

DIGEST OF INSURANCE LAW

ONTARIO

Courtesy of
Lang Michener LLP
Toronto, Ontario

INTRODUCTION

Incorporation and Regulation

Insurance companies operating in Ontario may be incorporated provincially under the Corporations Act, R.S.O. 1990, c. C.38 or federally under the Insurance Companies Act S.C. 1991, c. 47 which also governs foreign insurance companies wishing to operate in Canada.

The licensing and regulation of the conduct of insurance business within the province of Ontario is regulated by the Insurance Act of Ontario, R.S.O. 1990, c.I.8. Insurance companies carrying on business in Ontario have to be licensed for the classes of insurance which they wish to write. While there are major differences between the Insurance Acts of various provinces, particularly in the area of automobile insurance, a number of areas are uniform across Canada.

CIVIL JUDICIAL SYSTEM

Courts of Original Jurisdiction

Court of Ontario is court of original jurisdiction and is comprised of Superior Court of Justice and Ontario Court of Justice.

Superior Court of Justice is superior court of record which has all jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario. An action in Superior Court of Justice for claim less than or equal to \$50,000 (Canadian) exclusive of interest and costs must be brought under simplified procedure pursuant to Rule 76 of Ontario Rules of Civil Procedure.

Small Claims Court is a branch of Superior Court of Justice which has jurisdiction to hear and determine any action where the amount claimed does not exceed \$10,000 (Canadian), and \$25,000 in respect of claims commenced on or after January 1, 2010.

Family Court is a branch of Superior Court of Justice and has exclusive jurisdiction over family law matters in certain areas of the province.

Ontario Court of Justice has jurisdiction over criminal offences and Family Division has jurisdiction over some aspects of family law in the remaining parts of the province. Other aspects are dealt with in Superior Court of Justice.

Federal Court of Canada, constituted by Act of Parliament of Canada, is Court of law, equity and admiralty. Trial Division has original jurisdiction in claims by and against government of Canada, against Federal boards, commissions or other tribunals, in patent, trade mark and copyright cases and in maritime litigation.

Appellate Courts

Divisional Court of Ontario. This is intermediate Court of Appeal and is continued as part of the Superior Court of Justice. It hears appeals from the Superior Court of Justice involving final orders of \$50,000 or less and all interlocutory orders with leave (rule 62.02). Section 19 of the Ontario Courts of Justice Act, R.S.O. 1990, c. C.43 sets out its jurisdiction.

Court of Appeal for Ontario. Hears appeals from Superior Court of Justice involving final orders of \$50,000 or more, as well as appeals from Divisional Court, with leave (subrule 61.03.1).

Federal Court of Appeal. Has jurisdiction in appeal from every decision of Trial Division of Federal Court and from other Tribunals under various statutes; also jurisdiction to review and set aside decisions of federal boards, commissions or other tribunals.

Supreme Court of Canada. Appeals may be taken to Supreme Court of Canada from final judgments of Court of Appeal of Ontario or Federal Court of Appeal, in civil cases, with leave of the Court. The Supreme Court sits in Ottawa and has exclusive ultimate appellate civil and criminal jurisdiction within and for Canada.

LAW

Abbreviations

A.C. – Appeal Cases (English).

A.C.W.S. – All Canada Weekly Summaries.



C.C.L.I. – Canadian Cases on the Law of Insurance.
 C.P.C. – Carswell’s Practice Cases.
 D.L.R. – Dominion Law Reports.
 I.L.R. – Canadian Insurance Law Reporter.
 O.L.R. – Ontario Law Reports.
 O.R. – Ontario Reports.
 O.W.R. – Ontario Weekly Reporter.
 S.C.R. – Canada Supreme Court Reports.

Statutes

Class Proceedings Act, 1992, S.O. 1992, c.6.
 Compulsory Automobile Insurance Act, R.S.O. 1990, c. C.25.
 Family Law Act, R.S.O. 1990, c. F.3.
 Highway Traffic Act, R.S.O. 1990, c. H.8.
 Insurance Act, R.S.O. 1990, c. I.8.
 Motor Vehicle Accident Claims Act, R.S.O. 1990, c. M.41.
 Negligence Act, R.S.O. 1990, c. N.1.
 Occupiers’ Liability Act, R.S.O. 1990, c. O.2.
 Registered Insurance Brokers Act, R.S.O. 1990, c. R.19.
 Rules of Civil Procedure, R.R.O. 1990, Reg 194.
 Workplace Safety and Insurance Act, 1997, S.O. 1997, c.16, Schedule A.

ACCIDENTAL AND HEATH INSURANCE

See also “ACCIDENTAL MEANS” and “DISABILITY.”

Part VII of Insurance Act applies.

“Accident Insurance” means insurance by which insurer undertakes, otherwise than incidentally to some other class of insurance, to pay, in event of accident, to insured, but does not include accidental death insurance, which means insurance undertaken by insurer as part of contract of life insurance whereby insurer undertakes to pay additional amount in event of death by accident of person whose life is insured, nor does it include disability insurance, nor insurance under Automobile Insurance policy in respect of bodily injury to and death of insured or passenger arising out of accident involving automobile. Group insurance policies allowed for accident and sickness and life insurance.

Statutory Conditions. Deemed part of every contract of Accident and/or Sickness Insurance other than group insurance. §300.

ACCIDENTAL MEANS

See also “DISABILITY.”

There are, in Ontario, no statutory provisions dealing with words “Accidental means,” but they should be interpreted on principle of proximate cause. “Caused by accident” refers to any unlooked for occurrence or mishap rather than one that is unanticipated or unavoidable. *Canadian Indem. v. Walkem Machinery* [1976] 1 S.C.R. 309. Disability resulting from effect of an accident upon latent disease which but for accident would have remained harmless, permits recovery under policy, and where diseased condition results from accident, insured can recover. *Fidelity v. Mitchell*, [1917] A.C. 592. Recovery is allowed although accident caused through violation of provincial statute, where act is not patently criminal or wrongful. *Langley v. Fidelity* [1935] O.R. 424. Includes injuries intentionally inflicted by third person. *Horwitz v. Loyal Protective* [1932] O.R. 467. Sunstroke not accidental means. *Wyman v. Dominion* [1936] O.R. 154.

ADJUSTERS

All persons acting as Insurance Adjusters must obtain license from Superintendent of Insurance. To act as Adjuster without license is offence under Ontario Insurance Act. Does not apply to barristers or solicitors acting in usual course of profession; nor to a trustee or agent of the property insured. Adjusters’ licenses may be issued to partnerships and corporations. The Superintendent may, for cause shown, and after hearing, revoke or suspend license.

AGE

See “AUTOMOBILES.”

AGENTS AND BROKERS

Agent means person who, for compensation, not being member of Registered Insurance Brokers of Ontario, solicits insurance on behalf of any insurer or transmits, for person other than himself, application for or policy of insurance to or from such insurer or offers or assumes to act in negotiation of such insurance or its renewal, or solicits insurance on behalf of insurer who has appointed him to act as agent of such insurer.

Broker means person who for compensation deals directly with public and acts or aids in soliciting, negotiating or procuring any contract of insurance or reinsurance, provides risk management services, insurance consulting or advisory services or holds himself out to be insurance consultant.

Insurance agent must obtain license from Superintendent. Broker must obtain certificate under Registered Insurance Brokers Act, R.S.O. 1990, c. R. 19.



Collusion between agent and insured to defraud insurer. Contract of insurance like any other contract is voidable on ground of fraud and any fraudulent representation or non-disclosure made in order to induce insurer to enter into contract. Such grounds entitle it to avoid policy unless it is proved that insurer either knew true state of facts at time of contract or that it did not rely upon misrepresentation or non-disclosure. If agent joins with insured in attempt to perpetrate fraud upon insurer for their benefit, insured cannot argue that agent was Company's agent for that purpose. Whether the agent acts for insured or insurer is question of fact in each case, but as general rule broker is agent of insured.

Fraud of Agents. Insurer is liable for fraud of its agent when acting within scope of his agency even though fraud may be committed for agent's own benefit. However, if insured has opportunity to review application form before signing, insurer may not be liable for fraud of agent with respect to contents of application. *Vrbancic v. London Life* (1995) 25 O.R. (3d) 710 (C.A.).

Knowledge of Agent imputed to Insurer. From general principles of agency, knowledge of agent is deemed to be knowledge of principal and if agent represents insurer, insurer is deemed to have knowledge of circumstances known to his agent.

ASSIGNMENT

See "FIRE INSURANCE."

AUTOMOBILES

See also "FINANCIAL RESPONSIBILITY LAW," "LIABILITY INSURANCE" and "NO-FAULT INSURANCE."

Under the Insurance Act, "automobile" includes trolley bus and self-propelled vehicle, and trailers, accessories and equipment of automobiles, but does not include railway rolling stock, watercraft or aircraft.

In *McFarland v. Storm* (1987) 28 C.C.L.I. 128, a dune buggy was deemed not to be an "automobile" as it is not intended to carry or transport passengers from one place to another. In *Copley v. Kerr Farms Ltd.* [2002] 59 O.R. (3d) 346 a tomato wagon was not an "automobile" as it was not a vehicle that was required to be insured under a motor vehicle liability policy and in *Regele v. Slusarczyk* (1997) 33 O.R. (3d) 556 (C.A.) a farm tractor was held not to be an "automobile" because it was excluded from the definition of "motor vehicle" in the Highway Traffic Act.

Age. No person under age of sixteen years shall drive or operate motor vehicle.

Action based on master and servant relationship is not precluded, and employer of negligent driver may be held liable. *Co-operators Ins. Assoc. v. Kearney* [1965] S.C.R. 106. However, the negligence of an independent contractor, subject to certain limited exceptions, typically does not give rise to a claim for vicarious liability. *671122 Ontario Ltd. v. Sagaz* [2001] 2 S.C.R. 983.

BAD FAITH CLAIMS

Under Insurance Act, every contract evidenced by motor vehicle liability policy shall provide that where any civil action is brought against insured arising out of the ownership, use or operation of an automobile, the insurer will provide a defense at its expense including investigation costs, and pay all legal costs assessed by the court against the insured; and where there is a judgment against the insured, pay any post-judgment interest owed on that part of the judgment that falls within policy limits.

Bad faith may be indicated by failure of insurer to investigate, assess, defend properly, negotiate, inform and settle within policy limits if it was reasonable to do so. In *Whiten v. Pilot* [2002] 1 S.C.R. 595, the S.C.C. upheld a jury award of \$1 million dollars in punitive damages to the insured. Although rare, such was indicated to be awarded where the misconduct of the insurer is planned and deliberate and continued over a lengthy period of time. The insurer was found to have abused its power and the damage award was within the range where juries are free to make their assessments.

Bad faith claims may be made against insurer for amount which exceeds obligation on face of policy on basis of insurer's conduct in responding to claim. Insurer must give as much consideration to best interests of insured or excess carriers as to own.

BROKERS

See "AGENTS AND BROKERS."

BURGLARY INSURANCE

PART III of Insurance Act applies.

"Burglary" comes within definition in Act of "Theft Insurance," meaning insurance against loss or damage through theft, wrongful conversion, burglary, house-breaking, robbery or forgery. No statutory regulations are in force applicable to burglary insurance.

CANCELLATION

In case of automobile, fire, accident and sickness insurance, Statutory Conditions provide that insured may terminate contract at any time upon written notice to in-



suror, and loss payee, if any, and insurer shall refund excess of premium paid over short rate premium for expired period which shall not be deemed less than any minimum retained premium specified. Such cancellation is not effective until received by insurer. *Johns v. Guarantee Co. of North America* (1976) 12 O.R. (2d) 365. Insurer may terminate by written notice to insured and shall refund excess of premium paid over pro rata premium for expired period which shall not be deemed less than any minimum retained premium specified. Five days' notice of termination by insurer is required in all cases if notice is delivered to insured or, if sent by registered mail, fifteen days' notice following the date of receipt at the post office in case of Automobile and Fire insurance and ten days' notice following the date of mailing in case of Accident and Sickness insurance. If registered mail is used it is not necessary that notice of cancellation be received by insured. Notice of cancellation may be mailed outside of Canada. *Clapp v. Travelers* [1932] O.R. 116.

CHATTEL MORTGAGE

See "FIRE INSURANCE."

CONTRIBUTION

See "FIRE INSURANCE"; "LIABILITY INSURANCE."

DEATH

Presumption of Death. Death is presumed if individual is unheard of for time inconsistent with his being alive. Computation of this period must depend on all circumstances, but as general rule seven years is accepted in absence of evidence indicating motive. Under the Insurance Act where a claimant alleges that the person whose life is insured should be presumed to be dead by reason of his not having been heard of for seven years, the insurer or claimant may apply to the court for a declaration as to presumption of death. But there is no presumption that death occurred at particular time during period. Where life policy lapsed during seven year period claim failed in absence of evidence that presumed death antedated lapse. *Darling v. Sun Life* [1943] O.R. 26.

DISABILITY

See also "ACCIDENTAL AND HEALTH INSURANCE" and "ACCIDENTAL MEANS."

"Disability Insurance" means insurance undertaken by insurer as part of contract of life insurance whereby insurer undertakes to pay insurance money or to provide

other benefits in event that person whose life is insured becomes disabled as result of bodily injury or disease.

The policy definition of total disability is to be interpreted in light of *Paul Revere v. Sucharov* [1983] 2 S.C.R. 541. *Sucharov* sets out the test for total disability; the inability to perform substantially all of the duties of the insured's profession.

Man with totally disabled hand could not perform any and every duty of occupation of eye, ear and nose specialist and, therefore, came within clause insuring against bodily injury sustained through accidental means and resulting "directly, independently and exclusively of all other causes in total disablement from performing duties of his occupation." *Fidelity v. Mitchell* [1917] A.C. 592. Loss by violinist of index finger of left hand held to be "continuous total disability preventing insured from performing any and every duty pertaining to his occupation" within meaning of that clause in accident policy. *Langley v. Fidelity* [1935] O.R. 424. Any and every duty means any and every substantial duty of the occupation of the insured. *Myshrall v. Commercial Union* (1986) 17 C.C.L.I. 76 (B.C.S.C.).

FINANCIAL RESPONSIBILITY LAW

See also Law Digest Tables; "NO-FAULT INSURANCE."

Upon issuance, renewal or transfer of motor vehicle owner's permit, proof of financial responsibility in accordance with provisions of Compulsory Automobile Insurance Act must be produced.

Compulsory automobile insurance means insurance against liability arising out of bodily injury to or death of one or more persons or loss of or damage to property caused by motor vehicle or use or operation thereof and which (a) insures at least to limit of \$200,000 inclusive of pre-judgment interest and exclusive of legal costs and post-judgment interest, (b) provides no-fault benefits prescribed in the Statutory Accident Benefits Schedule of Insurance Act, and (c) provides for payment of all sums that insured and any person is legally entitled to recover from owner or driver of uninsured or unidentified motor vehicle as damages for bodily injury, death, and damage to insured motor vehicle or its contents as result of accident involving automobile and subject to regulations passed under Insurance Act.

Driver's license or owner's permit of person who fails to satisfy judgment for damages for injury to or death of any person or damage to property, occasioned by motor vehicle, within 15 days from date judgment became final, or who has been convicted of certain offenses under Criminal Code involving use of motor vehicle shall be forthwith suspended by Registrar of Motor

Vehicles, in accordance with provisions of Highway Traffic Act.

Operator of motor vehicle registered in Ontario must be able to produce evidence of insurance as required by Compulsory Automobile Insurance Act.

FIRE INSURANCE

Part IV of Insurance Act applies.

Assignment. Fire insurance may be assigned before or after loss. Insurer, however, is not liable after interest of insured in subject matter of insurance has been assigned save by bankruptcy, succession, operation of law, or death. It has been held that where policy covers insured "and his assigns," no express consent by insurance company to assignment is necessary to enable the assignee to recover on policy. *Noack v. Lanark* [1932] O.R. 580.

Cancellation. See "CANCELLATION."

Contribution. Where on happening of any loss or damage to property insured there is in force more than one contract covering same interest, each of insurers under respective contracts is liable to insured for its rateable proportion of loss, unless it is otherwise expressly agreed in writing between insurers.

Coverage. Insurer is liable for loss or damage to property owned by persons other than insured provided named insured has an insurable interest, named insured intends to insure interests of others and policy does not preclude insuring of other interests. *Keefer v. Phoenix* (1901) 31 S.C.R. 144. Section 151 grants court discretion to rule that an exclusion, stipulation, condition or warranty contained in a contract of fire insurance is not binding on insured if it is held to be unjust or unreasonable.

Mortgage. Mortgagor of property has insurable interest in it for full value; mortgagee has insurable interest for amount of mortgage debt, and if he intended to insure for benefit of mortgagor as well as of himself, he can recover from insurers full amount insured, holding excess over mortgage debt in trust for mortgagor.

Proof of Loss. Notice of loss may be given and proof of loss made by agent of insured named in contract in case of absence or inability of insured to give notice or make proof, and absence or inability being satisfactorily accounted for, or in like case, or if insured refuses to do so, by person to whom any part of insurance money is payable.

Any fraud or wilfully false statement in statutory declaration required in proof of claim shall vitiate claim.

Statutory Conditions. Deemed part of every contract of fire insurance in force in Ontario and shall be printed on every policy and no variation of or omission of or addition to any statutory condition is binding on insured.

Vacancy refers to absence of inanimate objects as well as persons, while unoccupied refers to animate occupancy and means not dwelt in as person's habitual or usual place of abode. Periodic weekly visits even for overnight do not constitute "occupation" within meaning of vacancy clause. *Lambert v. Wawanesa* [1945] O.R. 105 (C.A.).

FOREIGN INSURERS

See also "NO-FAULT INSURANCE."

Under the Insurance Act, a license to carry on automobile insurance in Ontario is subject to condition that the licensed foreign insurer shall not set up any defense based upon its motor vehicle liability policy which conflicts with mandated coverages and limits provided by the Act. For example, such insurer may not set up defense that it does not insure against loss or damage caused by an unidentified motorist. *Schrader v. U.S.F.&G. Co.* (1987) 59 O.R. (2d) 178. Such contracts are deemed to include the benefits set forth in Statutory Accident Benefits Schedule of Insurance Act. In respect of court proceeding commenced in Province of Ontario arising from motor vehicle accident which occurred in United States, foreign insurer may challenge Ontario forum as not being most convenient. An Ontario Court will only exercise jurisdiction where it has a "real and substantial connection" with subject matter of litigation. *Tolofson v. Jensen* (1994) 32 C.P.C. (3d) 141 (S.C.C.). Pain and suffering in Ontario alone is not sufficient to create substantial connection with jurisdiction. *MacDonald v. Lasnier* (1994) 21 O.R. (3d) 177 (Ont. Gen. Div.).

FRAUD

See "AGENTS AND BROKERS"; "FIRE INSURANCE, Proof of Loss."

GUEST CASES

No Guest Statute.

HUSBAND AND WIFE

Action in Tort: Common-law rule that spouse cannot sue other in tort abrogated by statute. Action in tort may be brought by spouse against other. "Spouse" means either of two persons who are married to each other, have together entered into a marriage that is void-

able or void, in good faith on the part of the person asserting a right under this Act, or have lived together in a conjugal relationship outside marriage, continuously for not less than three years, or in a relationship of some permanence, if they are the natural or adoptive parents of a child. No person shall be disentitled from bringing an action or other proceedings against another for reason only that they stand in relationship of parent and child.

Family Law Act, s. 61(1) gives cause of action to designated family member, including spouse (which includes same-sex), children, grandchildren, parents, grandparents, brothers and sisters to recover their pecuniary loss and other damages resulting from injury or death.

INFANTS

See also "AUTOMOBILES, Age"; and "HUSBAND AND WIFE."

By statutes, common-law distinction between legitimacy and illegitimacy abolished.

JUDGMENTS

By statute, claimants entitled to judgment for payment of money also entitled to have included in judgment amount of interest at bank rate as published by Bank of Canada at end of first day of last month of quarter preceding quarter in which proceeding was commenced, rounded to nearest tenth of a percentage point, and calculated from the date the cause of action arose to the date of judgment. The rate of interest on damages for non-pecuniary loss in an action for personal injury, if the injury occurred after October 23, 1989 shall be the rate specified by the Rules of Civil Procedure, currently 5 percent per annum.

Where judgment includes amount for special damages, interest calculated as hereinbefore stated shall be on balance of special damages incurred as totaled at end of each 6 month period and at date of judgment.

Judge has discretion to fix interest rate higher or lower than as set out above or disallow part or all.

LIABILITY INSURANCE

See also "NO-FAULT INSURANCE."

Part VI of Insurance Act re "Automobile Insurance" applies.

"Automobile Insurance" means insurance (a) against liability arising out of (i) bodily injury to or death of person, or (ii) loss of or damage to property, caused by automobile or use or operation thereof; or (b)

against loss of or damage to automobile and loss of use thereof.

Contribution Between Joint Tort-feasors. This is allowed by law of Ontario in actions arising from negligence. Defendant may bring into any action any other person whom he considers wholly or partly responsible for damages claimed, in order that all parties may be before Court. Court shall determine degree in which each tort-feasor is liable, and where two or more persons are found at fault or negligent, they are jointly and severally liable to person suffering loss or damage, and in absence of any contract, each is liable to make contribution and indemnify each other in degree they are respectively found to be at fault: Negligence Act. This principle applies even where plaintiff himself is found partially at fault.

Co-operation. Statutory Conditions in Ontario provide that insured must co-operate with insurer in all matters necessary to defense of any action or appeal. Failure to supply all available particulars to Company is breach of statutory conditions. *Provident v. Adamson* [1938] S.C.R. 482. Payment by insured of judgment recovered against him while insurance company is considering appeal therefrom is breach of above condition. *Fidelity v. Marchand* [1924] S.C.R. 86. If Company, whilst engaged in defending claim on behalf of insured, learns that insured is not co-operating, it should refuse to continue defense, as continuing to defend action might amount to waiver of its rights under this condition. *England v. Dominion of Canada* [1931] O.R. 264. Insured is bound by consent judgment taken out on instructions of insurer under co-operation clause. *Guildhall v. Denny* [1937] O.R. 361.

Coverage under Motor Vehicle Liability Policies. Owner's policy insures person named therein and every other person who with his consent drives, or is occupant of, automobile owned by him and designated therein, against liability imposed by law upon him or that other person for loss or damage arising from ownership, use or operation of any such automobile and resulting from bodily injury to or death of any person and damage to property. Insurer may provide under contract or by endorsement thereto for exclusion of liability in certain other cases provided for in Insurance Act except as provided in the Statutory Accident Benefits Schedule.

Every contract evidenced by motor vehicle liability policy insures, in respect of any one accident to at least \$200,000 with claims for bodily injury or death having priority to \$190,000 and claims for property damage to \$10,000. Every such policy issued in Ontario shall provide, in case of liability arising out of ownership, use or operation of automobile in any province or territory of Canada, insurer shall be liable up to minimum limits

prescribed for that province or territory if those limits are higher than limits prescribed by policy, and insurer will not set up defenses not available to policies issued in that province.

Insurance Act requires insurer to provide for payment of all sums that insured or surviving family members are legally entitled to recover from owner or driver of an uninsured or unidentified automobile as damages for bodily injuries to or death of an insured person or accidental damage to insured automobile and/or its contents. "Person insured under the contract" means in respect of claim for damage to insured automobile, owner thereof; in respect of claim for damages to contents of insured automobile, owner of contents; in respect of claim for bodily injuries or death, any person while occupant of insured automobile; insured and his or her spouse and any dependent relative of either, while occupant of uninsured automobile, or while not occupant of automobile or of railway rolling stock that runs on rails, who is struck by uninsured or unidentified automobile as more particularly set forth in §265 (2) of Insurance Act.

See also "NO-FAULT INSURANCE."

Rights of Injured Party Against Insurer. Any person who has claim against insured for which indemnity is provided by motor vehicle liability policy notwithstanding that such person is not party to the contract, may, upon recovering judgment therefor in any province or territory of Canada against insured, have insurance money payable applied in or towards satisfaction of his judgment and of any other judgments or claims against insured covered by contract and may, on behalf of himself and all persons having such judgments or claims maintain action against insurer to have insurance money so applied. No assignment, waiver, surrender, cancellation or discharge of contract, or of any interest therein or of proceeds thereof, made by insured after happening of event giving rise to claim, nor any act or default of insured before or after that event in contravention of Part VI or of terms of contract, nor any contravention of Criminal Code (Canada) or statute of any province or territory of Canada or of any state or District of United States of America by owner or driver of automobile shall prejudice right of person so entitled to have insurance money so applied nor be available to insurer as defense in such action. Insurer may require any other insurers liable to indemnify insured to be made parties to action and contribute according to their respective liabilities. Where insurer admits liability to pay and considers that there are or may be other claimants or there is no person capable of giving and authorized to give valid discharge for payment, willing to do so, insurer may apply to court without notice for order for payment of money into court. Insurer not liable to claimant for those types of

coverages enumerated in §250 of Insurance Act, in excess of limits mentioned above. Defenses are also available as specified in Act in certain other cases where liability is excluded by contract. Insured shall reimburse insurer upon demand in amount that insurer has paid by reason of said provisions and that it would not otherwise be liable to pay.

Where insurer denies liability under motor vehicle liability policy it shall, upon application to court, be made third party in any action to which insured is party and in which claim is made against insured by any party to action in which it is or might be asserted that indemnity is provided, whether or not insured enters appearance or defense in action, and insurer may contest liability of insured or amount of claim to same extent as if it were defendant in action.

Insurer under motor vehicle liability policy is not prevented from being added as a party to an action where insurer has waived its right to deny coverage to its insured. Issues relevant to misconduct and waiver fall to be decided in action between insurer and its insured and not on a motion brought in action between third party and the insured. *Minassian v. Toonen* (1987) 61 O.R. (2d) 765.

Statutory Conditions deemed part of contract, and to be printed in every policy and no variation or omission of or addition to is binding on insured.

Statutory Condition requires that insured shall not drive or operate or permit any other person to drive or operate the automobile unless the insured or other person is authorized by law to drive or operate it. Also, the insured shall not use or permit the use of the automobile in a race or speed test or for any illicit or prohibited trade or transportation.

Where insured contravenes term of contract, or commits fraud or wilfully makes a false statement in respect of a claim, claim by him is invalid and his right to indemnity forfeited, except as provided in the Statutory Accident Benefits Schedule.

Historically, in assessing damages for loss of earnings or earning capacity in personal injury actions, welfare payments, unemployment insurance benefits, disability benefits paid pursuant to policies arranged by the insured or his or her employer, or ex gratia payments should not be taken into account: *Boarelli v. Flannigan* [1973] 3 O.R. 69 (C.A.). Subsequently, *Ratyck v. Bloomer* [1990] 1 S.C.R. 940 held that damages are to be reduced by the amount of wages paid by an employer pursuant to a collective bargaining agreement. However, an exception arises whereby damages will not be reduced where such collateral benefits accrue to plaintiff pursuant to a collective bargaining agreement where

plaintiff demonstrates these benefits were obtained at expense of other compensation. *Cunningham v. Wheeler* [1994] 1 S.C.R. 359.

Where a benefactor can establish a right of subrogation to the damage award or a bona fide legal or moral right to be repaid the sums paid to the injured plaintiff, those benefits will not be deducted. However, salary and dividends paid to an employee/shareholder were deductible since the payments could not be said to be gratuitous, nor was there any obligation to repay the third party. *Fobel v. Dean* (1991) 83 D.L.R. 4th 385.

Section 267 of the Insurance Act, however, provides that damages awarded to a person in respect of motor vehicle accidents occurring between October 24, 1989 and December 31, 1993, are to be reduced by specified collateral benefits including the amount of payments available to a person for loss of income under the laws of any jurisdiction or under an income continuation benefit plan, and all payments received under a sick leave plan arising by reason of the person's occupation or employment. However, it was held that a survivor's death benefit received under the Public Service Superannuation Plan and the Canada Pension Plan should not be deducted from the plaintiff's claim for damages for loss of income under §61 of the Family Law Act. *Dall Estate v. Adams* (1994) 19 O.R. (3d) 93 (Ont. C.A.).

Section 267.1 of the Insurance Act provides that in respect of motor vehicle accidents occurring on or after January 1, 1994 and on or before October 31, 1996, only claims for non-pecuniary loss may be asserted and accordingly the amount of damages awarded is not reduced by the amount of collateral benefits received. However, amounts awarded are to be reduced by deductibles. (See "NO-FAULT INSURANCE.")

Sections 267.5 and 267.8 of the Insurance Act provide that in respect of motor vehicle accidents occurring on and after November 1, 1996, claims for both pecuniary and non-pecuniary losses may be asserted in certain circumstances, but damages awarded are to be reduced by benefits received pursuant to income continuation plan and are subject to deductibles. (See "NO-FAULT INSURANCE").

LIFE INSURANCE

Definitions. "Life insurance" is defined by order made under the Insurance Act and means any insurance that is payable (a) on death, (b) on the happening of an event or contingency dependent on human life, (c) at a fixed or determinable future time, or (d) for a term dependent on human life, and includes insurance under which an insurer (e) as part of a contract of life insur-

ance, undertakes to pay an additional sum in the event of the death by accident of the life insured, (f) as part of a contract of life insurance, undertakes to pay insurance money or to provide other benefits in the event that the life insured becomes disabled as a result of bodily injury or disease, and (g) an undertaking to provide an annuity for a term dependent solely or partly on human life.

Life insurance, which is governed by Part V of the Insurance Act, is to be distinguished from "accident and sickness insurance" which is governed by Part VII of the Act. If proceeds of insurance are payable under the same contract *both* in the event of death by accident *and* in the event of death from some other cause, i.e., sickness (e.g., cancer, heart attack, etc.), then it is not accident and sickness insurance but life insurance, and any disability coverage contained in such an insurance contract is part of the life insurance contract. In such case, the disability coverage is governed by the life insurance rules in Part V and not by the accident and sickness provisions in Part VII. As well, if the contract of insurance provides that insurance proceeds are payable both in the event of death caused by sickness *and* in the event of disability resulting from sickness, then the policy is also considered life insurance and Part V will govern.

Documents Forming Contract. Except in the case of a life insurance contract made by a fraternal benefit society, a life insurance contract is, as a matter of statute, comprised entirely of the provisions in (a) the application, (b) the policy, (c) any document attached to the policy when issued, and (d) any amendment to the contract agreed upon in writing after the policy is issued.

Insurable Interest. Except in the case of group insurance, or except in the case of a life insured who has consented in writing to the insurance being placed on his life, a life insurance contract will be void *ab initio* unless the policyholder has an insurable interest in the life insured at the time the contract would otherwise take effect. Accordingly, lack of an insurable interest can be raised to nullify the contract even after the contestable period. If the life insured is under the age of 16, then consent to insurance being placed on his life may be given by one of his parents or a person standing in *loco parentis*. Although it is not an all-inclusive list of the circumstances in which insurable interest exists, a person has an insurable interest in the person's own life and in the life of (a) the person's child or grandchild, (b) the person's spouse, (c) any person upon whom the person is wholly or partially dependent for support or education, (d) the person's employee, and (e) any person in whose life the person has a pecuniary interest.

Neither assignees of the insurance contract nor beneficiaries require an insurable interest in the life insured.

When Contract Takes Effect. Subject to any provision to the contrary in the application (such as an offer of interim coverage) or the policy, a life insurance contract does not take effect unless each of the following conditions are satisfied: (a) the policy is delivered to an insured, the insured's assign or agent or to a beneficiary, (b) the payment of the full first premium is made to the insurer or its authorized agent, and (c) no change has taken place in the insurability of the life insured between the time that the application was completed and the time that the policy was delivered. If the life insured dies before each of the foregoing conditions is satisfied, then there will be no contract and no obligation to pay insurance proceeds. The contract will not come into effect even though the life insured was unaware of the change in insurability. *Wagner Brothers v. Laurier Life* (1992), 2 O.R. (3d) 609 (Ont. C.A.); leave to appeal to S.C.C. refused; *Pusateri's Ltd. v. Prudential of America*, [1999] I.L.R. I-3703, aff'd on other grounds [2001] I.L.R. I-3965 (Ont. C.A.).

Subject to the Act, the contractual concepts of offer and acceptance apply to life insurance so that if the applicant rejects the policy on delivery, then no binding contract of insurance shall have been made.

Payment of Premium. Subject to the provisions of the particular policy, premiums subsequent to the first become due on the anniversary of the policy date if the contract specifies one. If the contract specifies the premium amounts, then the insurer has no duty to provide notification to the policyholder as to the due dates of the renewal premiums. *Edwards v. Imperial Life* (1905), 6 O.W.R. 170 (Ont. Div. Ct.). Except in the case of group insurance, an assignee, a beneficiary or a person acting on behalf of one of them or the policyholder may pay any premium that the policyholder is entitled to pay.

Where a bill of exchange (such as a cheque or promissory note) or other written promise to pay is given for the whole or any part of a premium and payment is not made according to its tenor, the premium is deemed not to have been paid. Accordingly, and in respect of a premium subsequent to the first, and subject to the terms of the policy, the policy will lapse immediately following the grace period if a cheque is returned NSF or a PAD is not processed through no fault of the insurer. However, if a PAD is not processed as a result of the insurer's default, then no lapse will be deemed to have occurred. *Dale v. Metropolitan Life*, [1990] 47 C.C.L.I. 253 (Ont. H.C.), aff'd [1991] 5 C.C.L.I. (2d) 220 (Ont. C.A.). If an otherwise valid cheque is dishonoured by the policyholder's bank merely because presentment occurred after the policyholder's death, then the premium will be considered to have been paid upon the insurer's

receipt of the cheque. *Duplisea v. T. Eaton Life*, [1980] 1 S.C.R. 144.

Whether properly characterized as waiver or estoppel, an insurer may not be entitled to rely on the lapse and reinstatement provisions contained in the policy in circumstances in which it has by words or conduct led or misled the policyholder to believe that the insurer will not strictly enforce the premium payment provisions of the policy. *Dale v. Metropolitan Life*, [1990] 47 C.C.L.I. 253 (Ont. H.C.), aff'd [1991] 5 C.C.L.I. (2d) 220 (Ont. C.A.).

Because life insurance is contingency insurance rather than indemnity insurance, no portion of the premium is refundable on death or cancellation in the normal course by the policyholder. In life insurance, where the risk has attached, or the premiums have begun to be earned for any length of time, premiums paid in advance are not recoverable. *Provident Savings Life Assurance Society v. Bellew* (1904), 35 S.C.R. 35.

Grace Period. No statutory or contractual grace period applies to the initial premium. If a premium, other than the initial premium, is not paid when due, then that premium may be paid within a grace period of (a) 30 days from and excluding the day on which the premium is due, or (b) the number of days, if any, specified in the contract for the payment of an overdue premium, whichever is longer. If the life insured dies during the period of grace and before the premium is paid, then the contract is deemed to be in effect and the death benefit is payable, but the insurer is entitled to deduct from the proceeds the overdue premium together with interest at the rate specified in the contract but not to exceed 6% per annum.

Duty of Disclosure and Incontestability. An applicant and each proposed life insured must disclose to the insurer in the application, on a medical examination, if any, and in any written statements or answers furnished as evidence of insurability, every fact within that person's knowledge that is material to the insurance and is not so disclosed by the other. Except for a misstatement of age, and subject to the incontestability provision under the Act, a failure to disclose or a misrepresentation of a material fact renders the contract voidable at the option of the insurer. It does not matter whether the misrepresentation was immaterial to the cause of the life insured's death. *Henwood v. Prudential Ins.*, [1967] S.C.R. 720. In the case of individual insurance, if the contract has been in force for two years during the lifetime of the life insured, then a failure to disclose or a misrepresentation of a fact within the person's knowledge that is material to the insurance, does not, in the absence of fraud, render the contract voidable. In the case of group insurance, a failure to disclose or a misrep-

resentation of a fact in respect of a life insured does not render the whole contract voidable, but, if evidence of insurability is specifically requested by the insurer, then the insurance in respect of that life insured is voidable at the option of the insurer unless such insurance has been in effect for two years during the lifetime of that person. Such two-year limit does not apply if there has been fraud. The incontestability rule does not apply to disability coverage contained in a life insurance contract with the effect that the insurer can deny the disability claim whether within or outside the two-year period for material misrepresentation, whether fraudulent or not. See *Joanisse v. Union of Canada Life* (1986), 19 C.C.L.I. 37 (Ont. H.C.), rev'd on other grounds 27 C.C.L.I. 164 (Ont. C.A.). The two-year contestable period also does not apply to creditor's group insurance.

If the insurer fails to disclose or misrepresents a fact material to the insurance, then the contract is voidable by the policyholder provided that the contract has not been in effect for two years. Such two-year limitation does not apply in the case of fraud by the insurer.

Reinstatement. Except in the case of a contract of group insurance, if the contract lapses and within two years of such lapse the policyholder (a) applies for reinstatement of the contract, (b) pays all of the overdue premiums and other indebtedness (e.g., policy loans) under the contract together with interest at the rate specified in the contract but not exceeding 6% per annum, and (c) produces (i) evidence satisfactory to the insurer of the good health of the life insured, and (ii) other evidence satisfactory to the insurer of the insurability of the life insured, then the insurer must reinstate the contract. This duty of disclosure is owed even if the insurer does not ask for written representations concerning the life insured's health. *Gregory v. Jolley*, [2001] 54 O.R. (3d) 481 (Ont. C.A.). This right of reinstatement is not available, however, if the cash surrender value has been paid or an option of taking paid-up or extended insurance has been exercised. The duty of disclosure on the applicant and the life insured that existed at the time that the policy was first applied for, applies upon the reinstatement and the two-year contestability period will commence again from the time of the reinstatement.

Suicide. An undertaking to pay insurance proceeds in the event that the life insured commits suicide is enforceable. If the life insurance contract contains a suicide exclusion for a stated period, and if such contract lapses and is subsequently reinstated, then such period will commence to run from the date of the latest reinstatement.

Beneficiaries. A policyholder may in the contract or by a "declaration", as defined in the Insurance Act, designate the policyholder's personal representative or a

beneficiary to receive insurance money, and except in the case of a living irrevocable beneficiary, may alter or revoke the designation from time to time by a declaration. A policyholder may in the contract, or by a declaration other than a declaration that is part of a will, designate a beneficiary irrevocably provided, however, that a declaration will not be effective for such purpose until it is filed with the insurer at its head or principal office in Canada during the lifetime of the life insured. If a person has properly and effectively been designated as an irrevocable beneficiary, then the policyholder will not be able to revoke such designation during the lifetime of such beneficiary, and the insurance money is not subject to the control of the policyholder or of the policyholder's creditors and does not form part of the policyholder's estate.

If a beneficiary (a) is not designated irrevocably, or (b) is designated irrevocably but is at least 18 years of age and consents, then the policyholder may assign, exercise rights under, surrender or otherwise deal with the contract as provided therein or under Part V of the Act or as may be agreed upon with the insurer.

Creditor's Rights. If a beneficiary is designated, then the insurance money, from the time of the happening of the event upon which the insurance money becomes payable, is not part of the estate of the policyholder and is not subject to the claims of the creditors of the policyholder. While a beneficiary designation in favour of a life insured's spouse, child, grandchild or parent, or any of them, is in effect, the rights and interests of the policyholder in the insurance money and in the contract are exempt from execution and seizure.

Assignment. A provision in a contract to the effect that the rights or interests of the policyholder, or, in the case of group insurance, the certificate holder, are not assignable is valid.

Proof of Claim. If an insurer receives sufficient evidence of (a) the happening of the event upon which the insurance money becomes payable, (b) the age of the life insured, (c) the right of the claimant to receive payment, and (d) the name and age of the beneficiary, if any, then the insurer must within 30 days thereafter pay the insurance money to the person(s) entitled thereto. Subject to any limitation in the order to the contrary, an order made under the Declarations of Death Act, 2002, that declares that the life insured has died is sufficient evidence of the death for the purposes of the foregoing.

Relief from Forefeiture. In *Saskatchewan River Bungalows v. Maritime Life*, [1994] 2 S.C.R. 490, the Supreme Court of Canada, by way of *obiter*, opened up the issue of whether relief from forfeiture could apply to a life insurance case pursuant to the inherent equitable

jurisdiction of any court. Since that time, relief from forfeiture has been allowed in some life insurance cases (*Boa Estate v. Crown Life*, [1996] I.L.R. I-3344 (Ont. Gen. Div.)); *Loney v. Northern Life* (1989), 67 O.R. (2d) 717 (Ont. Div. Ct.) (however, disability benefit and not death benefit was in issue) and has been rejected in others (*Khan v. Primerica Life* (1998), 13 C.C.L.I. (3d) 171 (Ont. Gen. Div.); *Padua v. Massachusetts Indemnity*, [1999] I.L.R. I-3711 (Ont. S.C.J.); *Pluzak v. Gerling Global* (2001), 195 D.L.R. (4th) 293 (Ont. C.A.), leave to appeal to S.C.C. refused). In *Kahn*, the court expressly rejected the concept that relief from forfeiture could apply to a lapse for non-payment of premium, lapse not constituting a forfeiture. In *Pluzak*, the Ontario Court of Appeal applied the court's reasoning in *Kahn* and found that relief from forfeiture has no application to life insurance policies following death, at least in a non-payment of premium situation.

Capacity of Minors. A minor who has reached the age of 16 may enter into a life insurance contract and otherwise deal with that contract except in respect of his or her rights as beneficiary.

LIMITATION OF RIGHTS AND TIME FOR COMMENCEMENT OF ACTION

See also Law Digest Tables.

As of January 1, 2004, the *Limitations Act 2002* ("Act") repeals limitation periods as set out in *Limitations Act 1999* and other individual statutes. The Act applies to claims based on acts or omissions which took place prior to January 1, 2004 but for which no proceeding has been commenced. For claims which are not discovered until the Act is in force, the new provisions apply. For claims discovered before the Act is in force and for which the old limitation has not expired, the old provision continues to apply even if an action has not been started before January 1, 2004. If the previous limitation period has already expired before the Act came into effect, no proceeding can be commenced.

Under section 4 of the *Limitations Act 2002* there is a general limitation period for any claim (not otherwise excluded), of 2 years from the time the claim was discovered. A claim is discovered on the earlier of (a) the date on which the person with the claim first knew that the injury, loss or damage had occurred, that the injury, loss or damage was caused by or contributed to by an act or omission, that the act or omission was that of the person against whom the claim is made, and that having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it, or (b) the date on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the factors set out

above. A person is presumed to have known all of the matters referred in part (a) when the act or omission on which the claim is based took place, unless the contrary is proved. §5.

Limitation periods set out above commence against minors from the date they attain age of majority. §6.

NO-FAULT INSURANCE

In respect of bodily injury or death arising from the use or operation of an automobile on or after November 1, 1996, the owner of an automobile, the occupants of an automobile and any person present at the incident are not liable in an action in Ontario for damages for (a) income loss suffered in the seven days after the incident; (b) income loss suffered more than seven days after the incident and before the trial in excess of 80 per cent of the net income loss; (c) loss of earning capacity suffered after the incident and before the trial in excess of 80 per cent of the net loss of earning capacity; (d) expenses that have been incurred or will be incurred for health care except if the injured person has died or sustained (i) permanent serious disfigurement; or (ii) permanent serious impairment of an important physical, mental or psychological function; (e) non-pecuniary loss unless as a result of the use or operation of the automobile the injured person has died or has sustained (i) permanent serious disfigurement; or (ii) permanent serious impairment of an important physical, mental or psychological function. However, the owner of an automobile, the occupants of an automobile and any person present at the incident receive these protections only if defended in the action by an insurer that is licensed to undertake automobile insurance in Ontario or who has filed an undertaking providing that the insurer's motor vehicle liability policies will provide, when the insured automobiles are operated in Ontario, the minimum liability limit, uninsured automobile coverage and statutory accident benefits mandated by Ontario law. Damages for non-pecuniary loss to be awarded to the injured person against protected defendant shall be reduced by \$30,000 (\$15,000 if the accident occurred between November 1, 1996 and September 30, 2003), and amount awarded for non-pecuniary loss to family member against the protected defendant shall be reduced by \$15,000 (\$7,500 if the accident occurred between November 1, 1996 and September 30, 2003). (§267.5 of the Insurance Act). These deductibles do not apply if the damages for non-pecuniary loss exceeds \$100,000 or exceeds \$50,000 in the case of a claim for non-pecuniary loss to a family member.

The Ontario Court of Appeal initially held that a serious impairment must, (i) substantially interfere with the person's ability to continue the essential tasks of his

or her regular or usual employment, despite reasonable efforts to accommodate the person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue employment, (ii) substantially interfere with the person's ability to continue training for a career in a field in which the person was being trained before the incident, despite reasonable efforts to accommodate the person's impairment and the person's reasonable efforts to use the accommodation to allow the person to continue his or her career training; or (iii) substantially interfere with most of the usual activities of daily living, considering the person's age. *Meyer v. Bright* (1993), 15 O.R. (3d) 129 (C.A.); *Jones v. Mazzola* (2005), 78 O.R. (3d) 772 (C.A.). More recently, the Court of Appeal held that an impairment is serious even though the plaintiff resumes the activities of employment and household responsibilities, if continuing pain affects the enjoyment and quality of life; *Brak (Litigation guardian of) v. Walsh* (2009), 90 O.R. (3d) 34. For the impairment to be permanent, the impairment must have been continuous since the incident and must, based on medical evidence and subject to the person reasonably participating in the recommended treatment of the impairment, be expected not to substantially improve, and be of a nature that is expected to continue without substantial improvement when sustained by persons in similar circumstances.

Mandatory Provisions. Every motor vehicle liability policy shall provide mandatory Medical and Rehabilitation Benefits, Death and Disability Benefits set forth in Statutory Accident Benefits Schedule to Insurance Act payable regardless of fault, to or with respect to each insured person as defined therein who sustains bodily injury or death, by accident arising out of use or operation of automobile. However, certain disability benefits are not payable to a person driving without a valid driver's license, driving while impaired by alcohol or drugs, driving without the owner's consent, or if the driver knew or ought to have known that he or she was operating the automobile while it was not insured. Also an occupant is not entitled to certain disability benefits if he or she knew or ought to have known that the driver was operating the automobile without owner's consent.

"Insured person," in the Statutory Accident Benefits Schedule means, in respect of a particular motor vehicle liability policy: (a) the named insured, any person specified in the policy as a driver of the insured automobile, the spouse or same-sex partner of the named insured, and any dependant of the named insured, spouse or same-sex partner, if the named insured, specified driver, spouse, same-sex partner or dependant, (i) is involved in an accident in or outside of Ontario that involves the insured automobile or another automobile, or (ii) is not involved in an accident but suffers psychologi-

cal or mental injury as a result of an accident in or outside of Ontario that results in a physical injury to his or her spouse, same-sex partner, child, grandchild, parent, grandparent, brother, sister, dependant, spouse's dependant or same-sex partner's dependant; (b) in respect of accidents in Ontario, a person who is involved in an accident involving the insured automobile; and (c) in respect of accidents outside Ontario, a person who is an occupant of the insured automobile and who is a resident of Ontario or was a resident of Ontario at some point during the 60 days before the accident.

Exclusion. Insurer not required to pay benefits under the Statutory Accident Benefits Schedule in respect of any person who, as a result of an accident, is entitled to receive the benefits of any workers' compensation law or plan. Despite this exclusion, insurer will pay full benefits to insured until resolution of any tort action brought by insured to recover for personal injuries resulting from accident under which workers' compensation claim arose or until insured receives payments under workers' compensation plan.

Rights Of Unnamed Insured. Any person insured but not named may recover in same manner and to same extent as if named in policy as insured.

Demand For Particulars Of Insurance. Where person is injured or killed in automobile accident in Ontario, that person or his personal representatives may demand insurance particulars by registered mail from owner or operator of automobile, or insurer.

Liability to Pay. Occupants of an automobile have recourse against the insurer of an automobile in respect of which the occupant is an insured, and if coverage is unavailable, the occupant has recourse against the insurer of the automobile in which he or she was an occupant, and if recovery is unavailable from either of the above, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to no-fault benefits arose, and if recovery is unavailable from any of the above, the occupant has recourse against the Motor Vehicle Accident Claims Fund. In respect of non-occupants, the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured, and if recovery is unavailable, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant, and if recovery is unavailable from either of the above, the non-occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to no-fault benefits arose, and if recovery is unavailable from any of the above, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund. If a person has recourse against more than one insurer for the payment of no-

fault benefits, the person, in his or her discretion, subject to §268 (2) of the Insurance Act, may decide the insurer from which he or she will claim the benefits.

Claimants Obligation To Inform. Claimant shall furnish person against whom claim is made full particulars of all such insurance available to claimant.

Statutory Accident Benefits Schedule - Accidents on or after November 1, 1996 provides for Income Replacement Benefit, Non-Earner Benefit, Caregiver Benefit, Medical, Rehabilitation and Attendant Care Benefit, Payment of Other Expenses, and Death and Funeral Benefits.

Insurer shall pay income replacement benefit to a qualifying insured person who sustains an impairment causing a substantial inability to perform the essential tasks of their employment within 104 weeks after the accident. Insurer is not required to pay benefits for the first week of disability nor for any period longer than 104 weeks of disability unless insured is suffering complete inability to engage in any employment for which he or she is reasonably suited by education, training or experience. For accidents occurring on or after April 15, 2004, insurer is not required to pay benefits for any period longer than 12 weeks after the accident, in the case of an insured person whose impairment comes within the *Grade I Whiplash Guideline*, or for any period longer than 16 weeks after the accident, in the case of an insured person whose impairment comes within the *Grade II Whiplash Guideline*. The amount of benefit shall be 80 percent of net weekly income as determined by specified formula to a maximum of \$400 per week (unless optional income replacement benefits were purchased by insured) for first 104 weeks, and the greater of that amount and \$185 for each week after the first 104-week period. The insurer may deduct from the amount of income replacement benefit payable, 80 per cent of net income received from employment subsequent to the accident, and collateral benefits.

Insurer shall pay non-earner benefit to a qualifying insured person who does not qualify for income replacement benefit or caregiver benefit, if he or she sustains an impairment as a result of an accident which results in a complete inability to carry on a normal life within 104 weeks after the accident. Insurer is not required to pay non-earner benefits for first 26 weeks after onset of complete inability to carry on a normal life or for any period before insured attains 16 years of age. The amount of benefit shall be \$185 per week, and if more than 104 weeks have elapsed since the onset of disability, the amount of the non-earner benefits shall be \$320 for each week insured person continues to be eligible to receive the benefit; and insurer may deduct specified collateral benefits.

Insurer shall pay caregiver benefit to an insured person if at time of accident the insured was residing with a person in need of care, was the primary caregiver and did not receive any remuneration for engaging in caregiving activities, and as a result of and within 104 weeks after the accident insured person suffers a substantial inability to engage in the caregiving activities in which she engaged at the time of accident. Insurer shall pay reasonable and necessary expenses incurred in caring for a person in need of care, but the amount shall not exceed, for the first person in need of care, \$250 per week and for each additional person \$50 per week. Insurer is not required to pay a caregiver benefit for any period longer than 104 weeks of disability unless insured is suffering a complete inability to carry on a normal life.

Insurer shall pay medical, rehabilitation and attendant care benefits which include all reasonable and necessary expenses incurred by insured as a result of accident but no goods or services that are experimental in nature. However, no medical or rehabilitation benefit is payable for expenses incurred more than 10 years after the accident if insured is 15 years of age or older at the time of the accident, or after the insured person attains the age of 25 in the case of an insured who was less than 15 years of age at time of accident. No attendant care benefit is payable for expenses incurred more than 104 weeks after the accident. These periods do not apply in respect of an insured who sustains a catastrophic impairment and also do not apply if insured has purchased optional medical, rehabilitation and attendant care benefits.

The sum of medical and rehabilitation benefits paid in respect of an insured person shall not exceed, for any one accident, \$100,000, or \$1,000,000 if insured sustained a catastrophic impairment. The amount of the attendant care benefit paid in respect of an insured person shall not exceed, for any one accident, \$1,000,000 if insured sustained a catastrophic impairment, nil, if the accident occurred after April 14, 2004 and the insured person sustained an impairment that comes within the *Grade I Whiplash Guideline* or the *Grade II Whiplash Guideline*, or \$72,000 in any other case. However, an insured can purchase optional medical, rehabilitation and attendant care benefit to increase these maximums.

With the exception claims that come within a *Pre-approved Framework Guideline*, the insured shall submit an application for a medical or rehabilitation benefit to the insurer before incurring expenses for which such benefits may be payable. The application must be signed by the insured person and must include: a treatment plan prepared by a member of a health profession; and a statement by a health practitioner approving the treat-

ment plan and stating that he or she is of the opinion, (i) that the expenses contemplated by the treatment plan are reasonable and necessary for the insured person's treatment or rehabilitation, and (ii) that the impairment sustained by the insured person does not come within a *Pre-approved Framework Guideline*. For claims that come within a *Pre-approved Framework Guideline*, advance approval is not required. Rather, the insured person submits to the insurer, within the time specified in the applicable guideline, a treatment confirmation form that satisfies the requirements set out in the Statutory Accident Benefits Schedule to the Insurance Act.

Insurer shall pay other expenses including lost educational expenses if the expenses are related to an educational program insured is unable to continue; reasonable and necessary expenses incurred by specified persons as a result of the accident in visiting the insured person during his or her treatment or recovery; reasonable and necessary additional expenses incurred by or on behalf of insured person as a result of an accident for housekeeping and home maintenance services; and damage to clothing, glasses and medical or dental devices that were lost or damaged as a result of an accident.

Insurer shall pay a death benefit in respect of an insured person if he or she dies as a result of an accident within 180 days after the accident or within 156 weeks after the accident if during that period the insured person was continually disabled as a result of the accident. Unless additional optional benefits are purchased insurer shall pay \$25,000 to insured person's spouse and \$10,000 to each of the insured person's dependants. If there is no spouse, an additional \$25,000 shall be paid to the insured person's dependants. Also, \$10,000 shall be paid to each former spouse of the insured person to whom the insured was obligated at the time of the accident to provide support; and \$10,000 shall be paid to a person in respect of whom the insured person was a dependant at the time of the accident, or in the event that person pre-deceases or dies within 30 days of the insured person, that person's spouse or dependants.

Insurer shall pay a funeral benefit for funeral expenses incurred as a result of an accident, in an amount not exceeding \$6,000 unless the optional benefit has been purchased.

Disputes in respect of any insured person's entitlement to statutory accident benefits or in respect of the amount of benefits to which an insured person is entitled shall be referred to mediation. Either the insured person or the insurer may refer to a mediator any matter in dispute. If mediation fails, the parties jointly or the mediator may refer the issues in dispute to a person appointed by Director for an evaluation of the probable outcome of a court proceeding or an arbitration. The evaluator must

provide a written report identifying the issues in dispute and those that remain outstanding as well as the insurer's last offer. This report may be submitted to an arbitrator if the parties choose arbitration instead of litigation. A party to an arbitration may appeal the order of the arbitrator to the Directors of Arbitrations, who may confirm, vary or rescind the order appealed from or substitute his or her order for that of the arbitrator.

PENALTY AND ATTORNEY FEES

See also "JUDGMENTS."

General rule is that successful litigant is also entitled to have included in judgment, interest and partial indemnity legal costs. Partial indemnity costs are less than substantial indemnity costs, which more closely approximate actual legal costs incurred. Where an Offer to Settle is made by the Plaintiff at least seven days before the commencement of the hearing and is not withdrawn before the hearing, is not accepted by the Defendant, and the Plaintiff obtains a judgment as favorable or more favorable than the terms of the Offer to Settle, the Plaintiff is entitled to partial indemnity costs to the date the Offer to Settle was served and substantial indemnity costs from that date.

Where an Offer to Settle is made by the Defendant at least seven days before the commencement of the hearing and is not withdrawn before the hearing, is not accepted by the Plaintiff, and the Plaintiff obtains a judgment as favorable or less favorable than the terms of the Offer to Settle, the Plaintiff is entitled to partial indemnity costs to the date the Offer to Settle was served and the Defendant is entitled to partial indemnity costs from that date. Where the Defendant makes an Offer to Settle under the conditions above and the Plaintiff is entirely unsuccessful at trial, the court has the discretion to award the defendant partial indemnity costs to the date the Offer to Settle was served and substantial indemnity costs from that date. *S & A Strasser Ltd. v. Town of Richmond Hill* (1990) 1 O.R. (3d) 243.

Contingent fee arrangements are permitted, subject to certain limitations.

PRIVILEGED COMMUNICATIONS

Class privilege includes solicitor-client privilege, litigation privilege, and settlement communications privilege. For communications within these classes, there is a prima facie presumption of privilege unless a party urging admission can show why the communications should be admitted into evidence as an exception to the general rule. *R. v. Gruenke*, [1991] 3 S.C.R. 263.

Solicitor-client privilege applies where legal advice of any kind is sought from a professional legal adviser in

his capacity as such, the communications relating to the purpose made in confidence by the client are at his instance permanently protected from disclosures by himself or by the legal adviser, except where the protection has been waived by the client. *Canada v. Solosky* [1980] 1 S.C.R. 821; *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860; *Smith v. Jones*, [1999] 1 S.C.R. 455.

Documents may be exempt from professional privilege if (a) they go to an issue raised by the party attempting to rely on privilege, and if the communication relates directly to that issue; or (b) privilege has been waived. *Nowak v. Sanyshyn et al.* (1979) 23 O.R. (2d) 797.

Litigation privilege protects documents prepared for anticipated or pending litigation. *Wheeler v. Le Marchant* (1881) 17 Ch.D. 675. However, the dominant purpose for preparing the document must be for use in litigation. *General Accident v. Chrusz* (1999) 45 O.R. (3d) 321 (C.A.); *Waugh v. British Railways Board* [1980] A.C. 521. For litigation to be anticipated, it does not have to be a certainty, but must be more than a mere suspicion. *Blackstone v. Mutual Life Ins. Co. of New York* [1944] O.R. 328 (C.A.).

Settlement communication privilege applies as a matter of public policy, as the law encourages the settlement of actions between litigants and so it regards as privileged any settlements or negotiations for settlement. The privilege is applied even as against a third party. *Waxman & Sons Ltd. v. Texaco Can. Ltd.*, [1968] 1 O.R. 642; *affirmed* [1968] 2 O.R. 452 (C.A.).

For all other communications, there is a prima facie assumption that they are not privileged unless policy reasons suggest that communications should not be admitted into evidence in a particular case. For case-by-case privilege to apply: (1) the communications must originate in a confidence that they will not be disclosed; (2) this element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) The relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of the litigation. *R. v. Gruenke*, [1991] 3 S.C.R. 263.

REINSURANCE

The Insurance Act permits companies to reinsure individual risks in the ordinary course of business, including reinsurance with companies not licensed in Ontario.

However, the concept of reinsurance has been incorporated into the definition of "transfer," which means

an arrangement whereby contracts made in Ontario by a licensed insurer incorporated or organized under the laws of Ontario or any class or group of such contracts are undertaken by or transferred to another insurer, either by novation, transfer or assignment or as a result of amalgamation.

Transfer agreements out of the ordinary course of business must be in writing and are not binding or effective until approved by the Superintendent of Financial Services.

Insurers who enter into transfer agreements must apply to Superintendent for approval of the agreement within 30 days from date of its execution (or such longer period as Superintendent directs). After receiving application, Superintendent may invite written submissions and, after considering all the submissions, approve or reject the transfer.

In the case of amalgamation of insurers, if one of the contracting insurers is not incorporated or organized under Ontario law, the insurers must establish to satisfaction of Superintendent that they have complied with the requirements of the law of the legislative authority under which the insurer was incorporated or organized.

Where subject matter of transfer agreement is life insurance, notice and particulars of transfer, together with actuarial or other reports must be served upon shareholders, members and policyholders in Ontario, other than industrial policyholders.

REPRESENTATIONS AND WARRANTIES

Failure to disclose or misrepresentation of material fact in application renders contract of accident and sickness and of life insurance voidable by insurer, although incontestable after two years, except in the case of fraud, subject to provisions for adjustment of benefits and premiums where age misstated. In group policies, failure to disclose or misrepresentation of material fact by one or more members of the group renders the contract voidable on the same conditions but only in respect of the person or persons who are guilty of failure to disclose or misrepresentation.

False particulars, misrepresentations and failure to disclose in application for automobile insurance or false statement in claim renders claim invalid and right to indemnity forfeited, except insofar as Statutory Accident Benefits Schedule provides.

Misrepresentations or fraudulent omissions of material circumstances in application for fire insurance voids contract as to property in relation to which made as does insured's failure to notify insurer of change ma-

terial to risk and any fraud or wilfully false statement in proof of claim.

SERVICE OF PROCESS

Upon Corporations. The Rules of Civil Procedure provide that, where personal service is not required, a corporation may be served by (a) serving its solicitor of record or (b) where corporation not represented by a solicitor or not a party to proceeding, by mail to last address for service or personal service. Where Rules require document to be served personally, shall serve a corporation by leaving a copy of document with officer, director or agent of corporation or with person at any place of business of corporation who appears to be in control or management of place of business. If head office of corporation cannot be found, may serve corporation by mailing copy of document addressed to corporation or attorney for service in Ontario at last address recorded with Ministry of Consumer and Commercial Relations.

Service of a corporation for the purpose of a proceeding before Financial Services Tribunal (the "Tribunal") or Superintendent of Financial Services (the "Superintendent") that may affect rights or obligations of person required to hold license under the Insurance Act may be effected by (a) on any person, personal service, (b) on insurer, by registered mail to head office in Ontario as identified by records of Superintendent, (c) on person who is not insurer, by registered mail to last known address, (d) by leaving a copy with solicitor or with employee in solicitor's office or (e) by telephone transmission in accordance with the Act.

Where head office of licensed insurer situate out of Ontario, notice or process in any proceeding in Ontario may be served on chief agent of insurer in Ontario.

Upon Superintendent of Insurance. Where an attempt is made to effect service on an insurer or agent for purpose of proceeding before Tribunal or Superintendent that may affect rights or obligations of person required to hold license under Act, and service cannot be effected, document may be served on Superintendent and such service will be deemed service on insurer or agent. Service on Superintendent may be made by personal service or registered mail, and the Superintendent shall forthwith mail document to insurer or agent at address contained in records.

If head office of insurer outside of Ontario, and no chief agent appointed, then service upon Superintendent shall be deemed service on insurer or members of the insurer in the case of an unincorporated body or association, and Superintendent shall forward the notice or process to insurer by registered mail.

Personal service. Originating process shall be served personally or by an alternative to personal service as specified under Rules of Civil Procedure. No other document requires personal service or alternative to personal service, unless ordered by a court or required by the rules.

SUBROGATION

Under principle of subrogation, if insured should renounce any of his rights and remedies against third parties to benefit of which, if unrenounced, insurers would have been subrogated, the insured will have to answer to insurers for amount of benefit lost.

Under fire policies, insurer is subrogated to insured's rights against third party which are not destroyed by settlement or release unless concurred in by both insurer and insured. *Biafore v. Bates-Pasis Leasing Inc.* (1976) 11 O.R. (2d) 409. Insurance Act, §278.

Under automobile policies, except as permitted by the regulations, insurers do not have a right of subrogation in respect of payments made to an insured on account of medical, rehabilitation, disability and other benefits, if the accident occurred after Oct. 23, 1989; nor in respect of property damage if an automobile or its contents, or both, suffers damage arising directly or indirectly from the use or operation in Ontario of one or more other automobiles, after June 21, 1990, if the automobile that suffers the damage or in respect of which the contents suffer damage and at least one other automobile involved in the accident are insured under motor vehicle liability policies issued by insurers licensed to undertake auto insurance in Ontario.

WAIVER AND ESTOPPEL

General law as to waiver and estoppel applies to contracts of insurance, subject to provisions as to waiver and estoppel expressly set out in contracts. The provision in Insurance Act that waivers are not effective unless in writing and signed by a person authorized for that purpose does not apply to an estoppel. *Hansra v. York Fire & Cas. Ins. Co.* (1982) 38 O.R. (2d) 281.

WORKERS' COMPENSATION

Workplace Safety and Insurance Act creates Workplace Safety and Insurance Board to perform functions relating to workplace safety and prevention of injuries and occupational diseases, and administer the insurance plan.

The insurance plan applies to every worker who is employed by a Schedule 1 or a Schedule 2 employer, with some exceptions such as those whose employment

is of a casual nature and who are employed otherwise than for the purposes of the employer's industry. The insurance plan does not apply to workers who are executive officers, proprietor's or partners unless they, upon application to the Board, seek a declaration that they be deemed to be a worker to whom the insurance plan applies.

The Board shall determine the amount of premiums to be paid by employers in order to maintain the insurance fund; and shall apportion the total amount of premiums among the classes, subclasses and groups of employers and shall take into account the extent to which each class, subclass or group is responsible for, or benefits from, the costs incurred under the Act.

A worker who sustains a personal injury by accident arising out of and in the course of employment is entitled to benefits under the insurance plan. The benefits amount to 85 percent of the difference between (a) the worker's net average earnings before the injury; and (b) the net average earnings that he or she earns or is able to earn in suitable and available employment or business after the injury. However, there are specified minimum payments. A worker is entitled to benefits for mental stress only where it is an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of employment. A worker's entitlement to benefits for chronic pain is subject to limits and exclusions as prescribed by the regulations to the Act.

If an injury is attributable solely to the serious and willful misconduct of the worker, no benefits shall be provided under the insurance plan unless the injury results in the worker's death or serious impairment.

A worker shall file a claim within 6 months after the accident or, in the case of an occupational disease, within 6 months after learning that the worker suffers from the disease. A survivor entitled to death benefits as a result of the death of a worker shall file a claim within 6 months after the worker's death. The Board may permit a claim to be filed after the 6 month period if, in opinion of Board, it is just to do so.

When filing a claim, a worker must consent to the disclosure to employer, of information provided by a health professional concerning the worker's functional abilities. The disclosure is for the sole purpose of facilitating the worker's return to work. A person receiving benefits under the insurance plan or who may be entitled to do so shall give the Board such information as the Board may require from time to time in connection with the person's claim.

No person may pursue an action to obtain benefits under the insurance plan, and all claims for benefits shall

be heard and determined by the Board. Certain rights of tort action are also extinguished against specified parties.

Where a worker or a survivor of a deceased worker is entitled to benefits under the insurance plan with respect to an injury or disease and is also entitled to commence an action against a person in respect of the injury or disease, the worker or survivor shall elect whether to claim the benefits or to commence an action and shall notify the Board of the option elected. The election must be made within 3 months after the accident occurs or, if the accident results in death, within 3 months after the date of death. If the worker or survivor elects to claim benefits under the insurance plan, the Board is subrogated to the rights of the worker or survivors in respect of the action. The Board is solely entitled to determine whether or not to commence, continue or abandon the subrogated action and whether to settle it and on what terms.

A worker who claims or is receiving benefits under the insurance plan shall co-operate in such healthcare measures as the Board considers appropriate. If worker fails to comply, the Board may reduce or suspend benefits.

Both employer of an injured worker and the injured worker shall co-operate in the early and safe return to work of the worker.

The Board shall provide a worker with a labor market re-entry assessment if (a) it is unlikely that the worker will be re-employed by his or her employer because of the nature of the injury; (b) the worker's employer has been unable to arrange work for the worker that is consistent with the worker's functional abilities and that restores the worker's pre-injury earnings; or (c) the worker's employer is not co-operating in the early and safe return to work of the worker.

A worker who has a loss of earnings as a result of an injury is entitled to payments continuing until the earliest of (a) the day on which the worker's loss of earnings ceases; (b) the day on which worker reaches 65 years of age, if the worker was less than 63 years of age on the date of the injury; (c) two years after the date of the injury, if the worker was 63 years of age or older on the date of the injury; and (d) the day on which the worker is no longer impaired as a result of the injury.

There are provisions providing for payments for loss of retirement income (§45), compensation for non-economic loss if a worker's injury results in permanent impairment (§46), and death benefits (§48). The Act specifies the method of calculating such benefits.