

# ***WHAT YOU NEED TO KNOW IF YOU ARE CONSIDERING A LAWSUIT FOR DAMAGES UNDER BILL 198***

Many people who are injured in automobile accidents in Ontario believe that they do not have a right to sue for damages because of the no-fault insurance scheme. This is simply not true. This section outlines the basic rights of an injured person under Bill 198 – Ontario’s current insurance scheme.

## ***When can an injured person sue the other driver for damages?***

Generally a person can sue the negligent or responsible driver for the accident whenever injured in an automobile accident in Ontario or whenever a family member has been injured or killed. This is called a “tort” action. A “tort” is a violation of one’s duty to another person that gives rise to a remedy in the form of a law suit for damages. Suing a negligent driver is a common example of a tort. A person may still sue the other driver even if he or she or the family member is partly responsible for the accident. A person will not be precluded from bringing an action even if they were drinking and driving at the time of the collision. However, any person who operates a motor vehicle without insurance cannot sue the at-fault driver for compensation for their injuries, regardless of fault.

## ***What can a person recover in a lawsuit against the other driver?***

An injured person can recover damages that will compensate him or her for economic losses, loss of earning capacity, pain, suffering, loss of enjoyment of life, and for the loss of a family member’s care, guidance, and companionship. A person can also recover damages for health care expenses if he or she has suffered a permanent serious disfigurement, or a permanent serious impairment of an important physical, mental or psychological function.

## ***Are there restrictions upon the right to sue for damages?***

Yes, there are important restrictions. Generally, there is no restriction upon the right to sue for future income losses or loss of earning capacity. However, an injured person can only recover 80% of the net income losses suffered prior to trial or settlement of a claim.

A person can also sue for damages to compensate for the pain, suffering, and loss of enjoyment of life endured because of injuries. A person can only sue for such damages, however, if the impairment passes a certain “threshold”. A person must suffer a permanent serious disfigurement, or a permanent serious impairment of an important physical, mental or psychological function. It is often difficult to determine

whether impairments cross this threshold and an injured person should always consult a knowledgeable lawyer.

An injured person may also be entitled to compensation for the cost of health care they require as a result of their injuries. They must meet the “threshold” to be entitled to compensation for their health care expenses.

These damages are subject to a \$30,000.00 deductible, however, no deduction applies where these damages, assessed without the deductible, exceed \$100,000.00.

There are some restrictions upon the right to sue for damages if a family member should die in an accident. A person can sue for any economic losses suffered subject to the restrictions set out above and can also sue for damages to compensate for the loss of the family member’s care, guidance, and companionship. These damages are subject to a deductible of \$15,000.00. No deduction applies, however, where these damages, assessed without the deductible, exceed \$50,000.00.

***Are there any time limitations?***

Generally a person has two years from the date of the accident to sue the other driver(s). However, this limitation period may be extended under certain special circumstances.

***Are there any steps an injured person should take right after a collision?***

A person who intends to make a claim is required to notify the other driver(s) of the intention to sue within 120 days of the accident, however, the failure to do so will not bar the right to sue for damages. The injured person is also required to apply for accident benefits before he or she may sue for damages.

***What if the other driver has no insurance or the injured person is struck by a hit-and-run driver?***

The injured person can sue his or her own insurance company for damages if a hit-and-run driver is responsible or the responsible driver(s) has no insurance. The injured person is insured in these circumstances under the Uninsured Automobile Coverage or the Unidentified Automobile Coverage of the policy if he or she has automobile insurance, if a spouse has automobile insurance, or if the person lives with parents and is dependant upon them and they have insurance. The Uninsured Automobile Coverage is mandatory in all automobile insurance policies in Ontario, and provides for compensation of up to \$200,000.00.

Many policies also provide a Family Protection Endorsement, which usually provides for coverage of \$1,000,000.00. A person may also be covered where his or her employer, his or her spouse’s employer, or parents’ employer provides regular use of a vehicle.

***What if a person does not have any insurance and the other driver does not have any insurance?***

As long as a person was not driving while uninsured, he or she may still sue for damages. Recourse for recovery is the Motor Vehicle Accident Claims Fund ("MVAC"). The MVAC Fund is a government run program that acts as a safety net for those people who are injured by uninsured drivers or hit-and-run drivers and do not have any automobile insurance of their own.

# ***BASIC TORT RIGHTS AND THE PRINCIPLE OF “NEGLIGENCE”***

This section deals with basic tort rights and the principle of “negligence”. It explains in a general way when an injured person can sue for damages.

## ***What is “negligence” and what are some examples?***

Negligence is the foundation of the so-called right to sue in tort. If a person has suffered an injury because of the negligence of another person he or she may have the right to sue for damages. Negligence arises whenever someone who owes a duty of care injures someone because he or she fails to meet a reasonable standard of care.

Negligence can arise in many ways. The most common way in our society is the failure of drivers to obey the rules of the road. Other examples include occupiers of land who may be liable for dangerous premises, which cause injury to users of the premises. Manufacturers of products may be liable if products are unsafe. Taverns and restaurants may be liable for allowing patrons to become intoxicated and then injuring themselves or another person. Even doctors and other professionals may be liable for failing to exercise a reasonable standard of care in looking after a patient or client.

## ***Are there any limitations on the amount of compensation someone can recover?***

Despite some technical limitations primarily applicable to automobile insurance, the simple answer to this question is “no”. However, in reality unless a person has been injured because of the negligence of a large company or a very wealthy person, recovery will probably be limited to whatever insurance coverage is available. For example, most drivers of cars and trucks have policies with insurance limits of at least \$500,000 or \$1 million. A person’s own automobile policy may provide additional coverage that is available if the responsible driver is underinsured or uninsured. Most businesses carry liability insurance. Most homeowners have liability insurance that will protect them in the event they injure a person who later sues for damages.

## ***Non-Motor Vehicle Related Accidents – Why are they different?***

Clients who are catastrophically disabled in a non-motor vehicle accident face significant challenges. They will likely never sustain competitive employment, will require expensive rehabilitation, and may require attendant care and other services for the rest of their lives. Quality long-term care for a young quadriplegic or paraplegic can easily reach several millions of dollars over their lifetime.

Unlike motor vehicle accident victims, these clients cannot apply for “accident benefits”. One of the most important issues is finding a negligent party who has sufficient assets or insurance to satisfy the judgment or fund a settlement.

### ***Why contact a Personal Injury Lawyer?***

It is important for accident victims to seek out an experienced personal injury lawyer and preferably someone who is a certified specialist in civil litigation. Personal injury law is complex. You would not go to an orthopedic surgeon if you required open-heart surgery and in the same vein, you would not go to a real estate lawyer or commercial lawyer to handle your personal injury matter. A personal injury lawyer with the required experience will be in the best position to identify all possible avenues of compensation.

### ***What if a homeowner is negligent?***

If a homeowner is negligent then their home insurance policy may respond to the claim. Most homeowner's policies contain broad liability insurance coverage for the insured, his or her spouse, and their dependents. Many homeowners' packages contain liability coverage for claims that happen anywhere in the world. Most people are not aware that they have coverage for incidents that occur away from home and not just in the home. For instance, a homeowner's insurance policy will provide coverage against liability for negligent acts committed outside the home and even outside of the country. Most people who own a home or live in an apartment have homeowner's insurance that contains liability coverage. This coverage is common in all homeowner's policies and the policies usually contain insurance limits of \$1 million.

### ***Does everyone have homeowner's insurance?***

No. Unlike motor vehicle insurance, homeowners are not required by law to purchase homeowners insurance. Someone may own a home or live in an apartment without liability insurance (although it would be foolish to do so).

### ***What situations do homeowner's insurance cover?***

Most non-motor vehicle related accidents caused by an insured person's negligence are covered by their homeowner's policy or other liability insurance policies. The liability coverage would apply to an endless array of situations involving negligence. For instance, swimming pool accidents are usually covered. We recently represented a young woman who was rendered quadriplegic when a tragic accident occurred at a 'pool party'. The young woman was invited to a friend's house that was having a pool party. The small group of young people there began to engage in horseplay when she was thrown into the shallow end of the swimming pool where she struck her head on the bottom, causing her to fracture her cervical spine.

We commenced a lawsuit on her behalf against all the people who were at the party and not just the person who threw her into the pool. The people at the party all had liability insurance because they were covered under their parents' homeowner's policies. They still lived at home at the time and therefore were covered under their

parents' policies as "dependants". The fact that there were several potential insurance policies available made a huge difference in this young woman's life because it enabled us to secure a settlement for her of nearly \$4 million.

Homeowner's policies also usually provide liability coverage to someone who causes a boating accident, a bicycle accident, sporting accidents, accidents that occur in the home or on their property, and many more situations involving negligence.

***What if a corporation or other entity is negligent? Do they carry liability insurance that may respond?***

Corporations, small companies, and other entities usually carry liability insurance in order to protect themselves against lawsuits in case they or their employees commit acts of negligence and injure someone. Restaurants and taverns are common examples of businesses that usually carry liability insurance.

Drinking and driving is a social evil that will likely never completely go away. It is common for accident victims to sue taverns or restaurants for serving too much alcohol to someone who causes an accident. If a drunk driver without insurance injures someone (an all too familiar situation) then the victim's only recourse may be against the tavern. If the tavern serves someone too much alcohol and that causes them to injure themselves then they may sue the tavern for damages as well.

We represented Linda Hunt who made headlines when she succeeded in her lawsuit against a tavern and her employer for serving her too much alcohol before she crashed her vehicle and suffered catastrophic injuries. What the public didn't hear is that these types of lawsuits are not uncommon. Most of the cases settle out of court and Linda Hunt's case turned out to be one of the few cases that actually went to trial. Recently in British Columbia a teenager who suffered catastrophic injuries after drinking alcohol at his friend's house successfully sued a homeowner. The friend's parents were held partly responsible because they allowed the under aged boys to consume alcohol in their home while failing to supervise them. The parents' homeowner's policy covered them for the loss they were held responsible for. Few of these lawsuits would be worth pursuing if the parties did not have liability insurance.

***What if a City or some form of Government is negligent? Can someone sue the City or Government if they are negligent?***

The answer is yes, however these cases pose unique challenges and should be handled by an experienced personal injury lawyer. Municipalities, Counties and the Province have special statutory duties they must fulfill or else risk being sued in negligence. For example, the Province has a duty to keep our highways in a state of repair both in the summer and the winter.

All of our Cities, Counties and even the Province carry liability insurance to protect themselves against a successful lawsuit. We recently represented a man who

was catastrophically injured in a single motor vehicle accident. He crashed his car during the winter while crossing an icy bridge. We sued the Province in negligence for failing in its duty to keep the highway in a state of repair. The Province was held liable for failing to maintain the portion of the highway that became icy and caused him to crash. He recovered over \$2.2 million dollars from the Province's liability insurance policy.

It is important to note that there are very short limitation periods applicable to claims against government bodies. You should consult a personal injury lawyer immediately if you suspect that a government body was responsible for your injuries.

***What if there is no one to sue?***

It is impossible for a non-lawyer to determine that no one or no entity is partly or wholly responsible for the accident. Not even an insurance adjuster is in a position to make such a determination. Only a personal injury lawyer is in a position to determine whether a client has a right to sue a third party in an effort to recover compensation for his/her losses.

# ***ACCIDENT BENEFITS- BASIC RIGHTS UNDER BILL 198***

This section deals with accident benefits – those rights under Bill 198 which define what funding is available to replace income and provide goods and services to all car accident victims, whether innocent or at fault.

## ***What are Accident Benefits?***

Accident Benefits are the benefits available under your car insurance policy. According to law, every policy of insurance in Ontario is the same, subject to additional benefits people may purchase.

## ***Who is eligible?***

Anyone injured in an accident is eligible for accident benefits. Also anyone who suffers psychological or mental injuries due to an accident that injures certain relatives and dependents is eligible for accident benefits. For example, if a person has suffered disabling depression because of the injury or death of a child, he or she would be entitled to benefits even though they were not in the crash which injured or killed the child.

## ***Does it matter if the injured person was all or partially at fault for the accident?***

Regardless of whether a person is responsible for the accident or whether he or she has any insurance, the person is entitled to accident benefits.

## ***What if the injured person was drinking and driving at the time of the collision?***

You will lose your coverage for income replacement benefits, non-earner benefits, lost-education benefit, housekeeping benefit and expenses for visitors in certain circumstances. If you are convicted of drunk driving, or refuse to provide a breath sample, you will lose these benefits.

## ***What if the injured person was working at the time of the collision?***

If a person was in the course of employment at the time of the accident, he or she may be entitled to workers' compensation. These benefits were payable under the *Workers' Compensation Act*, which was recently re-named the *Workplace Safety and Insurance Act*. An auto insurer may advise its insured to apply for workers' compensation. Before a client decides whether to apply for accident benefits or

worker's compensation, he should consult a lawyer because the choice could affect the right to sue someone who is responsible for a collision.

***What benefits are available to replace lost wages?***

If a client was employed at the time of the accident, or employed at least 26 of the preceding 52 weeks prior to the accident, or entitled to start work within one year under a legitimate written contract made prior to the accident, the client is entitled to receive an income replacement benefit.

***How much is the Income Replacement Benefit?***

Depending on when the car insurance policy was purchased or renewed, the maximum income replacement benefit will be either \$300/week or \$400/week. Optional benefits may be purchased to increase the maximum weekly benefit.

***Is an injured person entitled to be paid benefits that cover all lost wages?***

No. An injured person is entitled to be paid 80% of net income up to the maximum amount payable under the policy.

***May the injured person sue to recover the difference between 80% of net income and 100% of gross income?***

The answer to this question is somewhat complicated, but generally the answer is that the difference is not recoverable unless there is a settlement or court judgement with respect to losses extending into the future. Losses in excess of 80% of net, which have already been sustained are not recoverable. At the risk of over simplifying the issue, the legislation intends that only those clients who have suffered a permanent loss of income are entitled to recover 100% of the gross amount of that loss.

***Are there any weekly benefits if the injured person was not employed when s/he was injured?***

An injured person may qualify for the Non-Earner Benefit if s/he was not employed and suffers from a complete inability to carry on a normal life. This benefit also is available to full time students or students who have completed their education in the past year but have not obtained employment.

There is a 26 week waiting period before benefits are paid. For the first 104 weeks the benefit amount is presently \$185.00, with an increase to \$320.00 after 104 weeks following the injury. This amount is reduced by any other payments for loss of income received or available to the injured person.

***What if the injured person was not working because he/she was a student?***

An injured person will qualify for the Non-Earner Benefit if they were at least 16 years old at the time of the injury. There is no benefit payable for children who were less than 16 years old at the time of their injury.

***If the injured person paid for tuition, books, and rent and now cannot go to school, what benefits are payable?***

If the injured person is a student enrolled in an elementary, secondary, post-secondary or continuing education program and as a result of injuries from the accident cannot continue with the program, the client can recover expenses related to the program up to a maximum of \$15,000.

***What if a family member depends on an injured person to look after him or her, and the injured person is unable to do so?***

The Caregiver Benefit will reimburse an injured person for expenses incurred if s/he cannot continue as the main caregiver for a member of a family who is under 16 or, over 16 and suffers from a disability.

***What about medical and rehabilitation costs?***

Medical and rehabilitation benefits are intended to pay for reasonable and necessary medical and rehabilitation expenses not covered by a government or supplementary health plan. (The client must apply for payment to any other plan that is available.)

The limit of this coverage is \$100,000 unless a client has sustained a catastrophic impairment, in which case the limit is \$1 million.

***How long does the injured person have the right to ask the insurance company to pay medical and rehabilitation expenses?***

If catastrophically impaired this benefit is available for the client's life. But if a client is not catastrophically impaired the time limit is 10 years, except for children less than 15 years old in which case benefits are payable until the client attains 25 years of age.

***If the injured person wishes family members to visit, who pays for their trips?***

The insurance company is required to pay reasonable and necessary expenses in having certain relatives visit during a hospital stay, treatment or recovery. The individuals whose expenses would be paid are the spouse, children, grandchildren, parents, grandparents, brothers and sisters of the injured person.

### ***What if there are expenses for Attendant Care?***

There are accident benefits available for attendant care. These benefits provide payment for expenses incurred, including the cost of an aide or attendant or cost of a care facility including a nursing home, home for the aged or chronic care hospital. The basic amount available is \$3,000 a month to a maximum of \$72,000. If a client is catastrophically impaired the benefits are increased to \$6,000 a month to a maximum of \$1 million. The care does not necessarily have to be provided by a professional (example – nurse), but can be provided by a family member.

A client need not have actually paid for the expense to have incurred the expense. However, it is important for family members to keep track of any hours spent providing attendant care and actually invoice the client to create a legal liability on the client to pay the expense.

### ***What about housekeeping and home maintenance costs?***

There is coverage for the cost of having someone carry out certain work and duties that the injured person is unable to do around the home as a result of injuries. The maximum payable is \$100 a week.

### ***Can the injured person hire someone to help co-ordinate care?***

If a client is catastrophically impaired he or she is absolutely entitled to hire a case manager to assist in coordinating care. Even if not so impaired, many insurance companies will assist by approving such an expense.

### ***What if an insurer refuses to pay a benefit?***

The short answer is that it may be time to see a lawyer. The client has the right to ask the insurer to refer the issue to a Designated Assessment Centre. The client may have the right to mediate, arbitrate or sue over non-payment. Time is of the essence and a client should seek legal advice quickly.

### ***How long does a person have to mediate, arbitrate or sue?***

Always remember that just because an insurance company decides a client is no longer entitled to receive a benefit, does not mean the insurance company is right. The time limit for taking action is within two years after the insurance company has refused to pay the amount claimed.

<b>BILL 198 ACCIDENT BENEFITS OVERVIEW</b>		<b>SABS SECTION NUMBER</b>
<b>INCOME REPLACEMENT BENEFITS</b>	<p><b><i>Benefit payable for the first 104 weeks from time of the accident where the insured person:</i></b></p> <p>Was employed on the date of the accident and suffers a <u>substantial inability</u> to perform the essential tasks of that employment.</p> <p>Was not employed, but worked at least 26 of the 52 weeks before the accident (or was receiving UIC at the time of the accident) and was 16 years old or more (or was excused from attending school under the <i>Education Act</i> at the time of the accident) and suffers a <u>substantial inability</u> to perform the essential tasks of the employment in which the person spent the most time during the 52 weeks before the accident.</p> <p>Was entitled to start work within one year under a legitimate written contract of employment that was made before the accident and suffers a <u>substantial inability</u> to perform the essential tasks of the employment he or she was entitled to start under the contract.</p>	<b>S.4</b>
	<p><b><i>Benefit payable more than 104 weeks after the accident where:</i></b></p> <p>The insured person suffers a <u>complete inability</u> to engage in any employment for which he or she is reasonably suited by reason of education, training or experience.</p>	<b>S.5(2)</b>
	<p><b><i>Amount of Benefit:</i></b></p> <p>No benefit payable for the first seven days after the accident [s. 5(2)(a)].</p> <p>Amount of benefit for first 104 weeks is 80% of net weekly income reduced by applicable collateral benefits and 80% of any post-accident earnings, to a maximum of \$300.00 per week if the policy was issued or renewed on or after January 1, 2004 otherwise it is \$400 per week. If optional coverage was purchased, a maximum of \$1,000.00 per week may be available.</p> <p>After 104 weeks, the amount of the benefit payable is the greater of the weekly income benefit or \$185.00 per week.</p>	<b>S. 6</b>

	<p>The benefit is payable to age 65 when it is then reduced to the sum of 2%, multiplied by the number of years of entitlement, multiplied by the weekly benefit received before age 65.</p> <p>The benefit amount is reduced by any income replacement benefits paid by or available from any other source and by 80% of the net income received from any employment subsequent to the accident.</p> <p><b><i>Indexation</i></b></p> <p>For income replacement benefits, there is no indexation, except where optional coverage has been purchased.</p>	
<p><b>NON- INCOME EARNER BENEFITS</b></p>	<p><b><i>Benefit is payable where:</i></b></p> <p>The insured person suffers a <u>complete inability</u> to carry on a normal life.</p> <p>Not payable before the insured turns 16.</p> <p><b><i>Amount of Benefit:</i></b></p> <p>Nothing for the first 26 weeks after the accident.</p> <p>\$185.00 per week payable for period between 26 and 104 weeks after the accident.</p> <p>After 104 weeks of disability the amount increases to \$320.00 per week.</p> <p>Deductions from the non-earner benefit include collateral benefits and 80 percent of net income received from any employment subsequent to the accident.</p>	<p><b>S.12</b></p>
<p><b>CAREGIVER BENEFITS</b></p>	<p><b><i>Benefit is payable during the first 104 weeks after the accident where:</i></b></p> <p>The insured person lived with an individual in need of care and the insured was the primary caregiver for that person and did not receive any remuneration; <u>and</u>,</p> <p>The insured person suffers a <u>substantial inability</u> to engage in caregiving activities in which he or she engaged at the time of the accident.</p>	<p><b>S.13</b></p>

	<p><b><i>Benefit is only payable for a period more than 104 weeks after the accident where:</i></b></p> <p>The insured person suffers a <u>complete inability</u> to carry on a normal life.</p> <p><b><i>Amount of Benefit:</i></b></p> <p>\$250.00 per week payable for the first person in need of care.</p> <p>\$50.00 per week payable for each additional person in need of care.</p>	
<p><b>MEDICAL &amp; REHAB BENEFITS</b></p>	<p><b><i>(i) Medical benefit payable where the accident causes the insured person an impairment for which they incur reasonable and necessary expenses for:</i></b></p> <p>medical, surgical, dental, optometric, hospital, nursing, ambulance, audiometric and speech language services; chiropractic, psychological, occupational therapy and physiotherapy services; medication; prescription eyewear; dentures and other dental devices; hearing aids, wheelchairs or other mobility devices, prostheses, orthotics and other assistive devices; transportation for the insured person to and from treatment sessions; and, other goods and services of a medical nature which the insured person requires.</p> <p><b><i>(ii) Rehabilitation benefit payable where the accident causes the insured person an impairment for which they incur expenses in taking reasonable and necessary measures to reduce the effects of their disability, including:</i></b></p> <p>life skills training; family counselling; social rehabilitation counselling; financial counselling; employment counselling; vocational assessments; vocational or academic training; home, vehicle, and workplace modifications; transportation for the insured person to and from these sessions;</p>	<p><b>S. 14</b></p> <p><b>S. 15</b></p>

	<p>and, other goods and services that the insured person requires, except case manager services</p> <p><b>Medical/Rehabilitation Benefits Payable to a Maximum of:</b></p> <p>\$1,000,000.00 if the insured person is <u>Catastrophically Impaired</u>. Benefit is payable over the insured's lifetime.</p> <p>\$100,000.00 if the insured is <u>not Catastrophically Impaired</u>. Benefit payable for expenses incurred for period of ten years after the accident.</p> <p>Optional increased coverage may be purchased.</p>	
<p><b>ATTENDANT CARE BENEFITS</b></p>	<p><b><i>Benefit payable where the accident causes the insured person an impairment for which they incur reasonable and necessary expenses for:</i></b></p> <p>Services provided by an aide or attendant; and/or, Services provided by a long term care facility.</p> <p><b>(ii) Amount of Benefit:</b></p> <p>Maximum of \$3,000.00 per month for the first two years after the accident where the insured person is <u>not Catastrophically Impaired</u>. Benefit is payable to a maximum of \$72,000.00.</p> <p>Maximum of \$6,000.00 per month where the insured person is <u>Catastrophically Impaired</u>. Benefit is payable for the insured's lifetime, to a maximum benefit of \$1,000,000.00.</p> <p>Optional increased coverage may be purchased.</p>	<p><b>S. 16</b></p> <p><b>S. 19</b></p>
<p><b>LOST EDUCATION EXPENSES</b></p>	<p><b><i>Benefit payable where the insured person sustains an impairment preventing them from continuing in an educational program, causing them a loss of incurred educational expenses.</i></b></p> <p>The insured person must be enrolled in an educational program at the time of the accident.</p> <p>Expenses include tuition, books, equipment and room and board.</p> <p><b>(ii) Amount of Benefit:</b> \$15,000.00 limit for this benefit.</p>	<p><b>S. 20</b></p>





## INCOME REPLACEMENT BENEFITS, NON-EARNER BENEFITS & CAREGIVER BENEFITS

	INCOME REPLACEMENT BENEFITS	NON-EARNER BENEFITS	CAREGIVER BENEFITS
Eligibility	<p>You are eligible if you were employed at the time of the collision</p> <p style="text-align: center;"><b>- OR -</b></p> <p>You are eligible if you were not employed at the time of collision but you were employed for at least 26 weeks during the 52 weeks before the collision, or were receiving employment insurance benefits and were older than 16 years of age at the time of the collision</p> <p style="text-align: center;"><b>- OR -</b></p> <p>You are eligible if you were entitled at the time of the collision to start work within 1 year under a legitimate written contract of employment that was made before the collision</p>	<p>You are eligible if you do not qualify for income replacement benefits</p> <p style="text-align: center;"><b>- OR -</b></p> <p>You are eligible if you were enrolled on a full-time basis in elementary, secondary or post-secondary education at the time of the collision</p> <p style="text-align: center;"><b>- OR -</b></p> <p>You are eligible if you completed your education less than 1 year before the collision and was not employed after completing education and before the collision in an employment that reflected his/her education</p>	<p>You are eligible if you were living with a person in need of care (e.g. a child) and was primary caregiver and was not paid for caregiving at the time of the collision</p>
Disability Test During 1 <sup>st</sup> 2 Years	<p>You must suffer a “Substantial inability to perform the essential tasks of your employment” to qualify</p>	<p>You must suffer a “Complete inability to carry on a normal life” to qualify</p>	<p>You must suffer a “Substantial inability to engage in caregiving</p>

	<b>INCOME REPLACEMENT BENEFITS</b>	<b>NON-EARNER BENEFITS</b>	<b>CAREGIVER BENEFITS</b>
			activities” to qualify
Disability Test After 2 Years	You must suffer a “Complete inability to perform any job for which you are suited by education, training and experience to qualify	You must suffer a “Complete inability to carry on a normal life” to qualify	You must suffer a “Complete inability to carry on a normal life” to qualify
How Much Am I Entitled to Receive During the First 2 Years?	80% of your net pre-accident income, less collateral benefit payments and less 80% of net income earned after the collision up to a maximum of \$300/wk (if optional benefits were not purchased to “top up” this amount)	\$185/wk less collateral benefit payments, less 80% of net income earned after the collision	Reasonable and necessary expenses incurred as a result of the collision in caring for the person in need of care up to a maximum of \$250/wk for the first person and \$50/wk for each additional person in need of care
How Much Am I Entitled to Receive After 2 Years?	The greater of 80% of net pre-accident income or \$185/wk up to a maximum of \$300/wk, less collateral benefit payments (if optional benefits were not purchased)	<p>\$185/wk less collateral benefit payments if you were unemployed, not in school and had not recently graduated at the time of the collision</p> <p style="text-align: center;"><b>- OR -</b></p> <p>\$320/wk if you were a full-time student at the time of the collision or had completed your education less than 1 year before the collision and were not</p>	Reasonable and necessary expenses incurred as a result of the collision in caring for the person in need of care up to a maximum of \$250/wk for the first person and \$50/wk for each additional person in need of care

	<b>INCOME REPLACEMENT BENEFITS</b>	<b>NON-EARNER BENEFITS</b>	<b>CAREGIVER BENEFITS</b>
		employed after completing your education in employment that reflected your education	
Waiting Period	1 week	26 weeks	None
How Long Will I Receive the Benefits?	You are entitled to income replacement benefits for life if you continue to meet the “eligibility criteria” and “disability test”	You are entitled to non-earner benefits for life if you continue to meet the “eligibility criteria” and “disability test”	While the person remains in need of care

# ***WHAT IS A CATASTROPHIC IMPAIRMENT?***

The purpose of this section is to outline the definitions of “catastrophic impairment”. This section will also address the mechanisms for determining if a client meets the definition of “catastrophic impairment”. It will also explain the impact of that determination on the benefits that are available to the client.

Whether you are found to be suffering from a “catastrophic impairment” is one of the most important questions to be answered when accessing accident benefits through a motor vehicle insurance company. The answer to this question will dictate the benefits and compensation to which you are entitled.

## ***What is a “Catastrophic Impairment”?***

A person’s impairment is “catastrophic” if it falls into one of the following categories:

**paraplegia or quadriplegia;**

**the amputation or other impairment causing the total and permanent loss of use of both arms or both legs;**

**the amputation or other impairment causing the total and permanent loss of use of one or both arms and one or both legs;**

**the total loss of vision in both eyes;**

**(e) a brain impairment that, in respect of an accident, results in,**

**a score of 9 or less on the Glasgow Coma Scale, as published in Jennett, B. and Teasdale, G., *Management of Head Injuries*, Contemporary Neurology Series, Volume 20, F.A. Davis Company, Philadelphia, 1981, according to a test administered within a reasonable period of time after the accident by a person trained for that purpose, or**

**(ii) a score of 2 (vegetative) or 3 (severe disability) on the Glasgow Outcome Scale, as published in Jennett, B. and Bond, M., *Assessment of Outcome After Severe Brain Damage*, Lancet i:480, 1975, according to a test administered more than six months after the accident by a person trained for that purpose;**

- (f) subject to some exceptions, an impairment or combination of impairments that, in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, results in 55 per cent or more impairment of the whole person; or
- (g) subject to some exceptions, an impairment that, in accordance with the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, 4th edition, 1993, results in a class 4 impairment (marked impairment) or class 5 impairment (extreme impairment) due to mental or behavioural disorder.

It is important to note that categories (f) and (g) only apply if the condition is unlikely to cease to be catastrophic or two years have elapsed since the collision.

***Are children under the age of 16 treated differently?***

If it appears that the child has suffered a catastrophic impairment and the Glasgow Coma Scale, Glasgow Outcome Scale and the 55% whole body impairment tests cannot be applied because of the child's age, the child's impairments may still be catastrophic. Assessors must account for the developmental implications of the impairment on the injured child and analogize to the definitions applicable to adults.

***What is the process of determining if an insured person meets the definition of "Catastrophic Impairment"?***

There are various steps involved in determining whether a client has sustained a "catastrophic impairment". The first step is to complete an Application for Determination of Catastrophic Impairment (OCF-19/59). In most cases a "health care practitioner" must complete the form, certifying that the client has suffered a "catastrophic impairment".

***How long does an insurer have to respond to an insured person's application?***

Once the insurer has received the form, it has 30 days to give the client notice regarding whether it agrees that the client's impairments meet the definition of "catastrophic impairment."

***What if the Insurer does not accept that the insured person has suffered a “catastrophic impairment”?***

If the insurance company disagrees with the health care practitioner, it must notify the injured person and advise them of the reasons why it will not accept that s/he is catastrophically impaired. If this is the case, the injured person may require that the insurer refer them to attend a Designated Assessment Centre (or DAC) at the insurer’s expense.

The determination made by the DAC is binding on both the insurer and the client subject to any order of a court or arbitrator.

***What compensation is available to catastrophic clients versus non-catastrophic clients from an insured person’s accident benefit insurer?***

The following chart attached as Schedule ‘A’ sets out a comparison of the maximum benefits available to catastrophically impaired clients compared to the maximum available to clients who are not catastrophically impaired.

**SCHEDULE A**  
**COMPENSATION AVAILABLE TO CATASTROPHIC CLIENTS VERSUS NON-CATASTROPHIC CLIENTS\***

BENEFIT	CATASTROPHIC	NON-CATASTROPHIC
<b>1. Attendant Care Benefits</b>		
A. Maximum Benefits Payable	\$1,000,000.00	\$72,000.00
B. Maximum Monthly Benefits Available	\$6,000.00	\$3,000.00
C. Maximum Duration of Benefits	Unlimited – until \$1,000,000.00 is exhausted	2 years
<b>2. Medical and Rehabilitation Benefits</b>		
A. Maximum Benefits Payable	\$1,000,000.00	\$100,000.00
B. Maximum Duration of Benefits	Unlimited – until \$1,000,000.00 is exhausted	10 years after the accident (If the person was more than 15 years of age at the time of the motor vehicle accident)  - or -  Until they reach the age of 25 – If the person was less than 15 years old at the time of the accident.
<b>3. Housekeeping and Home Maintenance</b>		
A. Maximum Benefits Payable	\$100.00/week	\$100.00/week
B. Maximum Duration of Benefits	Unlimited	No longer than 104 weeks after the onset of the disability
<b>4. Case Management Services</b>	Entitled – may choose own case manager	Not entitled

\* Where optional benefits were not purchased

# ***LIMITATIONS AND NOTICE PERIODS***

A primary legal concern for anyone injured in an accident is “how long do I have to decide whether to sue or not”. This section is intended to provide preliminary information about the government imposed limitation and notice periods, which affect an injured client’s right to sue.

## ***What are limitation periods and notice periods?***

A “limitation period” is the period of time during which the lawsuit must be started. If the claim is started after the limitation period has expired, the courts may not allow the claim to continue. In such instances, the claim is said to be barred. There are legal principles, which may assist in fighting a potentially barred claim, but those are beyond the scope of this manual.

Notice periods are similar to limitation periods. In some instances the government requires that notice of a potential legal action be given to the party alleged to be at fault before the action can be started. The policy behind requiring a timely notice is to allow the potential defendant to fix the problem before someone else gets hurt and to allow them to investigate the alleged problem in a timely fashion.

## ***Common Limitation and Notice Periods***

The following list is a guide only and is not intended as the exclusive source of limitation and notice issues. There are many variables, which can affect when the limitation period begins to run. A legal professional should be consulted if you have any questions.

The Ontario Government recently changed the laws respecting limitation periods. These changes take effect January 1, 2004. The new laws affect all claims involving acts that occur after January 1, 2004. They also affect claims involving acts occurring before January 1, 2004 where the injured person first learns of the facts giving rise to their claim after that date. The new laws do not affect claims based on actions occurring before January 1, 2004 where the injured person knows of the facts giving rise to the claim before that date. The new laws do not affect existing proceedings. The new laws do not affect notice periods.

In cases where the new laws affect a limitation period, reference is made to both the old and the new limitation periods. It is also important to know that under the new laws, limitation periods do not begin to run until the injured person knows, or ought reasonably to have known, of the facts giving rise to the claim.

## Type of Action

## Limitation Periods

- Tort and related actions not subject to a special limitation period (e.g. slip and fall on private property) -6 years (pre Jan. 1, 2004)  
-2 years (post Jan. 1, 2004)
  - Assault, battery -4 years (pre Jan. 1, 2004)  
-2 years (post Jan. 1, 2004)
  - Proceedings against the Crown -60 days notice of the claim must be given before an action may be started.
  - Proceedings against the Crown (regarding ownership, occupation of land) -10 days notice
  - Fatal Accidents (claims under the *Family Law Act*) -2 years
- Highway Repair (King's Highway) -notice within 10 days;  
-action must be commenced within 3 months of injury. (pre Jan. 1, 2004)  
-2 years (post Jan. 1, 2004)
- Highway Repair (Municipal Roadway) -notice within 10 days;  
-action must be commenced within 2 years of injury. (pre Jan. 1, 2004)  
-2 years (post Jan. 1, 2004)
  - Highway Traffic Accidents -2 years

- Hospitals (Clarke Institute)
  - within 6 months after the act or omission complained of was committed (pre Jan. 1, 2004)
  - 2 years (post Jan. 1, 2004)
  
- Hospitals (Mental / Psychiatric)
  - within 6 months after the act or omission complained of was committed (pre Jan. 1, 2004)
  - 2 years (post Jan. 1, 2004)
  
- Hospitals (Public)
  - 2 years
  
- Insurance Claims (Accident Benefits)
  - 2 years from the date of insurer's refusal to pay a benefit.
  
- Long Term Disability Policies
  - the period is defined by the contract, and is usually one year from the date of a refusal. There may also be a time limit within which the initial application must be submitted following the injury. Legal advice should be sought immediately after the benefit is refused. (pre Jan. 1, 2004)

- 2 years from the day on which the claim was discovered unless the contract is made before January 1, 2004. In that case, then the period is defined by the contract. Legal advice should be sought immediately after the benefit is refused.  
(post Jan. 1, 2004)
- Fire Loss
  - 1 year from date of loss  
(pre Jan. 1, 2004)
  - 2 years from the day on which the claim was discovered.  
(post Jan. 1, 2004)
- Railways (Federal)
  - 2 years
- Railways (Provincial)
  - 1 year (pre Jan. 1, 2004)
  - 2 years (post Jan. 1, 2004)
- Workplace Compensation
  - notice of the accident should be given as soon as possible; the claim for compensation must be made within 6 months of the accident, or death.  
(pre Jan. 1, 2004)
  - 2 years (post Jan. 1, 2004)

The new laws respecting limitation periods in Ontario also create an ultimate limitation period, which governs practically all actions. The ultimate limitation period expires 15 years after the act on which the claim is based took place.

## **Which insurer has to pay my accident benefits?**

The answer to this question depends upon the circumstances by which you were injured. Under certain circumstances you may have the option of choosing which insurer among two or three different companies will become involved in your rehabilitation. The issue of which insurer may pay your benefits is a complex one. The decision as to which insurer becomes involved can make a real difference in your rehabilitation. For this reason, it is important that you consult a lawyer who will have some knowledge as to which company might be better for you.

Generally speaking, the first to pay is an insurer of a vehicle on which the injured person is a named insured or a spouse or dependant of a named insured.

The second payor is the insurer of the vehicle in which you are an occupant or which struck you.

If they are not insured, and you have no other coverage, the Motor Vehicle Accident Claims Fund is liable for the accident benefits.

However, do not let an insurer avoid paying benefits by claiming that it is not the insurer who is liable to pay the benefits. The first insurer to receive an application must pay the benefits pending the resolution of the dispute as between the insurers. In other words, this is not the client's problem, but rather, is a dispute amongst the insurers.

The following may give you some direction regarding which insurer is likely to have to respond given your specific circumstance. They are listed in descending order. This list assumes that the insurers are Canadian. If there are American insurers you must contact a lawyer to determine who will have to pay your accident benefits.

### **If you were riding in a vehicle:**

- the insurer of the vehicle on which you are an insured. This would include a person who is a spouse or dependant of a named insured under another policy. (in other words, the insurer of the family car)

If there is more than one policy that could respond (i.e. you are a named insured or spouse or dependant of a named insured under more than one policy), and you are in one of your own vehicles, the policy which insures the vehicle in which you were hurt must pay. In other words, if you have two vehicle (and two different policies) you would look to the insurer of the vehicle you were in when the collision happened.

If you are not in any of the vehicles on which you are a named insured or a spouse or dependant of a named insured, you get to pick which of your insurers has to pay.

- if you are not a named insured (or spouse or dependant of a named insured) under another vehicle, the insurer of the vehicle you were in at the time of the collision.
- if you are not an insured on another vehicle, and there is no coverage on the vehicle in which you are an occupant, you can claim against any other vehicle involved in the incident. If there is more than one vehicle involved, other than the one in which you are an occupant, you can choose which insurer that must respond.
- if none of the above are available, you must claim against the Motor Vehicle Accident Claims Fund.

**If you were hit by a vehicle:**

- the insurer of the vehicle on which you are an insured. This would include a person who is a spouse or dependant of a named insured under another policy.
- if you are not a named insured (or spouse or dependant of a named insured) under another vehicle, the insurer of the vehicle that struck you.
- if you are not an insured under a different policy, and there is no coverage on the vehicle that struck you, you can claim against any other vehicle involved in the incident. If there is more than one vehicle involved in the incident, other than the vehicle that struck you, you may choose which policy must respond.
- if none of the above are available, you must claim against the Motor Vehicle Accident Claims Fund.

In the examples above, spouse includes same-sex partner. A dependant is a person who is financially dependant on you or is dependant on you for guidance and support. There are many different scenarios and you should consult a lawyer if there are any problems.

You can get information and forms from the Motor Vehicle Accident Claims Fund at the following address:

Motor Vehicle Accident Claims Fund  
Financial Services Commission of Ontario  
5160 Yonge Street, PO Box 85

## **THE RELEVANT STATUTES**

### **Section 268(2)**

#### **Liability to pay**

(2) The following rules apply for determining who is liable to pay statutory accident benefits:

1. In respect of an occupant of an automobile,
    - i. the occupant has recourse against the insurer of an automobile in respect of which the occupant is an insured,
    - ii. if recovery is unavailable under subparagraph i, the occupant has recourse against the insurer of the automobile in which he or she was an occupant,
    - iii. if recovery is unavailable under subparagraph i or ii, the occupant has recourse against the insurer of any other automobile involved in the incident from which the entitlement to statutory accident benefits arose,
    - iv. if recovery is unavailable under subparagraph i, ii or iii, the occupant has recourse against the Motor Vehicle Accident Claims Fund.
  2. In respect of non-occupants,
    - i. the non-occupant has recourse against the insurer of an automobile in respect of which the non-occupant is an insured,
    - ii. if recovery is unavailable under subparagraph i, the non-occupant has recourse against the insurer of the automobile that struck the non-occupant,
    - iii. if recovery is unavailable under subparagraph i or ii, the non-occupant has recourse against the insurer of any automobile involved in the incident from which the entitlement to statutory accident benefits arose,
    - iv. if recovery is unavailable under subparagraph i, ii or iii, the non-occupant has recourse against the Motor Vehicle Accident Claims Fund.
- R.S.O. 1990, c. I.8, s. 268 (2); 1993, c. 10, s. 1; 1996, c. 21, s. 30 (3, 4).

#### **Liability**

(3) An insurer against whom a person has recourse for the payment of statutory accident benefits is liable to pay the benefits. R.S.O. 1990, c. I.8, s. 268 (3); 1993, c. 10, s. 1.

#### **Choice of insurer**

(4) If, under subparagraph i or iii of paragraph 1 or subparagraph i or iii of paragraph 2 of subsection (2), a person has recourse against more than one

insurer for the payment of statutory accident benefits, the person, in his or her absolute discretion, may decide the insurer from which he or she will claim the benefits. R.S.O. 1990, c. I.8, s. 268 (4); 1993, c. 10, s. 1.

**Same**

(5) Despite subsection (4), if a person is a named insured under a contract evidenced by a motor vehicle liability policy or the person is the spouse or same-sex partner or a dependant, as defined in the *Statutory Accident Benefits Schedule*, of a named insured, the person shall claim statutory accident benefits against the insurer under that policy. 1993, c. 10, s. 26 (2); 1999, c. 6, s. 31 (9).

**Same**

(5.1) Subject to subsection (5.2), if there is more than one insurer against which a person may claim benefits under subsection (5), the person, in his or her discretion, may decide the insurer from which he or she will claim the benefits. 1993, c. 10, s. 26 (2).

**Same**

(5.2) If there is more than one insurer against which a person may claim benefits under subsection (5) and the person was, at the time of the incident, an occupant of an automobile in respect of which the person is the named insured or the spouse or same-sex partner or a dependant of the named insured, the person shall claim statutory accident benefits against the insurer of the automobile in which the person was an occupant. 1993, c. 10, s. 26 (2); 1999, c. 6, s. 31 (10).