

# THE COMING CHANGES TO ONTARIO AUTO LEGISLATION: ACCIDENT BENEFITS & TORT

SEPTEMBER 2015

**DARCY R. MERKUR,**

Partner

Thomson, Rogers

dmerkur@thomsonrogers.com

416-868-3176

**RYAN MURRAY,**

Partner

Oatley Vigmond

rmurray@oatleyvigmond.com

1-888-662-2481

**LARA FITZGERALD-HUSEK,**

Associate

Oatley Vigmond

lfitzgeraldhusek@oatleyvigmond.com

1-888-662-2481

**THOMSON ROGERS**

PERSONAL INJURY LAWYERS

**Oatley, Vigmond**

Personal Injury Lawyers

## OVERVIEW

As part of the provincial budget announced on April 23, 2015, the Ontario government decided to first throw seriously injured accident victims off the bus and then deprive them of the ability to make a good recovery from their injuries. The announcement came as a total blindside to interested stakeholders.

Historically, whenever the Ontario government considered major changes to automobile insurance legislation, they first engaged in widespread consultation between stakeholders. That consultation process consistently revealed that all stakeholders agreed that the accident benefits available to the most seriously injured persons were sacrosanct. As a result, prior changes focussed on changes other than reductions to the no-fault statutory accident benefits available to the 'catastrophically impaired'.

The changes, first announced in the budget, have now all been introduced into legislation (with the last piece of legislation, Ontario Regulation 251/15, only being made public on August 27, 2015).

All of the government's announced changes reduce the funding available to accident victims, reduce the chance for an accident victim to regain their independence and result in further pressure on the chronically under-resourced public health care system.

This paper will review each of the following recent changes in greater detail:

- 1) Major reductions to statutory accident benefits (for accidents on or after June 1, 2016);
- 2) A narrowing of the definition of "catastrophic impairment" (for accidents on or after June 1, 2016); and,
- 3) An increase to the tort deductible (as of August 1, 2015).
- 4) The License Appeal Tribunal (to replace FSCO and eliminate the right to sue in accident benefits disputes-expected as of April 1, 2016);
- 5) The further "incurred" definition change (effective February 1<sup>st</sup>, 2014);
- 6) The tort prejudgment interest rate reduction (effective January 1, 2015);
- 7) The accident benefit dispute interest rate reduction (effective January 1, 2015); and,
- 8) A proposed overhaul and expansion of the Minor Injury Guideline.

Insurance, by its nature, is there to protect against unexpected events. The government's announced reductions automobile insurance benefits, provides no such protection. The changes serve to defeat the very purpose of mandatory automobile insurance in Ontario.

These changes are being made by the government as part of an attempt to address political pressure to reduce automobile insurance premiums. However, the changes are being made without an investigation into the legitimate questions that have been raised about the very significant profits that are being made by the very insurers that the government is trying to appease, and before the savings from the last round of changes has been thoroughly assessed.

Interestingly, while the above reductions in accident benefits were purportedly introduced as part of the government's pledge to reduce insurance rates by 15%, there is no legislation similarly affecting insurance rates. While insurance rates dropped 0.95% in the first quarter of 2015, nearly two-thirds of those "gains" were undone in the second quarter of 2015, when rates climbed back up by 0.6%.<sup>1</sup>

Through these changes and reductions, the Ontario government has sacrificed the most vulnerable citizens in exchange for political gain.

### **1. The Accident Benefit Reductions**

Further reductions in available accident benefits has just been introduced into legislation (despite the fact that accident benefits for non-catastrophic impairment claims were already cut by 50% as of September 1, 2010).

On August 27, 2015, the Ontario government posted Ontario Regulation 251/15 (see Tab A). Ontario Regulation 251/15 amends the current Statutory Accident Benefit Schedule (known as Ontario Regulation 34/10). The new amended SABS can be found at Tab B.

The changes will only impact claims arising from accidents on or after June 1, 2016.

The changes will, without question, curtail the rehabilitation of serious injured accident victims.

There are three major changes:

- a) A reduction in the non-catastrophic benefit limits and the duration that benefits are available;
- b) A major reduction in the scope of non-earner benefits; and,
- c) A reduction in the catastrophic impairment benefit limits.

---

<sup>1</sup> For more information, see Auto Insurance Rates for the Second Quarter of 2015, accessed at <https://www.fsco.gov.on.ca/en/auto/rates/Pages/q2-2015.aspx>.

Each of these changes is reviewed below.

**a) A reduction in the non-catastrophic benefit limits and the duration that benefits are available**

For accidents on or after June 1, 2016, the maximum accident benefits available for non-catastrophic impairment claims has been reduced from the current total maximum of \$86,000 (being \$50,000 for medical and rehabilitation benefits plus \$36,000 in attendant care benefits) to a combined total of \$65,000 (a \$21,000 total reduction, equivalent to about a 25% reduction).

In addition, the duration for accessing these benefits has been shortened from 10 years to 5 years (260 weeks), except in cases involving children (those under 18 at the time of the accident) where claims can be made until the claimant's 28<sup>th</sup> birthday.

Prior to the September 1, 2010 changes these benefits totalled \$172,000, so the new reduced maximum, after accounting for inflation, is about 35% of what used to be available (or about a 65% reduction from the benefits available prior to 2010).

**b) A major reduction in the scope of non-earner benefits**

For students, stay at home parents, the unemployed and retirees, non-earner benefits have been available to accident victims to provide some modest weekly benefit entitlement.

While non-earner benefits are not payable for the first 6 months post-accident, they are thereafter payable at a rate of \$185 per week for seriously injured accident victims that have suffered 'a complete inability to carry on a normal life'. For students, the weekly amount increased to \$320 per week at the 2 year anniversary of the accident.

Non-earner benefits have always been payable for life, assuming the claimant continues to qualify for them, although the weekly amounts are reduced after age 65.

The new legislation, applicable to claims arising from accidents on or after June 1, 2016, reduces the duration of eligibility for non-earner benefits from 'life' to a maximum duration of 2 years (while replacing the 6 month waiting period that currently applies with a four week waiting period).

This change will have a horrific impact on accident victims who were expected to shortly earn an income but are now unable to do so because of their injuries. Those that were about to enter or re-enter the workforce will now only be eligible for weekly benefits totalling \$18,500 over their lifetime (\$185 per week for 2 years, other than during the first four weeks) instead of a lifetime of access.

For example, a seriously injured teenager that will never work again because of their accident related injuries will now be prevented from accessing this weekly benefit that would have been present valued at more than \$500,000 (and, to be clear, that injured student does not now qualify for an income replacement benefit instead).

### **c) A reduction in the catastrophic impairment benefit limits**

For claims arising out of accident that occurred on or after June 1, 2016, the maximum benefits available to 'catastrophically impaired' persons has been reduced from \$2 million (\$1 million in medical and rehabilitation benefits plus \$1 million in attendant care benefits) to a total of \$1 million (i.e. a 50% reduction).

The current \$2 million total maximum has been in place for roughly 20 years and, after accounting for inflation on all of the benefits available (none of which have been adjusted for inflation since at least 1996), these further benefit changes will result in access for quadriplegic (and other catastrophically impaired) claimants to roughly 30% of what was available back in 1996 (a roughly 70% reduction in what was once available).

The new maximums will lead to heightened scrutiny over benefit spending. Spending on crucial items like home renovations, vehicular modifications and outsourced attendant care will all be second guessed out of concern for long term planning given the reduced benefit limits.

Even with the current maximum limits it has been a struggle for the most seriously injured claimants to evaluate how to best use their limited accident benefits. When you reduce the available limits by half, the pressure to make wise decisions and cut corners is substantially increased. The result is increased stress both emotionally and financially on the accident victim and their family.

For clarity, it should be noted that any benefit reductions will only impact new claims for accidents occurring on or after June 1, 2016.

## **2. The Revised CAT Definition**

The intention to revise the definition of 'catastrophic impairment' has purportedly been part of an effort to capture only the most seriously injured persons. But, given that all government supported proposals on this issue have included the removal of the simple, efficient and popular Glasgow Coma Scale (GCS) test, the revised definition will undoubtedly be seen as a significant narrowing of the 'catastrophic impairment' designation.

The new CAT definition stems from the Superintendent's Report on the Definition of Catastrophic Impairment in the Statutory Accident Benefit Schedule (prepared December 15<sup>th</sup>, 2011 and released publicly in June, 2012).

The new CAT definition will apply to claims arising out of accidents that occur on or after June 1, 2016. A chart at Tab C compares the current CAT definition with the new CAT definition. As you can see, a host of new tests have been introduced including:

- ASIA test for spinal cord injuries;
- Spinal Cord Independence Measures for lower limb amputations;
- GOS-E for brain injuries in adults (no more GCS!);
- KOSCHI scale for children with brain injuries;
- Maintaining the WPI test (albeit with the introduction of the 6<sup>th</sup> AMA edition for some portion of the calculation)

By changing the now well understood CAT tests that have been in place for close to 20 years and by eliminating the simple and easy GCS test, identifying who will qualify as 'catastrophically impairment' will be challenging and accessing the designation will be delayed, causing negative impacts on a claimant's rehabilitation.

Detailed discussion about the new CAT definition is beyond the scope of this presentation.

### **3. Changes to the Tort Deductible**

On August 1, 2015, the tort deductible was increased for tort claims for pain, suffering and loss of enjoyment of life and for tort claims of family members for loss of their loved ones' care, guidance and companionship. Before the amendments to Regulation 461/96, *Court Proceedings for Automobile Accidents that Occur on or After November 1, 1996*, a \$30,000 deductible applied to all cases where a judge or jury awarded a plaintiff less than \$100,000 for his or her pain, suffering and loss of enjoyment of life. Similarly, a \$15,000.00 deductible applied to the Family Law Act claims of family members who were awarded less than \$50,000 for the loss of the injured or deceased person's care, guidance and companionship.

The regulations have been amended to adjust the deductibles with inflation. From August 1 to December 31, 2015, the \$30,000 deductible is now \$36,450 and the \$15,000 deductible is \$18,270. As of January 1, 2016, the deductible will be adjusted in accordance with an indexed percentage stipulated in the Insurance Act. On January 1 of every subsequent year, the prescribed amount of the deductible will be revised according to the indexation percentage of the Insurance Act for that year.

The monetary threshold for applying a deductible for claims for pain, suffering and loss of enjoyment of life was previously \$100,000. In other words, where an injured plaintiff was awarded more than \$100,000 for his or her for pain, suffering and loss of enjoyment of life, the

deductible would not apply. The threshold for applying a deductible to *Family Law Act* claims for loss of guidance, care and companionship was \$50,000.

As of August 1, 2015, the deductible will not apply where the award for pain and suffering is greater **than \$121,799** for the period of August 1, 2015 to December 31, 2015. Thereafter, the threshold will be **inflation-indexed annually**. The \$50,000 threshold for deductible in *Family Law Act* claims has increased to \$60,899, and will also be adjusted annually.

These changes apply only to accidents that occur on or after August 1, 2015, although insurers may try to argue otherwise.

#### 4. Dispute Resolution - Licence Appeal Tribunal

In 2014 the Ontario government passed Bill 15 - the *Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014*<sup>2</sup>. The bill received royal assent on November 20, 2014. Interestingly, more than 9 months later, the government has yet to fully implement Bill 15's most controversial change: the removal of the right of insured people to sue their own insurer over denied accident benefits.

Under the existing system, when an insurance company denies reasonable and necessary accident benefits to an insured, the insured can dispute that denial by starting a mediation process with the Financial Services Commission of Ontario ("FSCO"). If the FSCO mediation does not resolve the dispute, the insured person can choose to sue his or her insurer in civil court or they can initiate arbitration proceedings with FSCO. FSCO is the regulator of the insurance sector in Ontario. As part of that role, FSCO has a dispute resolution section which has conducted mediation and arbitration proceedings of accident benefits disputes for 25 years. FSCO arbitrators are permanent public servants with extensive experience adjudicating disputes involving accident benefits.

Bill 15 changes this long established system. Under the new system, mediations and lawsuits will no longer be available over denied accident benefits. FSCO has also been removed from the accident benefits dispute resolution process.

These changes were opposed by many stakeholders, including both plaintiff and defence personal injury lawyers.<sup>3</sup> The Ontario government refused to amend the bill and instead took

---

<sup>2</sup> Bill 15 can be accessed at:

<http://www.ontla.on.ca/web/bills/billsdetail.do?locale=en&Intranet=&Bill10=3007>.

<sup>3</sup> The full transcript of the November 5, 2014 meeting of the Standing Committee on General Government discussing *Bill 15, Fighting Fraud and Reducing Automobile Insurance Rates Act, 2014* can be accessed at: [http://www.ontla.on.ca/web/committee-proceedings/committee\\_transcripts\\_details.do?locale=en&BillID=3007&ParlCommID=8998&Business=&Date=2014-11-05&DocumentID=28303](http://www.ontla.on.ca/web/committee-proceedings/committee_transcripts_details.do?locale=en&BillID=3007&ParlCommID=8998&Business=&Date=2014-11-05&DocumentID=28303)

the position that Bill 15 was simply implementing the recommendations contained in the February 2014 report of a retired Associate Chief Justice of Ontario, J. Douglas Cunningham.<sup>4</sup>

Once Bill 15 is fully implemented, insured persons with denied accident benefits will only be able to commence proceedings against their insurer at the Ontario Licence Appeal Tribunal (“LAT”). The LAT is a government tribunal which deals with diverse matters, including disputes over liquor licenses and driver’s licenses. The Tribunal's members are part-time adjudicators appointed on a contract basis. The tribunal members will initially have no experience in adjudicating accident benefits matters.

In April 2015, the Ontario government announced that the new LAT system for accident benefits disputes will take effect on April 1, 2016. However, as of August 10, 2015, the government has yet to publish the regulations that will provide us with fine details on exactly how the new dispute resolution system will function. The details provided below are all based on the Cunningham report and/or Bill 15. Additional regulations which flesh out the new LAT system will have to be released at some point prior to April 1, 2016. Another possibility is that the April 1, 2016 implementation of the LAT will be delayed by several months (and the thought is that it will be delayed to June 1, 2016 to correspond with the new legislation that applies to accidents on or after June 1, 2016). When these regulations are released, any or all of the below may be modified or eliminated completely.

The proposed new LAT dispute resolution model will begin the denial of a benefit. Once a benefit has been denied, the insured can request that his or her insurance company conduct an internal review of the denial. This internal review must take place within 30 days. If the denial is upheld, the next step is to apply for a settlement hearing with the LAT. Once the application is submitted, the LAT will set up an in-person or teleconference settlement meeting. Parties must be prepared to disclose the evidence they will be relying on at the hearing. Settlement meetings will not commence until the registrar (or some other “gatekeeper”) has reviewed the file and determined that the parties are ready for the meeting. The registrar/gatekeeper also has the power to consolidate proceedings that involve the same claimant and insurer. The settlement meeting is supposed to take place within 45 days of the accepted application.

In the event that the dispute does not settle at the settlement meeting, the next step is to apply for arbitration. The format and length of the arbitration hearing is determined by the registrar or arbitrator of the settlement meeting. There are three types of hearings:

1. Paper review hearings will be held within 60 days of the application for all disputes under \$10,000 or involving the determination of whether or not a claimant falls within the MIG;

---

<sup>4</sup> Justice Cunningham’s *Ontario Automobile Insurance Dispute Resolution System Review: Final Report* can be accessed at: <http://www.fin.gov.on.ca/en/autoinsurance/drs-final-report.pdf>



2. Expedited hearings (lasting either half a day or up to one full day) will be held within 90 days of the application for all “straightforward” disputes that do not qualify for the paper or full in-person hearings; and,
3. Full in-person hearings within 90 days of the application, for such issues as catastrophic determination, entitlement to income replacement benefits beyond the first 104 weeks and 24 hour attendant care claims.

As noted above, the implementation of Bill 15 will also eliminate the right for insured people to commence a civil lawsuit over denied accident benefits. This presents a procedural problem for many accident victims. Injured people who were hurt as a result of someone else’s negligence have both a tort and an accident benefits claim. In those cases, it is often not advisable for the insured person to fully and finally settle their accident benefits claim until the tort claim settles. By removing the right to commence a civil lawsuit, the government will have effectively forced insured people to litigate in two separate venues at the same time. This will add cost to the system. Bill 15 will also likely force insured people to spend time and money litigating at the LAT over denied benefits that, in the current system, would be included in an accident benefits lawsuit. That accident benefits lawsuit would then proceed in parallel with the tort claim and it would either settle or be adjudicated at the same time as the tort claim.

It remains unclear whether insured people will still be able to commence a civil lawsuit for punitive or bad faith damages against their insurer if the insurer has adjusted their claim in a manner that breaches the insurer’s duty of utmost good faith. It also remains unclear whether the LAT decisions will create a system of precedents which can be relied upon in later cases. Justice Cunningham’s report recommended that the LAT decisions not create any sort of precedent.

Bill 15 is currently the subject of a constitutional challenge. A personal injury lawyer has brought the challenge on behalf of accident victims and is seeking a declaration that the new legislation is discriminatory and unconstitutional. One of the main arguments advanced is that the right of citizens to access the court system is a fundamental right for Canadians.<sup>5</sup> Under the Bill 15 system, the only time a Judge will see an accident benefits issue is on judicial review. This is a very limited form of appeal under which a decision may only be overturned if the LAT acted unreasonably. Close attention will need to be paid over the next eight months as the LAT system is further fleshed out via regulation and the court challenge is presumably dealt with.

## **5. Change to “Incurred” and Economic Loss for Attendant Care Benefits**

On February 1, 2014, Regulation 347/13 amended the *Statutory Accident Benefits Schedule – Effective September 1, 2010* (“2010 SABS”) to limit attendant care benefits provided by non-

---

<sup>5</sup> For more information, see *Personal Injury Lawyer Launches Challenge Against Bill 15*, accessed at: <http://www.insurancebusiness.ca/news/personal-injury-lawyer-launches-challenge-against-bill-15-187471.aspx>.

professional service providers to the amount of the actual economic loss sustained by the service providers. This marked a major change in the payment of attendant care benefits.

Previously, under the 2010 SABS, attendant care benefits were payable for reasonable and necessary expenses incurred by or on behalf of the insured for services provided as a result of the accident. The benefit was only payable if the expense is incurred.

The definition of “incurred” introduced in the 2010 SABS included a requirement that non-professional service providers “sustained an economic loss as a result of providing the goods or services to the insured person.” This definition meant that attendant care provided by family members who were not professional caregivers would only be payable if the family members sustained an economic loss.

In *Henry v. Gore Mutual Insurance Co.*, the Ontario Court of Appeal confirmed that the requirement of economic loss was a threshold issue to establishing entitlement to the benefit, while the amount of the benefit was paid in accordance with the Form 1 “Assessment of Attendant Care Needs” required under the SABS.<sup>6</sup> In other words, as long as a loved one suffered some economic loss in providing the attendant care, they could receive all of the attendant care benefits payable pursuant to the Form 1. With the new amendments to the 2010 SABS, benefits are “capped” at the amount of the economic loss. In other words, if the loved one loses \$5 per month in providing the attendant care, they will only receive \$5 towards the provision of attendant care to their loved one.

The issue of prospective vs. retrospective has raised its ugly head again in the implementation of this change. There is no transitional provision in Regulation 347/13 that stipulates whether the new provision applies retrospectively or to future proceedings only. Considering the history of cases reviewed and relied upon by the Court of Appeal in *Henry v. Gore* and by Justice Toscano Roccamo in *El-Khodr*, it seems obvious that this new legislation marks a major change to an insured person’s substantive rights to attendant care benefits. However, the issue of whether this change applies retrospectively or only to accidents which occurred on or after February 1, 2014 is currently before the courts. Once a decision is rendered on this issue, it will certainly be circulated widely amongst the plaintiff’s personal injury bar and the community based rehabilitation community.

## **6. Changes to the Prejudgment Interest Rate for Tort Claims**

On January 1, 2015, the *Insurance Act* was amended and the previous interest rate of 5% per year no longer applies to awards for pain, suffering and loss of enjoyment of life. Under the new provision, the prejudgment interest rate for those damages is calculated according to general interest rate provisions under the *Courts of Justice Act*. This rate is currently 1% per year.

---

<sup>6</sup> 2013 ONCA 480.

One large issue surrounding the new amendments is whether these new provisions apply to new actions brought after January 1, 2015 or to pre-existing lawsuits. If new legislation reaches back to apply to a past situation (e.g. an ongoing lawsuit), it is said to have “retrospective” application. Where new legislation only affects matters occurring on or after the law is passed, it has “immediate” application.

In Ontario, the *Legislation Act* stipulates that changes to procedural legislation will apply immediately (to past, present and future proceedings alike). However, that provision applies to *procedural* legislation only. There is a long line of cases that have decided that new legislation will not apply retroactively where a party’s substantive rights are affected. The Court of Appeal has described the distinction between procedural and substantive law:

**[S]ubstantive law creates rights and obligations and is concerned with the ends which the administration of justice seeks to attain, whereas procedural law is the vehicle providing the means and instruments by which those ends are attained. It regulates the conduct of Courts and litigants in respect of the litigation itself whereas substantive law determines their conduct and relations in respect of the matters litigated.<sup>7</sup>**

Whether the changes to prejudgment interest would apply retrospectively or only to future proceedings depends on whether the right to prejudgment interest for pain and suffering was substantive or procedural. This issue has now been before the courts twice in 2015.

In *Cirillo v. Rizzo*,<sup>8</sup> the motion judge decided that the right to prejudgment interest was procedural and the new provision applied immediately to all past, present and future actions as of January 1, 2015. Justice MacKenzie considered entitlement to prejudgment interest to be substantive but concluded that the method by which the rate of interest was quantified was procedural.

In the more recent decision, *El-Khodr v. Lackie*,<sup>9</sup> Justice Toscano Roccamo determined that *Cirillo* had been wrongly decided and the new provisions should only apply to claims brought on or after January 1, 2015. In *Cirillo*, the difference between the new and old interest rates was quite small, whereas in *El-Khodr*, it amounted to a \$45,000 difference.

In *El-Khodr*, the judge, in our view correctly, decided that the changes to the prejudgment interest rate for pain, suffering and loss of enjoyment of life affect a plaintiff’s substantive rights. Justice Toscano Roccamo followed a long line of cases which held that legislation that affects substantive rights does not apply retrospectively unless parliament clearly states its intention to do so. In this case, the law was silent about whether the law applied

---

<sup>7</sup> *Sutt v. Sutt*, [1969] 1 O.R. 169, at p. 175.

<sup>8</sup> 2015 ONSC 2440 [*Cirillo*].

<sup>9</sup> 2015 ONSC 4766 [*El-Khodr*].

retrospectively.

Justice Toscano Roccamo also discussed the fact that prejudgment interest rates were known by insurance companies and were used to calculate their premiums:

**The 5% prejudgment interest rate for general damages was a known risk factor, and insurance companies took this into account in setting their premiums... the retrospective change would essentially result in a windfall for insurance companies and a disadvantage to insured persons who paid higher premiums.<sup>10</sup>**

As explained in section 5 below, the interest rates applying to accident benefits have also recently been changed. Fortunately, there are transitional provisions in the law changing the accident benefits interest rates which stipulate the dates on which the changes apply.

## **7. Changes to Accident Benefits Interest Rates**

The interest rate applicable in overdue accident benefits disputes also changed effective January 1, 2015. The purpose for the change was to align accident benefit interest rates with the new prejudgment interest rate used in court awards for non-pecuniary losses.<sup>11</sup>

Previously, interest on overdue benefits (for accidents occurring on or after September 1, 2010) was payable at the monthly rate of 1%, compounded monthly, whether or not a dispute had arisen. Under the new changes, when a dispute arises (i.e. if a mediation proceeding is commenced), the new prejudgment interest rate in the *Courts of Justice Act* (currently 1% per annum) applies. In situations where there is no dispute but payments are overdue, the interest rate remains 1% compounded monthly.

The provision does not apply to benefits that were overdue prior to January 1, 2015. The transitional provision provides that benefits that are currently overdue as of December 31, 2014 will continue to be payable under the old rules (1% compounded monthly).

## **8. Potential Changes to the SABS: the new MIG?**

FSCO and the Superintendent of Financial Services recently prepared a draft of a new Common Traffic Impairment (CTI) Guideline. This document was then circulated to a mailing list by a consumer group that advocates for the rights of accident victims. The draft CTI is still in the consultation stage but appears as though it is intended to supplant the Minor Injury Guideline ("MIG"). The proposed CTI guidelines are intended to be incorporated into the SABS and to be

---

<sup>10</sup> *El-Khodr, supra*, para. 51.

<sup>11</sup> See FSCO Bulletin A-15/14: *Proclamation Date for Amendment To Prejudgment Interest Rate*, accessed at: <https://www.fSCO.gov.on.ca/en/auto/autobulletins/2014/Pages/a-15-14.aspx>

binding. The guidelines apply to a new category of claimants called “Common Traffic Impairment.” Unlike the MIG, the proposed CTI Guideline applies to impairments with “mental and psychological signs, symptoms, injuries or conditions.”

Under the proposed new system, an insured with physical, mental or psychological impairments falling within the CTI would be treated in accordance with standardized “care pathways” which are designed in accordance with a number of structured guidelines (e.g. *Guideline for the Clinical Management of Neck Pain And Its Associated Disorders and Guideline for the Clinical Management of Soft Tissue Disorders of The Upper Extremity*). The care pathways are not mutually exclusive and insureds can access treatment under more than one pathway (if for example, their injuries, fell within the neck pain guideline and the soft tissue injuries to the upper extremity guideline they would receive treatment in accordance with both care pathways).

The new CTI guidelines impose strict timelines – regardless of whether treatment is initiated one day, one month or five months after the collision. Treatment in accordance with the CTI is only intended to continue for up to six months after the collision. The care pathways are divided into two phases: recent onset (0-3 months post-loss) and persistent (4-6 months). Although the financial limits under the new CTI guidelines have not yet been determined, it is clear there will be an overall financial cap as well as monthly sub-limits for treatment. It is also unclear as to how or whether an insured can be removed from the CTI guideline if they have not recovered by the 6 month anniversary of the crash.

Additionally, as currently drafted, all extended health care benefits reasonably available to claimants who fall within the CTI guidelines will be deducted from the amount otherwise payable by the auto insurer. Unlike the MIG, insurers do not have to pay for treatment in excess of the CTI pathways where a collateral carrier has already paid for treatment in accordance with the care pathways.

Much is still uncertain about the new CTI, but in its current draft form, it appears to be significantly more restrictive than its predecessor. The strict 6-month timeline also means that it is imperative that insureds are properly diagnosed and treated from the outset. There is also hope that the limits in the CTI will restore some of the medical and rehabilitation benefits which were slashed from \$100,000 to the \$3,500 MIG limit.

**DARCY R. MERKUR,**  
Partner  
Thomson, Rogers  
dmerkur@thomsonrogers.com  
416-868-3176

**RYAN MURRAY,**  
Partner  
Oatley Vigmond  
rmurray@oatleyvigmond.com  
1-888-662-2481

**LARA FITZGERALD-HUSEK,**  
Associate  
Oatley Vigmond  
lfitzgeraldhusek@oatleyvigmond.com  
1-888-662-2481