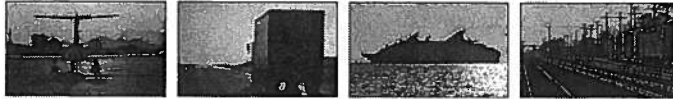


THE HARMONIE GROUP*



A seminar and reception serving the trucking and transportation industry.

Van Krkachovski
McCague Peacock Borlack McInnis & Lloyd LLP
Barristers and Solicitors
Suite 2700
The Exchange Tower
130 King Street West
Toronto, Ontario M5X 1C7
Canada
416-860-0001
Direct: 416-860-0034
Fax: 416-860-0003
vkkrkachovski@mwpb.com

CROSS BORDER ISSUES:

THE CURRENT AUTOMOBILE INSURANCE LEGISLATION IN ONTARIO

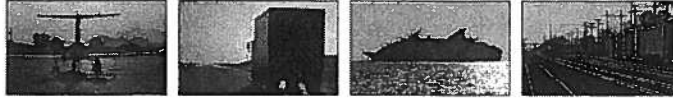
As the title suggests, the automobile insurance legislation in Ontario has undergone numerous amendments over the past 15 years which began with the introduction of a partial no-fault system in 1990 that replaced a pure tort system. As a result, a person injured in a motor vehicle accident has two types of claims. The first is a tort claim against the at-fault driver for general damages (pain and suffering), loss of income, and healthcare expenses. His right to recover those damages is subject to the apportionment of liability. A second claim is against his own insurance company for what are called "statutory accident benefits" and which are payable irrespective of fault. A defendant in a tort action is entitled to take credit for those statutory accident benefits so that a plaintiff is not over compensated. For example, the tort defendant will be given a credit for income replacement benefits and healthcare benefits that are paid by the plaintiff's own insurer. The following is a summary of the two types of claims.

Tort Claims

To merit an award of general damages (pain and suffering), a plaintiff's injuries must cross a legislated threshold. That threshold requires a permanent and serious impairment of an important physical, mental or psychological function, or permanent and serious disfigurement. Recent changes to the legislation have given additional meaning to that threshold. A plaintiff must show a substantial impairment with respect to employment, career training, or substantial interference with most of the usual activities of daily living. The word "permanent" has been defined to mean continuous and, based on medical evidence, not expected to substantially improve. To be permanent, the impairment must be of such a type that it is expected to continue without substantial improvement. A plaintiff is required to lead evidence from one or more qualified physicians regarding the nature and permanence of the impairment, the specific function impaired, and why it is important to that plaintiff.

Should a plaintiff's injuries cross that threshold, the entitlement to general damages is subject to a \$30,000 deductible for accidents occurring after October 1, 2003 (previously \$15,000). The deductible for each *Family Law Act* claimant has been raised to \$15,000 (previously \$7,500). Those deductibles do not apply where the general damages exceed \$100,000, or the *Family Law Act* entitlement for a claimant exceeds \$50,000.

THE HARMONIE GROUP*



A seminar and reception serving the trucking and transportation industry.

It should be remembered that Canada has a cap on general damages which is indexed annually for inflation. At present, the maximum award is \$307,000.

A plaintiff whose injuries cross the threshold is entitled to recover healthcare expenses over and above those that are payable by the accident benefit insurer.

A claim for loss of income or loss of earning capacity is not subject to the threshold or a deductible. Therefore, a plaintiff can advance such a claim irrespective of whether he has a viable general damage claim. Up to trial, the entitlement is for 80% of net wages. After trial, the entitlement increases to 100% of gross wages. The tort defendant is entitled to take credit for any collateral benefits paid or available to the plaintiff, including income replacement benefits from the accident benefit insurer, short-term and long-term disability benefits, and disability pension benefits payable under the Canada Pension Plan.

Recent changes to the legislation stipulate no gross-up to relieve against income tax liability for future care costs or any part of an award that is paid periodically. That will have the effect of reducing the quantum of future loss awards or where a court imposes structured payments.

Statutory Accident Benefits

A person injured in an automobile accident can claim statutory accident benefits (no-fault benefits) from his own insurance company. The following benefits are available:

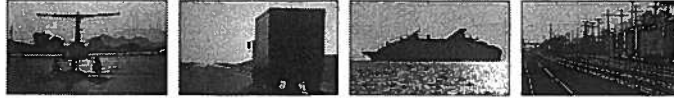
1. Income Replacement Benefits (IRBs)

- This benefit compensates the insured for lost income as a result of his automobile accident.
- It is not payable for the first week following the accident.
- After the first week, if the insured is substantially unable to perform the essential tasks of his employment, he will receive 80% of his net employment income up to \$400 per week (unless enhanced coverage is purchased in which case it may be more). This benefit is available for up to 2 years.
- Self-employed insureds may receive, in addition to their IRBs, 80% of the losses from their self-employment, up to a combined maximum of \$400 per week (unless enhanced coverage is purchased in which case it may be more).
- This benefit will continue after 2 years if the insured suffers a complete inability to engage in employment for which he is "reasonably suited for by education, training or experience".
- If the insured's impairment comes within the *Grade I Whiplash Guideline* and if the accident occurred after April 14, 2004, the insurer does not have to pay IRBs for any period longer than 12 weeks after the accident.
- If the insured's impairment comes within the *Grade II Whiplash Guideline* and if the accident occurred after April 14, 2004, the insurer does not have to pay IRBs for any period longer than 16 weeks after the accident.

2. Non-Earner Benefit

- This benefit compensates the insured in the event that he suffers a complete inability to carry on a normal life within 2 years of the accident and if the insured does not qualify for IRBs. An insured that received a caregiver benefit but no longer provides care would also qualify for this benefit. If the insured was a student at the time of the accident or had completed his education less than a year before the accident and was not employed in a job that reflected his education and training, he would also qualify.
- This benefit is not payable for the first 26 weeks following the accident.

THE HARMONIE GROUP*



A seminar and reception serving the trucking and transportation industry.

- This benefit is not payable for anyone younger than 16.
- The maximum amount for this benefit is \$185 per week for the first 2 years of payment. However, if the insured was a student at the time of the accident or had just completed his education less than a year before the accident and is suffering from a complete inability to carry on a normal life, after 2 years of receiving this benefit the payment increases to \$320 per week.

3. Caregiver Benefit

- This benefit compensates an insured in the event that he suffers a substantial inability to engage in caregiver activities following an accident. To qualify for this benefit, the insured must have been residing with a person in need of care and the insured must have been the primary caregiver and was not receiving any remuneration for providing this care.
- This benefit includes reasonable and necessary expenses incurred as result of the accident in caring for the person in need of care, but the maximum amount for the first person in need of care is \$250 per week and \$50 per week for each additional person (unless enhanced coverage is purchased in which case it may be more).
- The insured is not entitled to this benefit for longer than 2 years, unless he is suffering from a complete inability to carry on a normal life.

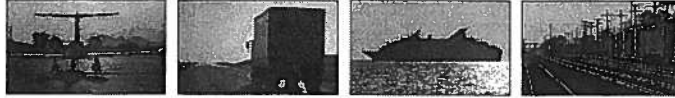
4. Medical Benefit

- This benefit compensates an insured for medical expenses required as a result of automobile accident-related injuries which are not covered by OHIP (Ontario Health Insurance Plan) or another disability insurance plan.
- Medical expenses include all reasonable and necessary expenses incurred by or on behalf of the insured as a result of the accident for medical, surgical, dental, optometric, hospital, nursing, ambulance, audiometric and speech-language pathology services, chiropractic, psychological, occupational therapy and physiotherapy services, medication, prescription eyewear, dentures and other dental devices, hearing aids, wheelchairs or other mobility devices, prostheses, orthotics and other assistive devices, transportation to and from treatment sessions including transportation for an aide or attendant.
- This benefit does not include experimental goods and services.
- The maximum medical benefit is \$100,000 per accident, or \$1,000,000 if the insured sustained a catastrophic impairment (unless enhanced coverage is purchased in which case it may be more).
- If at the time of the accident the insured was 15 years or older, this benefit is payable for a maximum of 10 years. However, if at the time of the accident the insured was under 15, this benefit is payable until the insured reaches 25 years of age (unless enhanced coverage is purchased in which case it may be more).
- There is no time limit if the insured sustained a catastrophic impairment or if the insured purchased enhanced benefits.

5. Rehabilitation Benefit

- This benefit compensates an insured for rehabilitation expenses required as a result of automobile accident-related injuries which are not covered by OHIP or another disability insurance plan.
- Rehabilitation expenses include all reasonable and necessary measures undertaken by an insured to reduce or eliminate the effects of any disability resulting from the impairment or to facilitate the insured's reintegration into his family, the rest of society and the labour market.
- The maximum rehabilitation benefit is \$100,000 per accident, or \$1,000,000 if the insured sustained a catastrophic impairment (unless enhanced coverage is purchased in which case it may be more).

THE HARMONIE GROUP*



A seminar and reception serving the trucking and transportation industry.

- If at the time of the accident the insured was age 15 years or older, this benefit is payable for a maximum of 10 years. However, if at the time of the accident the insured was under 15, this benefit is payable until the insured reaches 25 years of age (unless enhanced coverage is purchased in which case it may be more).
- There is no time limit if the insured sustained a catastrophic impairment or if the insured purchased enhanced benefits.
- This benefit also includes a provision for recovery of reasonable transportation expenses to and from treatment, necessitated by the insured's accident-related injuries. However, each return trip is subject to a 50 km deductible if the accident occurred before April 14, 2004 and the insured's car was used. The deductible applies to any car used if the accident occurred after April 14, 2004. However, there is no deductible if the accident occurred after April 14, 2004 and the insured is catastrophically impaired.

6. Attendant Care Benefit

- This benefit compensates an insured for the expense of hiring an aide or attendant.
- This benefit is not available if the accident occurred after April 14, 2004 and the insured's impairment comes within the *Grade I or II Whiplash Guidelines*.
- Attendant care benefits include all reasonable and necessary expenses incurred by or on behalf of the insured as a result of the accident for services provided by an aide or attendant, or for services provided by a long-term care facility, including a nursing home, home for the aged or chronic care hospital.
- Unless the insured purchased enhanced coverage or his injuries are deemed catastrophic, he can recover up to \$3,000 per month for this benefit for a period of up to 2 years, up to a maximum of \$72,000.
- If the insured's injuries are deemed to be catastrophic, he may be eligible for up to \$6,000 per month during his lifetime, up to a maximum of \$1,000,000.

7. Housekeeping and Home Maintenance

- An insured may receive compensation for reasonable and necessary additional expenses for housekeeping and home maintenance if, as a result of the accident, he sustains an impairment that results in a substantial inability to perform the housekeeping and home maintenance services that he normally performed before the accident.
- The maximum payment for this benefit is \$100 per week for a maximum of 2 years, unless the insured sustained a catastrophic impairment.

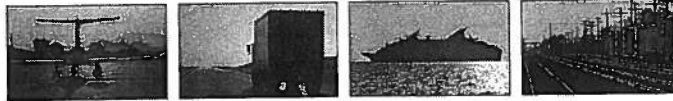
8. Dependent Care Benefit

- This benefit compensates an insured for reasonable and necessary additional expenses incurred by him or on his behalf as a result of an accident in caring for his dependents if he sustains an impairment as a result of the accident, if he was employed at the time of the accident, and if he is not receiving a caregiver benefit.
- This benefit is not payable for expenses incurred after the insured dies.
- The maximum dependent care benefit is \$75 per week for the first dependent and \$25 per week for each additional dependant, for a combined maximum amount of \$150 per week.

9. Lost Educational Expenses

- This benefit is payable for lost educational expenses incurred by a student who sustains an impairment as a result of an accident and is unable to continue his educational program.
- Educational expenses include tuition, books, equipment, room and board.
- The maximum benefit is \$15,000.

THE HARMONIE GROUP*



A seminar and reception serving the trucking and transportation industry.

10. Death Benefit

- This benefit is payable in respect of an insured who dies as a result of an accident within 180 days of the accident, or if the insured dies within 3 years following the accident and he was continuously disabled as a result of the accident during that time.
- The maximum death benefit payable is \$25,000 to the insured's spouse and \$10,000 to each of the insured's dependants (unless enhanced coverage is purchased in which case it may be more).
- This benefit is not payable to a person who dies before the insured or within 30 days after the insured died.
- If the insured had more than one spouse, the spousal payment will be divided equally among his or her spouses.

11. Funeral Benefit

- This benefit is payable in respect of an insured who dies as a result of an accident.
- The maximum funeral benefit is \$6,000 (unless enhanced coverage is purchased in which case it may be more).

12. Damage to Clothing, Glasses, Hearing Aids, Etc.

- This benefit is payable in respect of all reasonable expenses incurred by or on behalf of an insured in repairing or replacing clothing worn at the time of the accident that was lost or damaged as a result of the accident, and prescription eyewear, dentures, hearing aids, prostheses and other medical or dental devices. Watches or jewelry are not covered.

13. Expenses of Visitors

- This benefit is payable in respect of all reasonable and necessary expenses incurred by visitors visiting an insured who sustained an impairment as a result of an accident.
- Eligible visitors include a spouse, children, grandchildren, parents, grandparents, brothers, sisters, and an individual who was living with the insured at the time of the accident.
- This benefit is payable for a maximum of 2 years unless the insured sustained a catastrophic impairment.

14. Case Manager Services

- This benefit is payable in respect of all reasonable and necessary expenses incurred by or on behalf of an insured as a result of the accident for services provided by a qualified case manager in accordance with a treatment plan if the insured sustained a catastrophic impairment.