

# Navigating the New Frontier: Changes and Trends in Motor Vehicle Tort Litigation

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## OVERVIEW

This paper will address three topics; two of which are related to the legislative changes being introduced as of September 1, 2010. Specifically, the new buy-down options relating to the tort deductible are discussed below, as well as changes to the *Unfair and Deceptive Acts and Practices*, although the latter changes will mainly effect brokers and underwriters.

The bulk of this paper presents a review and commentary of several recent cases where the issue of threshold was raised by the defendant. As noted below, the focus of the courts is tending towards an analysis of the plaintiff's subjective feelings about his or her life since an accident, as opposed to functional inquiries that can be assessed more objectively. It seems that now, more than ever, the credibility and likeability of a plaintiff in a motor vehicle case will be of utmost importance when threshold considerations are raised.

## NEW OPTIONAL ENDORSEMENT TO REDUCE TORT DEDUCTIBLE

The optional endorsement to reduce the tort deductible is part of the changes that will become effective on September 1<sup>st</sup>, 2010 for all automobile insurance policy holders. Specifically, September 1<sup>st</sup> marks the introduction of Ontario Policy Change Form 48 (OPCF 48) providing optional first party coverage to offset the statutory third party liability tort deductible.

This change is reflected in Ontario Regulation 664 under the *Insurance Act*, which provides the following:

*Added Coverage to Offset Tort Deductibles Endorsement*  
51.1(1) If requested by an insured in respect of a contract of automobile insurance, the insurer shall offer the "added coverage to offset tort deductibles" endorsement, as approved by the superintendent under section 227 of the *Act*.

The new OPCF 48 optional coverage, if purchased, would not serve to completely eliminate the statutory third party liability tort deductible. If a policy holder purchases this optional coverage, his or her deductible would be \$20,000.00 instead of \$30,000.00 for pain and suffering awards, and \$10,000.00 instead of \$15,000.00 for family members claiming damages under the *Family Law Act*. It is assumed that the deductible will continue to vanish if damages surpass \$100,000.00.

This new optional coverage is only one of the additional options that will be available to consumers following September 1<sup>st</sup>, 2010. Currently, it is unknown whether consumers

will avail themselves of the optional coverages that are being introduced with the new legislation.

Optional coverages under the accident benefits scheme are currently available to consumers. The nature of the optional benefits under the accident benefits regime will be increased on September 1<sup>st</sup>, 2010. However, at the current time, less than 3% of motor vehicle policyholders in Ontario have optional benefits.

One of the government's goals with this new legislation is to "provide consumers with more choice." The Financial Services Commission of Ontario ("FSCO") has produced three publications to provide consumers with information regarding the auto insurance reforms. The publications explain the changes to the Standard Automobile Policy in Ontario effective September 1<sup>st</sup>, 2010, and the new choices available to renewing policyholders.

It has yet to be seen whether the government's "early awareness mailers" will have any impact on the percentage of consumers that avail themselves of the optional coverages, such as the new OPCF 48 "added coverage to offset tort deductible."

In addition to the added OPCF 48, similar changes are being implemented under OEF 87 (which is applicable to Ontario Garage Automobile Policies). The deductible buy-downs for the bodily injury tort deductible are the same under both endorsements.

The OPCF 48 and OEF 87 are effective for new business and renewals on or after September 1<sup>st</sup>, 2010.

## **CHANGES TO UNFAIR AND DECEPTIVE ACTS AND PRACTICES**

Ontario Regulation 37/10 will amend the existing regulation 534/06 – *Unfair and Deceptive Acts and Practices* ("UDAP"). The amendments reflect the strong stance that the Insurance Brokers Association of Ontario has taken in regard to the use of credit information during the underwriting process for personal lines insurance policies for the last number of years.

Most notably, the regulation now contains a definition of "credit information" that has been added to the list of lifestyle and financial factors prohibited from use in rate and classification. Additional language clarifies that credit information cannot be used to "interfere or to make difficult" the quoting process for consumers, nor should it be used to increase difficulty in obtaining a rate or hinder the binding of a risk in any way.

In addition, a provision has been added that requires an insurer to provide the best rate available to a consumer from any of its affiliated insurers, provided that the consumer would qualify for the premium offer.

The above changes are primarily important for insurance brokers and underwriters.

## RECENT CASES COMMENTING ON THRESHOLD

### ***Nicholas v. Bowers*, [2010] O.J. No. 1354 (S.C.J.)**

In the *Nicholas* decision, Justice Gans deliberated on the Defendants' motion, brought at the commencement of the jury's deliberations, pursuant to section 267.5(5) of the *Insurance Act*, for an order dismissing the action of Ms. Nicholas on the ground that she failed to establish on the evidence presented that she had sustained a permanent and serious impairment of an important physical, mental or psychological function. This decision is significant in that Ms. Nicholas had returned to the majority of her activities of daily living, including her employment. While she was able to work, she had residual symptoms that caused her difficulties at work where she had to stand most of the day due to her inability to sit for lengthy periods.

Although the Plaintiff's injuries are not specifically outlined in the decision, the impression is that they are of a soft tissue nature. The Defendants relied on evidence where Ms. Nicholas was referenced as being pain focused and demonstrating pain behaviours. Justice Gans felt that the Plaintiff's demeanour in court during trial was not consistent with pain behaviour.

In coming to his conclusion, Justice Gans found the statement of the Ontario Court of Appeal in the recent decision of *Brak v. Walsh* (2008), 90 O.R. (3d) 34 at paragraph 7, to be of particular importance to the matter before him. Specifically, in *Brak*, the Ontario Court of Appeal stated the following:

The requirement that the impairment be "serious" may be satisfied even though Plaintiffs, through determination, resume the activities of employment and the responsibilities of household but continue to experience pain. In such cases it must also be considered whether the continuing pain seriously effects their enjoyment of life, their ability to socialize with others, have intimate relations, enjoy their children, and engage in recreational pursuits.

In addition, in *Nicholas*, Justice Gans set out the following test:

In order to succeed in a motion of this nature, the Plaintiff has to establish that:

- (a) the impairment from which [the Plaintiff] suffers does not create a mere inconvenience to his or her daily life, and is something more than just tolerable;
- (b) the impairment substantially interferes with the ability of the injured person to perform his or her daily activities;
- (c) the seriousness of an impairment must be established in relation to the particular person who sustained the

impairment as well as to the condition and situation in life of that particular person; and

(d) regard should not be limited to any particular aspect of the Plaintiff's impairment but rather to the totality of her circumstances and cumulative effects that such has on her life.

Significantly, Justice Gans seemed to approach the losses experienced by the Plaintiff not from a functional perspective, but from an enjoyment of life perspective. He seemed to be particularly persuaded by the fact that the Plaintiff stated that her pain and its consequences effected very important pre-accident "life joys," namely her ability to fully experience the intimacy of sleeping with her husband "day to day," and entertaining her extended family on a weekly basis, without help from others. Accordingly, the jury award of general damages of \$55,000.00 was upheld.

***Brak v. Walsh (2008), 90 O.R. (3d) 34 (C.A.)***

This is a decision by the Ontario Court of Appeal that reversed the trial judge's finding that the Plaintiff was unable to establish that her injuries met the threshold under subsection 267.5(5) of the *Insurance Act*. The Court of Appeal found that the trial judge's focus in determining the severity of the Appellant's injury was too narrow, in that he failed to consider lay witness evidence that was crucial to assessing the Appellant's claim that the injuries effected her overall enjoyment of life. For this reason, the trial judge's decision was set aside and the matter was to be reconsidered by a different judge.

The trial judge relied on evidence of the Appellant's ability to resume "almost all" of her domestic duties and the fact that she was able to hold gainful and steady employment. He also relied on expert evidence that the pain that the Plaintiff was experiencing would "clear up with time" or "diminish with time if she followed an exercise program."

The Court of Appeal reviewed the jurisprudence on the meaning of the term "permanent" in the legislation. The Court of Appeal stated that "permanent" means lasting indefinitely into the future as opposed to for a limited time with a definite end. The requirement of a permanent injury is also met when a limitation in function is unlikely to improve for the indefinite future.

Accordingly, because neither expert could offer a date by which the Plaintiff would be pain-free, the Court of Appeal questioned the trial judge's finding that the injury was not "permanent." The trial judge's inquiry into the issue of seriousness was also questioned as he focused on the Appellant's ability to function in her activities, as opposed to her ability to enjoy her activities.

***Del Rio v. Lawrence*, [2009] O.J. No. 676 (S.C.J.)**

This is another recent decision of Justice Gans on a Defendant's motion for an order dismissing an action on the grounds that the Plaintiff failed to establish a permanent and serious impairment in accordance with section 267.5(5) of the *Insurance Act*. In this case, Justice Gans commented that the threshold analysis applicable under Bill 198 is a codification of the principles set out by the Court of Appeal in *Meyer v. Bright*, and hence the analysis is really no different than it was under Bill 59.

The Plaintiff in this case was able to continue in her regular employment as her employer was able to accommodate her. In addition, it was recognized by both the Plaintiff and Defendant that the Plaintiff suffered from chronic pain syndrome, and that chronic pain syndrome is an impairment.

The Court again referenced the *Brak v. Walsh* decision and commented that it was "beyond dispute" that the motions court is obliged to consider whether or not the continuing pain seriously effects a Plaintiff's enjoyment of life, including his or her ability to socialize with others, have intimate relations, enjoy his or her children, or engage in recreational pursuits. This analysis must be undertaken even if the motion judge concludes that the Plaintiff can otherwise "function" at work and take care of him or herself.

The Plaintiff in this case complained that her usual activities of daily living outside of work were curtailed markedly as a result of her accident. This evidence was supported by statements from friends and family. Justice Gans accepted her evidence that when she returned home from work, she was effectively unable to do anything but lie down as a result of the pain caused by her chronic pain syndrome.

The Court therefore concluded that the Plaintiff's condition substantially interfered with her quality of life, which was a proposition that was accepted in cross-examination by the Defendant's expert.

The Defendant argued that, when a Plaintiff suffers from chronic pain syndrome, it is necessary to lead evidence of a physiatrist or psychologist/psychiatrist in support of the claim that the impairment is permanent. Justice Gans rejected this argument and found that the orthopaedic surgeon, Dr. Ogilvie-Harris, was well equipped to render an opinion on this issue.

Justice Gans therefore held that the Plaintiff's injuries met threshold, and the jury award of \$22,500.00 for general damages, and approximately \$2,000.00 for lost income, which was subject to the statutory deductible, was upheld. Accordingly, the Plaintiff recovered only \$7,500.00 for general damages, even though her injuries were found to meet threshold.

**Xiao v. Gilkes, [2009] O.J. No. 735 (S.C.J.)**

This is one of the few recent decisions where the Court found that the Plaintiff's injuries did not meet threshold. It is interesting to note that, even if the Plaintiff had been successful in regard to the threshold issue, once the deductibles were applied, the net general damages would have only been \$5,000.00, and the *Family Law Act* claims were approximately \$7,000.00 (total).

Mr. Xiao was involved in two accidents, one in November of 2000 and one in May of 2002. He was unemployed for a period of at least 18 months, and then he worked for a year as a babysitter. In January of 2005, he became employed again in his chosen profession (a chef in a Chinese restaurant), and was working fulltime, 60 hours per week, without interruption.

As in most cases, the expert evidence differed on whether the Plaintiff's injuries were serious and permanent. The Court ultimately rejected the evidence of the Plaintiff's expert as a result of the credibility issues of the Plaintiff.

Justice MacDonnell considered the meaning of "permanent," and relied on the decisions in *Brak v. Walsh* and *Frankfurter v. Gibbons*. He found that "the requirement of a permanent injury is met when a limitation in function is unlikely to improve for the indefinite future. In addition, a Plaintiff need not prove that the impairment constantly manifests itself. A continuing impairment, even if experienced intermittently, can satisfy the language of the statute.

With respect to the issue of seriousness, the court considered the jurisprudence in *Meyer v. Bright*, as well as in *Brak v. Walsh*. The focus in the *Meyer* decision was whether the impairment caused substantial interference with the ability of the injured person to perform his or her usual activities or to continue his or her usual employment. In addition, it was noted that the legislature intended that injured persons are required to bear some interference with their enjoyment of life without being able to sue for it.

Of course, a different approach was taken in *Brak v. Walsh*, which was that the impairment will be serious if the continuing pain effects the Plaintiff's enjoyment of life, even though they may have been able to resume their regular activities, including employment and household activities.

Mr. Xiao was found to have sustained an impairment of an important physical function that was serious, however, the court was not satisfied that the impairment was permanent. The Court held that the Plaintiff had the onus to, but failed, in establishing that he had not made a full recovery from his injuries prior to the second accident (as it was the Defendant in the action pertaining to the first accident that brought the threshold motion). The Court found that even if the Plaintiff's back and neck problems had persisted beyond the date of the second accident, Justice MacDonnell was not satisfied that the Plaintiff continued to suffer from back and neck pain at the date of trial. In making this finding, Justice MacDonnell acknowledged the point made in *Brak* (above) that the fact that an injured person had resumed fulltime employment is not

necessarily inconsistent with the presence of a serious impairment. However, the Court felt that it remained a relevant circumstance to be considered with all of the other relevant circumstances in relation to whether the impairment exists, and if so, whether it is serious.

In addition, Justice MacDonnell recognized that some evidence was put forward to support the Plaintiff's position that the impairment suffered in the two accidents was serious and permanent. However, because of the credibility issues of the Plaintiff, the Court held that the preponderance of the evidence supported the view that Mr. Xiao no longer had an impairment of a physical function.

### **Lessons Learned in Past Two Years**

From a defence perspective, the *Nicholas*, *Del Rio* and *Brak* cases create difficult precedents as there is really no objective way to test a Plaintiff's evidence as to whether he or she is enjoying their life and their intimate relations, or social pursuits with others.

The trend seems to be that as the deductible has increased, the courts have adopted a more relaxed approach to the wording in section 267.5(5) of the *Insurance Act*.

It is interesting to note that in the recent decisions reviewed, regardless of whether the Defendant or Plaintiff is successful on the threshold issue, the damages awarded by the jury were extremely modest (with the exception of perhaps the *Nicholas* case where \$55,000.00 in general damages was awarded). Accordingly, there are cases where the costs incurred to bring the threshold motion likely outweighed the damages that were awarded to the Plaintiffs.

For this reason, in cases where the insurer or defence counsel are of the view that the facts are likely borderline in terms of the threshold analysis, it should be considered whether the cost of a threshold motion is worthwhile, given that juries awards in borderline cases (i.e., where there has been a return to most important pre-accident activities, but perhaps not a return to "enjoyment"), have been modest.

### **LIMITATION PERIOD IN TORT MOTOR VEHICLE LITIGATION**

#### ***Everding v. Skrijel*, [2010] O.N.C.A. 437**

While this decision does not directly relate to threshold considerations, it is an important recent decision of the Ontario Court of Appeal which affects Defendants and their insurers in motor vehicle cases. Specifically, the issue on appeal in this case was whether the motion judge erred by failing to consider the \$15,000.00 statutory deductible and threshold as factors relevant to the discoverability of a claim.

The chronology of the background facts in this case are as follows:

2000 – motor vehicle accident – immediate soft tissue pain

2001 – Plaintiff consults lawyer – lawyer says no case and don't sue

2004 – family doctor tells Plaintiff she has chronic pain syndrome

2006 – MRI shows bulging discs in cervical spine

2007 – Plaintiff consults second lawyer, who commences an action

The motion's judge held that the limitation period started to run in 2004 when the Plaintiff learned of the chronic pain diagnosis, and dismissed the action. The Court of Appeal reversed. It held that the Plaintiff learned in 2006 (due to the MRI) that the claim would surpass the threshold, and therefore that the claim was only discoverable in 2006 (as opposed to 2004 as found by the motion's judge). Accordingly, because the action was started in 2007, it was not barred by an expired limitation period.

The important point to be drawn from this case is that a Plaintiff's claim is discoverable under the *Limitations Act*, 2002 only when a Plaintiff knows that the damages that will be assessed for his or her injury surpass the monetary deductible under the *Insurance Act*, and by inference, the threshold provisions of the *Insurance Act*.