

# Then and Now: Recent Changes in Automobile Insurance Legislation in Ontario

Presented by:

**Stephen Birman and Robert M. Ben**  
Partners, Thomson Rogers

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# OVERVIEW OF CHANGES

## Accident Benefits

- Reductions to benefits
- Narrowing of “catastrophic impairment”
- “Incurred” expenses
- Reduction of SABS interest rate
- No right to sue/elimination of FSCO
- Proposed MIG overhaul

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# OVERVIEW OF CHANGES

## Tort

- Increased tort “deductible”
- Lower prejudgment interest rate

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## REDUCTIONS TO SABS

- Reduced “non-catastrophic” benefits
- Reduced “non-earner” benefits
- Reduced “catastrophic” benefit limits

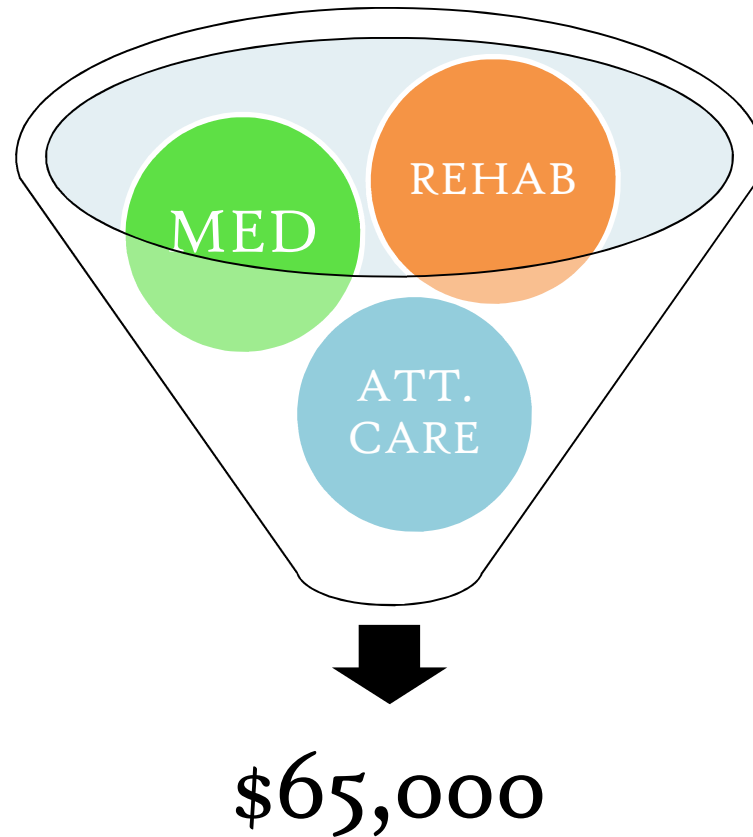
# “NON-CATASTROPHIC” BENEFITS

BENEFIT	THEN	NOW
Med/Rehab	\$50,000 10 years (age 25 for children)	\$65,000 combined 5 years (age 28 for children)
Attendant Care	\$36,000 (\$3,000/month) 2 years	

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# “NON-CATASTROPHIC” BENEFITS



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## “NON-CATASTROPHIC” BENEFITS



\$21,000 (25%) total reduction in medical, rehabilitation and attendant care benefits



50% reduction in duration of benefit (except for children)

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## “NON-CATASTROPHIC” BENEFITS

- Document the “choice”
- Document the “sacrifice”
- Document the “cost”



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## NON-EARNER BENEFITS

- Age 16 and up
- Students
- Stay-at-home parents
- Unemployed
- Retirees

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## NON-EARNER BENEFITS

- “Complete inability to carry on a normal life”
  - *Heath v. Economical Mutual Insurance Company*, 2009 ONCA 391
  - *Galdamez v. Allstate Insurance Company of Canada*, 2012 ONCA 508

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# NON-EARNER BENEFITS

## THEN

- 16 and up
- \$185/week
- 26-week waiting period
- \$320/week after 2 years
- Payable for life (reduced at 65)

## NOW

- 18 and up
- \$185/week
- 4-week waiting period
- No increase
- Payable for 2 years

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## NON-EARNER BENEFITS

- Reductions apply to accidents on or after June 1, 2016
- Negatively impacts people who were about to enter or re-enter workforce
- \$18,500 lifetime (vs. \$500K +)
- Will not qualify for income replacement benefits

# CATASTROPHIC IMPAIRMENT LIMITS

BENEFIT	THEN	NOW
Med/Rehab	\$1 million	\$1 million combined
Attendant Care	\$1 million (\$6,000/month)	

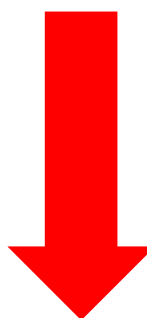
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## CATASTROPHIC IMPAIRMENT LIMITS

- Reduction applies to accidents on or after June 1, 2016
- Former \$2 million aggregate limit has been in place for 20 years

 Reduction to \$1 million (adjusting for inflation) means claimants get 70% less

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# CATASTROPHIC IMPAIRMENT LIMITS

- “Choices” and “sacrifices”
- Pressure to “cut corners” and “stretch”
- Spending on crucial items like home/vehicle modifications and outsourced attendant care will be “second guessed” by insurers
- Stress, strain on claimant and family

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## REVISED “CATASTROPHIC” DEFINITION

- New “tests” aim to capture only the most seriously injured persons
- Removal of simple, efficient and widely used Glasgow Coma Scale (GCS)



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# REVISED “CATASTROPHIC” DEFINITION

- New “tests”
  - ASIA (spinal cord injuries)
  - Spinal Cord Independent Independence Measures (lower limb amputations)
  - GOS-E (adult brain injury)
  - KOSCHI (child brain injury)
  - WPI maintained (but 6<sup>th</sup> ed. AMA Guides)

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## REVISED “CATASTROPHIC” DEFINITION

- Old tests have been around 20 years
- New tests have yet to be “tested”
- Means disputes and delayed CAT designations (at least initially)
- Delays negatively impact rehabilitation

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## “INCURRED” EXPENSES

- Under 2010 SABS benefit payable if:
  - Reasonable and necessary
  - Person received\* good/service
  - Person paid/promised/obligated to pay
  - Provider did so in course of regular occupation/profession or sustained an economic loss\*

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## “INCURRED” EXPENSES

- “An insured...need not actually receive the items or services or spend the money or become legally obliged to do so. It is sufficient if the reasonable necessity of the service or item and the amount of the expenditure are determined.” See: *Hoang v. Personal Ins.*, 2014 ONSC 81 (Div. Ct.)
- Prevents an insurer from benefiting from an insured’s lack of financial resources

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## “INCURRED” EXPENSES

- Economic loss is a “threshold” issue, not a “cap.” See: *Henry v. Gore Mutual*, 2013 ONCA 480
- But, mere “loss of time” may not be enough. See: *Simser v. Aviva*, 2015 ONSC 2363 (Div. Ct.)

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## “INCURRED” EXPENSES

- On February 1, 2014, SABS amended to “cap” benefit to amount of “economic loss”
- Effectively discriminates/penalizes low income earners providing attendant care

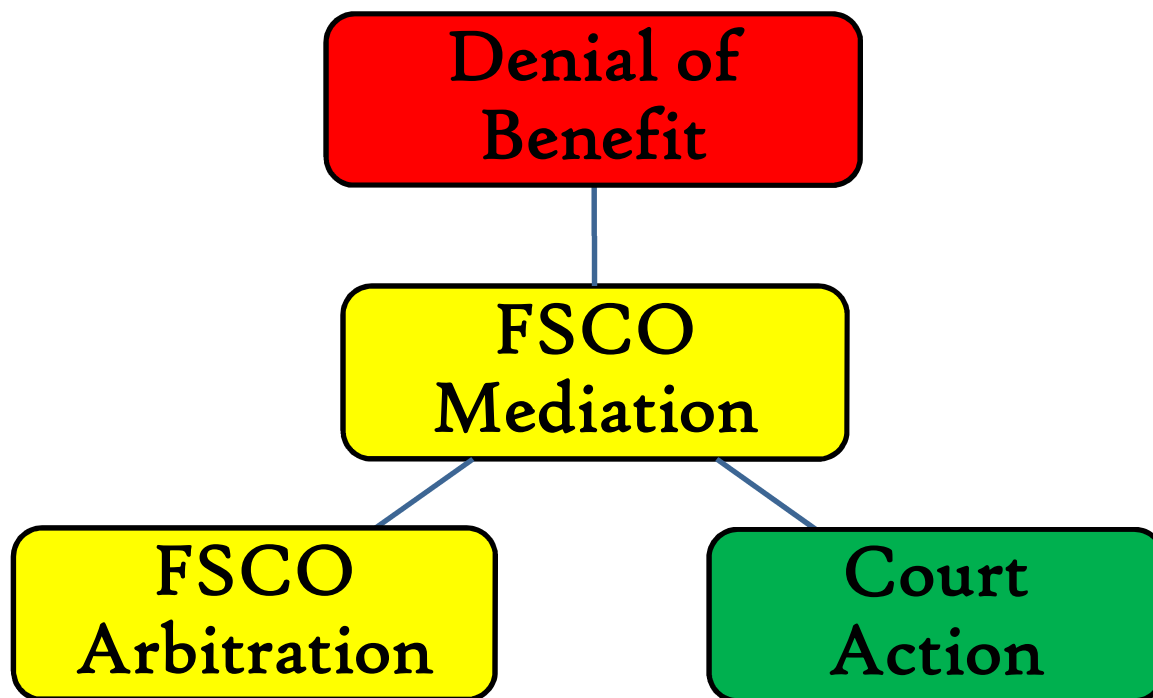
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## REDUCTION OF SABS INTEREST

- Interest rate on overdue benefits was 1% compounded monthly
- Effective January 1, 2015, prejudgment interest rate prescribed in the *Courts of Justice Act* applies from date on which a mediation proceeding is commenced
- Current PJI rate is 1.3% (non-compounded)

# NO RIGHT TO SUE/FSCO ELIMINATED

Current System:



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## NO RIGHT TO SUE/FSCO ELIMINATED

- Current system in place 25 years
- FSCO arbitrators permanent, full-time civil servants
- Developed specialized expertise adjudicating accident benefits disputes

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## NO RIGHT TO SUE/FSCO ELIMINATED

- Effective April 1, 2016, FSCO eliminated
- Licence Appeal Tribunal (LAT) will begin accepting applications to the new Auto Accident Benefits Service (AABS) system

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# NO RIGHT TO SUE/FSCO ELIMINATED

- LAT is a “multi-purpose” tribunal
  - liquor licences
  - new home warranty claims
  - medical suspension of driver’s licences
  - impoundment of motor vehicles
  - regulation of various occupations and businesses

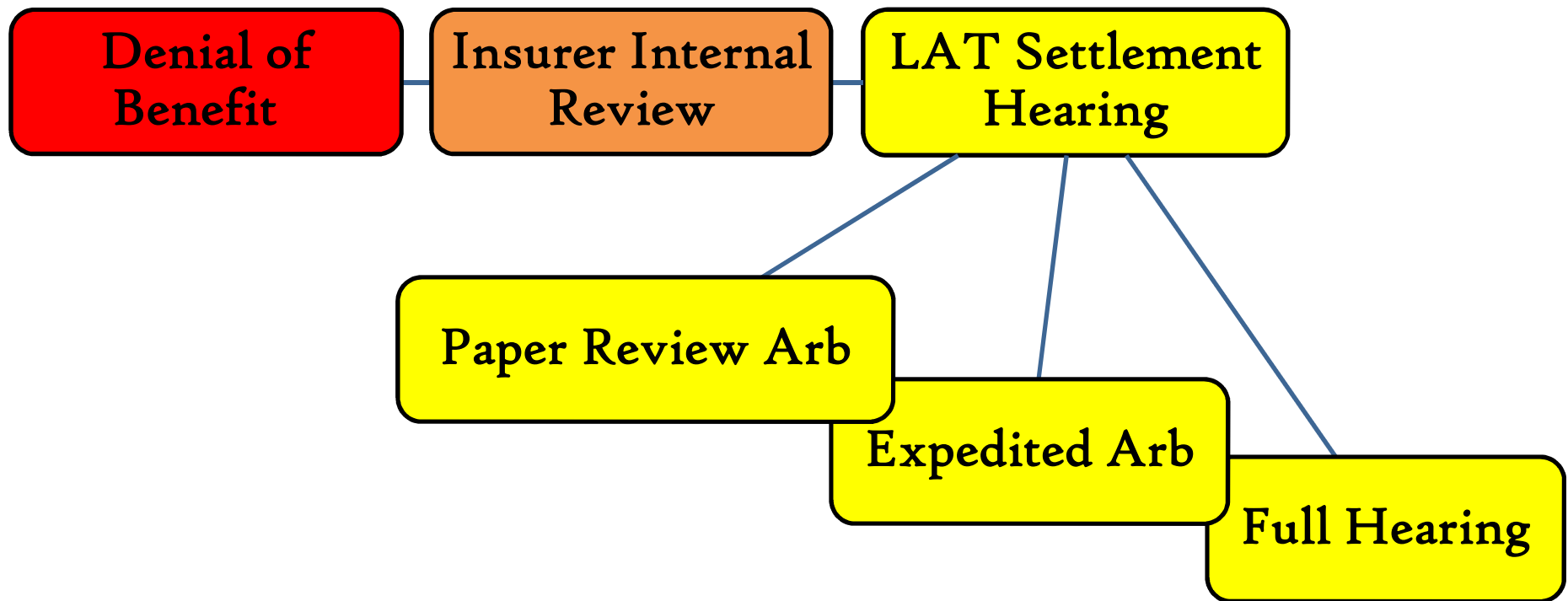
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## NO RIGHT TO SUE/FSCO ELIMINATED

- LAT adjudicators have no/little experience in accident benefits
- Part-time, contract
  - Beholden to whom?

# NO RIGHT TO SUE/FSCO ELIMINATED

- LAT rules/procedures still not set:



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# NO RIGHT TO SUE/FSCO ELIMINATED

- LAT Arbitration Streams
  - Paper review (if MIG/under \$10K)
  - Expedited hearing
  - Full in-person hearing  
(CAT, 24-hour care, post-104 IRBs)

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## NO RIGHT TO SUE/FSCO ELIMINATED

- No right to sue in court
- Forces those with tort claims to litigate in two parallel forums (added time/money)
- Judicial review still available, but standard is “reasonableness” not “correctness”
- Query whether can still bring court action for “bad faith” or “punitive damages”

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## PROPOSED “MIG” OVERHAUL

- FSCO proposal to replace Minor Injury Guideline
- Common Traffic Impairment (CTI) Guideline
- Still in consultation stage



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## PROPOSED “MIG” OVERHAUL

- CTI applies to impairments with “mental and psychological signs, symptoms, injuries or conditions” (unlike MIG)
- Physical/mental/psychological impairments within CTI will be treated in accordance with standardized “care pathways”
- Can access treatment under more than one “pathway” (i.e. separate neck and upper extremity “pathway”)

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## PROPOSED “MIG” OVERHAUL

- CTI “care pathways” intended to continue for up to six months post-collision (regardless of date of treatment initiation)
- Financial limits not yet determined
- Not yet clear how person can be removed from CTI if not recovered within 6 months

## INCREASED TORT “DEDUCTIBLE”

- *Insurance Act* provides for a deductible from any award of non-pecuniary general damages (i.e. pain, suffering and loss of enjoyment of life)

BENEFIT	THEN	NOW*
Threshold	\$100,000	\$123,016.99
	\$50,000 FLA	\$61,507.99 FLA
Deductible	\$30,000	\$36,905.40
	\$15,000 FLA	\$18,452.70

\*indexed annually  
for inflation

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## LOWER PREJUDGMENT INTEREST RATE

- Interest payable on awards for past losses
- Generally tied to the bank rate
- Exception: pain and suffering for motor vehicle accident injuries (5% per year)
- On January 1, 2015, exception no longer applies
- Standard prejudgment interest applies (currently 1.3%)

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## ARE TORT CHANGES RETROSPECTIVE?

- Prejudgment interest was reduced January 1, 2015
- Threshold and deductible amounts were reduced August 1, 2015
- Do changes apply to old accidents?

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## ARE TORT CHANGES RETROSPECTIVE?

- Procedural amendments apply immediately (i.e. retrospectively)
- If the right is substantive, it will not apply retrospectively
- Lower courts are divided on the issue

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## ARE TORT CHANGES RETROSPECTIVE?

- Tort deductible has been held to be a substantive right
- Insurers have been setting premiums based on the old deductible
- Insurers would reap a windfall with new, higher deductible
- See: *Cobb v. Long Estate*, 2015 ONSC 6799

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## ARE TORT CHANGES RETROSPECTIVE?

- Some courts say *right* to prejudgment interest is substantive, but *rate* is a procedural matter
- Court of Appeal will decide summer 2016.  
See: *El-Khodr v. Lackie*, 2015 ONSC 4766



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“Ch-ch-ch-changes  
Where’s your shame?  
You’ve left us up to our necks in it.”  
David Bowie (1971)

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# THANK YOU

Please feel free to call or email us with questions.

**Stephen Birman**

Tel: 416-868-3137

[sbirman@thomsonrogers.com](mailto:sbirman@thomsonrogers.com)

**Robert Ben**

Tel: 416-868-3168

[rben@thomsonrogers.com](mailto:rben@thomsonrogers.com)

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