

**SUBMISSION
OF
THE ADVOCATES' SOCIETY
TO
THE MINISTRY OF FINANCE
FIVE-YEAR REVIEW ON AUTO INSURANCE**



JULY 14, 2008

THE ADVOCATE S' SOCIETY'S SUBMISSION
ONTARIO AUTO INSURANCE FIVE-YEAR REVIEW

INTRODUCTION

The Advocates' Society is pleased to make the following submissions regarding the five-year review of Part VI of the *Insurance Act*, R.S.O. 1990 c.I.8 as amended, such review being conducted pursuant to Section 289.1 of the *Insurance Act*.

THE ADVOCATES' SOCIETY

The Advocates' Society is an association of over 3,800 lawyers throughout Ontario who practice as advocates in the resolution of disputes involving the Courts, administrative tribunals, government bodies, arbitrations and other forums for dispute resolution. The mandate of The Advocates' Society includes, amongst other things: a) the initiation of appropriate reforms to the legal system and to comment upon specific acts of the legislature and regulations thereto; and b) addressing issues of access to justice.

A significant number of our members practise in the personal injury field, both as plaintiff's counsel and as defence counsel. The Society's members also appear before the Ontario Insurance Commission regularly. The members of the committee making this submission (see list at the end of the submission) are members of both the plaintiff and defence bars in the personal injury field and this submission is the product of vigorous debate on the competing interests. As a result, we believe that our comments represent a balanced perspective in regard to possible changes to the automobile insurance compensation system. The suggested revisions are objective and reflect both the concerns of those injured in motor vehicle accidents and the insurers who must respond to their claims. The Society recognizes that the government's initiative is to achieve a fair and reasonable automobile insurance compensation system that is affordable and maintains price stability of the product. This submission is presented as a complete package of reforms to achieve that goal.

TORT LAW AMENDMENTS

VERBAL THRESHOLD

The verbal threshold limits the consumer's right to access compensation for health-care expenses and non-pecuniary general damages thereby denying appropriate access to justice. In this regard, we rely upon the submissions of the Honourable Coulter Osborne as set out in his Civil Justice Reform Project Report of November 2007. Justice Osborne comments that the objective of the verbal threshold is to keep smaller cases out of the system; similarly the purpose of a monetary deductible is to remove smaller cases from the system.

The difference between the verbal threshold and a deductible, however, is that a deductible carries zero transaction costs as it provides for a simple mathematical exercise. On the other hand, a determination as to whether an individual's injuries meet the verbal threshold carries high transaction costs. The high transaction costs arise by reason of the medical reports which must be generated (on behalf of the injured plaintiff and in response on behalf of defendants) in order to determine the 'threshold' issue and the fact that the threshold issue must be determined by way of motion either before or at trial. The verbal threshold also creates uncertainty in a claim, which our experience discloses causes an increase in the cost of litigation for all parties.

Additional uncertainty arises from the verbal threshold in the context of the limitation period issue of 'discoverability'. With the verbal threshold in effect, the date upon which an accident victim's cause of action arises is a moving target. Limitation period defences are ever more complex and costly because they now involve a determination as to when the accident victim knew or ought to have known that their injuries meet the verbal threshold. Removal of the verbal threshold would result in a return of the certainty that the two-year limitation period is intended to provide. It is unnecessary to have a verbal threshold and a deductible given that they both serve the same purpose - eliminate smaller 'nuisance' claims. The interests of the public are not served by a verbal threshold that excludes claims which otherwise exceed the monetary deductible.

We also support the observations of the Honourable Coulter Osborne regarding the discriminatory effect of the regulation defining the verbal threshold, the exclusion of the claims of children, the elderly and the unemployed. These exclusions are inappropriate, in our view, and fall within our Society's mandate as it relates to the promotion of access to justice.

Revocation of the verbal threshold and defining regulation will dramatically decrease transaction costs. Further, the objective of the verbal threshold will still be met through the monetary deductible which will remain in place. The consumer's right to 'access to justice' will be met by removing the discrimination arising from the verbal threshold.

THE DEDUCTIBLE

The Honourable Coulter Osborne in the Civil Justice Reform Project report comments on the current level of the statutory deductibles pursuant to Section 267.5(7) of the *Insurance Act* and *Ontario Regulation 461/96 "Court Proceedings for Automobile Accidents That Occur on After November 1, 1996."*

Currently, a \$30,000 deductible is prescribed for the purpose of subparagraph 3iB of subsection 267.5(7) of the *Insurance Act* for collisions, that occur on or after October 1, 2003, (see amendments found in Ont.Reg. 461/96, Section 5.1(1) and (2), i.e. damages for non-pecuniary loss). Further, a \$15,000 deductible is prescribed for the purpose of subparagraph 3iiB of subsection 267.5(7) for collisions that occur on or after October 1, 2003 (claims pursuant to section 61(2)(e) of the *Family Law Act*).

The Advocates' Society recommends that the \$30,000 deductible regarding injured persons be reduced to the pre-October 1, 2003 amount of \$15,000. The current amount of \$30,000 is too high and excludes claims which are more than minor in nature and deserve compensation. The type of claims intended to be excluded will continue to be so excluded by a \$15,000 deductible.

The Advocates' Society further recommends that the deductible for *Family Law Act* claimants be reduced from \$15,000 to \$5,000, and that there be no deductible whatsoever in fatality claims.

Finally, The Advocates' Society recommends that there not be a "vanishing deductible" for main claimants or *Family Law Act* claims. Currently, the \$30,000 deductible for injured persons does

not apply to the amount of damages if non-pecuniary loss is assessed at an amount equal to or greater than \$100,000. Further, the deductible of \$15,000 for *Family Law Act* claims does not apply if the amount of damages for non-pecuniary loss pursuant to Section 61(2)(e) if the *Family Law Act* exceeds \$50,000. To arbitrarily remove the deductible as these levels of award are reached is academically unsound.

RECOMMENDED CHANGES

1. Legislative amendment repealing sections 267.5(3) (the verbal threshold – protection from health-care expenses) 267.5(5) (the verbal threshold – protection from non-pecuniary loss), together with amendments to the balance of section 267.5 as required.
2. The immediate repeal of sections 4.1 and 4.2 of Ontario Regulation 461/96 (the regulation defining the verbal threshold).
3. The immediate change of section 5.1(1) of the Ontario Regulation 461/96 (from the \$30,000 deductible applicable to non-pecuniary general damages to \$15,000).
4. The immediate change of section 5.1(2) of Ontario Regulation 461/96 (from the \$15,000 deductible applicable to claims under section 61(2)(e) of the *Family Law Act* to \$5,000).
5. That there be no deductibles in fatality cases.
6. That there be no ‘vanishing deductible’.

STATUTORY ACCIDENT BENEFITS AMENDMENTS

INTRODUCTION

The current Statutory Accident Benefits Schedule is too complex and results in unnecessarily high transaction costs. Further changes by way of a 'band-aid' approach will only serve to increase complexity and cost. It is our view that a return to the basic principles of no-fault coverage - that which is 'reasonable and necessary' - will reduce complexity and cost.

COMPLEXITY

The Statutory Accident Benefits system was originally intended to facilitate consumer friendly, expeditious and timely access to necessary accident benefits. Over time, as a result of numerous amendments, the Statutory Accident Benefits Schedule has become too complex and costly. It has been compared in complexity to the *Income Tax Act*.

From the insurers' perspective, claims costs have increased because of complicated procedural rules, timelines, and innumerable medical assessments. From the accident victim's perspective forms are complicated, the system is difficult to understand, and numerous assessments are required leading to the consumption of a tremendous amounts of time, effort and cost and frequently inappropriate results.

ASSESSMENT COSTS

In many cases assessment costs are not proportional to the amount in dispute. It is important that the concept of 'proportionality' be introduced as an overriding principle for the Statutory Accident Benefits Schedule. Proportionality is a key concept in Justice Osborne's Civil Justice Reform Project Report wherein it is stated that "recommendations should reflect the principle that the time and expense devoted to civil proceedings [or in this case Statutory Accident Benefits] should be proportional to the amount in dispute and the importance of the issues at stake".

In reviewing the Statutory Accident Benefits Schedule, the following key points must be paramount:

- The current system is too complex for both the consumer (insured) and insurers, all of whom are required to work with the Schedule on a daily basis. The administrative procedures are too complex and there are too many forms - all of which preclude the expeditious delivery of benefits.
- Transaction costs are too high. The Statutory Accident Benefits Schedule in its current form is too expensive to administer.
- Proportionality – As Justice Osborne says, time and money spent must be proportional to the amount at stake. Transaction costs cannot exceed the amount of benefits in dispute.

RECOMMENDED CHANGES

Given the problems associated with attempting to alter and revamp the current Statutory Accident Benefits Schedule, the Society believes that a simpler solution is available. The system of accident benefits delivery available under the OMPP (Bill 68) No-Fault Benefits Schedule in force for accidents after June 21, 1990 up to December 31, 1993, provided for delivery of benefits in a very simple, uncluttered form. A return to that Schedule of benefits, subject to some amendments, would provide for a streamlined method of providing benefits to accident victims and significantly reduce the transaction costs associated with the current system.

The OMPP Schedule would require amendments in the following ways:

1. In Section 2 of the OMPP, the word “indirectly” under the definition of “accident” would be removed.
2. Supplementary medical/rehabilitation benefits and attendant care benefits under Sections 6 and 7, respectively, would be payable for life, with the maximum benefits available under each section raised to \$1,000,000.00 for each of medical/rehabilitation benefits, and attendant care benefits.

3. In the context of entitlement to medical/rehabilitation benefits and attendant care benefits, the catastrophic impairment designation would be eliminated to reduce the transactional costs associated with the determination of catastrophic status.
4. The pre-approved framework guidelines would be eliminated.
5. There would be a minimum capped amount immediately available for initial medical and rehabilitation treatments incurred within the first six months post-accident that need not be the subject of a Treatment Plan, nor require prior approval by the insurer.
 - a) \$5,000.00 would be available for treatment for any accident victim, requiring only submission of invoices or proposed invoices, of approved treatment providers.
 - b) Approved treatment providers would include chiropractors, physiotherapists, massage therapists, social workers, and psychologists.
 - c) Invoices or proposed invoices would be automatically paid or approval given (up to the capped amount available).
 - d) Payments for any treatment or other therapies required beyond the minimum amount, Treatment Plans would need to be submitted, and insurers would be permitted to contest the proposed treatments.
 - e) The test for entitlement would be the current test - whether the medical and rehabilitation treatments proposed or conducted are "reasonable and necessary".
6. Income Replacement Benefits would be payable at up to \$500.00 per week based on substantial inability to perform one's regular occupation, to the two-year mark following the accident, and continuing thereafter if total disability (based on current accident benefits legislation requirements) is established thereafter.
7. Non-Earner Benefits would be available and subject to a demonstration of a complete inability to carry on a normal life, commencing six-months post accident, if such inability can be proven.
8. The exclusions for payment of benefits would be expanded from those set out in Section 17 of the OMPP Schedule to include those set out in the Bill 59 and Bill 198 Accident Benefits Schedules.

RATIONALE

The transactional costs associated with determining catastrophic impairment entitlement are some of the most significant costs associated with the current no-fault benefits system. In keeping with the tort reform proposals, these accident benefits proposals lead to a simpler statutory accident benefits system, with current limits for medical, rehabilitation and attendant care coverage subject to such coverage being available when reasonable and necessary and regardless of whether the person is catastrophically impaired or not. In addition, funding up to \$5,000 is available for early treatment post-accident without restriction other than the treatment provider opining that it is reasonable and necessary. The income replacement benefit would increase to \$500.00 per week and the period of entitlement based upon the substantial inability test would remain at two years post-accident. These proposals are consistent with the purpose of no-fault benefits: to provide assistance early in the process without much restriction, regardless of fault.

We recommend the addition to the OMPP Schedule of the consumer protection legislation and anti-fraud measures which have been implemented under Bill 59 and Bill 168.

We support continuing to make available Optional Benefits, permitting insurers to sell coverage beyond those provided by the proposed Schedule, with consideration being given to update and increase amounts available to consumers, at additional costs to consumers. Permitting consumers to purchase higher levels of coverage, for income replacement benefits, medical/rehabilitation benefits, and attendant care benefits coverage, gives greater rights to the consumer of insurance products.

CONCLUSION

The Society believes that these recommended changes will benefit consumers, accident victims and the insurance industry – all of whom are represented by the Society's members. The overall benefits to consumers and insurers alike will be a reduction of the complexities in and the transaction costs for both tort and accident benefits claims, a return to proportionality, reasonable no-fault benefits and fair and consistent tort recovery, all at an affordable price.

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