arbitration hearing, discretion ought to be provided to the Mediator in order to allow an additional hearing to facilitate the more complicated disputes.

54. For disputes less than a fixed monetary sum, a simplified summary procedure ought to be put in place at FSCO to provide a timely and less costly means of determining the issue.

E. FRAUD AND ABUSE

55. There are two fundamental ways to address fraud and abuse. The first is to provide a disincentive to fraud through sanctions and penalties. The second is to remove the incentive for fraud by altering the provision that tends to give rise to fraud. Punishing abuse and fraud, through disincentives, is more difficult and expensive than removing the incentives for fraud, thereby eliminating it at the outset.

56. Fraud and abuse continue to impact negatively on the insurance system. Our recommendations calling for the simplification of first party benefits and the drastic reduction of transaction costs will contribute significantly to the reduction of abuse and fraud. By simplifying benefits and reducing transaction costs, some of the incentive for fraud and abuse is removed.

V. CONCLUSION

57. As the voice for accident victims and consumers, OTLA welcomes this opportunity to share its insight and provide recommendations as part of this mandatory review of the product. Without question, the changes suggested by OTLA in this paper will improve

the product, promote stability, improve access to justice, and meet with the approval of the public. OTLA values its role as a significant stakeholder in this process and welcomes the opportunity for further discussion and consultation as the necessary changes are implemented.

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Dated: July 14, 2008

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Non-Pecuniary General Damage Awards in Ontario

Plaintiff/Defendant	Citation	Damages	Details
Roach v. Mississauga	[2007] O.J. No. 4106	$27,500.00	Interarticular fracture to the right ankle, which will result in permanent pain in the right ankle, restricted weightbearing activities, limited ability to walk, stand, squat, and volunteer at church.
Li v. Rizvi	[2006] O.J. No. 4909	$20,000.00	Burst fracture of back at T-12, permanent bone loss, degenerative changes in back, onset of arthritis.
Ondrade v. Toronto (City)	[2006] O.J. No. 1769	$30,000.00	Fractured wrist, pain in wrist & hip, mild wrist deformity, 50% reduced grip & pinch strength, chance of developing arthritis, exacerbation of knee pain.
Flentje v. Nichols	[2006] O.J. No. 3836	$30,000.00	Comminuted fracture of tibia, fractured fibular shaft, surgery, 35 sutures, large scar on lower leg, subsequent surgery to excise incision and remove plate & screws, limp, and leg swelling.
Fulton v. Welland (City)	[2006] O.J. No. 4879	$25,000.00	Grade-two ligamentous strain to ankle, with partial tearing of ligament and nerve damage to ankle. Injuries required surgery and resulted in low back strain and chronic pain.
Schade v. Chris	[2005] O.J. No. 3020	$35,000.00	fractured humerus bone, burns to inner and outer aspects of left arm, permanent scarring to left arm and left upper thigh, cited in Justice Chadwick's Compendium on Damages, Superior Court of Justice
Brunetta v. Brampton (City)	[2004] CarswellOnt 2160	$20,000.00	Occult fractures to left foot, resulting in permanent chronic discomfort, aggravated by duties as a master electrician.
Milne v. Burlington	[2004] Carswell Ont 1338	$30,000.00	fractured olecranon resulting in shoulder restrictions, pain in elbow and shoulder, cited in Justice Chadwick's Compendium on Damages, Superior Court of Justice
Leslie v. Mississauga	[2003] O.J. No. 1188	$27,500.00	fractured left elbow resulting in elbow restricted, loss of strength, continuing pain in the elbow, cited in Justice Chadwick's Compendium on Damages, Superior Court of Justice
Mizzi v. Hopkins	[2003] O.J. 1671	$30,000.00	mild brain injury, laceration to scalp, mild concussion, memory, concentration affected, depression, neck and back pain, upheld by Court of Appeal, cited in Justice Chadwick's Compendium on Damages, Superior Court of Justice.
Mitchell v. Mason Estate	[2002] O.J. No. 4030	$25,000.00	fractured sternum; possible rib fracture; pain and breathing difficulty; dizziness; headaches; depression; numbness in the hand; leg and neck pain
Severiano v. Oliva	[2002] O.J. No. 4265	$35,000.00	fractured right tibia and fibula, swelling of right ankle, neck and back injuries
Manning v. 3980 Investments Ltd.	[2003] O.J. No. 1937	$20,000.00	shoulder injury causing restricted range of motion; knee injury resulting in scarring and pain; cervical strain
Sutherland Estate v. Hunt	[2002] O.J. No. 3859	$30,000.00	ulnar nerve injury (ulnar neuropathy) resulting in pain, deformity, numbness and tingling in the fourth and fifth fingers of the left hand, followed some time later, perhaps hours or days, by severe pain in the fingers and the hand which required two separate unsuccessful surgeries

Dunn v. Mississauga (City)	[2002] O.J. No. 5084	$22,500.00	left hip and back strain which resulted in significant difficulties in caring for her children and to carry on daily living; potential neurological damage
Cox (Litigation Guardian of) v. Marchen	[2002] O.J. No. 3669	$37,500.00	severed Achilles tendon requiring painful surgery to re-attach the tendon; no ability to use left leg for 2 ½ months; cast and wheelchair required; permanent pain and swelling; noticeable scarring; depression; unable to wear regular footwear
Brown v. Canadian Tire Corp.	[2002] O.J. No. 4722	$35,000.00	left shoulder dislocation or subluxation and accelerated consequences of pre-existing condition;
Koor v. Air Canada	[2001] O.J. No. 2246	$20,000.00	Bimalleolar fracture of the right ankle, dislocation, surgical insertion of plate, cited in Justice Chadwick's Compendium on Damages, Superior Court of Justice
Malhalab v. Windsor (City)	[2001] O.J. No. 2758	$22,000.00	four fractured ribs; compression fracture of thoracic vertebrae; aggravation of arthretic condition in neck and back, cited in Justice Chadwick's Compendium on Damages, Superior Court of Justice
Dhalla v. York (City)	[2001] O.J. No. 3989	$21,000.00	bi-malleolar ankle fracture requiring surgery with internal fixation; required below-knee plaster splint followed by a below-knee weight-bearing cast. cited in Justice Chadwick's Compendium on Damages, Superior Court of Justice
Hamilton v. H (E.F.)	[2001] O.J. No. 3262	$15,000.00	fractured cheekbone requiring surgery, bruised ribs, contusions, cited in Justice Chadwick's Compendium on Damages, Superior Court of Justice.
Michalak v. Oakville	[2000] O.J. No. 4466	$30,000.00	fractured tibia requiring surgery and cast, permanent pins placed in leg, permanent scarring, cited in Justice Chadwick's Compendium on Damages, Superior Court of Justice
Scott v. Chapnick	[2000] O.J. No. 412	$20,000.00	facial nerve damage, persistent numbness and pain, cited in Justice Chadwick's Compendium on Damages, Superior Court of Justice.
Vieira v. Delta Hotels Ltd.	[2000] O.J. No. 4364	$25,000.00	mechanical low back strain; nerve root pain in the left leg; altered dynamics of pre-existing disc herniation; limited leisure activities; eliminated sexual activity; some pre-existing back pain
Jones v. Lavalley	[1999] O.J. No. 4054	$20,000.00	Fracture of right tibia and fibula. Leg failed to heal normally. Bone grafting. cited in Justice Chadwick's Compendium on Damages, Superior Court of Justice
Scott v. Chapnik	[1998] O.J. 1305	$20,000.00	damage to facial nerve causing permanent numbness to chin and lip, cited in Justice Chadwick's Compendium on Damages, Superior Court of Justice
Rutherford v. Labatt Brewing	Doc. No. Belleville 2787/90; [1992] O.J. No. 1286	$30,000.00	six tendons and three nerves severed requiring surgical repair; resulting in little feeling left in three fingers of his dominant hand; lost 75% grip strength; hand is tender and throbs in the cold. He has pain in his fingers about half the time and pain in his palm almost all the time; three inch scar across the palm
Hauk Estate v. Hudson	Doc. 18054; [1997] O.J. No. 4123	$30,000.00	comminuted fracture of his right wrist and a fracture of the left side of his jaw; wrist fracture required immediate surgical intervention open release of Mr. Hauk's median and ulnar nerves, right wrist, arthroscopic reduction, along with internal and external fixation of his severe fracture/dislocation and required the use of much medical hardware including a special fixator device on the outside of the wrist and arm; injuries required three (3) further surgeries, including a wrist fusion

Winkler v. Vaughan (Town)	Doc. No. 259449/86	$30,000.00	subcapital fracture of the left hip requiring two hip replacements; restricted activities, loss of strength and depression
Dee v. Kingston Community Rec Centre	Doc. No. Kingston 253/87; [1992] O.J. No. 1143	$30,000.00	shoulder displacement with severe pain; Rotator cuff tear requiring surgery; lacerations to her head, scrapes and cuts on right arm and knee; . asymptomatic cervical disc disease triggered
Holness v. Elms	Doc. 90-CU-408394; [1995] O.J. No. 23	$30,000.00	closed head injury resulting in cerebral concussion, headaches, blackouts, dizziness, sleep, memory and concentration problems; laceration of the left eyelid and an undisplaced fracture of the right fibular neck; sleep disturbance
Posca v. Sotto	Doc. Brampton 383483/90U; (1997), 34 O.R. (3d) 703	$30,000.00	fractured nose requiring surgical repair; lost one tooth, lost a post and two of his teeth were chipped; teeth damage requiring thirteen dental appointments for repair; lost one tooth, lacerations to his face and another six-centimetre scalp laceration at the back of his head and a sore neck residual degree of nasal obstruction; headaches
Abbas v. Lalonde	[1994] O.J. No. 3741; aff'd (1994) CA194/91	$30,000.00	tear of her anterior cruciate ligament and a partial tear to the medial collateral ligament (knee)requiring surgical intervention and semi-tendinosis graft substitution, four inch oblique "unsightly" scarring; previously exceptional athlete requires use of knee brace
Mazzotta v. JL Belisle Bldg Materials Ltd.	Doc. Sudbury 2672/89; [1993] O.J. No. 858	$30,000.00	fractured sternum with severe pain; pain and discomfort when, for example, coughing and sneezing or over exerting; sleeping difficulties; incidents of sudden and sharp pains
Semenuk v. Hamilton (City)	[1995] O.J No. 2271	$25,000.00	fractured a metatarsal and strained ligaments and had her ankle placed in a cast. She also suffered swelling and sympathetic dystrophy for a time after the accident; scarring and diminished mobility

Awards for Loss of Guidance, Care and Companionship in Ontario

Plaintiff/Defendant	Citation	Age & Gender of Deceased	Plaintiffs & Damages	Details
Singleton v. Leisureworld Inc. (Loeisureworld Caregiving Centres)	2008 CanLII 16071	77, Female	4 Children (ages 49 to 56): $30,000 each 6 grandchildren (ages 3 to 22): $10,000 each	mother/grandmother in nursing home, involved and loving mother and grandmother. All four children maintained a close and caring relationship notwithstanding deceased's age and deteriorated health condition. Elder grandchildren had a closer relationship than younger
Wright v. Hannon	2007 CanLII 240	54, Male	Daughter (age 18): $50,000.00 Daughter (age 14): $50,000.00	Father age 54 at time of death. Daughters 18 and 14 at trial. Separated, not divorced, from wife for four years prior to death. Children lived with mother. Father had access. Strong bond between father and daughters.
Johnson v. Milton (Town)	[2006] CarswellOnt 4859	52, Male	Wife: $50,000.00 Step-son (age 13): $5,000.00 Son (age 3): $20,000.00	Husband and wife riding tandem bicycle. Bike went out of control when it failed to negotiate the sharp right hand turn and collided with the rock embankment. Husband killed, wife suffered serious injuries. Close relationship with husband. Son born 1989, age 3 when father died. Older son born 1979 and did not testify at trial.
Fish v. Shainhouse	[2005] CarsewellOnt 5265	Male	Wife: $80,000.00 Son (age 21): $25,000.00 Son (age 32): $40,000.00 Son (age 13): $80,000.00 Daughter (age 23); $50,000.00	Action dismissed, damages assessed. Husband and wife very close relationship, revolved around family. Youngest son, age 13 at father's time of death, life shattered , very close and dependant on father.
Arruda v. Scarborough Hospital	2005 CanLII 25895	34, Male	Father: $40,000.00 Mother: $40,000.00 Sisters: $10,000.00	Parents would have lived with their son for the balance of their lives. They both enjoyed his companionship and as they grew older they both had a reasonable expectation that he would provide considerable care to both of them.
Osman v. 629256 Ontario Ltd.	[2005] O.J. No. 2689	16, Male	Father: $80,000.00	Deceased boy very close to his parents.

			Mother: $80,000.00 Siblings: $20,000.00	Family of remarkable people. Deceased was a child who appeared to have everything: kindness, energy, intelligence, talent, compassion, athletic ability and ambition.
Bodnar v. Orban	2005 CanLII 9666	Female, 61	Adult Daughter: $30,000.00	Mother was extremely supportive of daughter, they spoke regularly. Traveled together. Mother always celebrated her daughter's accomplishments and encouraged her with her education and her employment. Provided her with money and gifts from time to time. Daughter became introverted, found it extremely difficult to work after her mother's death. Unable to function or cope. She suffered depression and was also suicidal, suffered from insomnia and had nightmares about what had happened to her mother and how she had died. The daughter had had an excellent memory and good organizational skills but those have all disappeared. She was unable to keep her executive job and was later employed as a dog walker.
Godin v. Yuke	2004 CanLII 16416	Male, 19	Father: $80,000.00	Father and son lived together and enjoyed great affection and companionship. Son made significant contributions to household chores and activities.
Cammack v. Martins Estate.	[2002] O.J. No. 4983	Female, 46	Father: $30,000.00	73 year old father lost his only child with whom he had a very close relationship.
Plourde v. Steele	2003 CanLII 6786 (Ont. C.A.)	Male, 47	Son (age 13): $55,000.00 Daughter (age 9): $55,000.00 Wife (separated): $46,000.00 Father (age 81): $30,000.00 Mother (late 70s): $30,000 Sister (age 55): $15,000.00 Sister (age 53): $15,000.00	Reduced on appeal from the following jury award: Son (age 13): $300,00.00 Daughter (age 9): $300,000.00 Father (age 81): $125,500.00 Mother (late 70s): $125,500.00 Sister (age 55): $50,000.00 Sister (age 53): $50,000.00
To v. Toronto Board of Education	[2001] O.J. No. 3490	Male, 14	Parents: $100,000.00 each Sister (age 11): $25,000.00	Parents suffered a substantial loss of comfort and protection. Parents did not speak English and relied heavily on their son. Extremely close relationship to both

				parents and sister. Boy was role model for his sister and always took care of her.
Bunting v. Li	Doc.No. 99-CV-178423	Female, 77	Sister (age 81): $30,000.00	Sisters were unmarried and lived, worked and socialized together all their lives.
Clarence v. Kerr	November 15, 2000, McDermid J. (Ont. S.C.J.)	Male, 17	Mother: $30,000.00 2 Sisters: $15,000.00 each	
Hechavarria v. Reale	(2000), 51 O.R. (3d) 364	Female, 53	Husband: $85,000.00 Children: $30,000.00 each Sisters: $12,500.00 each	MVA – married 34 years. 3 adult children in 20s and 30s.
Stell v. Obedkoff	[2000] O.J. No. 4011	Female,48	Husband: $50,000.00 Adult Children: $20,000.00	Very close family, two adult children. High award warranted
Ricard v. Trenton (City)	[2000] O.J. No. 4700	Male, 10	Mother: $40,000.00 Father: $20,000.00 Step-Father: $20,000.00 Sister: $18,000.00 Half-brother: $15,000.00 Grandmother: $2,500.00 Grandmother: $1,5000.00	
Ayoub v. Dreer	(2000), 24 C.C.L.I. (3d) 96	Male, 19	Parents: $35,000.00 each Brother (out of province): $7,500.00 Brother and sister: $15,000.00 each	
Howard v. Kingsway General Insurance Co.	(2000), 3 C.C.L.T. (3d) 302	Male, 24	Mother: $40,000.00	Son was living with mother, very close relationship. Loving and devoted son to single parent mother
Macartney v. Warner	(2000), 46 O.R. (3d) 669 (Ont. C.A.)	Male, 19	Mother: $25,000.00 Father: $15,000.00 Brother: $7,500.00 Grandmother: $3,000.00 Grandfather: $1,000.00	Ontario Court of Appeal: "While it is my view that these awards are low, they were within the accepted range for this type of case, albeit at the very bottom of that range."
Peel et al. v. West Wawanosh Mutual Insurance	[1999] O.J. No. 787	Male, 20s	Wife: $60,000.00 Children (ages 3 and 1): $35,000.00 each Son (age 17): $20,000.00	
Huggins v. Ramtej	[1999] O.J. No. 1696	Male, 15	Parents: $40,000.00 each Siblings: $15,000.00 each	Close knit family.
Rintoul v. Linde Estate	(1997), 32 O.R. (3d) 704	Male, 16	Mother: $55,000.00 Sister: $20,000.00	Mother was a widow and expected deceased son to take over farm eventually. Sister and deceased brother very close friends.

Jensen v. Guardian Insurance Co. Of Canada	(1997), 72 A.C.W.S. (3d) 683	Female, 37	Husband: $25,000.00 Son (age 9 months): $35,000.00 Mother: $12,500.00 Siblings: $12,500.00 each	Husband remarried 8 years after accident, but continued close relationship with mother despite deceased having own family.
Mason v. Peters	(1982), 39 O.R. (2d) 27	Male, 11	Sister: $5,000.00 Mother: $45,000.00	