

How Will Ontario's "Auto Insurance Reform" Impact Tort Claims?

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September 1st has arrived, and with it, a wave of changes to Ontario's insurance laws. While most of these changes are of primary interest to those working within the accident benefits regime, two changes will be of particular relevance to the "tort side" of automobile insurance law. Both of these changes affect the deductibles that apply to tort awards in Ontario.

Ontario's Tort Deductibles

Under the *Insurance Act*, a \$30,000.00 tort deductible applies to claims for general damages brought against an at-fault driver.ⁱ The deductible "vanishes", however, where general damages are assessed at \$100,000.00 or higher. Similarly, a deductible applies to certain claims made under the *Family Law Act*. Relatives of an accident victim may sue an at-fault driver for loss of care, guidance, and companionship, but their damages are subject to a \$15,000.00 deductible (this deductible also "vanishes", if the damages exceed \$50,000.00).ⁱⁱ

These tort deductibles, which were first introduced in 1996, were intended to reduce the litigation of minor claims, and were seen as a "trade-off" for an affordable and comprehensive accident benefits system. However, they have also been heavily criticized, as many have argued that they impede access to justice. This was highlighted in the Civil Justice Reform Project led by the Honourable Justice Coulter Osborne in 2007.ⁱⁱⁱ Justice Osborne, who was asked to review Ontario's civil justice system and make recommendations to make it more accessible and affordable, noted that the tort deductible had "access to justice implications" as it worked to "restrict access to the courts by providing an economic disincentive to making a claim". He noted, "put crassly, no one of sound mind is likely to pursue a \$30,000.00 or \$40,000.00 claim if \$30,000.00 of it is to be deducted in the end." Justice Osborne acknowledged that the deductibles played a role in keeping insurance premiums under control, but suggested that the government review whether they should be decreased or abandoned.

When the Financial Services Commission of Ontario called for submissions as part of its five-year review of the province's insurance laws, a number of interest groups cited Justice Osborne's report and suggested that the deductibles be reduced or eliminated.^{iv}

Seemingly in response to these submissions, the Ontario government has implemented two new changes to its auto insurance regime: the elimination of the tort deductibles in fatality cases, and the introduction of the OPCF 48 endorsement.

OPCF 48 endorsement: “Added Coverage to Offset Tort Deductibles”

As of September 1, 2010, the tort deductibles imposed by the *Insurance Act* remain intact (except in fatality cases, as discussed below). However, consumers now have the option to purchase OPCF-48, a change form to their standard automobile insurance policy, which will *reduce* the deductible for general damages to \$20,000, and to \$10,000 for *Family Law Act* claims.^v The difference is to be paid by the first party insurer, *after* a claim has settled or decided by a judge.

At first glance, the OPCF 48 endorsement does not appear to be particularly significant. It essentially provides an insured with an additional \$10,000 of coverage for pain and suffering (and \$5,000 of coverage for each *FLA* claimant). Furthermore, it seems that this coverage will be of limited scope, as it would only apply to claims assessed below the deductibles’ “vanishing” thresholds. Depending on the premium charged for this endorsement, many Ontarians may decide it simply “isn’t worth it”.

However, the OPCF-48 endorsement may be of significant value in certain cases, as it can apply not only to a named insured, but also to his/her spouse and dependants. As such, if multiple plaintiffs meet the definition of “insured person”, they could potentially each claim the benefit of the additional coverage to offset their respective tort deductibles. One could imagine a number of scenarios in which the amounts claimed under the endorsement could quickly “add up”.

Insurance adjusters should also be aware of paragraph 5 of the endorsement. It states that the findings of a court with respect to quantum or liability are binding on an insurer, regardless of whether it was given the opportunity to participate in the proceedings. However, where the claim is settled, the settlement will only be binding on the insurer if it was made with the “concurrence” of the insurer. Arguably, therefore, if a tort claim arising from a motor vehicle accident settles for \$50,000 (\$80,000 minus the \$30,000 deductible) without the concurrence of the OPCF 48 insurer, the insurer may refuse to pay the amount that would otherwise be owing under the endorsement.

Accordingly, insurers can now expect to receive letters from plaintiffs’ lawyers, querying whether the plaintiff purchased an OPCF 48 endorsement, and if so, requesting the insurer’s consent to any settlement reached. It remains to be seen whether insurers will wish to participate in mediations in this regard. On the one hand, it seems unlikely that insurers will “veto” the settlement of a tort claim, solely on the basis of their potential exposure under an OPCF 48 endorsement. However, as mentioned above, this exposure may be significant in certain cases. In other cases, insurers may believe that the damages exceed \$100,000 (in which case, the deductible would not apply), and therefore refuse to consent to a settlement figure

below that amount. In any event, insurers will want to establish a tickler system to track any potential OPCF 48 claims, and attempt to review these issues in the early stages of a claim.

Elimination of Deductibles in Cases of Fatality

As mentioned, the Ontario government has also now eliminated the deductible in cases of fatalities. The tort deductibles no longer apply to “damages awarded for non-pecuniary loss awarded in respect of a person who dies as a direct or indirect result of an incident that occurs after August 31, 2010.”^{vi} One can expect an increase in *Family Law Act* claims, particularly by grandparents, grandchildren, siblings, or adult children, whose damage awards previously would have been eliminated, or significantly reduced, by the deductible.

Ultimately, the impact of Ontario’s “Auto Insurance Reform” on tort claims, and on access to justice in this province, remains to be seen. However, it seems that these changes, at the very least, have the *potential* to be significant.

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ⁱ *Insurance Act*, R.S.O. 1990, c. I.8, s. 267.5(7); O. Reg 461/96, s. 5.1, as amended by O. Reg. 312/03.

ⁱⁱ *Ibid.*

ⁱⁱⁱ See “Civil Justice Reform Project: Summary of Findings & Recommendations”, Honourable Coulter A. Osborne, (November 2007), online <<http://www.civiljusticereform.jus.gov.on.ca/>>.

^{iv} See for example, the submissions of the Ontario Bar Association, the Advocates’ Society, and the Ontario Trial Lawyers Association, online: <<http://www.fsco.gov.on.ca/english/insurance/auto/5yr-review/default.asp>>.

^v A similar endorsement, OEF 87, has been introduced for Ontario Garage Automobile Policies.

^{vi} *Insurance Act*, *supra* note 1 at s. 267.5(8.1.1).