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Preliminary Requirements under Bill 198: The Plaintiff's Perspective

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Friday, January 14, 2005

I. Introduction

In October 2003, the Ontario government introduced legislation which has now become commonly known as 'Bill 198', and which resulted in significant changes to automobile insurance claims relating to accidents occurring after October 1, 2003. Bill 198 has and will continue to dramatically alter the landscape of motor vehicle accident litigation and has impacted on both tort and accident benefits claims, both by imposing new time requirements applicable to statutory accident benefits claims and by narrowing the threshold for non-pecuniary damage claims in tort.

While the increased deductible in tort and the Pre-Approved (PAF) framework applicable to accident benefits claims have undoubtedly reduced the number and the extent of claims since October 2003, the practical import of the changes to the threshold provisions applicable to tort claims and the changes to the statutory accident benefits regime remains to be seen. However, in the interim, it is incumbent on Plaintiff's counsel to be fully cognizant of these changes and their potential impact on their clients' claims.

II. Tort Claims

A. The 'New' Threshold: Statutory Provisions

The new Ontario Regulation 381/03, which introduced changes to the statutory accident benefits regime, has also modified Ontario Regulation 461/96 with respect to the tort threshold for claims for non-pecuniary general damages with respect to motor vehicle accidents after October 1, 2003[1]. However, although the wording of the threshold test has changed somewhat under Bill 198, the essential elements of the test remain the same. What has changed is that, instead of leaving the interpretation of the various elements of

[1] While the Regulation indicates that the changes apply to all motor vehicle accidents after October 1, 2003, given that the Regulation was not printed until October 4, 2003, the new threshold may not apply to accidents that took place between October 1 and 4, 2003.

the test to the Courts, Bill 198 purports to codify the definitions of these elements and to introduce new requirements applicable to evidence in support of claims for non-pecuniary general damages.

The threshold rule has been in place, in various incarnations, since the introduction of the Ontario Motorist Protection Plan ("OMPP"), which came into force on June 22, 1990. The introduction of the threshold rule served to limit claims by imposing a standard of severity applicable to injuries sustained in motor vehicle accidents which had to be met in order for a Plaintiff to claim any damages in tort. Bill 164, which replaced the OMPP legislation for motor vehicle accidents between January 1, 1994 and October 31, 1996. Bill 164 prevented a Plaintiff from obtaining compensation for non-pecuniary general damages unless it was established that the Plaintiff's injuries and impairment constituted a serious disfigurement or a serious impairment of an important physical, mental or psychological function.

Under Bill 59, which applies to motor vehicle accidents between November 1, 1996 and September 30, 2003, the threshold rule prevented claimants from suing for non-pecuniary losses unless, as a result of the use or operation of a motor vehicle, the injured person died or sustained a "permanent serious disfigurement" or a "permanent serious impairment of an important physical, mental or psychological function".[2] It is important to note, given the wording of the new legislation introduced under Bill 198, that the threshold under Bill 59 is not applicable to claims for loss of income; in other words, a Plaintiff is not prevented under Bill 59 from suing for loss of income, even if her claim does not meet the threshold. It is clear from this provision that the tests for general damages and loss of income are meant to be separate and distinct so as not to render a

[2] *Insurance Act*, R.S.O. 1990, c. I.8, 267.5(5)

claim for loss of income dependent on the success of a claim for general damages, or vice versa.

The most recent changes to the threshold rule occurred under Bill 198. Under this most recent legislation, the wording of the threshold test remains the same as that under Bill 59, but the descriptive terms used within the test are defined in a manner which is clearly designed to further limit claims for non-pecuniary general damages. These recent changes represent an effort by the former Conservative government to satisfy the interests of the insurance industry, to the detriment of innocent accident victims. As will be discussed below, the wording of the legislation confuses the former distinction between the threshold test applicable to claims for general damages and a Plaintiff's right to sue for loss of income by making an inability to work a condition of almost all claims for general damages.

The new, highly restrictive criteria applicable to the non-pecuniary loss threshold are as follows[3]:

1. A "permanent serious **impairment**" is defined as an impairment that substantially interferes with either:
    a. the person's ability to continue her regular or usual employment, despite reasonable accommodation provided and her reasonable efforts to use such accommodation;
    b. the person's ability to continue training for a career in which she was being trained before the accident, despite reasonable accommodation provided and her reasonable efforts to use such accommodation; **or**
    c. most of the usual activities of daily living, considering the person's age.

[3] *Ont. Reg. 461/96 – Court Proceedings for Automobile Accidents that Occur on or After November 1, 1996* made under the *Insurance Act*, R.S.O, 1990, c. I.8, and as amended by O. Reg. 312/03 and O. Reg. 381/03, at section 4.2.

2. An “**important function**” is one that is either:

a. necessary to perform the essential tasks of the person’s regular or usual employment, taking into account reasonable accommodation provided and reasonable efforts to use such accommodation;

b. necessary to perform the essential tasks of the person’s training for a career in which the person was being trained before the accident, taking into account reasonable accommodation provided and reasonable efforts to use such accommodation;

c. necessary for the person to provide for his own care or well-being; **or**

d. important to the usual activities of daily living, considering the person’s age.

3. A “**permanent** impairment” is one that:

a. has been continuous since the accident **and** is not expected to substantially improve;

b. meets the criteria for a “permanent serious impairment” set out above; **and**

c. is of a nature that is expected to continue without substantial improvement when sustained by persons in similar circumstances.

The Regulation also includes a description of the evidence required to prove that an injured person meets the non-pecuniary loss threshold. Specifically, the Regulation sets out the requirement that the claimant adduce the evidence of **one or more physicians**, subject to certain specific criteria[4], which are set out below:

1. The evidence must explain the nature of the impairment, its permanence, the specific function that is impaired and the importance of the specific function;
2. The physician providing the evidence must be trained for and experienced in the assessment or treatment of the type of impairment alleged;
3. The evidence must be based on medical evidence in accordance with generally accepted guidelines or standards of medical practice; **and**
4. The evidence shall include a conclusion that the impairment is directly or indirectly sustained as the result of the use or operation of an automobile.

In addition to the evidence of a physician, the claimant must also adduce "**evidence that corroborates the change in the function that is alleged to be a permanent serious impairment of an important physical, mental or psychological function**".

B. Problems with the 'New' Threshold

While the wording of the threshold test remains the same, Regulation 381/03 has imposed an extremely narrow definition of individuals whose injuries will be deemed to meet the threshold for non-pecuniary general damages. The new definition focuses primarily on the injured person's ability to work or to care for herself as a measure of her entitlement to general damages, which are designed to compensate an injured person for pain and suffering.

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[4] *Ont. Reg. 461/96 – Court Proceedings for Automobile Accidents that Occur on or After November 1, 1996* made under the *Insurance Act*, R.S.O, 1990, c. I.8, and as amended by O. Reg. 312/03 and O. Reg. 381/03, at section 4.3.

Most significantly, the definition ignores the significance of other compromises in function that may be equally important and debilitating to those who do not fit within the traditional working model; for example, those who are not employed outside the home, or those who, while their ability to work is not compromised, have suffered a significant reduction in their enjoyment of life or who have undergone extensive or painful surgeries or other medical procedures. Seriously injured Plaintiffs, including retirees, homemakers, stay-at-home parents or caregivers for elderly relatives, elementary or high school students and young children are among only a few of those whose right to sue may be lost.

Consider, for example, the case of a lawyer who suffers significant injury to his legs as a result of a motor vehicle accident. While this individual would likely be able to return to his pre-accident employment with some modifications, he would not be able to pursue sporting and leisure activities or perhaps to enjoy activities with his spouse or children, which may have formerly been an integral part of his life. Although the diminished function in his legs would have a profound impact on his enjoyment and quality of life and likely on his familial and social relationships, a literal or narrow reading of the new threshold test could prevent him from advancing a non-pecuniary loss claim, **unless he can show that the impairment substantially interferes with most of his activities of daily living.**

There are innumerable vagaries contained in the new legislation and in particular, the provisions dealing with an injured person's activities of daily living, "considering the person's age". An example of the myriad situations the legislation fails to address includes degenerative injuries which, while they may not interfere with a Plaintiff's activities of daily living immediately following the accident, can be expected to result in additional problems as he ages. Further, it is unclear the time frame one must use in considering a person's activities of daily living: is one limited to looking at the activities

the Plaintiff was engaged in immediately prior to the accident, or is one permitted to consider future plans such as marriage or child rearing, which may reasonably have been contemplated by the Plaintiff?

In addition, and as stated above, the new Regulation appears to confuse or confound the test for non-pecuniary general damages and the test of loss of income/impairment of earning capacity. The wording of the new Regulation suggests that, unless the injured person suffers a loss of his ability to work, there can be no corresponding loss of enjoyment of life or pain and suffering sufficient to trigger entitlement to non-pecuniary damages–an absurdity given the realities of the potential impact of accidents on an individual's entire life.

Further, by including in the definition of "permanent impairment" a requirement that the impairment be of a nature that would be expected to continue without substantial improvement when sustained by persons in **similar circumstances**, the Regulation's drafters appear to be attempting to introduce some element of "objectivity" into the threshold determination.

Aside from the practical difficulties of obtaining evidence from individuals in "similar circumstances" the drafters fail to define the criteria to be used in identifying those who might be considered to be in "similar circumstances" to the injured person. The term "similar circumstances", is so vague as to be utterly impractical and useless as an indicator of the severity of a Plaintiff's injury.

Further, the definition does not take into account the innumerable factors (including factors such as pre-existing physical or psychological vulnerabilities, personality type, background and social supports) which may affect the impact of injury on an injured person and his recovery. A claim for non-pecuniary general damages is, by its very

nature, intended to be calculated by taking into consideration the injured person's individual circumstances, such as lifestyle, leisure activities, hobbies and relationships and the impact the accident on his overall quality of life. The introduction of an 'objective' component based on the anticipated reaction to injury by a theoretical individual in "similar circumstances" is not only wholly inappropriate, but also impossible to apply in any meaningful way.

C. Strategies for Dealing with the 'New' Threshold

As indicated above, without changing the applicable test, the 'new' threshold nonetheless poses a number of new barriers to recovery by claimants. However, in terms of preparation of a Plaintiff's case, either in the initial stages or in preparation for trial, the conduct of a Plaintiff's case is not, at this time, expected to change significantly.

The evidentiary requirement that a qualified physician provide evidence of permanent serious impairment resulting from a motor vehicle accident imposes no new obligations on a Plaintiff, since experienced Plaintiff's counsel have long been aware of the importance of retaining appropriately qualified experts to comment on these very issues. Therefore, the Regulation does nothing more than articulate a long-standing practice.

Similarly, the requirement that a claimant adduce evidence to corroborate the change in the important function alleged to have been impaired does not change the practical realities of preparing the Plaintiff's case. Experienced Plaintiffs' counsel have long been aware of the need to fully explore the Plaintiff's pre-accident activities and pre-accident health to demonstrate the impact of the accident on the Plaintiff's health, abilities and quality of life.

While the threshold requirements under Regulation 381/03 may provide insurers with additional grounds on which to attempt to deny claims for non-pecuniary loss, Plaintiff's

counsel must simply be prepared to meet these arguments at mediation or trial. Once the appropriate experts are marshalled, causation is established and the impact of the accident on the Plaintiff's life has been fully explored and put forward, the Regulation may have very little practical effect, other than to increase the number of 'threshold motions' brought by Defendants. Until the Court considers these definitions (which has not occurred in any reported decisions to date), the practical import of the new Regulation on Plaintiff's claims cannot be known.

However, a look at prior Court decisions dealing with the threshold tests under the OMPP, Bill 164 and Bill 59 may be helpful. Following *Meyer* v. *Bright*[5], the first Court of Appeal decision on the issue, the Courts have considered the threshold under the various legislation. A review of such decisions may provide a framework for determining the manner in which Courts will likely interpret the threshold provisions under Bill 198. What is most significant in the *Meyer* case, particularly in light of the "similar circumstances" provision, is the Court of Appeal's finding that the question of whether a Plaintiff meets the threshold cannot be determined by an objective standard and must be considered on the facts of the individual case. Specifically, with respect to the seriousness of an injury, the Court states as follows:

> It is irrelevant to the determination of whether the particular injured person has sustained a serious impairment that the impairment would not be serious to someone else, to many others or indeed to all other persons. The question is whether it is serious to the particular injured person who is before the court.

The Courts have generally followed the principles enunciated in the *Meyer* case, applying an appropriately liberal and fact-specific threshold test. Specifically, in *May* v. *Casola*[6],

[5] (1993), 15 O.R. (3d) 651 (C.A.).

[6] [1998] O.J. No. 2475 (C.A.).

the Court of Appeal found that a university student who suffered soft-tissue injuries resulting in vertigo, nausea, neck pain and headaches and who was able to work following her graduation had suffered a significant impairment of her enjoyment of life and therefore met the threshold.

A number of other cases apply the principles enumerated in *May*, distinguishing between a Plaintiff's ability to work and the determination of whether her injuries meet the threshold and considering factors such as diminished employment prospects and impaired job performance.[7] The Courts have also accepted non-pecuniary loss claims advanced by Plaintiffs who are not employed at the time they are injured, including very elderly Plaintiffs[8], previously disabled Plaintiffs[9] and Plaintiffs who act as caregivers without remuneration[10].

The threshold cases under the previous legislation make it clear that, since the implementation of the first threshold test under the OMPP legislation, the Courts have taken a broad, liberal and fact-specific approach to determination of entitlement to non-pecuniary general damages. Whether this trend will continue in decisions under Bill 198 remains to be seen, but certainly Plaintiffs' counsel will have ample grounds on which to advocate for the fact-specific test heretofore supported by Ontario courts under the previous legislation.

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[7] See, for example, *Trench* v. *Samy* (1995), 52 A.C.W.S. (3d) 893 (Ont. Gen. Div) and *Chrappa* v. *Ohm* (1998), 38 O.R. (3d) 651(C.A.).

[8] *Knudsen* v. *Tyckyj* (1994), 21 O.R. (3d) 44 (Ont. Gen. Div.).

[9] *Vrdoljak* v. *Hamilton Street Railway Co.* (1994), 24 O.R. (3d) 613 (Ont. Gen. Div.); (1997), 37 O.R. (3d) 736 (C.A.).

[10] *Robb* v. *Becking*, [1997] O.J. No. 5610 (Ont. Gen. Div.).

III. Claims for Statutory Accident Benefits

A. Preliminary Timelines

Bill 198 imposes extremely stringent timelines on an insured person claiming statutory accident benefits under the *Statutory Accident Benefits Schedule* (hereinafter "the *Schedule*"). This is particularly true when one considers that an insured person claiming statutory accident benefits, particularly an insured person with significant injuries, is generally focused on issues other than insurance regulations in the days, weeks and even months following the accident. It is also interesting to note that the obligations imposed on an insured person are significantly more onerous than those imposed on insurers.

In contrast to Bill 59, which provided 30 days for the insured person to advise the insurer of a claim for statutory accident benefits, Bill 198 requires that an insured person must notify his insurer of his intention to apply for statutory accident benefits within seven days, "or as soon as is practicable thereafter" after the motor vehicle accident[11]. Failure to do so without a "reasonable explanation"[12] may delay the determination of entitlement to (i.e., payment of) certain benefits by up to 45 days from the date the insurer receives the completed Application for Accident Benefits[13].

In contrast to the strict time limits imposed on the insured person, the rule applicable to the insurer's corresponding obligation to respond to notice of the claim is much more lenient, stating only that the insurer must "promptly" provide the insured person with the Application for Accident Benefits[14]. The insured person must then submit the completed

[11] See s. 32 (1.1) of the *Schedule*.

[12] See s. 31 (1) of the *Schedule*.

[13] See s. 32 (6) of the *Schedule*.

[14] See s. 32 (2) of the *Schedule*.

Application for Accident Benefits to the insurer within 30 days from the day he receives it[15].

If an Application for Accident Benefits submitted by an insured person to the insurer is incomplete, the insurer must notify the insured within 14 days of receiving it[16]. Thereafter, the insured person must provide the required information to the insurer. No benefit is payable until the insured person provides the requested information.

If the insurer requests any of the following information from an insured person:

a. Any information 'reasonably required' to assist the insurer in determining the person's entitlement to a benefit;
b. A statutory declaration as to the circumstances that gave rise to the application for a benefit;
c. The number, street and municipality where the insured ordinarily resides; or
d. Proof of the insured's identity;

the insured person must provide this information to the insurer within 14 days after receiving the request[17].

B. Pre-Approved Framework

In addition to the new timelines applicable to the initial application for accident benefits, there are also new timelines, as well as new procedures, relating to claims for medical and rehabilitation benefits. Many of these new timelines relate to claims under the Pre-Approved Framework ("PAF") guidelines, which apply to claimants whose injuries are

[15] See s. 32 (3) of the *Schedule*.

[16] See s. 31 (3.1) of the *Schedule*.

[17] See s. 33 (1) of the *Schedule*.

limited to WAD-I or WAD-II injuries. For individuals who are designated as falling under the PAF guidelines, Bill 198 establishes limits on the extent and duration of the treatment which will be provided.

With respect to claims by insureds who suffer WAD-I injuries, an initial medical assessment must be completed and an OCF-23 Treatment Confirmation Form must be submitted to the insurance company within 21 days of the accident. The treatment itself must be completed within 28 days from the date of the initial assessment.

With respect to claims by insureds who suffer WAD-II injuries, the initial medical assessment must be completed and an OCF-23 Treatment Confirmation Form must be submitted to the insurance company within 28 days of the accident. The treatment itself must be completed within six to seven weeks from the date of the initial assessment.

C. Treatment Plans and Assessments

As most personal injury practitioners are aware by now, under Bill 198, the insured person must obtain prior approval for all assessments relating to medical and rehabilitative treatment, with certain exceptions[18].

The *Schedule* imposes time limits on an insurer to respond to an application for approval of an assessment. If the amount to be charged for the assessment is $180.00 or less, notice of approval or denial is to be provided within two business days from receipt of the application and, if the amount is greater than $180.00, notice shall be given within five

[18] For example, an assessment to complete a Treatment Plan where there is an immediate risk of harm to the insured, or a person the insured person's care (see s. 24 (1.2) of the *Schedule*).

business days[19]. If the insurer does not respond within the required time, the insurer is deemed to have agreed to pay for the assessment[20].

Similar time limits are also applicable to approval of Treatment Plans, to which an insurer must respond within 14 days of submission[21]. If an insurer does not respond to a Treatment Plan within 14 days of its submission, all expenses incurred between the expiry of the 14-day period and the date the insurer gives notice are deemed payable[22].

Knowledge of these provisions can be an extremely useful tool in handling claims for accident benefits and can prevent unnecessary delays in examination and treatment.

D. Examinations Under Oath

Another new development under Bill 198 is the requirement that, if requested by an insurer, an insured person must submit to an examination under oath. However, there are restrictions and conditions applicable to the insurer's right to such examinations, which are as follows:

1. The insured is not required to submit to more than one examination under oath in respect of matters relating to the same accident[23];
2. The insured is not required to submit to an examination under oath during a period when she is incapable of being examined because of her physical, mental or psychological condition[24];

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[19] See s. 24 (1.3) of the *Schedule*.

[20] See s. 24 (1.5) of the *Schedule*.

[21] See s. 38 (8.1) of the *Schedule*.

[22] See s. 38 (8.2) 2. of the *Schedule*.

[23] See s. 33 (1.1(a)) of the *Schedule*.

3. The insured is entitled to be represented by counsel or a representative of her choice[25];
4. The insurer must provide the insured person with the reason or reasons for the examination[26];
5. The scope of the examination is limited to matters relevant to the insured's entitlement to statutory accident benefits[27].

Failure to comply with a request for an examination under oath negates the insurer's obligation to pay statutory accident benefits. However, any benefits suspended during a period of non-compliance shall be resumed once the insured has submitted to an examination under oath and all amounts withheld during a period of non-compliance shall similarly be paid, provided the insured provides a "reasonable explanation for the delay"[28].

It has been our experience that most insurers do not request examinations under oath and are content to proceed on the basis of a statement provided by the insured, as under Bill 59. However, under the broad wording of s. 33, an insurer would be entitled to **both a statement provided by the insured and the insured's evidence under oath**.

Further, such examinations under oath may take place at any time during the course of the claim. Therefore, it is possible that, in circumstances where a dispute between an

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[24] See s. 33 (1.1(b)) of the *Schedule*.

[25] See s. 33 (1.2) of the *Schedule*.

[26] See s. 33 (1.3) 3. of the *Schedule*.

[27] See s. 33 (1.4) of the *Schedule*.

[28] See s. 33 (4) of the *Schedule*.

insurer and an insured is proceeding to arbitration, the insurer may exercise its right to have the insured person examined under oath, thereby obtaining a transcript of sworn evidence which may be used to impeach the insured person at arbitration. However, unlike Examinations for Discovery in the litigation process, the insured person has no such corresponding right to examine a representative of the insurer. This may influence counsel's decision as to whether to proceed to arbitration or litigation following a failed Financial Services Commission of Ontario mediation.

IV. Conclusion

The relatively recent implementation of Bill 198; in particular, the changes to the threshold definition, render it difficult to predict the practical impact of such changes on the rights of claimants. Without court decisions interpreting the new threshold, it is not possible to predict whether the changes will result in changes to a plaintiff's practice. However, with the new deadlines imposed under the *Statutory Accident Benefits Schedule*, there are new, and more onerous, obligations imposed on claimants and it is therefore essential that Plaintiffs' counsel be aware of the new legislation and its potential impact on claimants' entitlement to benefits.