

From Allen J. Wynperle



We would like to wish all of our readers a happy and prosperous New Year.

It is a goal of this newsletter to provide information with respect to the new auto legislation in order to assist you with your practice. Throughout the New Year, our greatest challenge will be developing and implementing practice management strategies which will allow us to manage this legislation in a reasonable fashion.

The new Liberal Government has held some very brief hearings to determine what, if any, changes should be made to this legislation. Unfortunately, any future changes may only provide greater uncertainty. However, changes to the fees for healthcare providers, and a reduction in the monetary threshold (deductible) would be welcome changes.

The new Guidelines regarding fees chargeable by healthcare professionals will result in reduced access to the health care system for injured parties. Over time, this will have a significant impact on injured parties. Unfortunately, those with the most severe injuries who, rely on the most experienced healthcare professionals, will likely feel the effects of this shortage in the most traumatic fashion. However, the delays inherent in this new insurance legislation will unquestionably create increased disability for the entire continuum of motor vehicle accident victims.

Allen J. Wynperle



Amendments To The Auto Insurance Regulations (PART 2)

In the Fall Newsletter, we provided changes to the auto insurance legislation. Since that time, there have been significant changes to the legislation which are highlighted below.

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*"We're here to help
YOU piece your life
back together."*

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HIGHLIGHTS

Threshold

In our last newsletter, we advised that the statutory deductible (monetary threshold) on pain and suffering damages had increased from \$15,000 to \$30,000. This deductible will apply to all cases where pain and suffering damages are worth less than \$100,000. If these damages are worth more than \$100,000, the deductible will not be applied. The assessment of pain and suffering damages is more of an art than a science and there will certainly be significant disputes about claims that are close to \$100,000.

In addition, those family members making claims pursuant to the *Family Law Act*, will now face a statutory deductible of \$15,000 unless their claim is worth more than \$50,000. If the claim is worth more than \$50,000, the deductible will not be applied.

The Government has also implemented a new verbal threshold. Since 1990, each successive "no fault" legislation has had its own verbal threshold. From November 1, 1996 to September 30, 2003, the injured person could only continue a claim for pain and suffering damages if, as a result of the injuries suffered in the motor vehicle accident, they had (1) died, (2) been permanently and seriously disfigured, or (3) suffered a "permanent, serious impairment of an important physical, mental or psychological function" (267.5 (5) of the *Insurance Act*).

As of October 1, 2003, the Government has added a new regulation defining what is meant by "permanent, serious impairment of an important physical, mental or psychological function". Only those injured persons who meet this new definition will be permitted to continue with claims for both the cost of care and pain and suffering damages. Injured people will only fall within the new definition if they prove the following:

1) THE IMPAIRMENT MUST:

- i) substantially" interfere with the person's ability to perform their regular job (pre-accident job); or
- ii) substantially" prevent a person from pursuing training for a pre-motor vehicle accident career; or
- iii) substantially" interfere with the injured person's usual activities of daily living.

2) FOR THE FUNCTION THAT IS IMPAIRED TO BE CONSIDERED IMPORTANT, THE FUNCTION MUST:

- i) be necessary for the performance of the essential tasks of the person's regular or usual employment (with reasonable efforts to accommodate taken into account); or
- ii) be necessary to perform training for a career that the injured person was involved in before the accident (with reasonable accommodation taken into account); or
- iii) be necessary for the injured person to

provide for his or her own care or well-being; or

- iv) be important to the performance of injured person's daily activities.

3) FOR THE IMPAIRMENT TO BE PERMANENT, IT MUST:

- i) have been continuous since the accident
- ii) be based on medical evidence (from a physician)
- iii) not be expected to improve in the future; and
- iv) all of the above must be true even though the Plaintiff has attempted all reasonable rehabilitation efforts; and
- v) the impairment must be of a nature that is "expected to continue without substantial improvement when sustained by persons in similar circumstances".

For the most part, this appears to be a codification of the present case law. However, criteria 3 (v) is an attempt to add an objective standard to the definition of "permanent".

Statutory Accident Benefits Schedule

(A) PROFESSIONAL SERVICES GUIDELINE

The Financial Services Commission of Ontario (FSCO) has issued a new Guideline outlining the fees chargeable by healthcare professionals for medical and rehabilitation treatment as follows:

HEALTH PROFESSIONAL OR PROVIDER	MAXIMUM HOURLY RATE
Chiropractors	\$95.00
Massage Therapists	\$49.00
Occupational Therapists	\$84.00
Physiotherapists	\$84.00
Podiatrists	\$84.00
Psychologists (other than Master's Level)	\$126.00
Masters of Psychology	\$93.00
Speech Language Psychology	\$94.50
Registered Nurses, Registered Practical Nurses and Nurse Practitioners	\$77.00
Unregulated Providers	\$49.00

Interestingly enough, it appears as though social workers are not covered by this Guideline. Thus, they are free to charge fees in accordance with the provisions of their pro-

fessional body. Also, physician's fees have not been restricted under this Guideline. Unfortunately, these fee restrictions will place a heavy and most unfair burden on

treatment providers. However, the changes do not affect the amounts that can be charged for medical-legal work.

In addition to regulating fees for medical and rehabilitation treatment, the FSCO has also outlined the fee for completion of forms as follows:

FORM / MAX. FEE FOR COMPLETION OF FORM

Disability Certificate (OCF-3)	\$62.00
Treatment Plan (OCF-18)	\$62.00
Form 1 – Assessment of Attendant Care Needs	\$62.00
Automobile Insurance Standard Invoice (OCF-21)	\$0.00
Application for Approval of an Examination (OCF-22/198)	\$0.00

Physicians and social workers will, once again, not be subject to these fee Guidelines. However, these fees will apply to the remainder of health care providers.

However, the Professional Services Guideline states that the maximums noted in the above chart are only applicable for filling out the form. Quite specifically, the Guideline clearly states that these maximum fees do not apply to the assessment related to the completion of these forms. Thus, it is anticipated that insurers will be forced to pay for the screening examination done by health care providers in order to fill out any of the above-noted forms. I have already been advised that insurers are in fact paying for such assessments.

These Professional Services Guidelines with respect to maximum fees for treatment and fees for completion of forms are effective as of November 1, 2003 and are applicable to all motor vehicle accidents from November 1, 1996 onward.

(B) PRE-APPROVED FRAMEWORK

As discussed in our Fall Newsletter, the "simple WAD I and II" cases are to be managed with the pre-approved framework for the initial phase of treatment. New guidelines were issued on September 18, 2003, further restricting the fees for treatment

providers. New guidelines are effective as of November 1, 2003.

(C) CHOICE OF DAC

Under Bill 59, the DAC selected to perform an assessment would simply be the one closest to the injured person's home.

Effective October 1, 2003, for all motor vehicle accidents from November 1, 1996 onward, the insurer can now choose any DAC assessor within a 50 kilometre radius of the injured person's home to perform the assessment. If the injured person disputes the choice of DAC, it must be done within two days after receiving the request. Thereafter, the DAC will be selected by FSCO. The criteria that FSCO

will use in selecting the DAC is unknown and their selection of DAC cannot be disputed.

For right or for wrong, many people already perceive that the DAC system is not impartial. Unfortunately, it is feared that this change will only increase the perception that DAC facilities are bias despite the best efforts of facilities to the contrary. It is most disheartening to think that those honest assessors attempting to perform a service may be tarred with such an unfair characterization. As with past legislative changes, the intended effects are always difficult to predict and remedy.

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EAST END PAIN CLINIC

A Commitment to Life-Long Pain Management

By: Tina Dealwis

The condition of chronic pain encompasses a wide range of physical, emotional and systemic issues. As patients deal with their pain challenges, it helps to have a doctor like psychiatrist Dr. Jeff Ennis who understands his patients' situation first-hand. "I'm a patient with the exact same issues," he explains.

Dr. Ennis, who suffers from chronic pain himself, founded the East End Multidisciplinary Pain Management Program in 1998. The

Hamilton-based clinic is located within St. Joseph's Healthcare Centre for Ambulatory Services. Through his work at the clinic, he has turned his own challenges into a way to help others, while simultaneously helping himself.

Dr. Ennis encourages patients to pursue active lifestyles despite their pain. The idea is that the pain will no longer be a signal for determining what a patient can do, Dr. Ennis

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says. In addition to an empathic director, the clinic is also unique in its focus on allowing patients to continue with their normal lives, while attending the clinic three mornings per week. "We are trying to get people involved in learning new skills and using those skills in their daily lives," Dr. Ennis says. "People at both ends of the functional spectrum can participate in this program. People who have severe functional problems can manage in our program. People who function well can still work at their jobs," he insists.

Patients can practice what they have learned at the clinic at home, and discuss and resolve any issues the following week. "Once they get back into their day-to-day lives, it can be difficult to resolve pain problems. If they have difficulties, they bring them back to the clinic and we discuss them."

The clinic offers an 11-week cognitive behavioural program, which incorporates 100 hours of training, in both the physical and emotional aspects of pain management. "We dispel the myths about pain. Patients come out with an understanding of the reality of the pain instead of the myths," program manager Gilda Ennis explains. "Many patients are afraid to do too much for fear of the pain worsening. Coping means living a full life," she maintains.

The program offers a wide range of serv-

ices, including psycho-educational sessions, tai chi, water aerobics classes, physiotherapy, psychotherapy, specialized occupational therapy, nutritional counseling and psychiatry, as well as relaxation and stress management training. Help with physical fitness, hypnosis and sleep, and family dynamics is also offered. In addition, goal setting is an important component of the program.

The clinic's staff has extensive experience in the area of chronic pain, and is trained in the use of cognitive behavioural therapy. Prior to opening the East End Pain Clinic, Dr. Ennis worked as assistant director at the Chedoke Hospital pain clinic in Hamilton, and has many years of experience in working with chronic pain patients.

The benefits of the clinic extend far beyond the 11 weeks that patients are in the program. Some continue their pain management program through a support group created by patients that meets monthly for information and motivation. At each meeting, a different expert offers relevant information for the management of chronic pain – for example, a pharmacist. All East End Pain Clinic patients, past and present, are welcome to join once their 11-week session is complete. "Some people have really risen to the occasion," Gilda Ennis credits. "They have been able to find new meaning in their lives," she smiles.

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(D) INCOME REPLACEMENT BENEFITS

At present, injured persons who are unable to perform their pre-accident employment can obtain income replacement benefits at 80% of their net pre-accident income to a maximum of \$400 per week. The former Tory Government had amended the *Statutory Accident Benefits Schedule* to decrease the maximum income replacement benefits to \$300 per week. However, most recently the new Liberal government rescinded this amendment. Thus, there will be no changes to the quantum of income replacement benefits.

CONCLUSION

The amendments outlined in this newsletter and in my previous newsletter, were done to save insurance companies money and to give them further procedural control over the auto insurance system. These accommodations are increasingly difficult to understand in light of the fact that property and casualty insurers are reporting a 500% increase in profits through the first half of 2003 (1.1 billion dollars).



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