Getting Schooled

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An Ontario court recently ruled that insurers owe a duty of care to their customers since customers would reasonably be expected to rely on information communicated to them by their insurer.

The issue of optional auto insurance benefits under Ontario's revised *Statutory Accident Benefits Schedule* (SABS) is front and centre in the 2012 decision, *Zefferino v. Meloche Monnex Insurance Company*.

Legislative amendments adopted by the Ontario government for individuals injured in car accidents on or after September 1, 2010 resulted in significant reductions to accident benefits to which those individuals are entitled.

Changes of note include the following:

- a reduction in available medical and rehabilitation benefits, in standard auto insurance policies, from $100,000 to $50,000;
- a halving of attendant care benefits from $72,000 to $36,000 for persons who sustain non-catastrophic injuries; and
- elimination of housekeeping benefits (formerly as much as $100 weekly) and caregiver benefits (formerly starting at $250 per week) for non-catastrophic injuries.

Despite the aforementioned reductions in benefits in standard policies, Ontario maintained the requirement for every insurer to offer optional benefits under SABS.

In *Zefferino*, the plaintiff was injured in a motor vehicle accident and would have been entitled to income replacement benefits of $1,000 per week, had he purchased the optional benefit available when he renewed his policy (his standard income replacement benefit gave him entitlement to $400 per week). The plaintiff argued that had he known about the optional benefits, he would have purchased them as part of his auto insurance coverage.

Using a three-step analysis, Ontario's Superior Court of Justice recognized that insurers owe a duty of care to their customers as a customer would reasonably be expected to rely on information communicated to them by their insurer.

After finding that a duty of care was owed to the plaintiff, the court next assessed whether or

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not the insurer breached this duty of care. The court adopted a purposive approach to the requirement for every insurer to offer optional benefits, stating that an insurer may need to take a more detailed history of its customer, provide hypothetical loss scenarios and then ensure the customer understands the optional coverage, its costs and whether or not it might apply to their particular circumstances.

In essence, the customer must be offered the optional coverage in a manner that enables that person to make a "fully informed decision" about what level of coverage to purchase.

Ontario's *Insurance Act* sets mandatory coverage levels that apply to every auto insurance policy. In *Zefferino*, the court stated: "to make [the] mandatory offer of optional coverages meaningful, consumers must be given an understandable alternative which would allow them to measure the need for more against risk and cost. Otherwise there would be no purpose behind the mandatory language [for optional increased benefits]."

The court pointed out that optional accident benefit coverage may not be as well-known to the customer as optional increased liability coverage, for example, which may increase the insurer's obligation to fully explain the optional increased accident benefit coverage.

The court strongly emphasized the need and importance for insurers to make the optional accident benefit coverage known to their customers in a "meaningful way" to enable them to make "fully informed" decisions.

It is important to note that in finding a breach of the standard of care by the defendant, the court rejected the defendant's argument that its conduct in not making a detailed inquiry into the customer's circumstances and without providing a quote as to additional costs of optional coverage was consistent with industry practice at the time. The court ruled there was a failure in the defendant's conduct — both for this particular customer and in its general standard practice — to offer the optional benefit in any "meaningful way."

After finding a breach of the standard of care, the court ultimately determined that the plaintiff failed in the final step of the test, which was whether or not the plaintiff would have likely purchased optional benefits if they were properly offered and explained, and if so, in what amount.

Regardless of the decision's outcome, the court strongly emphasized the need and importance for insurers to make the optional accident benefit coverage known to their customers in a "meaningful way" to enable them to make a "fully informed decision" when assessing the risk and cost of the optional accident benefit coverage.

In personally contacting several insurance companies, this completely unofficial survey makes clear that a customer with characteristics similar to my own, including age and a "fairly" clean driving record, would have optional accident benefit coverage levels that were quite reasonable relative to the annual costs of the insurance policy on his or her motor vehicle.

For example, responses indicate a driver with similar characteristics would face the following costs: in the range of $160-$230 annually to increase weekly income replacement benefit coverage from the standard of $400 per week to $1,000 per week; $50-$70 annually to increase benefits to $600 weekly; about $60-$80 yearly for optional housekeeping and caregiver benefits of $250 per week for accident victims with non-catastrophic injuries; $35-$55 per year for a policyholder to access $100,000 for medical and rehabilitation coverage for non-catastrophic injuries, as opposed to the standard $50,000 in line with the revised SABS; an additional $100-$130 annually for $1 million in medical and rehabilitation coverage; and $6-$10 annually to increase attendant care benefits from $36,000 to the pre-2010 benefit level of $72,000.

After finding a breach of the standard of care, the court ultimately determined the plaintiff failed in the final step of the test, which was whether or not the plaintiff would have likely purchased optional benefits if they were properly offered and explained.

Considering the recent reductions in standard coverage under the SABS, the *Zefferino* ruling and the seemingly low costs for optional increased accident benefit coverage, both the insurer and, in turn, the insured or prospective customer must have a clear understanding of the available coverage options.

Sweeping reductions in standard benefits for car accident victims under standard policies under the new SABS, is expected to lead to an even greater duty placed on the insurer to ensure that its customers are able to make fully informed decisions.

This duty on the insurer is arguably even greater than as discussed in the *Zefferino* decision. The motor vehicle accident at the heart of that case occurred before the changes to SABS in 2010, a time when customers had access to much more accident benefit coverage under standard policies than they do today.