

The 2004 Auto Insurance Reforms Four Years Later – The Defence Perspective
Presented at The Canadian Institute’s Motor Vehicle Accident Litigation Seminar
January 28 and 29, 2008

Presented by:

Kelly J. Robinson

Partner

Chomicki Baril Mah LLP

Edmonton, Alberta

A number of auto insurance reforms were put into place in 2004 in Alberta. Both counsel and insurers have now been dealing with the reforms for close to four years. This paper will address how the reforms have impacted the defence practice in particular as well as insurers.

The Elimination of Double Recovery and Subrogation

Prior to the 2004 amendments, it was common place for a claimant who was injured in a motor vehicle accident to be entitled to “double recovery” if the claimant received benefits from another source. For example, if a claimant was rendered unable to work for a period of time following a motor vehicle accident and during that time frame collected

disability benefits from his or her workplace disability insurer, that claimant could still claim and recover the full income loss from the tortfeasor's insurer without having to account for the disability benefits received. In most instances, the disability insurer would subrogate for what they paid out meaning that the claimant would not actually receive double recovery but the tortfeasor's insurer could not take advantage of the fact that the claimant collected disability benefits. This of course was in contrast to Section B disability benefits which were always deducted from a claim. There certainly were instances however prior to the reforms when a claimant did in fact receive double recovery because their disability insurer chose not to subrogate.

Section 626.1 of the *Insurance Act* came into force on January 26, 2004. This Section eliminated the possibility of double recovery with respect to most forms of disability benefits. The reform describes payments received by a claimant which must be deducted from a claim. Those forms of payment include private disability benefits, CPP disability pensions, out of province benefits paid under legislation equivalent to the *Workers' Compensation Act*, no-fault benefits received by non-Alberta residents and medical, sickness and accident benefits.

A corollary to the deduction is that the legislation indicates that a Court can take into account premiums or other amounts paid by the claimant in respect of those benefits which must be deducted from their claim. It is anticipated that this provision would be used to add back into a claim the amount a claimant paid by way of premium for those

benefits which are then being deducted from the claim. To date, there is no case law expressly dealing with this provision (Section 626.1(7)).

Section 626.1 also eliminates an insurer's ability to subrogate for benefits paid (s. 626.1(6)). These provisions have had a dramatic effect on significant injury claims where the claimant is off work for an extended period of time. It has of course reduced substantially the award to claimants who are in receipt of disability benefits. It has also had the effect in some instances of facilitating earlier settlement. A disability insurer does not have to be consulted any longer with respect to their subrogated claim before a file can be resolved. Further, claimants have shown more of a willingness to resolve claims at an earlier stage when in receipt of significant disability benefits. So long as it does not appear that those benefits are going to end at any point in the foreseeable future, claimants have typically been more willing to consider early resolution since they are not going to receive anything for their loss of income in any event as a result of the tort action.

It should be kept in mind that not all subrogation rights have been abolished by this legislation. The Alberta WCB of course still has a right to subrogate. Further, Section 626.1 only deals with automobile accident claims. There is still a right to subrogate and potentially obtain double recovery for other tortious claims such as slip and falls or host liability.

Net of Tax Awards

Section 626.1(2) also dictates that a claimant's award for loss of income must be reduced by the income tax that the claimant would normally be obligated to pay on the income had they been able to earn it. Similarly, CPP contributions and EI premiums are deducted. This provision has allowed insurers to in some instances significantly reduce their exposure on loss of income claims. It has also complicated the calculation of loss of income when those claims are significant. Economists are now becoming involved in making those calculations in order to determine exactly what the net of tax figure would be.

It is not only past loss of income claims that are subject to the net of tax rule but also future loss of income claims. The fact that this net of tax figure applies to future claims may to some extent explain the proliferation of loss of capacity claims rather than pecuniary calculated future loss of income claims.

Update on the Minor Injury Regulation in Practice

The Minor Injury Regulation came into force on October 1, 2004 and applies to all motor vehicle accident claims arising after that date. The Regulation, or at least portions of it, is the subject of a constitutional challenge. That challenge will not be dealt with within the scope of this paper. Instead, the focus here is on how the Regulation has affected those involved in auto insurance claims in Alberta.

There seem to be a number of Plaintiffs' counsel in Alberta who are taking a "wait and see" approach. That is, they are doing as little as possible on their minor injury claims while awaiting the outcome of the constitutional challenge. For the most part, insurers are not allowing that approach and are forcing those files to be litigated by retaining defence counsel as soon as possible to ensure the files proceed expeditiously. The Alberta Courts have thus far also taken the position that litigation cannot sit at a standstill pending the challenge. Justice Lee in *Cyre (Next Friend of) v. Knol*¹ held that minors' settlements for figures within the cap will be approved of by the Court if they are appropriate notwithstanding the awaited constitutional challenge:

I conclude however that I must act on the basis that the "cap" legislation is the current law in Alberta, and remains the law in Alberta until there is binding authority on me to the contrary. Otherwise the law would be in the state of uncertainty indefinitely. As has been pointed out there are many settlements pursuant to the *Minors Property Act* that have to be dealt with on a regular basis. I conclude that there is no viable practical

¹ 2006 CarswellAlta 962 (QB)

alternative but to approve these settlements in accordance with the current law in Alberta...If the Court were to refuse to approve these settlements while awaiting the constitutional challenge, insurers would be left in a difficult if not untenable position (at para. 15, 16).

Similarly, Justice Lee in *Banha v. Ho*² held it was appropriate to set matters down for Trial where the Minor Injury Regulation was in issue. He declined to hold off on setting a matter down for Trial pending the outcome of the constitutional challenge.

It was anticipated that all, or at least the vast majority of claims that were found to fit within the definition of a minor injury, would be settled for \$4,000.00 in general damages. Certainly that was the opinion of the vast majority of claimants when the Regulation came into place. However, insurers are rarely paying the full \$4,000.00 for general damages. They are taking the position that \$4,000.00 is the maximum allowable for something which fits within the definition of a minor injury and are therefore often settling for figures well under the \$4,000.00 maximum. Insurers have found that the general public is surprisingly cognizant of the new law and are retaining counsel less often than they were under the old regime for less serious injuries. To some extent, even the overall number of claims may be reduced because individuals feel that for a maximum of \$4,000.00, it is not worth pursuing a claim at all.

There has been some change in the emphasis on particular types of injuries as a result of the Minor Injury Regulation. For example, some claimants and Plaintiffs' counsel are of

² 2006 ABQB 926

the view that things normally associated with whiplash may be relied upon to take the claim outside of the Minor Injury Regulation. Things like headaches, brief neurological symptoms like dizziness or tingling, post-traumatic stress disorder and other psychological issues and TMJ disorders are injuries that are now being emphasized by some counsel in an effort to take a claim outside of the minor injury definition. It must be kept in mind however that the Minor Injury Regulation does address to some extent how minor and non-minor injuries are to be assessed when they occur in the same claimant. In those circumstances, if the non-minor injury alone would result in an award for non-pecuniary damages of less than \$4,000.00, the total amount recoverable for all injuries does not exceed \$4,000.00. If the non-minor injury alone would result in an award exceeding \$4,000.00, the total amount recoverable for general damages for all injuries is to be the total of the amount of damages assessed for the non-minor injury and the amount of damages assessed for the minor injury (s. 7, Minor Injury Regulation).

Since the Regulation came into place, there seems to have been an increase in non-auto injury claims. For example, slip and fall and liquor liability claims have increased. This is likely at least somewhat due to the fact that Plaintiffs' counsel are more willing to take on those claims now even where there may be a liability issue whereas in the past, they were busy enough to turn those claims away.

From the defence perspective, there has been minimal impact on the number of claims or files defence counsel are receiving. For the most part, claims that fit within the definition

of a minor injury, are claims that the auto insurer would settle on their own before retaining counsel even under the old regime. If anything, the number of files received by defence counsel may have increased because we are now seeing files where the interpretation of portions of the Minor Injury Regulation are being questioned or whether a particular injury fits within the definition is being disputed. Those claims are now going to defence counsel whereas under the previous regime, they may not have.

One area where claims have definitely decreased are those that insurers call “low speed impacts”. Both lawyers and consulting engineers can attest to the fact that after the 2004 reforms, insurers stopped fighting or using the low impact defence like they were previously. For the most part, injuries from claims in low impact collisions fit within the Minor Injury Regulation and therefore it is not worth it for the insurer to spend the time, money and resources on a low speed impact defence when the general damages can be settled for \$4,000.00 or less.

The Regulation also provides a mechanism by which parties can obtain an opinion as to whether an injury is minor or not. If there is a disagreement with respect to whether the injury is minor, either side can have a certified examiner assess the claimant. The party wanting to use a certified examiner chooses a doctor from the register. The other side is then given an opportunity to either accept that choice or propose another choice. If another choice is proposed and there still is no agreement on that doctor, the Superintendent of Insurance can be consulted who will then randomly select a certified

examiner from the register. The opinion of the certified examiner as to whether the injury fits within the minor injury definition or not is not definitive but is *prima facie* proof only. Therefore, even when a certified examiner is involved, either side can continue to disagree with the finding with whatever evidence they choose to produce to the contrary (ss. 8 – 14, Minor Injury Regulation).

The certified examination process can allow an insurer to essentially obtain an IME outside of the Rules of Court and long before a Defendant would be entitled to an IME in the litigation process. However, certified examiners are not being used as frequently as was initially anticipated. Particularly once a case is in litigation, there is little advantage to either side to proceeding with the certified examiner process. If one is involved in litigation anyway, it is preferable to hire whichever doctor or specialist one chooses for an examination under the Rules of Court rather than being tied to the register and potentially receiving a random choice of doctor made by the Superintendent of Insurance.

There are certainly a large number of terms contained within the Minor Injury Regulation that could be the subject of judicial interpretation and legal argument. To date, very little of that discussion has taken place pending the result of the constitutional challenge. It is anticipated that even if the Minor Injury Regulation is upheld on the challenge, there is still a great deal of litigation that will occur with respect to particular aspects of the Regulation.

Bill 42 – Insurance Amendment Act, 2007

A very lengthy Bill was before the Alberta Legislature addressing further amendments to the *Insurance Act*. The Bill only went through First Reading in the last legislative session. It is expected that a number of changes will occur before it is re-introduced. There are however some key features in the Bill that will be of interest to insurers and counsel alike.

Section 22 of Bill 42 would allow for Regulations respecting disclosure by an insurer to an insured of relevant limitation periods. That is, insurers may be obligated to advise an insured of a relevant limitation period. In practice, insurers tend to do this in any event but Bill 42 could potentially require that.

Bill 42 also includes a provision (s. 580) that would entitle the Lieutenant Governor in Council to make regulations respecting the disclosure of liability limits under a Motor Vehicle Liability Policy. This provision is actually already in force being Section 637.1 of the *Insurance Act* but to date, no regulations thereunder have been passed. There is now a similar provision in British Columbia which requires the actual Policy of Insurance to be produced as part of the Discovery process but interestingly, the legislation in British Columbia specifically states that the Policy may not necessarily be used at Trial unless found to be relevant and material.

The disclosure of limits could have a significant effect in serious injury cases. Traditionally, insurers do not disclose the limits of their insurance for strategic reasons. The decision not to disclose the limits can even on occasion result in a reduced settlement because the claimant suspects the limits are one number when really the number is higher. Obviously that will no longer be possible if regulations under this Section are passed requiring the limits to be disclosed. That requirement however may result in less SEF 44 claims being advanced because if the claimant has the ability to determine whether the tortfeasor's limits of insurance are the same as or more than their own, there is no reason to sue under the SEF 44.

CONCLUSION

Overall, the 2004 Reforms have reduced the value of motor vehicle accident injury claims. However, there are still a lot of issues under the Minor Injury Regulation to be determined and that is unlikely to occur until at least the Alberta Court of Appeal has ruled on the constitutional challenge. Further reforms to the *Insurance Act* are in the offing but it is unknown at this time whether those amendments will in fact become legislation.