

Ontario eliminates fatality deductible

By Darcy Merkur

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The Ontario government has finally corrected a miscarriage of justice caused by the application of a harsh and inappropriate \$15,000 statutory deductible that commonly applied to claims by family members following the death of a loved one in a motor vehicle accident in Ontario.

As of Sept. 1, the controversial deductible has been eliminated in all cases of death caused directly or indirectly by a motor vehicle accident in Ontario. The logic behind a statutory deductible is generally considered to be to deter modest claims by those with modest injuries?—?but since cases of death are by necessity serious cases, that logic never applied. In fatality cases, family members are rightfully angry and want justice both in the criminal and civil context for the premature death of their loved ones.

Even though the pre-Sept. 1 legislation provided a "vanishing" deductible where no deductible applied to claims under the *Family Law Act* of Ontario for compensation for loss of care, guidance and companionship in excess of \$50,000, many valid claims by loved ones were often substantially or entirely wiped out by the \$15,000 deductible that otherwise applied.

While the elimination of the fatality deductible is most welcome, the interpretation and implementation of the new subsection of the Ontario *Insurance Act* eliminating the deductible may lead to some confusion and uncertainty.

As part of Bill 16, *Creating the Foundation for Jobs and Growth Act, 2010*, the Ontario government amended s. 267.5 of the *Insurance Act* by adding subs. 267.5?(8.1.1). This new subsection eliminates the statutory deductible, as of Sept. 1, for claims "in respect of a person who dies as a direct or indirect result of an incident that occurs after August 31, 2010."

Removing the deductible in situations where the death is an "indirect" result of a motor vehicle accident may revive long-standing disputes on the relationship between a motor vehicle accident and an injury. Those disputes addressed the fundamental issue of whether someone was in an "accident," as defined by the *Statutory Accident Benefit Schedule* (SABS), so as to be entitled to no-fault benefits. Older versions of the SABS defined accident to include injuries "directly or indirectly" resulting from a motor vehicle accident, while the newer and current definition of accident narrows the definition to injuries "directly" related to a motor vehicle accident.

As a result of the inclusion of the word "indirect" in new subs. 267.5?(8.1.1), any time a claimant dies with an outstanding tort claim, his family members will want to argue that the death was a "direct or indirect" cause of the accident and that no deductible ought to apply to their claims.

Also of interest is the fact that new subs. 267.5?(8.1.1) does not include a deadline for what might be considered a "direct or indirect" accident-related death. By comparison, under the SABS, a death benefit is payable if an insured person dies within either six months (180 days) of the incident, or three years (156 weeks) if the person was continuously disabled as a result of the accident. Recognizing that the deductible already does not apply in cases where the amount of the Ontario *Family Law Act* claim exceeds \$50,000, there nevertheless are some interesting scenarios that can arise from this new provision.

For example, imagine a grandparent injured in an accident. Typically, claims under the *Family Law Act*



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of Ontario by grandchildren would be largely or entirely wiped out by the \$15,000 deductible. Now, however, if injured grandparents happen to die indirectly from their injuries, these claims will be viable, as no deductible will apply. Alternatively, plaintiff's counsel may now, in cases where eventual death from injuries is expected, rightfully suggest at mediation that no deductible should apply to the *Family Law Act* claims.

There is also the question of how limitation periods would be applied where a claim that is not otherwise financially viable becomes viable following the death of a loved one.

In addition to eliminating the fatality deductible, Bill 16 amends sections of the *Insurance Act* dealing with past income loss claims in tort. The amendments serve to synchronize past income loss claims in tort with the new 70 per cent gross income calculations used for income replacement benefits as of Sept. 1 under the new SABS.

The elimination of the statutory deductible in fatality motor vehicle claims is an overdue and appropriate change that hopefully will be implemented in a way that recognizes the severe emotional impact caused by the premature death of a loved one.

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