

ONTARIO AUTOMOBILE ACCIDENT BENEFITS

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This is intended as a brief survey of some features of the mandatory medical and accident benefits endorsement now found in the Ontario motor vehicle liability policy. The law is found in sections 230 through 238 and Schedule E of the Insurance Act.¹ This mandatory coverage has the purpose of ensuring that when an occupant of a car or a pedestrian² is injured or killed in an automobile accident, there will be some measure of compensation for economic loss resulting from the injury or death and this without regard to fault. Within certain limits then, there is coverage for medical and funeral expenses, total disability and death benefits.

Each policy's endorsement covers a broad category of insured persons.³ An owner's policy insures any occupant of his vehicle including himself and any pedestrian struck by his vehicle. In addition, it insures himself and certain related persons as occupants of any other vehicle and as pedestrians struck by any other vehicle. It follows that an injured party may be an insured person under more than one policy at the same time. For example, a car owner will be insured under his own policy and if an occupant of someone else's car, or a pedestrian struck by someone else's car, an insured person under the other's policy as well. In relation to the multiple coverage situation, different considerations apply to medical expenses than apply to disability and death benefits.

I. DOUBLE COVERAGE

Section 234a of the Act provides that the insurer of the owner of the car in which the injured person was an occupant or which struck the injured pedestrian is liable, in the first instance, for payment of benefits. This provision does not in my view preclude the injured party, a pedestrian for instance, from claiming benefit under his own policy, his own insurer then having a claim over against the owner's insurer.

In relation to medical expenses, section 234a, read alone or perhaps in conjunction with section 231(3), would make the owner's insurance in relation

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¹ ONT. REV. STAT., 1970, c. 224 as amended by Ont. Stat. 1971, c. 84 and 1972, c. 66.

² Some difficulty may be encountered in defining the scope of this term. Broadly interpreted, it may include someone standing or sitting on his front lawn, perhaps someone taking a meal in a sidewalk café. It would stretch grammar to extend it to a person standing or sitting in his livingroom. This limiting term was not used formerly. See Ont. Stat. 1966, c. 71, § 11.

³ Schedule E, subsec. 3, para. (1).

to the occupant's insurance for instance, first loss coverage. The injured occupant's insurance would only be liable for expenses in excess of those covered by the owner's policy. However, the owner's coverage is itself in excess to non-auto medical coverage such as OHIP.⁴ If, on the other hand, medical expenses are covered by Workmen's Compensation, the auto insurer incurs no liability at all.⁵ Finally, if neither the owner of the car nor the injured occupant or pedestrian has a motor vehicle liability policy, then no auto benefits are available to him.

With regard to total disability and death benefits, where the person injured or killed is covered under more than one policy, Schedule E provides that there may be recovered only an amount equal to one benefit.⁶ However, with regard to disability benefits, during the first two weeks of disability, an injured party may recover the whole of the benefit in spite of being entitled under other disability insurance contracts as well.⁷ The first two weeks having expired, the auto insurer is liable only for a rateable proportion of benefits for loss of time. Again, as in the case of medical expenses, if the injured person is receiving a total disability benefit under Workmen's Compensation, no benefit is payable.⁸ Nothing is said regarding a person on unemployment insurance as a result of the injury received.

II. IMPACT ON TORT CLAIMS

At common law, as a general rule, the amount of damage to which a plaintiff was entitled was not subject to reduction by reason of his entitlement to accident insurance benefits.⁹ However, even prior to mandatory coverage in Ontario, the Insurance Act provided with respect to auto accident benefits that tort claims were to be reduced to the extent of the "payment" of benefits if the person against whom the claim was made was insured under a contract of the same type.¹⁰ Mandatory coverage ushered in an additional provision, section 237(2). It provides that to the extent of benefits "paid or available" to the claimant, this constitutes a release by the claimant of any claim against the person liable to the claimant or his insurer. One effect of this may be that a tortfeasor would be released to the extent of benefits once available to the claimant but no longer so by reason of his failure to give proper notice and proof of claim. On the other hand, availability may mean still available but the benefits haven't been paid over for one reason or another.

At this point, I would like to deal with the effect of death benefits on a claim under the Fatal Accidents Act. The operative provision regarding death benefits is section 232(2). It has the effect of providing that to the

⁴ Schedule E, subsec. 1 and section 231(4) of the Act.

⁵ Schedule E, subsec. 3, para. (2)(a)(ii).

⁶ Schedule E, subsec. 3, para. (8) added by Ont. Stat. 1972, c. 66, § 18(5).

⁷ Schedule E, subsec. 2, Pt. II, last para.

⁸ *Supra* note 5.

⁹ *E.g.*, *Bourgeois v. Tzrop*, 9 D.L.R.2d 214 (N.B. 1957).

¹⁰ Sections 231(2) and 232(2) paraphrased.

extent of death benefits paid, the payment constitutes "a release by the insured person or his personal representatives of any claim that the insured person or his personal representatives or any person claiming through or under him or by virtue of the Fatal Accidents Act may have against . . . any other person who may be liable to the insured person or his personal representatives" In the case of *Schiedel v. Rick*,¹¹ the Ontario Court of Appeal decided that this section did not affect an award to a dependent widow claiming in her own right under the Fatal Accidents Act. The reasons given were that since the claim was hers in her own right, it could not be released by the insured person or his personal representative, the only releasors referred to in section 232. Also, the court pointed out that the only liability spoken of under section 232 as being released was liability to the insured person or his personal representatives and thus didn't affect liability to the insured person's dependants in their own right. This semantic difficulty diminishes in light of the fact that normally an action under the Fatal Accidents Act is brought in the name of the personal representative of the deceased.¹² The semantic difficulty notwithstanding, I submit the intent was there and that the case could easily have been decided differently.

Tortfeasor Uninsured

Reading section 237(2) alone, accident benefits enure to the benefit of any person liable to the plaintiff. Yet sections 231(2) and 232(2) provide for a release only if the person liable is insured under a contract of the same type—thus a reciprocity rider. Since no accident benefits would be available to an innocent uninsured owner-driver of a car involved in an accident, no release is available to the party liable to him.

The Controversy

The controversial question is whether we should have a no-fault plan which would remove tort liability altogether except in cases where economic loss exceeded a certain figure or where the accident caused death, disfigurement or permanent injury. An industry spokesman is reported as having said that a complete no-fault system would "clearly convert expense and legal dollars to benefits and bring about a larger and faster payback"¹³ to accident victims. I can not speak with authority on the merits and demerits of this kind of proposal, but I think it must be judged on what its *net* impact might be expected to be, the result of weighing and balancing all the interests involved.

III. DEATH BENEFITS¹⁴

The death benefit provisions¹⁵ are less than crystal clear. I would

¹¹ [1972] 2 Ont. 114.

¹² ONT. REV. STAT. 1970, c. 164, § 3(1).

¹³ The Globe and Mail, March 5, 1973, at 6, cols. 1 and 2.

¹⁴ Here I draw upon a list of panel questions employed in the Advocates Society Workshop on No-Fault Insurance held in Toronto on January 28 and 29, 1972. I have modified them to some extent.

¹⁵ Schedule E, subsec. 2, pt. I.

interpret them as follows. Death benefits based upon the age and status of the deceased person are available to certain dependants. If the head of the household is killed, *i.e.*, the principal breadwinner,¹⁶ the first dependant, *e.g.*, his or her spouse, will be entitled to 5,000 dollars plus 1,000 dollars for each additional dependant, *i.e.*, a dependent child. If the deceased's parents or the parents of his spouse are his only surviving dependants and were residing with him at the time of the accident, they are entitled to benefits.¹⁷ It would seem that other classes of dependants, related to him or otherwise, are not entitled to benefit under the scheme.¹⁸

If the other spouse in a two-parent household is the one killed, 2,500 dollars is payable. For the death of a child, an amount ranging up to 1,000 dollars is payable. For each death, funeral expenses up to 500 dollars are payable.¹⁹

Cases of Interest

1. A man is estranged from his wife and thirteen year old child. He helps to support the child but not his wife who works. (A) He dies—who gets how much? (B) She dies—who gets how much?

(A) Under the plan, benefits are payable with respect to the death of the head of the household in a household where a spouse or dependants survive. Being estranged from his wife and child, he can hardly be regarded as the head of a household. As his spouse and child are not part of a household of which he is the head, no benefit can be claimed. Moreover, a child under twenty-one years of age is only a dependent child within the meaning of the plan if he is wholly dependent upon the head of household and residing with him or her as the case may be.²⁰

If there is a collective domestic unit of which a deceased person is the acknowledged head,²¹ then I would regard the household limitation as satisfied though the deceased for one reason or another was not residing with his family at the time of the accident, for instance, if his job had him residing elsewhere.

(B) If the estranged wife was killed, then she should be understood as having the status of head of a household as a result of which 5,000 dollars would be payable to her child.

2. A man is living with and wholly supporting an unmarried woman and her seven year old child. If the man is killed, who gets how much?

¹⁶ *Id.* at para. B(1).

¹⁷ *Id.* at para. B(2); Ont. Stat. 1972, c. 66, § 18(2).

¹⁸ *Id.* at para. B(4).

¹⁹ Schedule E, subsec. 1.

²⁰ Schedule E, subsec. 2, pt. 1, para. B(3); other considerations apply to a child twenty-one years of age or over. Contrast the differently worded provision litigated in *McNeilly v. Allstate Ins. Co.*, 29 D.L.R.3d 384 (B.C. Sup. Ct. 1973).

²¹ See Rand, J.'s definition of household cited in *McNeilly v. Allstate Ins. Co.*, *id.* at 385.

Not being his spouse, she would seemingly not be entitled to claim. If within the meaning of the provisions, dependent child does not include someone else's child, then the seven year old would not be entitled to claim. Unlike Workmen's Compensation, no reference is made to a *loco parentis* concept.

Common Disaster

Where the head of a household and the spouse die as a result of a common disaster, Schedule E provides that the total amount payable is to be divided equally between surviving dependants.²² Suppose that the spouse survived her husband but died two weeks later leaving one dependent thirteen year old. In this situation, if she is to be understood as surviving him for purposes of calculating the benefit, then with respect to his death, 6,000 dollars would be payable (more than one dependant surviving); if not, then only 5,000 dollars would be payable. Another 2,500 dollars, but only 2,500 dollars I would say, is payable with respect to the death of his spouse two weeks later. Since she wasn't alive thirty days after his death, the amount payable with respect to her husband's death would not be payable to her. It along with the other 2,500 dollars would be payable to the child.²³ In the common disaster situation, I don't think it was intended that, should she survive him, she is the new head of the household for purposes of determining the benefit payable. However that could very well be the case where she died after him as a result of a separate accident.

IV. MISCELLANEOUS

The insurer is not liable for medical or funeral expenses or disability benefits with respect to bodily injury or death sustained by a person who is convicted of impaired driving at the time of the accident.²⁴ Strictly interpreted, the exclusion would apply even in a case where the man's drinking had nothing whatever to do with the accident. Broadly interpreted, some nexus between the two would have to be shown.

Unlike Workmen's Compensation, no provision is made to exempt benefits from attachment.

V. CONCLUSION

I think I can safely conclude that the provisions of this plan require some amplification and clarification to resolve a number of problems of interpretation and application.²⁵

²² Schedule E, subsec. 2, pt.1, para. B(5).

²³ *Id.* at para. B(7).

²⁴ Schedule E, subsec. 3, para. (2).

²⁵ To cite another example, what impact does possible future total disability entitlement have on the non-variable judgment concept?

