

Common Issues in
the Automobile
Litigation Process –
A Primer for
Insurance
Professionals

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Overview

1. Jurisdictional Issues
2. Pleadings
3. Liability
4. Damages
5. Collateral Benefits
6. Prejudgment Interest
7. Costs
8. Mediation and Pre-Trial Conference
9. Loss Control Measures

1. Jurisdictional Issues



Jurisdiction

- If accident occurs in the U.S.A., does an Ontario court have jurisdiction over a lawsuit?
- Supreme Court of Canada: *Van Breda v. Village Resorts Ltd.* (2012)
 - *Jurisdiction simpliciter*
 - *Forum conveniens*

Jurisdiction simpliciter

- 4 main factors for Ontario court to assume jurisdiction:
 - a) the defendant is domiciled or resident in Ontario;
 - b) the defendant carries on business in Ontario;
 - c) the tort was committed in Ontario; and
 - d) a contract connected with the dispute was made in Ontario.

Forum Conveniens

- If one of the factors is met, an Ontario court most likely has jurisdiction
- But court still has discretion to refuse jurisdiction if there is another more convenient forum
- Defendant can challenge
- Burden to show compelling reason why jurisdiction should be declined

Forum Conveniens

- Factors court will consider:
 - Location of parties and witnesses
 - Cost of transferring case to another jurisdiction
 - Possibility of conflicting judgments
 - Issues re: enforcement of judgments
 - Relative strength of connection of parties
 - Other parties with connection to jurisdiction

Forum Conveniens

- What if plaintiff names his/her own Ontario insurer as co-defendant?
- Contract connected with dispute made in Ontario?
 - Ontario Court of Appeal: this type of claim is not a factor to establish jurisdiction.
 - *Tamminga v. Tamminga*, 2014 ONCA 478

Choice of Law

- Substantive vs procedural law
- Substantive:
 - jurisdiction in which accident occurred
 - Examples: limitation periods, existence of thresholds or deductibles, ability of family members to recover damages
- Procedural:
 - Jurisdiction in which action is taking place
 - Gowns/wigs for lawyers

Protected Defendant Undertaking

- Some insurers signed this undertaking
- Applies to accidents in Ontario
- Insurers who sign this undertaking receive certain protections under Ontario *Insurance Act*: threshold, deductible, less past loss of income
- In exchange, these insurers must provide SABS, uninsured coverage, and minimum 3rd party liability limits, presently at \$200,000

Protected Defendant Undertaking

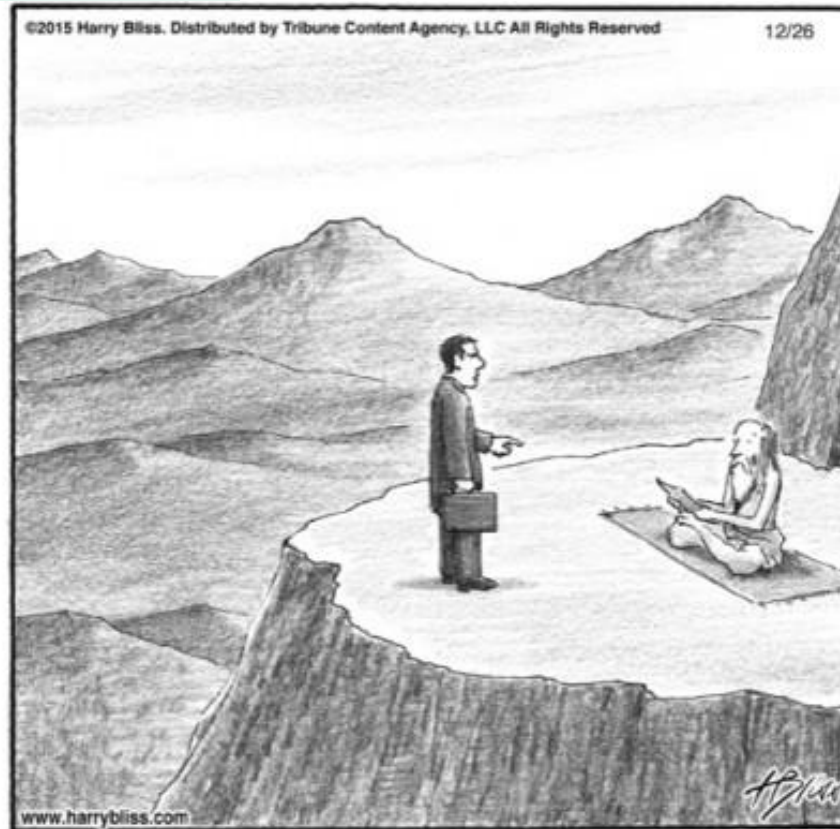
- Result is that some insurers may have much greater exposure than they ever contemplated under policy
 - Greater minimum third party liability limits
 - SABs for insured, with possibility of loss transfer
 - SABs for others involved in the accident (priority dispute)

Limitation Period

- Presumption of 2 years
- But can be extended based on when claim was “discovered”
- Claim is discoverable when plaintiff knew or ought to have known that he/she sustained injury that would meet threshold and otherwise has a claim



2. Pleadings



"You've been served."

Service of Claim

- Plaintiff has 6 months to serve statement of claim after date of issue
- Claim must be served personally or by alternative to personal service (e.g., leaving with adult member of same household and then mailing copy)

Service of Claim

- Plaintiff cannot serve insurer instead of serving insured, unless there is court order for substituted service
- Should request certain terms if ever going to accept service or consent to an order for substituted service
- e.g., limit claim to policy limits; plaintiff will not seek to strike defence if insured cannot swear affidavit of documents or attend discovery (comply with *Rules*)

Responding to the Claim: 11 Things to Consider

1. Jurisdiction
2. Simplified procedure; Small Claims Court
3. Jury or non-jury
4. Date of issue (date of loss; service of claim)
5. Parties under disability
6. Other party defendants
7. Quantum and nature of damage sought (punitive damages?)
8. Nature of the claim and allegations:
 - a) Motor vehicle allegations only
 - b) Intentional torts
9. Description of injuries
10. Plaintiff and counsel
11. Overall representation of the claim

Deadline for Defence

- 20 days if served in Ontario
- 40 days if served elsewhere in Canada or in U.S.A.
- Plaintiffs' lawyers will often provide waiver or extension to deadline
- Should not enter defence if challenging jurisdiction
 - May be seen to have 'attorned' to jurisdiction

Juries



Juries

- Filing a jury notice is recommended except in very tragic cases where emotion and sympathy could inflate damages
- Jury notice can be filed without consent of other parties, if done within 10 days of filing of statement of defence
- Jury not always allowed – e.g., if Crown is a co-defendant

Juries

- Juries tend to award lower damages than judges in Ontario
- Not many instances of “runaway juries”
- But juries are more unpredictable

Jury

- Lawyers not permitted to ask prospective jurors questions
- Only know their names, addresses, and occupations
- Six jurors selected
- Four challenges permitted

3. Liability

Liability

- Joint and several liability – applies to 2 or more tortfeasors
- If Def. A even 1% liable and Def. B 99% liable, plaintiff has right to recover full damages from Def. A
- Def. A then has to pursue Def. B
- Practically, only applies if one defendant is uninsured, or does not have enough insurance or assets to cover his/her share

4. Damages



Cap on Generals

- Upper limit on non-pecuniary general damages (pain & suffering)
- Was \$387,464 in May 2019, and rising
- Adjusted for inflation

Chronic Pain



- Courts have accepted as legitimate
- Supreme Court of Canada: *Nova Scotia (Workers' Compensation Board) v. Martin* (2003)
- “No authoritative definition of chronic pain”

Chronic Pain

- “Generally considered to be pain that persists beyond the normal healing time for the underlying injury or is disproportionate to such injury, and whose existence is not supported by objective findings at the site of the injury under current medical techniques.”

Chronic Pain

- “Despite this lack of objective findings, there is no doubt that chronic pain patients are suffering and in distress, and that the disability they experience is real.”

Chronic Pain

- Very wide range of damages
- In 2008, the Court of Appeal for Ontario examined various chronic pain cases: \$55,000 to \$120,000
- C.A.: \$80,000 is reasonable for debilitating chronic pain/fibromyalgia
- Often dependent in large part on plaintiff's credibility
- Juries of late generally assessing very low

Mental Injuries

- Supreme Court of Canada has greatly increased ability to claim these damages:
- *Saadati v. Moorehead* (2017)
 - No physical injury from accident
 - Friends said personality changed, now sullen and prone to mood swings
 - No expert evidence
 - \$100,000 non-pecuniary general damages awarded at trial

Mental Injuries

- Supreme Court:
 - Recognized stigma with mental injuries
 - Trier of fact to be concerned with symptoms and effect, rather than simply diagnosis
 - Also limit: no legal right to happiness, need serious and prolonged injury above ordinary annoyance, anxiety or fear
 - Still, concern for insurers
 - Need experts to respond

Mental Injuries

- Juries presently assessing damage for mental injuries quite high
- Particularly PTSD, if backed up by medical evidence and lay witnesses



Threshold

- Legislative intent was to discourage lawsuits over minor injuries - Trade-off for enhanced SABs
- Only applies to non-pecuniary general damages (pain & suffering) and health care expenses
- Other damages are not subject to threshold – e.g., loss of income, housekeeping
- Determined by trial judge, not jury

Threshold

- 3 ways to meet threshold:
 1. Death;
 2. Permanent serious disfigurement (e.g., scarring); or
 3. Permanent serious impairment of an important physical, mental or psychological function.
- Defined in legislation:

Threshold

Permanent Serious Impairment of Important Function

“Permanent” means:

- Continuous since accident; and
- Not expected to substantially improve based on medical evidence and subject to plaintiff reasonably participating in recommended treatment; and
- Expected to continue without substantial improvement when compared with people in similar circumstances.

Threshold

Permanent Serious Impairment of Important Function

“Serious” means:

- Substantial interference with ability to engage in usual employment or to continue training, despite reasonable efforts to accommodate, or
- Substantial interference with most of the usual activities of daily living, considering the person’s age.

Threshold

Permanent Serious Impairment of Important Function

“Important function” means:

- Necessary to perform essential tasks of employment or training; or
- Necessary for own care or well-being; or
- Important to usual activities of daily living, considering person’s age.

Threshold

Brak v. Walsh – Ont. C.A. (2008)

- “The requirement that the impairment be ‘serious’ may be satisfied even although plaintiffs, through determination, resume the activities of employment and the responsibilities of household but continue to experience pain.”

Threshold

Brak v. Walsh – Ont. C.A. (2008)

- “In such cases it must also be considered whether the continuing pain seriously affects their enjoyment of life, their ability to socialize with others, have intimate relations, enjoy their children, and engage in recreational pursuits. “

Deductible

	Non-Pecuniary Damages		<i>Family Law Act Claims</i>	
	Monetary Threshold	Deductible Amount	Monetary Threshold	Deductible Amount
January 1, 2019 to December 31, 2019	\$129,395.49	\$38,818.97	\$64,697.21	\$19,409.49

Amounts above apply retrospectively, and are adjusted annually with inflation

Applicable monetary threshold deductibles are those in place as of the date of trial

Costs and Deductibles

In a positive development for the defence, s. 267.5(9) of the *Insurance Act* was amended in 2015 to clarify that:

...the determination of a party's entitlement to costs "shall be made **with regard to the effect** of [the statutory deductible] on the amount of damages, if any, awarded for non-pecuniary loss.

- The change is understood to direct a costs assessment based on the net award (i.e. no costs payable on the Deductible) instead of gross damages
- Also has major impact on whether defendant beat its offer
- As can now compare net offer with net result

Family Law Act

Claims can be advanced by:

- The Family “t”
 - spouses
 - children
 - grandchildren
 - parents
 - grandparents
 - brothers
 - sisters

Family Law Act

Most common FLA damages:

- loss of guidance, care and companionship.
- loss of income or an amount for value of services where the family member provides nursing, housekeeping or other services for the injured person.
- loss of dependency in wrongful death claims.

Family Law Act

- Loss of opportunity
 - *McCartney v. Warner*
 - Relatively new trend in *FLA* damages
 - Where *FLA* claimant sues for own income loss arising from grief and emotional upset from death or grievous injury to family member

Loss of Income and Auto Restrictions

- Zero for first 7 days after accident
- Prior to trial: 70% of gross income (for accidents on or after Sept. 1/10)
- After trial: 100% of gross income

Loss of Competitive Advantage

- Range of jobs available to plaintiff have diminished due to injuries
- Cannot compete as freely in marketplace

Housekeeping



- Different types of claims can be advanced (*McIntyre v. Docherty*):
 - Pecuniary: expenses to hire others
 - Past and future
 - Non-pecuniary: diminished capacity or less efficiency
 - i.e. takes longer to clean house due to pain or restrictions, some housework left undone

Past and Future Care

- Also subject to threshold
- Plaintiffs' lawyers often retain occupational therapists or life care planners
- Assistive devices
- Treatment
- Medication
- Attendant care
- Home renovations
- Largest exposure in serious cases

5. Collateral Benefits

Collateral Benefits

- Includes Statutory Accident Benefits, STD, LTD, Canada Pension Plan disability benefits.
- Prior to trial, deductions permitted for most pecuniary payments (e.g., income loss, healthcare, housekeeping)
- For future losses (post-trial), defendant has to pay full amount, and plaintiff is required to hold benefits in trust or assign benefits to defendant

Collateral Benefits

- Onus is on plaintiff to prove all past and future health care needs
- Defendant is entitled to:
 - Deduction of entirety of SABs paid, per category, if SABs file settled prior to trial; or
 - Reduction of entirety of SABs paid, per category, plus an assignment of the plaintiff's entitlement to SABs, if SABs file still open as of trial

Collateral Benefits

- *Carroll v. McEwen*, 2018 ONCA 902
- Plaintiff must prove all losses, even if covered by collateral benefits
- Key impact where:
 - Liability split
 - Generous SABs payments
- No temporal matching
 - Can deduct post-age 65 income payments (settlement) from award of past income loss
- No greater categorical matching than statute (silo)
 - Can deduct attendant care from med/rehab award

6. Prejudgment Interest



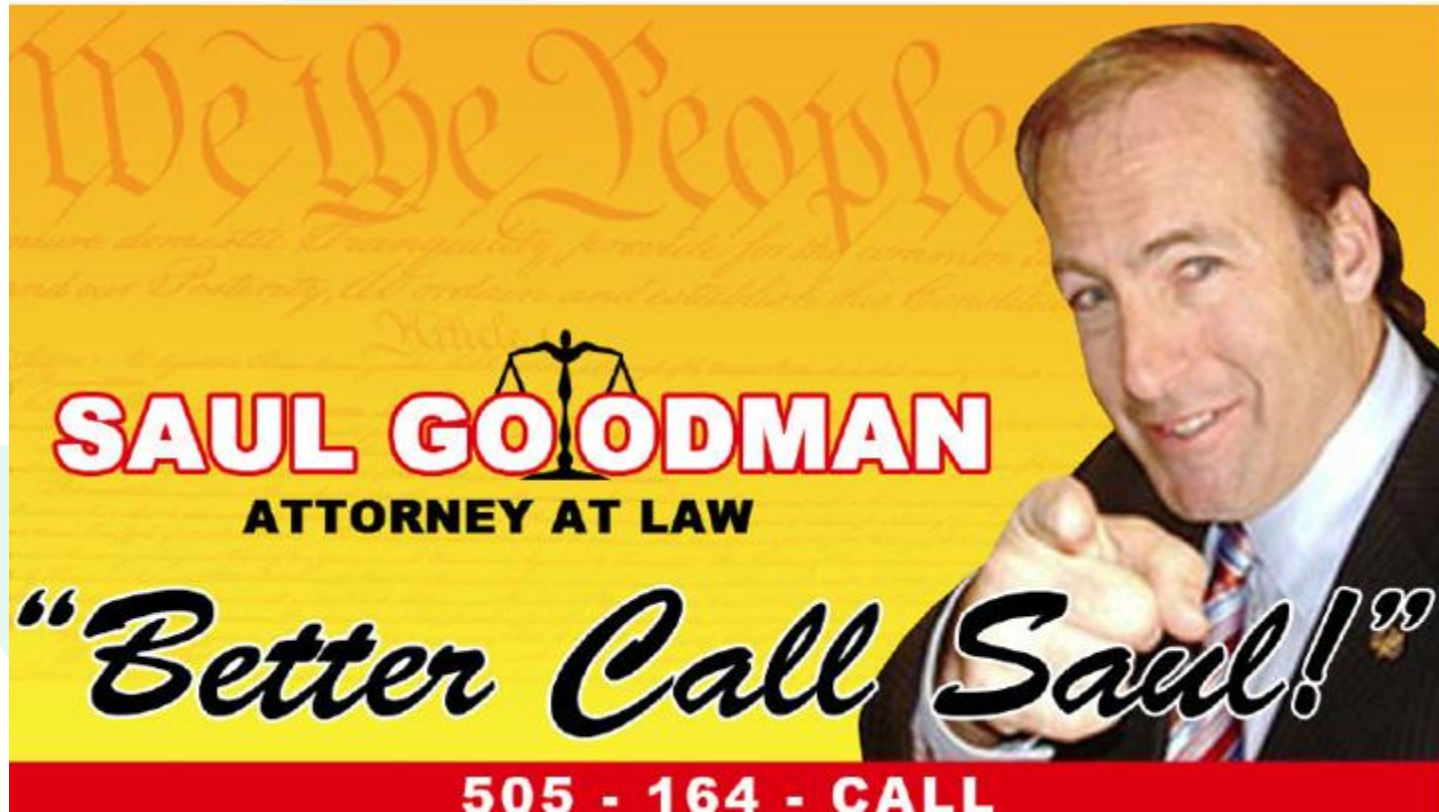
Prejudgment Interest

- In auto claims, PJI starts when plaintiff puts defendant on notice of claim (notice letter)
- In non-auto claims, PJI starts on date of loss

Prejudgment Interest

- Legislation recently amended re: prejudgment interest; now based on rate set in *Courts of Justice Act* – currently 2.0%
- Changes apply retrospectively
- Past pecuniary loss: varies depending on the year and quarter in which the loss arose

7. Costs



We the People

SAUL GOODMAN
ATTORNEY AT LAW

"Better Call Saul!"

505 - 164 - CALL

Plaintiffs' Fees (“Costs”)

- Generally, loser pays winner
 - Whether a defendant is considered a winner or loser often depends on whether beat offer to settle
- Typically payable by defendant on settlement unless there is an all-in settlement agreement
- On settlement, general convention is 15% of the first \$100,000 in damages, plus 10% of any damages in excess
 - Or 12% on the whole
- If serious case, simply make offer that is fair, and have plaintiff's costs assessed

Plaintiffs' Fees

- 13% Harmonized Sales Tax (H.S.T.) is payable on fees.
- Fees can be very high if lawsuit gets close to trial or proceeds to trial.

Disbursements

- Most disbursement have to be paid by defendant if reasonable
- Big ticket items are experts
- Can be very costly
- Even in run-of-mill cases, plaintiffs' lawyers often run up \$20,000 to \$30,000 in experts

8. Mediation and Pre-trial Conference



"A mediator hasn't worked, so I brought in everyone's moms."

Mediation

- Mandatory mediation in Toronto, Ottawa, and Windsor
- In all jurisdictions in Ontario, defendants should agree to mediation in tort auto claims if requested by plaintiffs; otherwise, trial judge can award increased costs
- Top mediators are expensive: \$5K and up
- Not all cases require top mediator

Pre-Trial Conference

- Clients are generally required to attend, and should have authority to settle
- Judge often provides assessment of case, pressures parties to settle
- Trial management discussed (readiness for trial, identity of witnesses)

9. Loss Control Measures

Loss Control Measures

- Witness investigations
- Social media searches
- Surveillance
- Experts
 - deadlines of 90, 60 and 30 days prior to pre-trial conference



In Closing

- Auto cases are unique, interesting, and can be quite serious
- Complicated interplay with SABs, particularly when split in liability
- Cross-border dynamic introduces important considerations, such as jurisdiction and choice of venue

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