

BOGOROCH & ASSOCIATES

LITIGATION *bulletin*

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A MESSAGE FROM RICHARD BOGOROCH



It is with great pleasure that we announce the first publication of the *Bogoroch & Associates Litigation Bulletin*. Beginning with this issue we will publish six times a year. We hope to inform, educate and inspire you in an interesting and lively fashion about matters of law, lawyers and occasionally the medical profession.

And we want to hear from you: suggestions for future topics, comments, and inspirational thoughts you would like to share with others. All suggestions and comments will be gratefully acknowledged when received.

It is difficult to believe that it was only four years ago that members of my team and I at Thomson, Rogers, formed Bogoroch & Associates. Starting with two lawyers and nine support staff, we are now a staff of thirty – lawyers, law clerks and legal assistants – including a full complement of evening personnel.

We continue to learn, grow and be inspired by our many clients, who with courage and grace face terrible injuries and afflictions. My passion for justice and commitment to excellence remains as unshaken now as when I started practicing in 1983.

Once again in 2003/04 we are faced with changes to automobile insurance legislation. It is perhaps fitting that since this firm specializes

in motor vehicle litigation we inaugurate our newsletter with a discussion of changes to the *Insurance Act*.

Since 1990 each successive government, it seems, has tinkered with, modified and altered the landscape for compensating injured accident victims. Two decades ago, there were no restrictions on the right to sue for damages as a result of injuries sustained in a motor vehicle accident. Twenty years later, restrictions on the right to sue are firmly established, income replacement benefits have not kept pace with inflation, deductibles for pain and suffering have increased and medical and rehabilitation benefits are limited.

Over the years, legislative change has increasingly favoured the guilty and penalized the innocent accident victim. Largely in response to demands of insurance companies, the government has brought in changes that are unfair, unjust and unwarranted. These changes to the *Insurance Act* effective October and November 2003 are generally unfair to victims.

What follows is a brief discussion of changes to the *Insurance Act* that you ought to be aware of, both to the tort system and to the *Statutory Accident Benefits Schedule*.

RICHARD M. BOGOROCH

“Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives.”

— JAMES MADISON,
4TH AMERICAN PRESIDENT

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**BOGOROCH
& ASSOCIATES**

Barristers and Solicitors

A passion for justice.
A commitment to excellence.



INSURANCE ACT: Recent changes in a nutshell

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Almost a year ago, in December 2002, Bill 198 (*Keeping the Promise for a Strong Economy Act*) was passed by the government of the day and for the most part became law. All that remained was for certain of its provisions to be declared into force by the government.

Several key provisions for injured claimants were declared in effect in October and November 2003. Those with the most import for injured claimants are discussed below.

OCTOBER 1, 2003

A person injured in an automobile accident on or after October 1, 2003 now has an extended right to sue for excess health care expenses. However, the injured person must not have been at fault, and must have died or sustained "permanent serious disfigurement" or "permanent serious impairment of an important physical mental or psychological function". The regulations (O. Reg. 381/03) provide a fairly complicated three-part definition of this impairment.

However, it is safe to say that this is an improvement over the previous provision, which required catastrophic impairment in order for an injured person to sue for excess health care expenses. In other words, it "lowers the bar" for plaintiffs seeking to recover these types of expenses.

A less positive change involves deductibles from damages awarded for pain and suffering (non-pecuniary damages). What does the term 'deductible' mean? It means that insurance companies simply reduce the value of the pain and suffering claim by an amount predetermined by the Insurance Act.

For automobile accidents that occur on or after October 1, 2003, damages for pain and suffering are subject to a deductible in the amount of \$30,000 for the injured person. Where the damage award for pain and suffering is made in favour of a family member, the deductible amount is \$15,000.00. For the injured

WHAT DO THE OCTOBER CHANGES TO DEDUCTIBLES MEAN IN PRACTICE?

Let's consider a person injured in an automobile accident and assessed as being entitled to \$60,000.00 for pain and suffering. Under the previous legislation that person would get \$45,000.00 for their pain and suffering. However, under the new amendments to the *Insurance Act*, this case will only attract an award of \$30,000.00.

Further, the accident victim's spouse may have assisted him/her, nursed, cooked, cleaned and done all of the chores that the accident victim would otherwise have done for a year or more. Under the new legislation, a partner awarded damages in the amount of \$15,000.00 under the *Family Law Act* would receive nothing given the \$15,000.00 deductible. Under previous legislation they would have received \$7,500.00

Unfortunately, this unfairness is what we now have to contend with.

person the deductible has increased from \$15, 000 to \$30,000 and for family members the deductible has increased from \$7,500 to \$15, 000.

However, the deductibles are eliminated where the amount of damages for pain and suffering is in excess of \$100,000 for the injured person and over \$50, 000.00 for a family member.

The Regulations also expand the previous definition of catastrophic impairment for the purposes of receipt of enhanced benefits for accidents occurring on or after October 1, 2003. (O.Reg. 281/03). Several changes are made to the definition to remedy previous deficiencies, such as those pertaining to loss of use of arms and legs. The most significant changes pertain to the impairment of a child under 16 where existing adult tests for impairment cannot be applied. In these cases, the new provisions provide for the child's impairment to be deemed catastrophic by analogy to the adult test.

SUMMARY OF RECENT CHANGES TO THE *INSURANCE ACT*

SUBJECT MATTER	ACCIDENTS OCCURRING FROM NOV. 01/96 – SEPT. 30/03	NEW PROVISIONS: BILL 198	EFFECTIVE DATE
<i>Suing for excess health care expenses</i>	<ul style="list-style-type: none"> Required catastrophic impairment to sue for excess health care expenses. 	<ul style="list-style-type: none"> Can now sue for extended health care expenses for "permanent serious impairment of an important physical, mental or psychological function". Complicated definition. Injured person not at fault. Threshold evidence required. 	Auto accidents occurring on/after October 1, 2003
<i>Deductibles from non-pecuniary damages</i>	<ul style="list-style-type: none"> \$15,000 for injured person. \$7,500 for family member. 	<ul style="list-style-type: none"> \$30,000 for injured person. \$15,000 for family member. No deductible where damages exceed \$100,000 for victim and \$50,00 for family member. 	Auto accidents occurring on/after October 1, 2003
<i>Definition of "Catastrophic Impairment"</i>	<p>EXAMPLES:</p> <ul style="list-style-type: none"> Required loss of an arm and a leg or two arms. No analogous test for child under 16. Glasgow coma scale 9 or less. Paraplegia Quadraplegia 	<ul style="list-style-type: none"> Now includes a loss of both legs. Clinical discretion allowed to determine that child under 16 catastrophically impaired by analogy to adult test. 	Auto accidents occurring on/after October 1, 2003
<i>Designated Assessment Centre (DAC)</i>	<ul style="list-style-type: none"> DACs responsible for handling benefits related disputes. DACs injury specific - i.e. disability, catastrophic etc. 	<ul style="list-style-type: none"> Two types of Med/Rehab DAC disputes now: Fast Track and Staged – Focused Fast track must be completed within 5 days. Staged – Focused report max. time is 42 days. 	October 1, 2003
<i>Medical Assessments</i>	<ul style="list-style-type: none"> Provided for funding of expert reports in support of benefit claims. 	<ul style="list-style-type: none"> Restrictions on type of reports funded. Restrictions on who may do assessments. Limits on what will be paid for reports. Some limited exceptions to requirement for prior approval of insurers. 	October 1, 2003
<i>Pre-Approved Framework (PAF)</i>	<ul style="list-style-type: none"> Maximum fees payable for treatment of whiplash and related minor injuries. Two frameworks : one for WAD I and one for WAD II (level of injury). 	<ul style="list-style-type: none"> Fees revised and reissued for both WAD I and II. No treatment plans during PAF period. 	Expenses incurred as of November 1, 2003
<i>Fee Guidelines</i>	<p>PROFESSIONAL FEES FOR:</p> <ul style="list-style-type: none"> Occupational therapists Podiatrists Physiotherapists Speech-Language Pathologists Psychologists etc. 	<ul style="list-style-type: none"> Previous guidelines revoked. Maximum fees set for completing forms, and for services of any health professional listed. 	Expenses incurred as of November 1, 2003

Other changes effective October 1, 2003 include the circumstances in which medical assessments will require prior approval of insurers and time-lines for Designated Assessment Centre Reports.

NOVEMBER 1, 2003

The new Professional Services Guidelines set out maximum fees for the services of any health

professional listed in the Guideline, and Pre-Approved Framework Guidelines (PAF) have also been revised for whiplash and related minor injuries. These guidelines apply to treatment provided on or after October 1, 2003 (PAF Guidelines) and November 1, 2003 (Professional Services Guidelines).

To obtain copies of legislation and regulations visit: www.e-laws.gov.on.ca.

To obtain copies of guidelines visit: www.fsco.gov.on.ca.



Recent and Upcoming Speaking Engagements Calendar



Bogoroch & Associates are honoured to have the opportunity to speak to groups & organizations on matters of legal interest. Below is a list of recent & upcoming speaking engagements:

OCTOBER 22, 2003: Richard Bogoroch presented on the subject of "Understanding and Managing the Increase in Chronic Claims and Newly Classified Disabilities" at the 3rd Annual Meeting, Your Duty to Accommodate, held in Toronto. This conference provides tools to assess and successfully tackle employment issues in the duty to accommodate. For a related paper prepared by Richard Bogoroch and Leanne Goldstein visit: www.bogoroch.com/frame_whatsnew.html.

NOVEMBER 3-5, 2003: Richard Bogoroch chaired a workshop on

how to effectively handle chronic fatigue, chronic pain and fibromyalgia litigation at the Litigating Disability Insurance Claims Conference in Toronto. At this conference leading insurance representatives, medical experts and trial lawyers from across Canada gathered to give their strategies for success in managing claims and building a winning case.

DECEMBER 2-3, 2003: Richard Bogoroch presented on the subject of "Shoulder Dystocia and Obstetric Liability: Effectively Avoiding Litigation" at the Patient Safety and Risk Management in

Obstetrics & Obstetric Malpractice conference in Toronto. A group of top legal and medical professionals presented the latest medico-legal developments and advances on patient safety and obstetric malpractice.

FEBRUARY 26-27, 2004: Richard Bogoroch will be presenting on the topic of Mediating and Settling Claims for Damages at the 2nd National Forum on Litigating Damages convening in Toronto. A select group of personal injury lawyers from across North America will be discussing the latest in damages law and proven strategies for litigating damages.

If you or your organization would like a member of our team for a speaking engagement, kindly contact **Mary Battaglia**: mbattaglia@bogoroch.com or (416) 341-5606.

THOUGHTS ON THE MEANING OF LIFE

"What is the use of living if it be not to strive for noble causes and to make this muddled world a better place for those who will live in it after we are gone?"

— SIR WINSTON CHURCHILL

"Never give in, never give in, never, never, never, never—in nothing great or small, large or petty—never give in except to convictions of honor and good sense".

— SIR WINSTON CHURCHILL



Legal Lexicon

DEFINITIONS OF COMMON LEGAL TERMINOLOGY

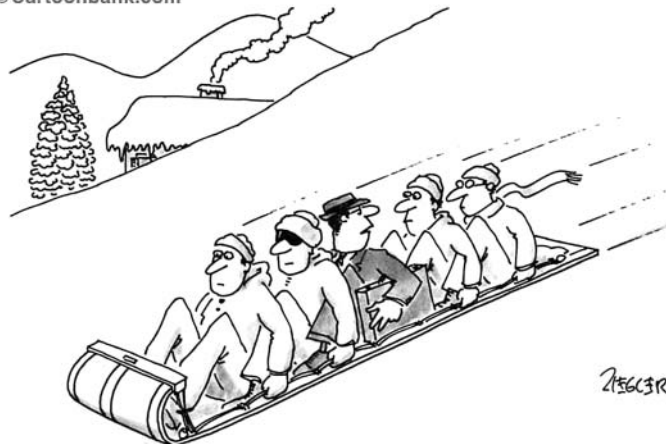
Non-Pecuniary/General Damages: Non-pecuniary or general damages are also known as damages for pain, suffering and loss of enjoyment of life. In general, these damages are an award of money made to an injured person for losses that are not strictly financial and are not easily measured in financial terms. They are designed to be solace for the injured person's misfortune. By way of contrast, pecuniary losses would include damages for lost income and future lost income.

Non-Pecuniary Damages Trilogy: Three cases decided by the Supreme Court of Canada in 1978 determined a threshold or limit on damages that can be awarded for pain and suffering. When these cases were decided the limit imposed was \$100,000.00 which is now equivalent to approximately \$296,000.00; the current ceiling for an award for pain and suffering. (The trilogy consists of *Andrews v. Grand and Toy Alberta Ltd.*; *Thornton v. Board of School Trustees of School District no. 57*; and *Arnold v. Teno.*)

Tort: A tort is simply a civil wrong that confers the right to sue in court for damages. Whenever someone sues as a result of a car accident, slip and fall, medical malpractice or other injury, they are pursuing what is known as a "tort claim".

Deductibles: This is an amount predetermined by the *Insurance Act* by which insurance companies reduce the value of a pain & suffering claim.

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"Look, I'm not saying it's going to be today. But someday—someday—you guys will be happy that you've taken along a lawyer."

NEXT ISSUE

Coming up in our next Newsletter

March 2004:
Medical Malpractice.

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