A Comparison of Ontario's Auto Insurance Schemes

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<u>Up until June 21, 1990</u>

General Damages

Claimant has full right of recovery for non-pecuniary general damages. In 1978, the Supreme Court of Canada, in a series of three cases ("the trilogy"), set a cap on general damages at $100,000 (with inflation, the cap is at approximately $254,000 as of August 1996).

Pecuniary Losses

Claimant has full right to sue for all pecuniary losses. Claimant must deduct from award all no-fault benefits received. No-Fault Benefits to be paid by insurer of vehicle in which claimant was travelling. Limited accident benefits set out in Schedule "B" of S.P.F. No. 1. Weekly Income Benefits: paid to insured who suffers substantial inability to perform the "essential tasks" of his or her occupation or employment. Payable for up to 2 years and thereafter only where the injury "continuously prevents the insured from engaging in any occupation for which he or she is reasonably suited by education, training or experience". Weekly Benefits at the lesser of $140 per week or 80% of gross weekly income.

Collateral Benefits

For cases before October 13, 1989, insurer can deduct collateral benefits pursuant to the common law principles regarding double recovery. *Ratych v. Bloomer* [1990] 1. S.C.C. 940 establishes principle that such collateral benefits are deductible unless the plaintiff can demonstrate that he or she has "given something up" in exchange for the benefit received. Cunningham v. Wheeler [1994] 1 R.C.S. 359 narrows the deductibility possibilities further in suggesting that such a trade off may, in certain circumstances, be implied from the employment context. Also, the court suggests that if the provider of collateral benefit has right of subrogation, there is no deduction even if that right is not exercised. For cases after October 23, 1989, and before January 1, 1994, see collateral benefits section of OMPP.

Direct Property Damage

Insurer free to bring subrogated action for direct property damage to vehicle.

O.M.P.P.

From June 22, 1990 to December 31, 1993

General Damages

Claimant has no right to sue an owner, occupant or any person present at the incident ("protected persons") unless damages exceed threshold defined as: s.266(1) (a) permanent serious disfigurement; or (b) permanent serious impairment of an important bodily function caused by continuing injury which is physical in nature. No right of recovery of non-pecuniary general damages when injuries below threshold. Full right of recovery for any physical and/or mental injuries, subject to trilogy cap, for general damages when any physical injury exceeds the threshold.

Pecuniary Losses

If injuries over the threshold, claimant has full right to sue for all pecuniary losses. Claimant must deduct from award all no-fault benefits received. s. 267(1)(a). No-Fault Benefits to be paid by claimant's own insurer. s.268(2). Accident Benefits to be paid for pecuniary losses as set out in Schedule "B" of O.P.F. 1. Three broad categories of benefits: (a) Medical, Rehabilitation and Care Benefits (b) Funeral Expenses and Death Benefits (c) Weekly Income Benefits. Weekly Income Benefits: paid to insured who suffers substantial inability to perform the "essential tasks" of his or her occupation or employment. Payable for up to 3 years and thereafter only where the injury "continuously prevents the insured from engaging in any occupation for which he or she is reasonably suited by education, training or experience". Weekly Benefits at the lesser of $600 per week or 80% of gross weekly income (minimum benefit of $185.60).

Collateral Benefits

October 24, 1989, to December 31, 1993 The following Collateral Benefits are statutorily required to be deducted from a claimant's award: s. 267(1) (a) all no-fault benefits received or available and the present value of the benefits to which the person is entitled; (b) all payments received under any health care plan or law and the present value of such payments to which the person is entitled; (c) all payments received or available under the laws of any jurisdiction or under an income continuation plan and the present value of such payments to which the person is entitled; (d) payments received under an employment sick leave plan. Such collateral benefits are deductible from any damages awarded to the plaintiff and not simply from pecuniary damage claims. See: *Marshall v. Heliotis* (1993), 16 O.R. (3d) 637 and *Cugliardi v. White* (1994), 21 O.R. (3d) 225.

Direct Property Damage

Where damage is caused to a vehicle by the use and operation of another vehicle, and where both vehicles are insured, such damage is to be recovered from one's own insurer. s. 263. The insurer has no right of subrogation for amounts so paid to its insured. If the offending driver is not insured, the insurer can bring a subrogated action against the uninsured driver for property damage.

Bill 164

January 1, 1994 to October 31, 1996

General Damages

Claimant has no right to sue an owner, occupant or any person present in the incident ("protected persons") unless damages exceed a verbal threshold and subject to a monetary deductible: 1. Verbal Threshold: s.267.1(2) (a) serious disfigurement; or (b) serious impairment of an important physical, mental or psychological function. Clearly a lower threshold than OMPP -notable absence of 'permanent' requirement and addition of non-physical injuries. 2. Monetary Deductible: s.267.1(8)3 Claimant's award is to be reduced by statutory deductible which is approximately $10,000. Each Family Law Act claimant's award is to be reduced by statutory deductible which is approximately $5,000. No right of recovery for general damages below either the verbal threshold or monetary deductible. Full right of recovery (less the deductible), subject to trilogy cap, for generals when injuries over the threshold.

Pecuniary Losses

Claimant has no right to sue protected persons for pecuniary losses. They are recoverable only through Statutory Accident Benefits. No-fault benefits to be paid by claimants own insurer. s.268(2). The Statutory Accident Benefits Schedule provides a much more comprehensive benefit scheme than under the previous regimes. s.268(1). A wide range of benefits are available including: Income Replacement; Education Disability; Caregiver; Other Disability; Loss of Earning Capacity; Supplemental Medical; Rehabilitation; Attendant Care; Death; Funeral; Compensation for Other Pecuniary Losses. Weekly Income Benefits: paid to claimant who suffers substantial inability to perform the "essential tasks" of his or her occupation or employment. Weekly Benefits at the lesser of 90% of net income or $1,000 per week for 2 years while entitled (no minimum benefit). After 2 years claimant's entitlement is governed by Loss of Earning Capacity Benefits ("LECB"). LECB amount is set through a formula set out in regulations and subject to a cap of $1,000 per week. LECBs continue until age 65 and are thereafter adjusted as per the regulations.

Collateral Benefits

The amendments to s. 267 (1) have removed the defendant's right to deduct the benefits outlined in former s. 267(1). Benefits are again deductible as per common law principles ie. *Ratych v. Bloomer*; *Cunningham v. Wheeler*. Protected person defendants are not entitled to deduct collateral benefits (including accident benefits) from the claimant's tort award. Indeed, the collateral source rule is relevant in the context of Bill 164 only where a claimant has received collateral benefits but has also commenced an action against an unprotected person (a tortfeasor who was not an owner, operator, or otherwise present at the accident scene) for pecuniary damages.

Direct Property Damage

The amended version of s. 263 is not significantly different from former s. 263. The insured is compensated by own insurer for property damage. The insurer has no right of subrogation, unless none of the other vehicles in the accident are insured, in which case the insurer can bring an action against an uninsured driver for property damage.

Bill 59

Royal Assent June 27, 1996
Effective Date November 1, 1996

General Damages

Claimant has no right to sue an owner, occupant or any person at accident scene ("protected persons") unless damages exceed a verbal threshold and subject to a monetary deductible:

1. Verbal Threshold:
(a) permanent serious disfigurement; or
(b) permanent serious impairment of an important physical, mental or psychological function.

Clearly a higher threshold than Bill 164. Note the re-inclusion of "permanent". Note also that the addition of non-physical injuries has been retained.

2. Monetary Deductible:
claimant's award is to be reduced by statutory deductible of $15,000.00.

Each Family Law Act claimant's award is to be reduced by a statutory deductible of $7,500.00.

Note higher deductible.

Deductible applies only to non-pecuniary losses.

The deductible is to be applied to the award of damages before any split in liability.

Pecuniary Losses

Neither the threshold nor the deductible applies to pecuniary loss claims. No claim for income losses suffered in first seven days after accident may be made. Claims for pre-trial income loss are restricted to 80% of net income. Claims for post-trial income loss will be 100% of gross. No claims will be allowed for health care expenses unless the plaintiff has sustained a catastrophic impairment (as defined in the regulations). Insured is entitled to recover pecuniary losses from insured's own insurer (accident benefits). Range of benefits available including: income replacement; caregiver; medical, rehabilitation and attendant care; death and funeral; and other expenses. Weekly income benefits: paid to claimant who suffers substantial inability to perform the essential tasks of his or her occupation or employment. Benefits at the lesser of 80% of net income or $400 per week for 2 years while entitled. After two years claimant receives benefits only where the injury "continuously prevents the insured from engaging in any occupation or employment for which he or she is reasonably suited by education, training or experience."

Collateral Benefits

The following Collateral Benefits are statutorily required to be deducted from Tort award. Re: income loss:

- all A-B's received or available for income loss up to date of trial;
- all payments received or available under a legislated income continuation plan or an income continuation benefit plan up to the date of trial;
- all payments received under a sick leave plan up to the date of trial.

Similar statutory provisions require that health care expenses and other economic loss claim awards be reduced by collateral benefits received or available up to the date of trial. Benefit deemed not available if the insured has made an application for the benefit and been denied provided the application was made in good faith. Collateral benefits are not to be deducted from general damage awards for non-economic losses. Future Benefits payable will be subject to a statutorily codified Cox v.Carter Order. The plaintiff can recover from tortfeasor for future pecuniary losses without regard to future collateral benefits. Plaintiff is required to hold all future benefits received in trust for the tortfeasor. Alternatively Court may Order that plaintiff assign future rights to collateral benefits over to tortfeasor and to co-operate with tortfeasor in the future collection of benefits.

Direct Property Damage

Insured to be compensated by own insurer for property damage.

It is not anticipated that there will be any major modifications to Section 263 as it presently stands.

Bill 198

Royal Assent June 27, 1996
Effective Date October 1, 2003

Non-Pecuniary General Damages

Section 267.5(10.1) makes an owner who is also an employer a "protected person". This fixes the problem in *Vollick v. Sheard*. Claimant may not sue protected persons (owner, occupant, person at the scene) for non-pecuniary general damages or costs of future care unless the claimant's impairments pass a verbal threshold. Claims for non-pecuniary general damages are subject to a monetary deductible.

Verbal Threshold:
(a) permanent serious disfigurement; or
(b) permanent serious impairment of an important physical, mental or psychological function.

The threshold is further defined by regulation. The phrase "permanent serious impairment ..." defined and evidence to be lead on threshold motion is now specified in sections 4.2 and 4.3 of Ontario Regulation 461/96. Significant changes include:

- For the impairment to be serious, it must interfere with person's ability to continue his or her regular employment, despite reasonable efforts to accommodate and despite the person's efforts to use accommodation to continue employment;
- For the impairment to be serious, it must substantially interfere with most of the person's activities of daily living;
- For the impairment to be an impairment of an important function, the function must be important to most of the person's usual activities of daily living, considering the person's age; and
- For impairment to be permanent it must be of a nature that is expected to continue without substantial improvement when sustained by persons in similar circumstances.

Under the Bill 59 regime, a plaintiff could not claim for costs of future care unless catastrophically injured, as defined for purposes of the Statutory Accident Benefits Schedule. Under Bill 198, a plaintiff need not have suffered a catastrophic injury to claim for cost of future care. Under Bill 198 the verbal threshold for cost of future care claims is the same as the verbal threshold for non-pecuniary general damages.

There is a $30,000 deductible for non-pecuniary general damages awards. Non-pecuniary general damages deductible 'vanishes' for awards greater than $100,000 - Section 5.1 of Ontario Regulation 461/96

There is a $15,000 deductible for Family Law Act claims. Family Law Act claims deductible 'vanishes' for awards greater than $50,000 - Section 5.1 of Ontario Reg 461/96

Pecuniary Losses

Neither the threshold nor the deductibles apply to claims for pecuniary loss. There is no claim for the losses in the first 7 days after the accident. Claims for pre-trial pecuniary loss are restricted to 80% of the net loss. Claims for post-trial losses are for 100% of gross.

Neither the threshold nor the deductible apply to pecuniary tort losses.

Collateral Benefits

Collateral benefits are divided between pre and post-trial collateral benefits. All pre-trial collateral benefits are statutorily required to be deducted but this is done on the basis of a strict matching system. That is, benefits are deducted only against the like damage award (e.g. deduct income benefits from income loss claims). Benefits are to be deducted if they are received or available to the plaintiff before trial. A benefit is deemed not available if the plaintiff has applied for it and been denied so long as the plaintiff has actually applied and acted in good faith (not too late etc.).

All future losses are payable by a defendant despite the availability of collateral benefits.

The statute requires plaintiffs to hold in trust all future collateral benefits and pay those benefits over to the tortfeasor (s.267.8(9)).

The *Act* provides a court with the option of awarding a tortfeasor an assignment of the plaintiff's future collateral benefit rights (267.8 (12). The plaintiff in this situation is statutorily mandated to co-operate with the tortfeasor in the future recovery of these benefits and the court is statutorily entitled to impose such conditions on the assignment as it considers just.

Direct Property Damage

No changes from Bill 59 regime.