

Accident Benefit Reporter

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STATUTORY DEDUCTIBLE CONFUSION

The risk analysis associated with the resolution of ongoing motor vehicle tort claims in Ontario has been turned on its head following the surprising December 8th decision by Justice Martin James of the Ontario Superior Court of Justice in *Vickers v. Palacios*, 2015 ONSC 7647 (Ont. S.C.).

Since October 1, 2003, Ontario has had in place a \$30,000 statutory deductible on claims by injured persons against at-fault automobile owners and operators (unless the general damage award exceeded a vanishing deductible limit of \$100,000). The deductible, along with a defined “permanent and serious” threshold, was designed to reduce automobile litigation by precluding cases by those with modest injuries and modest damages. A statutory deductible of \$15,000 has also been in place since October 1, 2003 on claims by family members (unless the Family Law Act award exceeded the vanishing FLA deductible limit of \$50,000). Cont’d

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In the summer of 2015, the Ontario government announced changes to the statutory deductible aimed at bringing the deductible in line with inflation since 2003. At the same time, interestingly, the Ontario government, instead of increasing benefit entitlement with inflation, announced major reductions in available accident benefits come June 1, 2016.

The government deductible changes came into force as of August 1, 2015 via Ontario Regulation 221/15, amending Ontario Regulation 461/96.

The new provision, incorporated into section 267.5 of the Insurance Act, indicates that the prescribed deductible until December 31, 2015 is now \$36,540 (increased by nearly 22%) and thereafter will increase every January 1st by inflation. In addition, the \$100,000 vanishing deductible limit was also increased by nearly 22% to \$121,799 and is to be increased with inflation every January 1st. Similarly, the deductible on claims by family members was increased to \$18,270 unless the amount exceeds the new inflated vanishing FLA deductible amount of \$60,899.

In *Vickers*, the question was whether an October 29, 2015 jury verdict in an automobile tort claim arising from injuries sustained well before 2015 was subject to the new deductible provisions in force as of August 1, 2015.

The Honourable Justice James of the Ontario Superior Court of Justice reviews the genesis of the deductible amendments and concludes that, "...the revised deductible is to apply to all pending actions".

Justice James notes that "...the deductible issue is a matter of procedural law and ought to be presumed to apply to this action". Accordingly, Justice James applies the new post August 1, 2015 higher deductible of \$36,540 to this pre 2015 motor vehicle claim.

The decision in *Vickers* throws a wrench into the fair resolution of auto insurance tort claims. Plaintiff's personal injury lawyers argue it is blatantly unfair to apply increased deductible limits to ongoing claims. The unexpected application of increased deductibles has drastic consequences on the viability and recovery of certain claims and on Offers to Settle made in the context of ongoing claims.

For example, for ongoing claims where accident victims expected a general damage award of between \$100,000 and the new \$121,799 limit,



there will now be a \$36,540 deductible that is applied, causing a major alteration in the anticipated recovery of the plaintiff (i.e. instead of recovering a full general damage award of say \$100,540, without a deductible, the plaintiff would now recovery just \$64,000 after accounting for the new deductible and the new vanishing deductible threshold).

The impact could be even more profound on claims by family members as these claims are often modest but legitimate ones that marginally exceed the deductible.

The *Vickers* decision will likely be appealed, or, alternatively, the issue of the retrospective impact of the deductible changes will undoubtedly be addressed by an appellate court in the coming months. Sadly, until then, accident victims will be under pressure to consider reducing settlement demands in light of the uncertainty surrounding the appropriate deductible application.

The notion that amendments can be made by the government that drastically negatively impact the financial recovery of an accident victim with a longstanding ongoing claim is extremely controversial. Frankly, it cannot legally be done (and especially cannot be done without express and clear legislative intention to do so, and even then will be challenged as illegal).

Imagine the reaction by the insurance industry if this 'procedural' deductible was eliminated or reduced to \$1 on a retrospective basis. Insurers would be crying foul arguing that their insurance premiums were based on the law as it was when the contracts of insurance were bound. Similarly, it is not fair to suddenly reduce financial recovery for accident victims and their families in relation to ongoing claims that predate the August 1, 2015 amendment. ■■■

UPCOMING EVENTS 2016



1. **February 19 - 21 Motorcycle Show** Thomson, Rogers is proud to support Ride for Sight and She Rides Nite and to be a show sponsor at this year's event. Stop by our booth and say hello.
2. **April 21, 2016 PIA Law Practical Strategies Conference** This year's conference will address various topics surrounding Paediatric Traumatic Brain Injury. Presenting from Thomson, Rogers will be David Tenszen, Deanna Gilbert and Robert Ben. Keynote speaker will be Dr. Jacob Neufeld, Medical Director of Paediatric Rehabilitation at St. Luke's Children's Hospital in Boise, Idaho, USA. Registration is now open.
3. **April 22 - 24 MADD Canada National Conference** Ian Furlong will be presenting on behalf of PIA Law.
4. **May 5-6 Hamilton Convention Centre** Thomson, Rogers is proud to continue its support of the Hamilton Health Sciences as a Platinum sponsor of the 23rd Annual Hamilton ABI conference.
5. **May 10 PIA Spring Webinar** Topics will focus on the New SABS Changes coming into effect June 1, 2016. David MacDonald will be a panel speaker.
6. **September 15, 2016 Back to School Conference with PIA Law and Ontario Brain Injury Association** SAVE THE DATE
7. **October 27 Brain Injury Association of Niagara Conference** David Payne and David Tenszen will be presenting on behalf of Thomson, Rogers.
8. **November 10 -11 Toronto ABI Network Conference** Thomson, Rogers is proud to be the Diamond Sponsor.

**FOR MORE INFORMATION
ON THE EVENTS LISTED ABOVE,
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