

**Practical Strategies Under *Bill 198: The Threshold and New Deductibles***  
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*Bill 198, the Keeping the Promise for a Strong Economy Act (Budget Measures), 2002*<sup>1</sup> came into force on October 1, 2003, bringing with it a host of legislative changes aimed at reducing insurance premiums. Amongst the notable positive amendments for innocent accident victims is an expansion of an injured person's right to sue for excess health care expenses to the extent they are not at fault, if the person has sustained an impairment which meets the verbal threshold. As well, the new Bill eliminates the deductible (that would otherwise apply for pain and suffering awards) on claims that exceed \$100,000 and under the *Family Law Act*<sup>2</sup> for claims over \$50,000.

The changes in *Bill 198* mainly benefit those individuals who have sustained the most severe injuries, while placing further restrictions on the rights of those who have suffered lesser injuries to obtain compensation. What's more, Ontario Regulation 312/03 (amending Ontario Regulation 461/96<sup>3</sup>), increases the monetary deductible for pain and suffering awards from \$15,000 to \$30,000 for claims under \$100,000, as well as increasing the monetary deductible for *Family Law Act* claims under \$50,000 from \$7,500 to \$15,000. These changes come on the heels of *Bill 59, the Automobile Insurance Rate Stability Act, 1996*, which was the operative legislation for motor vehicle accidents occurring between November 1, 1996 and September 30, 2003.

## **LEGISLATIVE HISTORY**

### **Pre-1990: Tort System**

Up until 1990, there was a completely tort-based auto insurance system in Ontario which gave claimants the unrestricted right to compensation for all economic and non-economic losses.

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<sup>1</sup> *Keeping the Promise for a Strong Economy Act (Budget Measures), 2002*, S.O. 2002, c. 22 - Bill 198

<sup>2</sup> *Family Law Act*, R.S.O. 1990, c. F.3 (hereinafter "*FLA*")

<sup>3</sup> *Court Proceedings for Automobile Accidents that Occur on or after November 1, 1996*.

Large claims settlements, especially for soft tissue injuries, delays in treatment by insurers and excessive litigation (especially for bodily injury) characterized auto insurance during this period. This led to increased premiums for drivers and across-the-board availability issues. As a result, insurance rates were increasing in the latter half of the 1980's at double-digit levels per year on average, especially from 1987 to 1989.<sup>4</sup> In 1978, the Supreme Court of Canada released three decisions (the "trilogy") which set a cap on non-pecuniary general damages at \$100,000. However, the Court opened the door for large claims for future economic and medical losses.

**June 22, 1990 – December 31, 1993: OMPP (Bill 68)**

The Ontario Motorist Protection Plan (OMPP) was Ontario's first extensive no-fault plan, striving to make access to treatment for injured accident victims quicker and more efficient. OMPP governed automobile accidents occurring between June 22, 1990 and December 31, 1993 and introduced a "threshold" system whereby claimants could only obtain compensation for the tortious act if the injury was of a "permanent" and "serious" physical nature. In order to recover damages under this regime, the injury had to qualify under the verbal threshold of: a) "permanent serious disfigurement"; b) "permanent serious impairment of an important bodily function caused by a continuing injury which is physical in nature"; or c) death. Most soft tissue injuries therefore were barred from tort recovery. However, all injured victims could apply to their own insurer for benefits in three broad categories: medical, rehabilitation and care; funeral and death benefits; and weekly loss-of-income benefits.

The Court of Appeal dealt with the interpretation of the verbal threshold set out in section 266(1) of the *Insurance Act* in the trilogy cases of *Meyer v. Bright*<sup>5</sup>, *Dalglish v. Green*<sup>6</sup>, and *Lento v. Castaldo*<sup>7</sup>. The Court of Appeal took the position that the legislation be viewed as providing statutory exceptions, rather than creating a threshold that needed to be crossed. The Court held that the provision essentially does immunize owners and occupants of motor vehicles from tort actions, unless the injuries fall within the three exceptions whereby certain

<sup>4</sup> Auto Insurance Reforms in Ontario, "Change in Motion", online: <http://www.autoinsurancereforms.on.ca/highlights/asp>.

<sup>5</sup> (1992), 9 O.R. (3d) 225 (Gen. Div.), affd (1993), 15 O.R. (3d) 129 (C.A.).

<sup>6</sup> (1993), 12 O.R. (3d) 40 (Gen. Div.), revd (1993), 15, O.R. (3d) 129 (C.A.).

<sup>7</sup> (1993), 12 O.R. (3e) 321 (Gen. Div.), affd (1993), 15, O.R. (3d) 129 (C.A.).

injured persons may sue. The real question becomes whether the injured person could prove organicity in their injury claims. Without radiographic or convincing medical evidence, many claims failed. Many lawyers as well as claimants refused to proceed with claims fearing the cost consequences if they lost. Other lawyers stockpiled these cases and many eventually succeeded as the threshold eroded by subsequent judicial decisions.

**January 1, 1994 – November 1, 1996: Bill 164**

Although *Bill 164* limited the right of injured people to sue for economic losses, it further increased the amount of medical and rehabilitation benefits available to claimants. The threshold under this protocol was greatly relaxed as it no longer required that the injury be physical in nature. Under this regime a plaintiff was required to show that the injury must have been a serious disfigurement or serious impairment of an important physical, mental or “psychological function”. The requirement of permanency was removed and psychological injuries were now compensable. *Bill 164* introduced a \$10,000 deductible on claims by injured persons and a \$5,000 deductible for claims under the *FLA*. This deductible was subject to inflationary adjustments.

**November 1, 1996 – September 30, 2003: Bill 59**

The *Automobile Insurance Rate Stability Act, 1996*, otherwise known as *Bill 59*, was a much needed change from the overly restrictive regimes of *Bill 68* and *Bill 164* for innocent accident victims. Although the word “permanent” had made its way back into the threshold and the deductible had been increased by 50%, the rights of an innocent accident victim to recover economic losses were partially restored. Under this protocol, all types of economic losses were actionable net of collateral benefits and recovery of loss of income was limited to 80% of net income prior to the trial date, and 100% of gross income from the date of the trial into the future.

The threshold for recovery of non-economic loss required a permanent and serious disfigurement or permanent serious impairment of an important physical, mental or

psychological function. A \$15,000 deductible for claims of injured persons was added as well as a \$7,500 deductible for claims under the *FLA*.

**The New Regime, October 1, 2003 – ?: Bill 198**

Perhaps the most significant restrictive change brought on by this new legislation is the definition of the verbal threshold. Additionally, provisions have been amended to allow an injured person to sue for excess health care expenses provided that the claim satisfies the threshold. Under the old system, a person was only entitled to sue for health care expenses if his injuries met the “catastrophic” definition. While the characterization of “catastrophic” and “non-catastrophic” will continue to be significant for the determination of the duration and level of medical rehabilitation benefits in the *Statutory Accident Benefits Schedule*, recovery in the tort action will no longer be contingent upon this designation. Finally, the deductible on pain and suffering awards under \$100,000 has been increased from \$15,000 to \$30,000. The deductible on *FLA* claims under \$50,000 has been increased from \$7,500 to \$15,000. There is no deductible on pain and suffering awards over \$100,000 and *FLA* awards over \$50,000.

**FROM MEYER v. BRIGHT TO AHMED v. CHALLENGER: THE EVOLUTION OF A THRESHOLD IN THE COURTS**

The creation of the threshold under *Bill 68* (OMPP) had the intention of restricting claims. It became apparent that many injuries, including chronic soft tissue injuries have been able to fit within the threshold exceptions. As a result, many have argued that the threshold has become somewhat watered down. As *Bill 59* partially restored an individual’s right to sue for economic loss, plaintiffs were facing fewer challenges based on threshold than under *Bill 68*. As the threshold only affected pain and suffering awards, plaintiffs who did not meet the threshold were still not excluded from recovering for economic loss. Similar to *Bill 59*, *Bill 198* will not affect a plaintiff’s right to recover for economic loss.

**Meyer v. Bright**

*Meyer v. Bright*<sup>8</sup> was the first judicial interpretation of the threshold introduced as part of the *Ontario Motorists Protection Plan* (OMPP).

This case, one of a trilogy of threshold cases, involved two individuals who were injured in a motor vehicle accident shortly after the OMPP came into force. One of the key issues before the Court was whether the plaintiffs' injuries constituted a "permanent serious impairment of an important bodily function caused by a continuing injury which is physical in nature", and thus sufficient to satisfy the new threshold requirements. The Court ultimately concluded that "the Ontario threshold is close to, but not confined to, impairment of bodily functions of a catastrophic nature".<sup>9</sup> In his judgment, Browne J. set out six elements that would be involved in a consideration of the threshold provision:

- 1) What is the bodily function allegedly impaired?
- 2) Is that bodily function important?
- 3) Is there more than one bodily function impaired, and if so, are the further bodily functions important?
- 4) Are the bodily functions impaired?
- 5) Are the important bodily functions permanently and seriously impaired?
- 6) If the answers 1-5 are yes, the result is of permanent serious impairment of an important bodily function or functions. It remains to be considered (i) is the impairment caused by a continuing injury and, if yes, is it (ii) physical in nature?<sup>10</sup>

The Court stated that the term "permanent serious impairment" should be interpreted as meaning that the impairment must be both permanent AND serious, not permanent OR serious. Browne, J. at paragraph 28, stated:

"My interpretation is that the ordinary meaning to this entire term is that the impairment is to be permanent and serious, that both the words 'permanent' and 'serious' refer to impairment. If the

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<sup>8</sup>*Meyer v. Bright* (1993), 15 O.R. (3d) 12.

<sup>9</sup>*Ibid.* at para. 27.

<sup>10</sup>*Ibid.* at para. 31.

legislation had intended that the terms be used in the alternative, it could have so provided.”<sup>11</sup>

However, there are certainly cases in which an injury is initially serious, and then improves to the point where it ceases to be classified as serious, but remains permanent. In such a case, it would have been simpler and more accurate for the legislation to have used the word “permanently”, rather than “permanent”. Browne J., at paragraph 30, states:

“If the Ontario legislation intended a limit to recovery of non-economic damages to the catastrophically injured it would have been simple to say so. My conclusion is that the Ontario threshold is a significant threshold ... but not so extraordinarily high as to be inclusive only of damages to the catastrophically injured, approaching a seriousness near but not confined to the seriously injured.”<sup>12</sup>

It appears then, that the use of the word “permanent”, rather than “permanently” in conjunction with the relevant rules of statutory construction, clearly indicate that an impairment need not be permanently serious in order to pass the third threshold test, it need only be serious for a reasonable or indefinite period of time, after which it will be presumed on a balance of probabilities to be permanent, but need not necessarily continue to be serious.<sup>13</sup>

### **Ahmed v. Challenger**

In his judgment, Jennings J. maintains that *Meyer v. Bright* remains the definitive decision on the no-fault scheme. He confirms the direction given to the trial judge in that case that the test is not whether the plaintiff has “climbed over a threshold”, but rather whether the plaintiff has satisfied the onus of establishing that he/she falls within one of the statutory exemptions. He further reiterates the test set out in *Meyer v. Bright* which, modified by the current legislation (*Bill 59*) would read:

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<sup>11</sup> *Ibid.* at para. 28.

<sup>12</sup> *Ibid.* at para. 22.

<sup>13</sup> David Hillel, “Interpretation of the Threshold: *Meyer v. Bright*”, Canadian Cases on the Law of Insurance (2<sup>nd</sup> Series), 11 CCLI-ART 72.

1. Has the injured person sustained a permanent impairment of a physical, mental, or psychological function?
2. If yes, is the function which is permanently impaired an important one?
3. If yes, is the impairment of the important function serious?

He continues on to say that “the plain reading of section 267.5(5) introduces no element not before the Court in *Meyer and Bright*, other than the addition of mental and psychological functions. The directions given to trial judges considering whether a plaintiff comes within the exemption and the general prohibition remains the same, and there have been no subsequent qualifications of the words “permanent, serious or important.”<sup>14</sup>

### **The Development of the Three-Pronged Test**

The standard for satisfying the verbal threshold, as set out in the three-pronged test, has become significantly more relaxed over time:

1. **Permanent Impairment** – the first part of the three part test questions whether the injured person has sustained a permanent impairment of a physical, mental or psychological function. In the 1996 case of *Chrappa v. Ohm*<sup>15</sup>, the Court held that soft tissue injuries qualified as physical injuries. In *Altomonte v. Matthews*,<sup>16</sup> the Court took the same approach; in this case, the plaintiff did not recover from a soft tissue injury which developed into a chronic pain syndrome. Finally, in *Lemire (Litigation Guardian of) v. Roztek Ltd.*,<sup>17</sup> the Court heard evidence from doctors that the plaintiff’s injuries were “soft tissue” in nature and permanent, that were unlikely to resolve.
2. **Important Function** – the second part of the test looks at whether the function that is impaired is an important one. The Court in *Meyer v. Bright* held that the bodily function must be important to the injured person as a whole, and that the court must consider the

<sup>14</sup> (2000), O.J. No. 4188 at para. 20.

<sup>15</sup> 1996 Carswell Ont 1742, 2 O.T.C. 42, (1996), 29 O.R. (3d) 222.

<sup>16</sup> (2001), O.J. No. 5757 (Ont. S.C.J.).

<sup>17</sup> (1997), O.J. No. 2307 (Ont. Gen. Div) (hereinafter “*Lemire*”).

effect which the relevant bodily function has upon the plaintiff's way of life in the broadest sense.<sup>18</sup> The Court in *Lemire* adopted the approach set out in *Lento v. Castaldo*<sup>19</sup> Belleghem J. stated:

In applying the *Meyer v. Bright* trilogy to the injuries arising from the 1992 accident, I am obliged to ask, 'How serious was the 1992 accident for her?' It is clear from the *Meyer v. Bright* trilogy that I am to consider the effect of the accident on Mrs. Lemire, not on some other objectively discernible 'reasonable person'. The defendant must take his victim as he finds her.<sup>20</sup>

He continues on:

I am required, however, to look at the plaintiff as an individual in order to determine how the legitimate physical injuries sustained by her in the accident affected her. I must look at Evelyne Lemire, the whole person. The effect of a physical injury, as was amply demonstrated by the example of the Court of Appeal in referring to the loss of the little finger of a violinist, will vary depending upon who the person is and what the person's needs for that particular bodily function are. Just as a violinist needs his little finger to play the violin and the loss of it is devastating to him, so Mrs. Lemire needed full physical function in order to cope with her overabundant life stresses.<sup>21</sup>

3. **Serious Impairment** – the third question asks whether the impairment of the important function is serious. The Court in *Meyer v. Bright* looked at the extent to which the impairment substantially interfered with the injured person's ability to participate in his usual daily activities. In this case, Browne J. found that while the injuries sustained were continuing and physical in nature, he did not consider the impairment to be serious: "Mrs. Meyer continues with her recreational walking now at a half-hour a day in place of the previous hour a day."<sup>22</sup> However, in *May v. Casola*,<sup>23</sup> the Court found that: "a person who can carry on daily activities, but is subject to permanent symptoms including

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<sup>18</sup> *Supra* note 7. See also *Frankfurter v. Gibbons* 2003 CarswellOnt 716; (2003), WL 8755 (Ont. S.C.J.).

<sup>19</sup> *Lento v. Castaldo* (1993), 17 C.C.L.I. (2d) 1, at 137

<sup>20</sup> *Supra* note 17 at para. 106.

<sup>21</sup> *Supra* note 17 at para. 124.

<sup>22</sup> *Supra* note 8 at para. 58.

<sup>23</sup> (1998), O.J. No. 2475.

sleep disorder severe neck pain, dizziness and nausea ... must be considered as a serious impairment.”

### **THE DEFINITION OF *PERMANENT, SERIOUS AND IMPORTANT* UNDER *BILL 198***

In an effort to make the threshold test more certain, the government has introduced a definition of the threshold terms. Basically, the legislation merely adopted and expanded the strict tests as outlined in the “trilogy”. Criteria for assessing whether injuries sustained satisfy the threshold level of “permanent serious impairment of an important physical, mental or psychological function” are set out in Ontario Regulation 381/03. **Pursuant to section 267.5 of the *Insurance Act*, the impairment must:**

1. Substantially interfere with the person’s ability to continue 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,
2. 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
3. Substantially interfere with most of the usual activities of daily living, considering the person’s age.

**Furthermore, for a function to be considered important, the function must be:**

1. Necessary to perform the activities that are essential tasks of the person’s regular or usual employment, taking into account 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,

2. Necessary to perform the activities that are essential tasks of the person's training for a career in a field in which the person was being trained before the incident, taking into account 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,
3. Necessary for the person to provide for his or her own care or well-being, or
4. Important to the usual activities of daily living, considering the person's age.

**For an impairment to be considered permanent, the impairment must,**

1. 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,
2. Continue to meet the criteria in paragraph 1, and
3. Be of a nature that is expected to continue without substantial improvement when sustained by persons in similar circumstances.

**WHO IS MOST AFFECTED AND RESTRICTED UNDER THIS DEFINITION?  
CHILDREN, STUDENTS & CAREGIVERS**

It is obvious by these amendments that the government has acquiesced to the insurance industry's demand for a more restrictive threshold. There may be a major problem for students and children to claim in tort, unless they were in an actual training program and are incapable of returning to that program. Secondly, persons who are not employed and not students may lose the right to sue if they cannot do their normal daily activities, and those activities are not on par with "persons in similar circumstances".

Individuals who care for children or elderly parents may also be faced with severe challenges in making claims in tort. Under these amendments, the measure of an important function is if a person can “provide for his or her own care or well being”. This may completely exclude individuals who, although they may be able to take care of themselves, are no longer capable of caring for their dependants. Furthermore, there are concerns with the continuity requirement. For an impairment to be considered permanent, it has to “have been continuous since the incident ...”. The problem here is that an individual may not initially present with certain psychological impairments, but might develop them over time. For example, a person may become depressed several months or years post-trauma. The requirement that the impairment be continuous from the date of the accident may be a barrier to individuals in claiming tort.

The requirement that “reasonable efforts” must be made to accommodate a person’s impairment, and the further requirement that the injured individual must use “reasonable efforts” to adopt this accommodation when assessing whether they can return to work is also a serious concern to consider. Who will decide what is considered reasonable? The physician; an independent assessor; the insurance company’s choice of doctor, etc.? Will this determination take into account the person’s psychological status, or will it be based on physical limitations alone? What will happen if the accident benefit insurer does not agree that a certain “accommodation” is necessary, and consequently does not provide for it?<sup>24</sup> Can you then say that all reasonable efforts to accommodate have been used? It will be years and after much litigation and waste before we know the answer.

## **TACKLING THE VERBAL THRESHOLD: PRESENTING CREDIBLE EVIDENCE**

Changes to the deductible on pain and suffering awards under the new legislation have made it necessary to develop cases which meet both the verbal and monetary thresholds. What evidence will be required to prove a \$100,000 claim? To begin, you must assemble all relevant documentation, such as medical, school and employment records, as well as a complete

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<sup>24</sup> Lawrence H. Mandel, “Dealing with Serious Injuries under *Bill 198*: Tort Perspective” (Paper presented to the Law Society of Upper Canada, Managing Serious Injury Claims under Ontario’s Automobile Insurance Regime, September 2003) at 5-6.

investigation of the accident. It is also important to demonstrate the vehicular damage if possible. Photos may have been taken by witnesses, newspapers, the client, family members, police or the insurance company for property loss insurance. Any obvious damage to the interior of the car caused by your client's head or other parts of the body should be demonstrated visually and discussed by every witness who is able.

Photos showcasing the injuries sustained by the claimant are also a valuable tool. Not surprisingly, jurors find it easier to believe the brain is injured if the head or face is bruised or scarred. There are usually very early photos available which record black eyes and cuts to the head. These photographs are important corroborative evidence which are especially effective when enlarged or when projected.

The Ambulance Call Report often proves to be the most important, objective record of your client's injury. It will document your client's condition shortly after the accident, and will indicate whether he/she was unconscious and/or sustained any lacerations or bruising to the head and face. You will also want to highlight your client's score on the Glasgow Coma Scale (GCS) if it is particularly low. Generally, a GCS score of 13 or higher correlates with a mild brain injury, 10 to 12 are indicative of a moderate injury and 9 or less a severe brain injury.

Detailed medical records including the emergency room report show the continuation of the injury post-trauma. It is important to carefully review every report and look for consistencies between medical opinions so you can better demonstrate the severity of your client's injuries. Tests such as a CT or MRI will be a solid indicator of structural damage to the brain.

Expert evidence is fundamental to establishing a successful personal injury case. Consulting and calling a number of the following experts, when appropriate, would undoubtedly be beneficial: Bio-mechanical Engineer, Lighting Engineer, Neurosurgeon, Neurologist, Family Physician, Orthopedic Surgeon, Psychiatrist, Physiotherapist, Occupational Therapist, Vocational Therapist, Speech-Language Pathologist, Educational Therapist, Social Worker, Private Investigator and Accountant, etc.

Lay witnesses are extremely important, as they provide valuable insight into how the injured person functioned before the accident, and how his life has been affected by his injuries. They can add perspective and undermine a defence based on pre-existing problems. Other useful lay witnesses include a spouse or significant other, children, parents, other relatives, teachers, employer/work supervisor, fellow employees, friends and clergy. In the appropriate case, you should have an accident reconstructionist demonstrate by way of computer animation or otherwise how the accident occurred and how the injuries were caused. A large scale drawing of the injuries by an artist is extremely persuasive.

## **CONCLUSION**

*Bill 198* will be a challenge to say the least. As personal injury lawyers, we will have to muster all our skills and imagination to protect the rights of innocent accident victims. We did this before under *Bill 68* and again under *Bills 164* and *59*. It will take time, energy, fortitude and considerable financial outlays to assist the triers of fact to come to a favourable interpretation of the threshold definition. Personal injury law is becoming more and more complex. It is not for the meek. The next few years will be the most challenging we have ever faced.