

## Fatal Accidents: The Deductible

When a person is the innocent victim of a car crash, whether as driver, passenger or pedestrian, it stands to reason that the person should be compensated for his or her injuries. However, that is not the case in Ontario.

### Background

An individual injured in a car accident in Ontario must meet a verbal threshold test before he or she can sue for damages. In other words, the victim must show that the injury is a qualifying injury. In Ontario an injured person must prove that he or she has suffered a permanent serious impairment of an important physical, mental or psychological function or a serious permanent disfigurement. If the injury suffered is something less than this, the person is out of luck.

### The Insurance Companies

As the solution to its escalating costs and shrinking profits, the insurance industry in 2003 touted further restrictions to an innocent victim's right to

access the court. That summer just before the last provincial election, the insurance industry was able to cajole the Tory Government to pass Regulation 312/03.

Essentially, the Eves government dealt the industry two "get out of court free cards", in an attempt to appease the industry and reduce premiums. The first allowed insurers to keep the first \$30,000 (up from \$15,000) of every crash claim or settlement for harm and loss of enjoyment of a normal life due to serious and permanent injury. The second allowed them to keep the first \$15,000 (up from \$7,500) of claims arising out of an innocent death.

Regulation 312/03, together with Regulation 381/03 which defines what is a serious and permanent injury, has allowed the insurance industry to escape paying for so called "minor" injuries. The Insurance Bureau of Canada has stated that "minor injuries account for over 80% of auto insurance claims".

The new verbal threshold barrier definition, together with the increased monetary deductible apply to all accidents after October 1, 2003.

### Deductibles for Fatalities

While the increased monetary deductible for harm and loss of enjoyment of life may be harsh, applying any deductible to fatality claims is illogical. How is death ever "minor"? There has been no flood of fatality claims that need to be kept in check and in fact court awards for fatality claims have historically been unduly modest, if not outright stingy.

An unpleasant but necessary job of our courts has always been to place a value on human life. In ascertaining the appropriate value, courts have recognized that death in an auto crash can be sudden and will result in family members experiencing confusion, anxiety, bewilderment, self reproach and overwhelming states of psychological shock. Surviving family members have a great sense of helplessness, feelings of vulnerability and insecurity. They can become pre-occupied with coping if the crash was preventable and will experience feelings of unfairness and injustice when a death is utterly senseless and unnecessary. Sudden unexpected death in an auto crash can precipitate a post-traumatic stress response that will intensify the experience of loss.

The courts must decide the value of a life based on relationships with surviving family members. What is the life of a daughter or a son or parents worth?

By placing an arbitrary deduction on the value of life is to treat each of us as things, not people. In applying a one-size-fits-all deduction of \$15,000 to fatality claims, insurers have succeeded in effectively taking away from most consumers the right to have the courts decide what an individual's life, wrongfully taken, is worth. The real value of human life should be determined in the sanctity of the courtroom where important issues effecting people have been decided for decades.

The following cases help to illustrate the callousness of applying a deductible of \$15,000 to fatality claims.

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*The articles in **Perspective** are necessarily of a general nature, and cannot be regarded as legal advice. Our firm will be pleased to provide additional details on request.*

**FATAL continued from page 1***Macartney v. Warner, 2000*

The Plaintiffs' 19-year old son was killed in a car crash near his home. The mother was awarded \$25,000 for loss of guidance, care and companionship. The father was awarded \$15,000. On appeal, the Ontario Court of Appeal refused to increase the awards.

These sums can only be characterized as miserly. If the \$15,000 deductible had been in existence in 2000 the father would have been awarded nothing for the loss of his son.

*To v. Toronto Board of Education, 2001*

A 14-year boy of Chinese decent was killed in a school gym. His family relied upon him as the first born son to eventually provide social and financial support for them. At trial the jury assessed the damages of the parents for loss of guidance, care and companionship at \$100,000 for each parent. The awards were upheld on appeal, although the Ontario Court of Appeal determined that the awards were at the high end of the range.

At trial the jury awarded the sister the sum of \$50,000. In her case, the Court of Appeal held that sum was out of line with prior decided cases and reduced it to \$25,000. The deceased boy was

found by the jury to be twenty-five percent liable for his own death. If this case had been an automobile fatality case and the \$15,000 deductible had been applicable in 2001, the surviving sister would have received \$3,750 for the loss of her brother.

The appellate court held that non-pecuniary damages must be assessed in an objective and unemotional way and that the Appeal court would not lightly interfere with a jury's assessment if it was properly instructed. But the Court went on to state that the reasonableness of a jury's assessment must be viewed by comparing it with range of assessments established in other cases.

The Court of Appeal has demonstrated its unwillingness to dramatically increase the level of damages for loss of care, guidance and companionship and now with the \$15,000 deductible the ability of families to advance and settle fatality claims has been severely restricted.

As illustrated by the *To* case, the deductible is particularly insensitive to families where a deceased loved one may have been responsible in part for the crash. In those particular cases, the damages are assessed and the deductible subtracted from that amount, and the resulting sum is then reduced by the

percentage of liability attributed to the deceased. The result could be that the family member is awarded a sum within the \$10,000 jurisdictional limit of the Small Claims Court, if at all. And this can result in costs penalties for improperly proceeding in the Superior Court.

**Fairness**

There is some consolation to be found in Bill 198 to this dilemma of deductibles. Bill 198 amended the Insurance Act to provide that there be no deductible for non-pecuniary damages in fatality claims assessed in excess of \$50,000. Of course the question remains - is it fair and rational to have a deductible of \$15,000 applied to fatality cases assessed below \$50,000 and no deductible for those assessed above \$50,000?

Fairness is an intuitive but elusive concept that varies according to the context. We know it when we see it, but have trouble defining it. But by anyone's definition a substantive legislated rule requiring the arbitrary deduction of \$15,000 is not rational.

To allow the continuance of any deductible to be applied to fatality cases is the abdication of any sense of rational decision-making in the regulation of insurers selling compulsory automobile insurance to the people of Ontario. ☞

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## Why Canadians Should Oppose Secrecy in Litigation

Since at least the mid-1970s, a disturbing practice of secrecy has taken root in our system of litigation. Defendants in civil actions, as a condition to discovery or settlement, often seek to keep private the information that emerges from litigation and the fact liability has been admitted and funds paid.

A common form of secrecy in litigation is the use of confidentiality agreements. A typical confidentiality agreement can require that certain matters, once discussed or agreed to by the par-

ties, remain confidential. For instance, such an agreement may prohibit disclosure of the cause of injury, the terms of settlement, or even the fact that a claim was ever filed.

The most effective way to prevent injuries and deaths, and the resulting tort claims, is to ensure that consumers have adequate information about the safety of products and services. The free flow of information can lead to more awareness about hazards and opportunities to avoid harm. The result will be fewer

injuries--and less litigation. Secrecy orders and agreements prevent consumers from making informed decisions. Secrecy permits defendants to bury "smoking gun" evidence and limit public debate on real hazards.

Secrecy in our courts undermines the right of every citizen to know about dangers to their health and safety. If we change anything in our civil justice system, it should be this practice, which leads to increased legal costs. ☞

# Occupiers' Liability

*A customer slips and falls at the grocery store. A child falls off the monkey bars at a city park. A teenager is injured during gym class.*

The legal issue in each of these instances is the liability of the occupier for their visitors' injuries. In Ontario, an occupier's obligations are set out in the *Occupiers' Liability Act*. In essence, an occupier of premises has a legal duty to those coming onto its premises to take reasonable care for their safety. Although the focus of this article is on the duty of commercial establishments, it is important to know that occupiers' liability legislation applies equally to homeowners.

The following is an overview of occupiers' liability.

## Who is an occupier?

An occupier is a person

- who is in physical possession of premises, or
- who has responsibility for and control over the condition of the premises or the activities taking place, or
- who has control over the persons entering the premises.

## What is the occupier's responsibility?

An occupier owes a duty of care, as in all the circumstances of the case is reasonable, to see that visitors entering on the premises are reasonably safe while on the premises. This duty applies to risks caused by the condition of the premises as well as by the activities carried out on the premises.

## What recourse does an injured visitor have against an occupier?

A person, who is injured on another's property, may be entitled to recover monetary damages if it can be established that the occupier was liable for the damages that were sustained. In making this determination, a court will take a number of factors into account in assessing reasonable care, including:

- The inherent or unusual danger at the premises.
- The reasonable likelihood of a particular incident occurring.
- The sufficiency of the occupier's program of care and maintenance.
- The visitor's willingness to assume a foreseeable risk.
- The age and status of the visitor.
- The nature and extent of any warnings or waivers of liability on the part of the occupier.
- The sufficiency of the connection between the accident and the alleged breach by the occupier.

## When is an occupier not responsible?

An occupier may not be responsible for damages suffered by persons on the premises if the occupier has restricted, modified or excluded its duty. However, the occupier is under an obligation to bring any restriction, modification or exclusion to the attention of its visitors.

In addition, an occupier will not be responsible in respect of risks willingly assumed by visitors to the premises.

The Occupiers' Liability Act is binding on Public institutions and government authorities and it is not open to them to make policy decisions to absolve themselves or reduce their statutory obligations.

We have chosen several relevant court cases to help illustrate the obligations of an occupier,

### The School Gym

**Occupier** - School Board

**Visitor** - Student

**Facts** - The 16-year old student suffered a dislocated elbow when he hit the floor after the protective mats separated during a wrestling match. The mats separating during wrestling exercises was not uncommon. The only precaution taken was a standing instruction to the non-participating students to sit around the perimeter of the mats with their feet pressed against the edges of the outside mats.

**Result** - The student successfully sued the school board.

**Reasons** - The judge concluded that the school board had failed to discharge the burden of proving that it had adopted the best safety precautions reasonably possible for the protection of students taking part in physical education courses. He found that the so-called perimeter system was a dangerous one when the wrestling reached the competitive stage, particularly since the separation of mats was foreseeable.

### The Municipal Tennis Court

**Occupier** - Municipality leased court from local paper mill

**Visitor** - Competitive Tennis Player

**Facts** - The 33-year old tennis player suffered torn ligaments in his knee when, during a competitive tennis match, his toe got lodged in a crack on the court. The tennis player played on these particular courts regularly and was aware of the state of disrepair. The municipality inspected the courts each spring and was aware of the numerous cracks. It did not want to resurface the court before obtaining a Wintario grant.

**Result** - The tennis player's lawsuit was dismissed.

**Reasons** - The tennis courts were dangerous premises keeping in mind the purpose for which they were constructed.

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200 Elgin Street, Suite 1100  
Ottawa, Ontario K2P 1L5  
**Phone:** (613) 236-0735  
**Fax:** (613) 238-3501

www.cooliganryan.com

## LAWYERS

**Garret J. Cooligan**  
cooligang@cooliganryan.com

**Murray E. Ryan**  
ryanm@cooliganryan.com

**Harold R. McNeely**  
mcneelyh@cooliganryan.com

**Robert J. Montague**  
montaguer@cooliganryan.com

**Thomas P. Connolly**  
connollyt@cooliganryan.com

**Roxanne G. Cooligan**  
cooliganr@cooliganryan.com

**Joseph Y. Obagi**  
obagij@cooliganryan.com

**Elizabeth A. Quigley**  
quigleyb@cooliganryan.com

**Amanda M. Hall**  
halla@cooliganryan.com

**Jennifer L. Guth**  
guthj@cooliganryan.com

**Lisa A. Neil**  
neill@cooliganryan.com

## AREAS OF PRACTICE

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The municipality had an obligation to provide facilities that could be used safely and it was insufficient for the municipality to simply make an on-site inspection in the spring. **However**, the tennis player was aware of the dangers and notwithstanding that knowledge, he chose to play anyway and therefore voluntarily incurred the risk.

### The Municipal Playground

**Occupier** - Municipality

**Visitor** - Child

**Facts** - The two-year old child suffered a skull fracture when she fell from the playground structure. She hit her head on the concrete foundation used to anchor the structure. The municipality maintained a regular system of inspection and repair of equipment and parks.

**Result** - The mother's lawsuit on behalf of the child was dismissed.

**Reasons** - The municipality's inspection program with respect to parks and playgrounds was entirely reasonable. The existence of the concrete foundation was not hazardous in the circum-

stances or any more hazardous than the structure itself.

### The School Parking Lot


**Occupier** - The Public School Board

**Visitor** - Grade 13 student

**Facts** - The student lost control of his motorcycle while driving too fast in the school parking lot. He flew off and hit his head on a bollard situated on a grass area of the school. The school had removed the chains between the bollards but for policy reasons did not remove the bollards.

**Result** - The school board was held 25% liable for the student's head injuries.

**Reasons** - The presence of the bollard made the premises unsafe. A policy decision by the school board not to remove the bollards did not relieve it from liability for breach of its duty.

Depending on where the injury occurs, the limitation period for commencing legal action might be very short. Therefore if you have been injured while on another's premises, it is important to promptly seek legal advice. 

## COOLIGAN RYAN NEWS

We are pleased to announce that **Jennifer Guth** has joined the firm as an associate. Jennifer was called to the Ontario Bar in 2002. She has been practicing law in Ottawa in the area of civil litigation with a particular focus on personal injury, product liability and professional liability claims. She will continue to practice as a civil litigator, with a particular emphasis as a plaintiff's advocate.

**Chelsea Gilder** has joined the firm as an articling student. Chelsea, who is originally from Vancouver, received her LLB, with distinction, from the University of Saskatchewan.

We welcome Jennifer and Chelsea to our firm.

**Joseph Obagi** has been appointed to the Planning Committee for the Carleton County Law Association Civil Litigation Conference which is held annually in Montebello, Quebec.

**Beth Quigley**, with the assistance of **Christopher Obagi**, published an article entitled "*The Intermingling of Labour and Employment Law: Representing Unionized Employees in the Civil Courts*" in the Summer 2006 issue of *The Litigator*. 