Ontario Trial Lawyers Association Submission to the Standing Committee on Finance and Economic Affairs

Pre-Budget Consultations 2022

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The Ontario Trial Lawyers Association is pleased to provide input to the 2022 Ontario Pre-Budget Consultation process.

The Ontario Trial Lawyers Association (OTLA) was formed in 1991 by lawyers acting for plaintiffs. Our purpose is to promote access to justice for all Ontarians, preserve and improve the civil justice system, and advocate for the rights of those who have suffered injury and losses as the result of wrongdoing by others, while at the same time advocating aggressively for safety initiatives.

OTLA frequently comments on legislative matters and has appeared on numerous occasions as an intervener before the Court of Appeal for Ontario and the Supreme Court of Canada.

OTLA welcomes the opportunity to submit comment on Financial Services policy and, in particular, the regulation of auto insurance in Ontario and the elimination of civil juries in most actions.

After years of temporary solutions, the auto insurance product has reached a point where it is seriously out of balance and is no longer meeting the needs or expectations of Ontario's drivers and accidents victims. OTLA and the insurance industry continue to agree that Ontario's auto insurance system is fundamentally "broken."

On April 11, 2019, the government announced a return to the benefit limit of $2 million for medical, rehabilitation and attendant care benefits for victims who have been catastrophically impaired. We commend the government for this announcement. Catastrophically impaired individuals are the most seriously injured and the harsh benefit reductions enacted by the previous government were devastating to the victims who need it the most. In many cases, even the $2 million statutory limit does not provide a sufficient level of care to the accident victim for the duration of their life when they require extensive treatment, home care and assistive devices.

Despite the announcement of the restoration of the $2 million benefit limit in April of 2019, other harsh benefit reductions enacted by the previous government still remain in place. Notably, the 2016 changes to the definition of "Catastrophic Impairment" also remains, which significantly restricts the eligibility criteria and reduces the number of accident victims who were otherwise eligible for that level of benefit. The reality is that this more stringent and overly restrictive definition continues to leave many of the most seriously injured in need. Accident victims who are denied medical benefits through the auto insurance regime undoubtedly rely on our already strained publicly funded health care and social support system.

We are pleased to share the following principles and proposals that represent a fundamental re-ordering of auto insurance after years of tinkering and mismanagement by the previous government. The pattern established from 2003 to 2018 of tinkering with insurance to only bring about harsh coverage reductions without net savings for consumers failed for all but the insurance sector. And yet, we continue to hear from Ministry officials that it is necessary to find savings for the insurance sector.

The following principles and proposals are intended to be a complete, interwoven, balanced package of ideas – not a grocery list from which certain items can be selected and others entirely ignored. To do so would only perpetuate the fundamental problems and imbalance that plague our current system. In addition, considerations of improvements to the sector should also take into account the ongoing pandemic, which has only highlighted the significant disparity and power imbalance between insurance companies and accident victims.

OVERRIDING PRINCIPLES FOR AUTO INSURANCE

OTLA believes that a thorough re-examination of auto insurance in Ontario is required, which necessarily involves a return to the most basic principles and goals of an effective automobile insurance system:

1. Transparency
2. Simplicity and Certainty
3. Accessibility and Early Treatment
4. Personal Responsibility and Accountability

1. Transparency

Data transparency is paramount. A revised auto policy in Ontario must be based on complete data transparency and accountability from the auto insurance sector.

The government ought to undertake a thorough, transparent and independent review of auto insurer rating and financial data to hold insurers to account for rate increases, while respecting the need for reasonable profit. The government must be prepared to disclose ALL of this financial data to the people to allow for informed decisions. If insurer profits are part of the consideration for our auto insurance system, and they certainly have been for almost three decades now, why then should there be any question about what those profits are and how they are determined?

Notably, in 2020, on average, insurers far exceeded the 5% profit target set by the Financial Services Regulatory Agency of Ontario (FSRA), ultimately realizing a staggering and enriching **27.6% profit provision**.[1] Significantly, while insurer profits have continued to soar throughout the pandemic, injured accident victims have had to delay, or completely stop treatment for months.

This drastic increase in insurer profit has not been passed on to consumers by way of reduced premiums, and, in fact, premiums have been increasing.

According to FSRA, the average premium to the end of June 2020 had increased $30 since December 2019. If each of the approximate 6.6 million drivers in Ontario experienced a $30 increase in premiums, this would result in an increase of revenue for insurers of $198,000,000.

Again in 2021 most insurers applied for and received rate increases through FSRA, and many policyholders saw their premiums increase at renewal yet again. Indeed, on average, auto insurance premiums have increased since 2018 through to 2020.[2]

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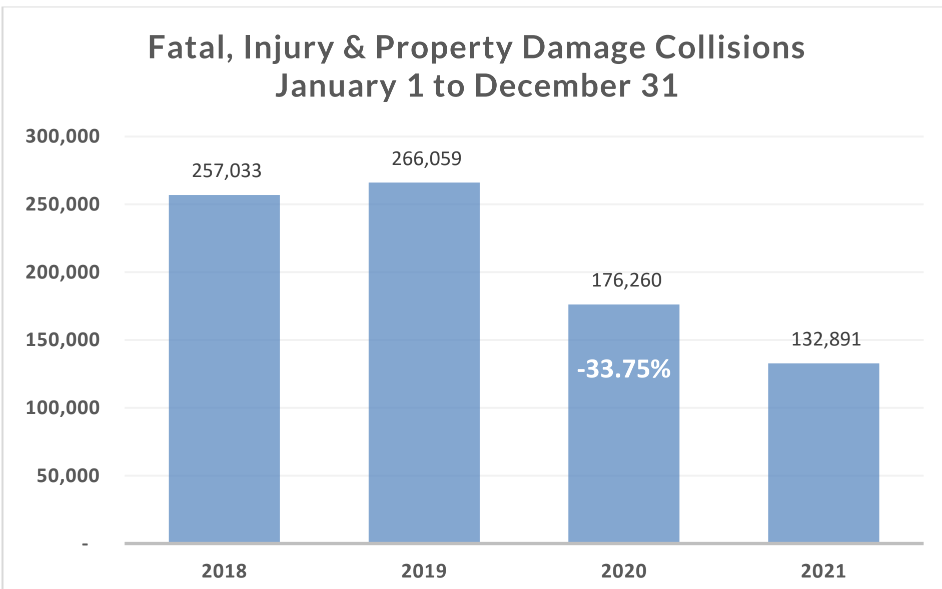
[1] Preliminary Ontario Private Passenger Vehicles Annual Review – Based on Industry Data Through December 31, 2020 (July 12, 2021) [Oliver Wyman Review] at page 18. In 2021, FSRA retained Oliver, Wyman Limited (Oliver Wyman) to review the private passenger vehicle insurance experience in Ontario, with reference to data compiled and presented by the General Insurance Statistical Agency (GISA) as of December 31, 2020, https://www.fsrao.ca/media/4426/download
[2] Supra, note 2, Oliver Wyman Review, at pages 9-10.

Rates continue to increase despite collisions and related insurance claims being down in 2020 by approximately 34% when compared to the previous year[3]. This trend continues in 2021 as highlighted in the table and graph below, with the preliminary data provided by MTO indicating that collisions may be down by approximately 40% compared to 2019.[4]

Class of Collision	2018* Jan 1 to Dec 31	2019* Jan 1 to Dec 31	2020* Jan 1 to Dec 31	2021* Jan 1 to Oct 31
Fatal	619	641	604	465
Personal Injury	39,006	36,231	25,548	20,001
Property Damage	217,408	229,187	150,108	112,425
Total	257,033	266,059	176,260	132,891

*preliminary data from 2018 through 2021 Source: Ministry of Transportation



Automobile insurance is a compulsory financial services product. Consumers are required to purchase insurance to protect their families in the event of auto crashes and should be assured that the price they are made to pay for their insurance is both fair and reasonable. Insurers continue to realize staggering profits, all to the detriment of the Ontario consumer.

Ontario can learn from the experiences in other jurisdictions. In California, for example, consumers are encouraged to participate in the insurance rate filing and review process, and may receive intervenor funding for this purpose. Ultimately, the system should be designed so that there is a transparent reporting system, with verifiable information, so that premiums can be set accordingly.

Through FSRA, the government regulates insurance companies in the interest of the public. There is a clear opportunity for the government to return some of this excess profit to consumers and

[3] MTO Collisions Statistics - 2018-2021, https://www.otla.com/docDownload/1884309
[4] *Ibid.*

OTLA urges the government to do so. At the very least, there should be no rate increases and premiums should be restored to 2019 levels.

2. Simplicity and Certainty

A 2016 poll by the Financial Services Commission of Ontario indicated that as little as 10% of all policyholders really understand the coverage provided by their Ontario auto policy.[5] Our own experience as legal professionals supports that view: the vast majority of people who come to see us have very little basic knowledge of their auto insurance coverage. That should come as no surprise, since those who work daily within this system have a difficult time interpreting the complex legal maze that is now Ontario auto insurance.

While the comprehension of the policy is limited, the ability of the average policyholder to competently manage his or her own insurance claims and related disputes is essentially non-existent. As a result, legal assistance is often sought after most accidents because most victims, even lawyers who practise outside personal injury, frequently feel overwhelmed by Ontario's complex auto insurance system.

The accident benefits system (also referred to as the no-fault system) in Ontario should be designed to be simple and clear, so that most injured persons can submit and handle their own claims.

Millions of people in Ontario access health benefits through their private work insurance every year. It is not necessary to hire a lawyer in order to do so. Not one of them has to call an insurance adjuster to negotiate payment. Not one of them has to attend an insurance medical examination. As long as the treatment falls within the terms and limits of the healthcare insurance policy, it is paid. The automobile no-fault system in Ontario ought to be designed in the same manner.

Accident benefits legislation and regulations involve multiple, often incomprehensible tests for benefit and compensation entitlement that have led to decades of litigation, at an enormous cost to parties and to Ontario. As much as possible, we must eliminate those tests that lead to uncertainty and litigation.

Simply put, consumers should know and understand what they are buying when they pay for auto insurance every year.

A revamped and simplified Ontario auto insurance system should allow most policyholders to independently handle their own claim for benefits, while only retaining legal representation when necessary to manage disputes.

If the no-fault system is designed appropriately, the number of points of conflict between an insurer and their insured should be substantially reduced, and the number of resulting disputes should decrease, to the point where lawyers will no longer be routinely required to assist with no-fault benefit claims.

[5] Financial Services Commission of Ontario, *Auto Insurance Reforms Require Informed Decisions*, https://www.fsco.gov.on.ca/en/pubs/News-Releases/Pages/2016-06-15-auto-insurance.aspx

3. Accessibility and Timely Treatment

The insurance system should be able to quickly respond to the legitimate needs of accident victims. Not only is it clear that victims benefit from early, appropriate treatment and support, but it is also evident that insurers can limit future costs by supporting appropriate care on a timely basis. However, the benefits system should not attempt to be all things to all victims. The focus ought to be on short term, reasonable medical and financial assistance, except for those victims with catastrophic injuries whose care is more extensive.

Currently, the design of our system allows for, and actually encourages, far too many disputes. Multiple complicated forms, difficult to understand entitlements, and an environment wherein victims are treated as fraudsters, and insurers are treated as the enemy, all contribute to these disputes. This dysfunctional approach leads to significant delays for injured people when attempting to access treatment, and adds considerable cost to the system. This is particularly evident when one considers the multiple, expensive medical assessments that are now routinely and excessively ordered by insurance companies. There can be no doubt that delays in obtaining treatment, unnecessary medical assessments, and disputes with one's own insurance company, act as a significant barrier to recovery. **Instead, the focus for Ontario's injured people should be on reasonable, easy-to-access treatment and financial support.**

4. Personal Responsibility and Accountability

Consumers in Ontario expect that, if they are injured because of the negligence and conduct of someone else, they will be able to recover reasonable compensation for their losses from those responsible. In the current system, nothing could be further from the truth. No other province in Canada with a tort system has imposed the substantial restrictions on the rights of innocent accident victims that we have in Ontario. The rationale given by previous Ontario governments for these draconian restrictions was that the right to sue (*the right to justice*) was restricted as a trade-off for a comprehensive no-fault system.

Unfortunately, over the past several years, Ontario has further restricted the rights of innocent victims to sue and it has also reduced the amount of no-fault accident benefits available to all injured people. The promised trade-off is now a fallacy and these previous legislative changes have created a failed automobile insurance product.

OTLA's proposal, which is set out below, represents a fundamental re-ordering of auto insurance after years of tinkering and mismanagement by the previous government. With the current government, there is hope and a clear opportunity to re-assert a more appropriate balance and deliver fundamental fairness and justice for injured accident victims and, at the same time, provide premium relief to Ontario's drivers.

We are urging a renewed emphasis on basic, fundamental tort rights, as is commonplace in other provinces. This is a model that works. It is a model that needs to be re-emphasized in Ontario.

A renewed emphasis on tort is consistent with the Common-Sense approach taken by previous Conservative governments in Ontario. In 1996, for example, the government brought about reforms that helped restore fundamental third-party rights for injured accident victims.

This is consistent with our proposal: a renewed emphasis on personal responsibility and accountability.

Why should, for example, the innocent, injured collision victim forgo over $40,000 in damages through a secret deductible to benefit the impaired driver or the texting driver distracted by their cellphone? Why should those negligent drivers benefit at the expense of innocent victims?

We have moved too far from those ideals in this province.

OTLA'S PROPOSAL: A RETURN TO COMMON SENSE

We need to restore essential rights for innocent injured accident victims and return to simplicity, certainty and efficiency. **OTLA's proposals are intended to be a complete, interwoven, balanced package that should not be considered as individual proposals.** We are urging a renewed emphasis on basic, fundamental tort rights, as is commonplace in other provinces.

ACCIDENT BENEFITS

1. Return to the "loser pays" system under the LAT

OTLA strongly recommends that we return to the "loser pays" system for Licence Appeal Tribunal (LAT) hearings, similar to what exists under the *Rules of Civil Procedure* in the Province of Ontario. Making the unsuccessful party contribute towards the legal costs of the successful party promotes access to justice and fairness in the system. Without it, access to justice is lost, and with it, personal responsibility and accountability.

The LAT dispute resolution process is a "David and Goliath" situation that favours the well-resourced insurer. Disbursements are not ordered and costs are very rare. Even when costs are awarded, the quantum is so low it has no deterrent value. The present design and application of the system economically incentivizes insurers to deny legitimate claims, leaving accident victims (many of whom are unable to work and have limited resources) to personally fund their disputes or go without.

Given that the expense associated with such disputes, many meritorious claims are not advanced. This was highlighted by the court on a recent class action jurisdiction motion, wherein Mr. Justice Belobaba determined the LAT had sole jurisdiction over the issues in dispute and noted that as a result, "individual claims will not be pursued and the impugned insurers will arguably be enriched in the millions of dollars. Such is the consequence of the jurisdiction design decision."[6]

The restoration of access to justice through the availability of costs is a solution that is shared by those representing insurers and injured victims alike. As elaborated by Stephen Ross, past President of the Insurance Law section of the Ontario Bar Association and Chair of the special Joint Insurance Committee established to provide advice on legislative reform to the Ontario government:

> As it presently stands, there is a disparity in economic resources to fund litigation. If the dispute is on the issue of a catastrophic designation or post-104 IRB's, the amounts at issue

[6] *Dorman v. Economical Mutual Insurance Company*, 2020 ONSC 4004 (CanLII) at para. 23.

can be very significant. An insurer presumably has the resources to retain appropriate experts and hire counsel to engage in the litigation process. If there is no ability to achieve cost indemnity for amounts spent on experts or legal counsel, few applicants will have the resources to fund the litigation and certainly not in a manner congruent with the insurer's anticipated approach. This presents as the potential for a vastly unequal playing field and represents a significant barrier to justice for the very group whose interests the LAT was designed to protect.[7]

The return to the "loser pays" system, including the availability of costs and disbursements, "will allow for applicants to properly fund the dispute and concerns about adverse costs awards can be addressed by various considerations, including offers to settle."[8]

A return to the "loser pays" system will also reduce the number of disputes at the LAT by deterring unmeritorious denials or unmeritorious applications, and encouraging parties to resolve disputes or face cost consequences. Notably, since the creation of the LAT, the number of Applications received by the LAT has continued to grow every quarter, with an increase to date of over 32% in the number of LAT Applications.[9] At the same time, however, the average length of time between the filing of a LAT Application and the date of its Case Conference, its hearing, and even its decision, continues to dramatically increase.[10] For example, the number of days that it takes to reach a decision at the LAT has gone from 323 days (approximately 10.5 months) to a concerning 589 days (approximately 1 year and 7 months).[11] Ultimately, the dispute resolution of the LAT does not work without a "loser pays" system.

2. Extension of the time limit for medical, rehabilitation and attendant care benefits by 104 weeks

The past 22 months have seen surges in COVID-19 cases consequent restrictions and lockdowns. During this time, businesses and services have either been unavailable, have provided scaled-down services, or have had to function in a virtual platform, where possible. This includes services for physical and non-physical rehabilitation, treatment and therapy for accident victims.

The *Statutory Accident Benefits Schedule*, O Reg 34/10 (*SABS*)[12] requires that auto insurance companies pay the reasonable and necessary medical, rehabilitation and attendant care expenses for those individuals who are injured in motor vehicle collisions in Ontario. Section 20[13] of the *SABS* sets out the time limits within which insurance companies must pay those benefits for accident victims. The section specifically limits payment of these benefits to 260 weeks (5 years) for adults

[7] Stephen Ross and Alon Barda, "LAT – 2 Years Later: Where We Were, Where We Are, and Where We Are Headed", Rogers Partners LLP (January 26, 2018), Tricks of the Trade 2018. See http://www.rogerspartners.com/wp-content/uploads/2018/02/Tricks-of-the-Trade.pdf pages 20 to 21.
[8] *Ibid*. at page 20.
[9] Licence Appeal Tribunal (LAT) Statistics - 2017-2021, https://www.otla.com/docDownload/1884311
[10] *Ibid*.
[11] *Ibid*.
[12] O. Reg. 34/10: Statutory Accident Benefits Schedule, https://www.ontario.ca/laws/regulation/100034
[13] Section 20, O. Reg. 34/10: Statutory Accident Benefits Schedule - Effective September 1, 2010, https://www.ontario.ca/laws/regulation/100034#BK26

who are injured beyond the minor injury level, but who are not catastrophically impaired. For children, section 20 extends the time for payment of these benefits to their 28th birthday.

As a result of the ongoing pandemic, medical and rehabilitation treatments, which are normally provided in person, have simply not been available for the accident victims who desperately require treatment. This includes physiotherapy, chiropractic treatment, osteopathic treatment, massage therapy, acupuncture, occupational therapy, attendant care and other in-person services, such as psychological counselling and therapy. While some accident victims have been able to obtain modified treatment and therapies, it has been on an inconsistent basis and many accident victims have not been able to access treatment at all. Some do not have access to computers and the internet, which leaves them in a position where no treatment or counselling of any kind is available to them, and the likelihood of recovery becomes less likely with the passage of time.

As the pandemic continues to be the most significant health emergency of our time, the clock continues to tick down on many of Ontario's accident victims' access to medical and rehabilitation benefits under the SABS. While it is understood that delay in access to treatment because of COVID-19 is inevitable, eligibility of injured accident victim to benefits under the SABS should not be limited because of the public health crisis.

OTLA recognizes the critical nature of the public health measures that have been put in place during the pandemic. However, the only way to ensure that the critical treatments accident victims require are not lost, or denied through the passage of time, during the various lockdowns and pandemic, is by mandating an extension of the limitation period in Section 20 of the *SABS*.

OTLA recommends that the government introduce an amendment to the *SABS* that would extend the temporal limit under Section 20 of the *SABS*. **Specifically, OTLA recommends an amendment to the *SABS* that would extend the payment of medical, rehabilitation and attendant care benefits for an additional 104 weeks from the time the pandemic is officially declared over for persons over the age of 18, and for 104 weeks following the 28th birthday for children injured in motor vehicle collisions**.

OTLA's proposed amendments will not adversely affect insurers because insurers' maximum financial exposure would continue to apply. The proposed amendment is only with respect to time, ***not*** monetary limits. Conversely, without the proposed amendment, it is likely that the ability of many Ontario accident victims to access necessary care, treatment and rehabilitation will be unfairly limited, through no fault of their own, due to the public health restrictions necessitated by the COVID-19 pandemic.

3. Two categories of claims: catastrophic and non-catastrophic

Medical rehabilitation and attendant care benefits are payable to claimants under one of two categories, catastrophic and non-catastrophic claims:

a. **Catastrophic claims** – As announced almost 3 years ago in April 2019, a return to $2,000,000 as the default for those defined as catastrophically injured within the *Statutory Accident Benefits Schedule* (*SABS*) is critical. However, the definition changes made in 2016 have severely limited the number of individuals who can qualify as catastrophically impaired. Those who qualify are the most severely injured and will need

both immediate and ongoing help. If that help is not provided by the *SABS* via the private auto insurer, it will fall upon government institutions such as OHIP, long-term care and the Ministry of Children, Community and Social Services to pay for these needs.
The definition of catastrophic impairment within the *SABS* should be amended to allow for the determination of Marked Impairment or 55% Whole Person Impairment at any time after the accident. Accordingly, O. Reg. 34/10, Sections 3.1 (2a) and 3.1(3a) [14] "*two years have elapsed since the accident*," should be repealed. Without this amendment, those who are catastrophically in need of medical treatment will likely be left without benefits for a significant period of time.

b. **Non-catastrophic claims** – Presently, our system divides non-catastrophic claims within the Minor Injury Guideline (MIG) and those claims not within the MIG. Unfortunately, much dispute has arisen over which claimants should not be in the MIG. The insurance industry has previously advised that each dispute to determine whether a claimant is in the MIG costs on average over $15,000.

   Instead of fighting over the MIG, each claimant should have up to $20,000 made available for medical, rehabilitative and/or attendant care benefits payable, so long as the claimant has the appropriate physician and/or qualified healthcare practitioner's approval for that treatment.

4. **Indexation of all benefits under the *SABS***

OTLA strongly recommends that going forward, all benefits available under the *SABS* be indexed to inflation. Inflation erodes the value of these benefits over time making indexation necessary. For example, in 1996, income replacement benefits were set at a maximum of $400 per week. Twenty-five years later, the effect of inflation makes that same benefit today worth only $249 per week (in 1996 dollars).

5. **Service of documents by electronic means**

We commend the government's strong measures taken in response to COVID-19 towards the modernization of the court system, through the provision of electronic options for various aspects of court proceedings. The changes to the *Rules of Civil Procedure*, which came into effect January 1, 2021, are a strong step forward in getting our court system caught up with technological and practical realities. One key step forward is the authorization of service of documents by electronic means, such as e-mail, which in our members experience have reduced costs and prioritized access to justice.

However, similar measures are lacking and equally needed in our *SABS* claims system. To illustrate the need for similar measures, presently, certain insurers rely on subs. 64(2)(e)[15] of the *SABS* to refuse the delivery of documents by electronic means, such as e-mail.

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[14] Section 3.1, O. Reg. 34/10: Statutory Accident Benefits Schedule - Effective September 1, 2010, https://www.ontario.ca/laws/regulation/100034#BK4
[15] Section 64, O. Reg. 34/10: Statutory Accident Benefits Schedule - Effective September 1, 2010, https://www.ontario.ca/laws/regulation/100034#BK91

For ease of reference, subs. 64(2)[16] of the *SABS* states as follows:

> **Notices and delivery**
>
> 64.(2) Any document, including a notice in writing, required or permitted under this Regulation to be given to a person may be delivered,
>
> …
>
> (e) by electronic means, **if the intended recipient of the document consents** to delivery by electronic means. [emphasis added to original]

A refusal by an insurer to consent to the delivery of documents by electronic means, such as e-mail, is contrary to access to justice, unnecessarily increases costs and delays the administration of benefits to injured accident victims. Amendments similar to the recent amendments in our court system, which authorize electronic service of documents without first requiring the consent of the other party, should be adopted in our *SABS* system. Insurers are sophisticated, familiar with electronic means of communication and should adapt to the current practical and technological reality.

Having regard to the nature of the *SABS* as consumer protection legislation, OTLA proposes the following amendment to subs. 64(2)(e) of the *SABS*:

> **Notices and delivery**
>
> 64.(2) Any document, including a notice in writing, required or permitted under this Regulation to be given to a person may be delivered,
>
> …
>
> (e) by electronic means, including e-mail,
>
> (i) in the case of an insurer, addressed to the insurer or its chief executive officer at the insurer's head office in Ontario as identified in the records of the Chief Executive Officer,
>
> (ii) in the case of an insured person, if the person consents to delivery by electronic means, and
>
> (iii) in the case of the solicitor or authorized representative of an insured person, addressed to the solicitor or authorized representative.

The above proposed amendments would ensure that insurers embrace the current practical and technological reality, while at the same time protecting individual consumers who may be unfamiliar with or lack sufficient access to electronic means of communication, such as e-mail. This proposed amendment would result in efficient communications between insurers, insureds and their counsel. It would also reduce costs, as well as continuing this government's commitment to strong measures towards the modernization of access to justice.

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[16] *Ibid*.

TORT CLAIMS

In accordance with a common-sense approach to insurance, OTLA recommends the expansion of tort rights to innocent, seriously injured victims as outlined below. This is also consistent with principles of personal responsibility and accountability.

1. **Repeal of the Deductible** - OTLA recommends that the secret deductible on pain and suffering damages be repealed. The threshold would be left in place with the exception noted below for healthcare expenses.

    a. This year, the secret deductible on pain and suffering damages now exceeds $40,000.00. It stands at $41,503.50. Any claim for pain and suffering damages of less than $138,343.86 is subject to this deductible.[17]

    b. More than 80% of the innocent accident victims in the Ontario who pursue tort claims are subject to this deductible. In addition, no victim is entitled to payment for pain and suffering damages unless their injuries are serious and permanent (threshold test). With this threshold test in place, the legislative goal of keeping smaller claims out of the court system is met.

    c. The secret deductible is unnecessary, redundant and unfair, and causes significant hardship for those injured in car accidents due to the negligence of another driver, while that negligent driver's insurance company derives an unfair economic benefit. The insurer for the at-fault driver gets to keep that deductible, at the expense of an innocent accident victim.

2. **No Threshold for Healthcare Expenses** – Despite the fact that the threshold may remain for pain and suffering damages, it should not be expanded to apply to other heads of damage such as healthcare expenses. The benefits provided under the *SABS* for medical, rehabilitative and attendant care benefits have been steadily reduced both in terms of monetary limits ($65,000 total available for non-catastrophic, non-MIG cases, for example) and in terms of temporal limits (Five years is the maximum time period for non-catastrophic, non-MIG cases, for example). There are many individuals who are seriously, but not catastrophically, injured. They face a shortfall in coverage for their health care expenses under the accident benefits system and should be entitled to claim necessary healthcare expenses against an at-fault party in a tort action.

3. **Past Loss of Income** – Victims of negligence or wrongful conduct have always been entitled to claim 100% of their loss of income in tort actions. However, victims of car accidents are only entitled to claim 70% of their past loss of income to the date of trial (and 100% for future loss of income). Any other victim of negligence still gets 100% of their past loss of income. Arbitrarily limiting past loss of income for car accident victims is unfair and provides auto insurers with an economic incentive to delay the settlement or trial of an action. This is particularly problematic in light of the backlog in getting cases to trial caused by the COVID-

[17] Financial Services Regulatory Authority of Ontario, 2020 Automobile Insurance Indexation Amounts, https://www.fsrao.ca/industry/auto-insurance-sector/guidance/2020-automobile-insurance-indexation-amounts

19 pandemic. Why should car accident victims be treated differently than other victims in their pursuit of justice? **OTLA recommends that the restriction to 70% be removed and car collision victims be entitled to claim 100% of their past loss of income**.

4. **Pre-Judgment Interest** - Rule 53.10 of the *Rules of Civil Procedure* requires that a negligent defendant pay 5% pre-judgment interest on the plaintiff's pain and suffering damages from the date of the accident forward. The reason is because the law recognizes that pain and suffering damages are owed to the victim as soon as the negligent act of the defendant occurs. In 2016, the Liberal government carved out an exception to pre-judgment interest payable to innocent victims injured in motor vehicle accidents. The result is a reduction from the standard 5% to an amount that presently stands at 0.5%[18] for victims of motor vehicle accidents. Defendants need to be sufficiently motivated to resolve claims at the earliest reasonable opportunity. With limited judicial resources, this is in the best interest of the public. With this reduction, as with the reduced amount payable for past loss of income in motor vehicle accident cases, insurers are not incented to settle meritorious claims in a timely fashion given that their return on investments is likely significantly higher than any pre-judgment interest they will ultimately have to pay. Pre-judgment interest on pain and suffering damages at 5%, in accordance with the *Rules of Civil Procedure*, both for motor vehicle accident and non-motor vehicle accident claims, is not only fair, but it removes the incentive for insurance companies to delay resolution of claims. Again, why should car accident victims be treated differently than other victims in their pursuit of justice?

OTLA supports and encourages reforms to Ontario auto insurance that provide more transparency and better protection of consumers and injured accident victims.

Insurers have continued to make profits throughout the pandemic while injured accident victims had to delay treatment, stop treatment or to look to virtual treatment. Many treatment providers were forced to close their offices completely and struggled to provide piecemeal services through virtual means as the pandemic progressed. Treatment was not accessible by all and continues to be provided at reduced levels as we persist through the current Omicron surge. The *SABS* provide for 5 years of medical/rehabilitation benefits for non-catastrophic claims. To date, accident victims have lost more than 20 months of comprehensive and continuous treatment, and many are experiencing relapses and delayed recovery in their conditions due to delayed treatment.

ELIMINATION OF CIVIL JURIES

Ontario has long grappled with a backlog of civil cases, which has increased exponentially over time. Civil jury cases were not being called to trial on any regular basis in many jurisdictions even before the COVID-19 pandemic. As a result of the COVID-19 pandemic, the Ontario Superior Court of Justice was unable to proceed with civil trials for several months beginning in March 2020 while the courts grappled with implementing technological innovations to allow proceedings to progress when the physical courts were closed. In the fall of 2020 non-jury virtual trials were initiated in certain judicial centres. Uncertainty remains regarding trial time availability and resources regardless of the pandemic. Longer and complex trials are being delayed in many jurisdictions.

[18] Prejudgment and postjudgment interest rates, https://www.attorneygeneral.jus.gov.on.ca/english/courts/interestrates.php

There is a lack of consistency in the availability of access to justice throughout various Ontario jurisdictions. All jurisdictions are struggling to provide access to justice to civil matters.

In 2020, it is believed that only Toronto briefly attempted a few civil jury trials commencing the week of October 5, 2020, the first since the pandemic started. However, by November 21, 2020, even the potential of a civil jury in most judicial centres had been restricted when Chief Justice Morawetz announced that all new jury selections for new jury trials, civil or criminal, be suspended until January 2021 in all areas of the province except those deemed Green Zones.[19] Following this, all civil jury trials were suspended until at least May 3, 2021 at the earliest[20], while jury trials that had already started were subject to the discretion of the trial judge. After May 2021, each jurisdiction attempted to provide further guidance on whether civil jury trials would be heard. It is not clear how many civil jury matters, or civil matters alone, have been delayed but our membership reports extraordinary delays in all jurisdictions. The current systems for dealing with civil jury trials has created inconsistency, delay and inherent unfairness to the parties.

The pandemic has significantly affected the civil justice system. As recently stated by the Court of Appeal of Ontario, "**The civil justice system in Ontario faces an unprecedented crisis**. Among other challenges, the COVID-19 pandemic has significantly reduced the availability of courtrooms. Trial courts have necessarily had to prioritize criminal and family law cases to the detriment of civil cases' timely resolution" [emphasis added].[21]

With a patchwork of various directives from jurisdictions and little hope of civil jury trials being called to trial during the pandemic, motions to strike juries began to be heard in the hopes that civil matters could reach a trial date on a judge alone lists. There have already been several decisions from Ontario courts striking civil juries in cases where keeping a jury would result in an adjournment of the trial[22]. The message from the courts has been clear – a judge alone virtual trial will serve the administration of justice in circumstances where there is uncertainty about when civil jury trials will be safe once again, and there is already backlogs in our courts. The backlog is only intensifying, especially in busier judicial centres. Motions to strike juries are now being brought before the court regularly, taking up valuable court time and resources. The courts are striking jury notices in civil cases as a result of these motions, but at a cost to the parties and the administration of justice. Without a legislative change the patchwork of directives and the motions to strike juries are likely to continue for the foreseeable future.

In a ruling of January 25, 2021 on the issue of the right to a jury in civil actions, the Ontario Court of Appeal pointed out that, "It is well settled in the jurisprudence that the substantive right to a civil jury trial is qualified because a party's entitlement to a jury trial is subject to the power of the court

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[19] Notice to the Profession and Public Regarding Court Proceedings, https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/notice-to-the-profession-and-public-december-22-2020/

[20] Notice to the Profession and Public Regarding Court Proceedings, https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/notice-to-the-profession-and-public-december-22-2020/

[21] *Louis v. Potrais*, 2021 ONCA 49 at para. 1 - https://www.ontariocourts.ca/decisions/2021/2021ONCA0049.htm

[22] See for example n *Belton v. Spencer*, 2020 ONSC 5327 and also *Louis v. Potrais*, 2020 ONSC 5301 (CanLII), aff'd 2021 ONCA 49.

to order that the action proceed without a jury" and that "**the right to a jury trial is subject to the overriding interests of the administration of justice and issues of practicality**" [emphasis added].[23]

Given the new Omicron variant it is expected that further delays will develop as courthouse staff, potential jurors and other members of the system contract COVID-19, or if further lockdowns are implemented. Jury trials are currently being delayed and given new trial dates, some more than a year into the future. As of January 19, 2022, Chief Justice Morawetz has provided another notice to the profession that juries will not be selected for any jury trial in Ontario until February 28, 2022.[24]

Many jurisdictions had made it clear to the civil bar that jury trials would not be possible even before this directive. For over a year, cases have been delayed and reassigned trial dates in various jurisdictions. In Brampton, our members are advising us that January 2022 civil jury matters will now be placed on the January 2024 trial list. This is a two-year delay, after having waited years for the January 2022 trial date. The interests of the administration of justice cannot be met with such delays.

Delays in hearing civil jury matters are impacting real lives. Recently, the CBC reported on Krystal Mann's civil jury matter in Windsor Ontario.[25] Ms. Mann's car crash occurred in November 2014 and her trial has been delayed. It was reported that she is unable to work and is paying for therapies out of her own pocket. She struggles to put food on the table for her children. She has had to remortgage her home and borrow money from her mother. Her civil jury trial has been rescheduled to occur in October 2023, nine years after her car crash. Ms. Mann had filed documents in 2019 asking for a trial date. The Windsor jurisdiction has only held one criminal jury trial which required the use of 3-4 courtrooms. There have been no civil jury trials at all in Windsor and cases have been adjourned to new trial dates. At a recent assignment court in November 2021, the earliest date available for a civil jury trial was 2024. Unfortunately, Ms. Mann's story is not unusual and similar stories can be heard across Ontario.

While injured Ontario citizens have been waiting for trial dates and their cases delayed for years, the insurance companies have continued to increase their profits. Delay is a windfall to insurers under the current *Insurance Act*, which limits past income loss to 70%, and which provides for an increasing secret deductible on damages for pain and suffering. Every day of delay means that accident victims will be penalized the value of 30% of their income loss.

Further concerns have arisen recently regarding the selection of juries and what that may look like in the future even if civil jury trials commence. It is understood that currently smaller jury pools are being convened, thus limiting jury selection to a lesser number than previously. The need for jurors to be vaccinated will also limit jury selection. The idea that a jury allows the public to be tried by

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[23] *Louis v. Potrais*, 2021 ONCA 49 at paras. 17 and 24 - https://www.ontariocourts.ca/decisions/2021/2021ONCA0049.htm
[24] Notice to the Profession and Public Regarding Court Proceedings, https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/court-proceedings-notice/
[25] Woman severely injured in 2014 car crash 'trapped in purgatory' as pandemic delays Ontario civil trial, https://www.cbc.ca/news/canada/windsor/victim-struggling-civil-jury-trial-delays-1.6211231

their peers is already complicated by race, ethnicity and gender concerns but is now also complicated by a further reduction in the jury pools.

Civil jury trials take longer to proceed. The pace of a jury trial is slower. They are often set for longer dates than judge alone trials. Judge alone trials can proceed in tranches, or broken up over time, whereas civil jury trials cannot. Judge alone trials are becoming more common place and efficient, with the parties, witnesses and judge using Zoom and CaseLines. Civil jury trials on the other hand have been creating a delay in the administration of justice and this has only been compounded by the pandemic.

Justice Strathy made the following comment at the opening of courts in 2021:

> "We need to examine the way we do justice in criminal, family and civil cases and ask ourselves whether there is a more just, cost-effective and cost-efficient way to do things at every stage of the proceeding. That process must be fair, it must respect and promote the rights and freedoms contained in the *Charter* and it must not be unreasonably delayed."[26]

The problems created by the civil jury system are not just a pandemic era problem. The current backlog will have long lasting impacts on the future of our civil justice system. Given the significant backlog in cases, and the current crisis the civil justice system faces, OTLA recommends that all civil jury notices be struck until further notice so that trials may proceed virtually with a judge alone until the pandemic is officially declared over. This will eliminate the need for patchwork directives and costly motions to strike jury notices.

However, this alone will not solve our current problems within the civil justice system. The Honourable Doug Downey, Attorney General, sought input to potential amendments to the *Courts of Justice Act* regarding civil juries by letter dated June 5, 2020. OTLA was pleased to provide input on this potential amendment and reiterates our submissions as set out in our June 15, 2020 response.[27]

Motor vehicle collision cases are by far the largest number of civil files currently before our courts. Based on information provided by the Ministry of Attorney General, in 2019 as an example, of the almost 184,000 cases pending before the courts across the province, over 122,000, or 66.5% of cases, were motor vehicle collision cases. Based on additional information provided by the Ministry of Attorney General, between 2015 to 2020 over 90% of jury trial notices that have been filed in civil motor vehicle collision cases were filed by the defendant insurer.

[26] Court of Appeal for Ontario, Opening of the Courts of Ontario for 2020 - https://www.ontariocourts.ca/coa/en/ps/ocs/ocs.htm
[27] OTLA Submission to MAG on Civil Juries, https://www.otla.com/docDownload/1617176

OTLA recommends the permanent elimination of civil juries altogether subject to cases which trigger a public interest and engage community values or a person's character, where the right to a verdict of one's peers serves an important function in a free and democratic society, specifically cases arising from:

a. Defamation
b. Intentional Torts
c. Professional and Institutional Negligence in Healthcare
d. Assessment and Award of Punitive Damages.

As set out in our submissions of June 15, 2020, OTLA's proposal represents a fair balance, maintaining the right to a jury in a small subset of appropriate cases, while eliminating juries in all others to reduce the backlog in the courts that pre-dated, but has been worsened by, the pandemic. These changes will provide access to justice to Ontarians while saving the province and litigants substantial costs and delay. The proposed exemptions listed above represent a small fraction of the civil jury trials in the Superior Court of Justice.

CONCLUSION

In conclusion, a fair and efficient tort system, a simple, easily accessible no-fault system that provides immediate short-term access to treatment and financial support, and a system that provides reasonable protection with few potential areas of dispute and minimal transaction costs, is the system that the people of Ontario deserve. Above all, we urge the government to make transparency, consumer protection and fairness to Ontario residents the paramount guiding principles upon which all decisions regarding automobile insurance are made.