1 The Legislative Regime—Key Concepts in the Insurance Act

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I. Introduction

This chapter explores key concepts in the Ontario *Insurance Act*[1] for automobile accidents. In exploring those critical concepts, this chapter will provide an overview of how particular sections of the *Insurance Act* work together, how they work with other key acts and regulations, how they relate to Ontario's standard automobile insurance policy, and how important provisions have been interpreted in the jurisprudence. One of the objectives of this chapter is to show how different pieces of the *Insurance Act*'s intricate framework fit together, and how that framework helps form a complex and comprehensive legal structure that applies to automobile accidents and the proceedings that may arise therefrom.

II. Key Statutory Definitions

A. "Automobile"

1. The Importance of the Definition of Automobile

In Ontario, there are two separate but related compensation systems for those who have been involved in automobile accidents: (1) the tort system, and (2) the statutory accident benefits system.

The tort system, as discussed in this chapter, encompasses civil actions based on the common law cause of action in negligence as it is modified and governed by Ontario's insurance legislation. These tort claims require that the party seeking compensation prove not only that the other party caused them harm, but that the harm was the result of careless conduct (fault).

A detailed review of statutory accident benefits (or accident benefits) is beyond the scope of this book. However, there are no-fault auto insurance benefits made available and paid in accordance with a regulation under the Ontario *Insurance Act*: the *Statutory Accident Benefits Schedule*, commonly called the SABS.[2]

In both systems, the definition of automobile is critical. For example, in the no-fault system, it must be proven, among other things, that there was an incident involving the use or operation of an automobile for accident benefits to be paid.[3]

In the tort context, because of the wording of the Ontario *Insurance Act*, there must be loss or damage arising out of the ownership or directly or indirectly from the use or operation of an automobile before any of the following can be triggered:

1. **Obligations to indemnify:** Whether an auto insurer has a duty to pay for the losses that its insured is legally responsible for in a lawsuit (according to

1 RSO 1990, c I.8.

2 O Reg 34/10.

3 SABS, s 3(1).

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the terms and limits of the policy).[4] Those losses include damages, prejudgment interest on those damages, and the legal costs of the plaintiff in a proceeding.

2. **Obligations to defend:** Whether an auto insurer has a duty to defend (though not necessarily indemnify) its insured who has been sued.[5]
3. **Uninsured and underinsured coverage:** Uninsured and underinsured claims can happen when a plaintiff's damages exceed the available insurance limits, or where a tortfeasor does not have any insurance coverage or cannot be identified, or where the tortfeasor's insurance is not collectible.[6] In those circumstances, the injured party can commence a proceeding against their own insurer for damages, interest, and legal costs they are entitled to recover from the uninsured or inadequately insured tortfeasor.
4. **Protected defendant status:** If a proceeding is brought for damages and losses for bodily injury or death arising out of the use or operation of an automobile,[7] then certain protections from liability or damages may be given to the named tortfeasors.[8] These named tortfeasors are called "protected defendants," and more will be written about them later in the book.
5. **The "driving without insurance" defence:** Owners and lessees who operate their automobile on a "highway" (as defined in legislation) without liability insurance or who cause or permit their automobile to be operated on a highway without liability insurance are barred from bringing a personal injury lawsuit arising out of the use or operation of the automobile.[9]

Accordingly, whether or not an accident involves an automobile can be a critical issue. But what exactly is an automobile? How is it defined? And where is it defined?

2. The Definition of Automobile and the Ontario Insurance Act

In most cases, it is obvious that an accident involves an automobile. For example, cars, buses, sport utility vehicles, jeeps, pickup trucks, vans, and bobtail trucks are all clearly automobiles that we see regularly on the roads.

4 *Insurance Act*, s 239.

5 *Insurance Act*, s 239. See also *Russo v John Doe*, 2009 ONCA 305.

6 *Insurance Act*, ss 239, 265, 251, 252; *Uninsured Automobile Coverage*, RRO 1990, Reg 676; *Ontario Automobile Policy (OAP 1) Owner's Policy*, ss 5.1.2, 5.2; *OPCF 44R: Family Protection Coverage* endorsement, s 3. There are limits on what can be recovered, which is beyond the scope of this chapter.

7 The use or operation of the automobile must be in Canada or the United States or a jurisdiction designated in the SABS. See *Insurance Act*, s 267.41.

8 *Insurance Act*, ss 267.3; 267.4; 267.5(1), (3), (5).

9 *Insurance Act*, ss 267.6, 224(1). See also *Compulsory Automobile Insurance Act*, RSO 1990, c C.25, s 2; *Highway Traffic Act*, RSO 1990, c H.8, s 1(1) [HTA]. The use or operation of the automobile must be in Canada or the United States or a jurisdiction designated in the SABS; see *Insurance Act*, s 267.41.

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But there are some motor vehicles where the answer is not so clear. What about a go-kart? How about farm tractors? Boats? Airplanes? In those situations, we must turn to applicable legislation, regulations, and case law.

The Ontario *Insurance Act* is particularly important to proceedings concerning automobile accidents. Part VI of the Act, for instance, is specifically dedicated to automobile insurance and addresses, among other things, the standard conditions for automobile insurance policies,[10] who is covered under a given insurance policy,[11] what automobiles are covered under that same policy,[12] when liability coverage is triggered for automobile accidents,[13] the compensation scheme for automobile property damage claims (known as direct compensation),[14] mandatory benefits available to those who have been in an automobile accident (statutory accident benefits),[15] and the unique rules that apply to court proceedings for loss or damage from bodily injury or death arising from the use or operation of an automobile.[16]

"Automobile" is broadly defined in section 1 of the *Insurance Act* to include "a trolley bus and a self-propelled vehicle, and the trailers, accessories and equipment of automobiles, but does not include railway rolling stock that runs on rails, watercraft or aircraft."[17] Under this definition, the trailers of automobiles are also automobiles, but boats and airplanes are not.

However, part VI of the Act provides its own definition of the term. This is critically important because, as noted, part VI is specifically dedicated to automobile insurance. Part VI defines "automobile" to include:

> (a) A motor vehicle *required under any Act to be insured under a motor vehicle liability policy*; and
>
> (b) A vehicle prescribed by regulation to be an automobile.[18]

For the purposes of part VI of the Act, automobiles include motor vehicles that are required to have liability insurance under "any Act." But what does "any Act" mean? Would that include the statute in another Canadian province or territory? How about the statute in another country altogether, such as the United States?

10 *Insurance Act*, s 234; *Statutory Conditions—Automobile Insurance*, O Reg 777/93.

11 *Insurance Act*, ss 239(1), (4).

12 *Insurance Act*, ss 239(1), (3).

13 *Insurance Act*, s 239(1).

14 *Insurance Act*, s 263.

15 *Insurance Act*, ss 239(2), 268.

16 *Insurance Act*, ss 267.3-276.

17 *Insurance Act*, s 1.

18 *Insurance Act*, s 224(1) (emphasis added).

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This question was addressed by the Court of Appeal for Ontario in *Benson v Belair Insurance Company Inc*.[19] In that case, the Court of Appeal for Ontario determined that "any Act" means any relevant act in Ontario, which includes regulations as well.

Importantly for motor vehicle accident claims, under the Ontario *Compulsory Automobile Insurance Act*, owners and lessees of motor vehicles are not allowed to operate their motor vehicles on a highway or to cause or permit their motor vehicles to be operated on a highway unless they are insured. This requirement applies to automobiles because all automobiles are motor vehicles under the *Compulsory Automobile Insurance Act*.[20] Highways are defined broadly in the *Compulsory Automobile Insurance Act* to include public highways, streets, avenues, parkways, driveways, bridges, viaducts, and trestles.[21]

Thus, automobiles include motor vehicles that are required to have liability insurance under Ontario law. More specifically, automobiles include motor vehicles that are operated on highways or that are caused or permitted to be operated on highways. But what is a "motor vehicle"?

3. The Definition of "Motor Vehicle" and the Ontario Highway Traffic Act

Under the HTA, a motor vehicle is defined to include an automobile, a motorcycle, a motor-assisted bicycle (unless otherwise indicated in the HTA), and any other vehicle propelled or driven otherwise than by muscular power.

With that said, it does not apply to streetcars or other motor vehicles running only upon rails, power-assisted bicycles, motorized snow vehicles, traction engines, farm tractors, self-propelled instruments of husbandry, or road-building machines[22]—instruments of husbandry being vehicles specifically used in farming.

So, all automobiles are motor vehicles, and motor vehicles are vehicles propelled or driven otherwise than by muscular power or wind, with certain limited exceptions.

For the purposes of part VI of the *Insurance Act*, then, automobiles include:

1. vehicles propelled or driven otherwise than by muscular power or wind, with certain limited exceptions;
2. vehicles that are required to be insured under a motor vehicle liability policy by Ontario law.

19 2019 ONCA 840.

20 *Compulsory Automobile Insurance Act*, s 1(1); HTA, s 1(1).

21 *Compulsory Automobile Insurance Act*, s 1(1); HTA, s 1(1).

22 HTA, s 1(1).

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4. Other Modes of Transport as Automobiles

As noted earlier, in most cases it can be easy to determine if a vehicle is an automobile. In other cases, it is not so easy. For example:

- trailers or tomato wagons,[23]
- backhoes,[24]
- go-karts,[25]
- all-terrain vehicles,[26] and
- motorized snow vehicles (e.g., snowmobiles).[27]

In *Adams v Pineland Amusements Ltd*,[28] the Court of Appeal for Ontario confirmed that there is a three-part test to determine when a vehicle is also an automobile. The test is:

1. Is the vehicle an automobile in ordinary parlance?
2 If not, is the vehicle defined as an automobile in the wording of the applicable insurance policy that applies to it?
3. If not, does the vehicle fall under any enlarged definition of automobile in a relevant statute?

When answering the third question, the important regulations and legislation to carefully consider will likely include:

1. the *Insurance Act*,
2. the *Compulsory Automobile Insurance Act*,
3. the HTA,
4. O Reg 316/03[29] under the HTA,
5. the *Off-Road Vehicles Act*,
6. Regulation 863 under the *Off-Road Vehicles Act*, and/or
7. the *Motorized Snow Vehicles Act*.

23 *Copley v Kerr Farms Ltd*, 2002 CanLII 44900 (ONCA).

24 *Morton v Rabito*, 1998 CanLII 5865 (ONCA).

25 *Adams v Pineland Amusements Ltd*, 2006 CanLII 42797 (ONSC).

26 *Off-Road Vehicles Act*, RSO 1990, c O.4, s 1; *General*, RRO 1990, Reg 863, s 3 [Regulation 863]; *Matheson v Lewis*, 2014 ONCA 542.

27 HTA, s 1(1); *Motorized Snow Vehicles Act*, RSO 1990, c M.44; *Fortin v Laplante*, 2000 CanLII 4208 (ONCA).

28 2007 ONCA 844 [*Adams* (CA)]. See also *Benson v Belair Insurance Company Inc*, 2019 ONCA 840.

29 *Operation of Off-Road Vehicles on Highways*, O Reg 316/03 [Regulation 316/03].

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Sometimes, determining whether or not a vehicle is an automobile is a very complex, fact-specific inquiry. The answer in more complicated scenarios often turns on whether the vehicle in question was a motor vehicle as defined by the HTA or whether Ontario law required the vehicle to have liability insurance in the specific circumstances of the accident. The type of vehicle being driven, where the vehicle was, and what the driver was doing with it (e.g., driving on a highway or just across it) can all be critical to the determination.

a. Off-Road Vehicles

In some cases, an accident may involve an off-road vehicle, and it may be necessary to determine if that off-road vehicle is an automobile for the purposes of the *Insurance Act*.

Whether an off-road vehicle is also an automobile can be a very complicated question to answer.[30] The three-part test in *Adams* (CA) applies, and the third question of the *Adams* test asks if the vehicle in question falls under any enlarged definition of automobile in a relevant statute. As already noted, part VI of the *Insurance Act* defines automobiles as including motor vehicles that are required to be insured under a motor vehicle liability policy under Ontario legislation.[31] So, when do off-road vehicles meet that definition of automobile?

An "off-road vehicle" is defined in section 1 of the *Off-Road Vehicles Act* as (emphasis added):

> a vehicle *propelled or driven otherwise than by muscular power or wind* and designed to travel,
>
> (a) on not more than three wheels, or
>
> (b) on more than three wheels and being of a prescribed class of vehicle.

Section 3 of Regulation 863 lists the prescribed classes of vehicles with more than three wheels that are deemed to be off-road vehicles. They are dune buggies; all-terrain vehicles (ATVs) that meet specific requirements; vehicles designed for utility applications that meet specific requirements; and certain models of Suzuki, Honda, and Yamaha vehicles.

The first part of the off-road vehicle definition in the *Off-Road Vehicles Act* closely resembles the definition of motor vehicle in section 1 of the HTA: "any other vehicle propelled or driven otherwise than by muscular power." However, it should be kept in mind that the HTA definition of motor vehicle has several exceptions, including power-assisted bicycles, motorized snow vehicles, and self-propelled instruments of husbandry. Nevertheless, in most scenarios, an off-road vehicle should also be classified as a motor vehicle under the HTA.

30 See *Neto v Liberatore*, 2005 CanLII 33787 (ONSC) for an analysis of whether a Yamaha dirt bike was an automobile under the *Insurance Act*.

31 *Insurance Act*, s 224(1).

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Even if an off-road vehicle is also a motor vehicle, the next issue is whether it is required to be insured under a motor vehicle liability policy under any relevant Ontario legislation.[32]

Regulation 316/03 under the HTA requires all off-road vehicles to be insured in accordance with section 2 of the *Compulsory Automobile Insurance Act* and section 15 of the *Off-Road Vehicles Act*. Section 2(1) of the *Compulsory Automobile Insurance Act* requires off-road vehicles to be insured under a motor vehicle liability policy when *operated* on "highways" as defined by the HTA. Section 15(1) of the *Off-Road Vehicles Act* requires off-road vehicles to be insured under a motor vehicle liability policy when *driven*, though there are exceptions. For example, off-road vehicles do not have to be insured if they are driven on land "occupied" by the owner of the vehicle.[33] There are also specific classes of vehicles that are exempt from the requirements of the *Off-Road Vehicles Act*.[34] With that said, there are many situations where off-road vehicles are motor vehicles that require motor vehicle liability insurance when operated on a highway or when driven.

b. Motorized Snow Vehicles

As noted in the previous section, off-road vehicles can be automobiles for the purposes of part VI of the *Insurance Act*, though that will not always be the case. But what about "motorized snow vehicles"? Can they also be considered automobiles under part VI?

According to the Court of Appeal for Ontario in *Fortin v Laplante*,[35] the answer to that question is "no"—at least for snowmobiles. One of the issues in that case was whether a snowmobile meets the definition of automobile in part VI of the *Insurance Act*: is it a motor vehicle that must be insured by a motor vehicle liability policy under Ontario legislation? The Court held that while snowmobiles must be insured under the *Motorized Snow Vehicles Act* when *driven*,[36] they are not motor vehicles in ordinary parlance or as defined under the HTA. In fact, section 1(1) of the HTA specifically excludes "motorized snow vehicles" from the definition of "motor vehicle." Furthermore, snowmobiles are not automobiles in ordinary language either. As a result, they are not automobiles under the *Insurance Act*.

32 See *Matheson v Lewis*, 2014 ONCA 542 for an analysis of whether an ATV was required to be insured.

33 *Off-Road Vehicles Act*, ss 1, 15(9). The s 1 definition of "occupier" under this legislation includes:

> (a) a person who is in physical possession of the land, or
>
> (b) a person who has responsibility for and control over the condition of land or the activities there carried on, or control over persons allowed to enter the land, even if there is more than one occupier of the same land.

34 *Off-Road Vehicles Act*, s 23; Regulation 863, s 2(1).

35 2000 CanLII 4208 (ONCA).

36 *Motorized Snow Vehicles Act*, s 12(1).

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B. Automobile Accidents

1. The Importance of the "Use or Operation" of an Automobile

Under the *Insurance Act*, auto insurance contracts are required, with certain exceptions, to provide liability coverage to (1) the owners of an automobile who are named in the auto policy, and (2) the occupants of that automobile and any other person who has the named owner's consent to drive that automobile.[37]

However, before liability coverage can be triggered, the loss or damage must arise from the ownership or *directly or indirectly* from the *use or operation* of the automobile.

The basis of this requirement is found in section 239(1) of the *Insurance Act*, which reads (emphasis added):

> **Policy coverage**
>
> **Coverage of owner's policy, specific automobile**
>
> 239(1) Subject to section 240, every contract evidenced by an owner's policy insures the person named therein, and every other person who with the named person's consent drives, or is an occupant of, an automobile owned by the insured named in the contract and within the description or definition thereof in the contract, against liability imposed by law upon the insured named in the contract or that other person for loss or damage,
>
> (a) arising from the ownership or *directly or indirectly from the use or operation of any such automobile*; and
>
> (b) resulting from bodily injury to or the death of any person and damage to property.

However, section 239 is not just the basis of liability coverage under the standard auto insurance contract, the *Ontario Automobile Policy Owner's Policy* (OAP 1). It is also the basis for uninsured and underinsured coverage provided by an endorsement to the OAP 1 called the *OPCF 44R: Family Protection Coverage* (OPCF 44R).[38]

As noted earlier in this chapter, underinsured or uninsured claims can happen when a tortfeasor has auto insurance limits that are below the damages entitled to be recovered from them, or where a tortfeasor does not have any insurance coverage or cannot be identified, or where a tortfeasor's insurance is not collectible. In those instances, the injured party can sue their own auto insurer for their damages, prejudgment interest, and legal costs that would otherwise be recoverable from the uninsured or inadequately insured tortfeasor.[39]

Given that section 239 is the basis for uninsured and underinsured coverage under the OPCF 44R, it is very likely that section 239 is also the basis for uninsured

37 *Insurance Act*, s 239.

38 *Citadel General Assurance Co v Vytlingam*, 2007 SCC 46 at para 7. Financial Services Regulatory Authority of Ontario, "OPCF 44R: Family Protection Coverage" (last modified 1 July 2026), online: <https://www.fsrao.ca/opcf-44r-family-protection-coverage>.

39 *Insurance Act*, ss 239, 265, 251, 252; *Uninsured Automobile Coverage*, RRO 1990, Reg 676; the OPCF 44R endorsement. As noted earlier in this chapter, there are limits to what can be recovered, but those restrictions are beyond the scope of this chapter.

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coverage under the OAP 1. After all, the OPCF 44R is an endorsement to the OAP 1, and the wording of the OAP 1 specifically states:

> An uninsured automobile is one for which neither the owner nor driver has liability insurance to cover bodily injury or property damage *arising out of its ownership*, *use or operation*, or the insurance is not collectible.[40]

Consequently, any loss or damage must *arise* from the *use or operation* of an automobile for uninsured or underinsured coverage to be claimed under the OPCF 44R and, very likely, for uninsured coverage to be claimed under the OAP 1.

Furthermore, as noted earlier, tortfeasors, in certain circumstances, receive the benefit of certain limitations or exclusions from liability and damages in a personal injury lawsuit under sections 267.5(1), (3), and (5) of the *Insurance Act*. Those tortfeasors are called protected defendants.[41] However, in order to have protected defendant status, the bodily injury or death being sued for must also arise directly or indirectly from the use or operation of an automobile.

In summary, then, whether a plaintiff's injuries or death arise directly or indirectly from the use or operation of an automobile is relevant to triggering:

- liability coverage for tortfeasors,
- uninsured or underinsured coverage for plaintiffs, and
- protected defendant status.[42]

Not surprisingly, given the critical importance of sections 239 and 267.5 of the *Insurance Act*, issues may arise from time to time as to whether a plaintiff's injuries or death in fact arise directly or indirectly from the use or operation of an automobile.

2. "Use or Operation" of an Automobile: Meaning and Examples

There are two questions that must be asked to determine whether a plaintiff's injuries or losses arise directly or indirectly from the use or operation of an automobile:

1. Whether the fault occurred in the course of using a motor vehicle as a motor vehicle, that is, for ordinary and well-known activities for which motor vehicles are used.
2. Whether there is an unbroken chain of causation linking the claimed injuries or losses to the use or operation of the motor vehicle. The connection must be more than mere correlation.[43]

40 OAP 1, s 5.1.2 (emphasis added).

41 *Insurance Act*, ss 267.3-5.

42 *Insurance Act*, ss 267.4(1), 267.5.

43 *Definity Insurance Company v Intact Insurance Company*, 2024 ONSC 3195 at para 22; *Citadel General Assurance Co v Vytlingam*, 2007 SCC 46 at paras 12, 25.

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If the answer to both questions is "yes," the injuries or losses arise directly or indirectly from the use or operation of an automobile.

Most often, answering whether a plaintiff's injuries arise out of the use or operation of an automobile is straightforward. Obvious examples include:

- when two or more automobiles crash and the occupants of one or more of them are harmed, or
- when a pedestrian or cyclist is hit by a moving automobile and is harmed.

However, in some circumstances, whether the injury arises directly or indirectly from the use or operation of an automobile is not so clear. Generally, if the *ordinary* use and operation of an automobile is merely *incidental* to the injuries or losses suffered, then they do not arise from the use or operation of the automobile in question.[44] It will not be enough to show that there is a *correlation* between the use or operation of the automobile and the injury or loss. There must be *causation*.

It must also be stressed that for purposes of triggering liability coverage, the duty to defend, or uninsured/underinsured coverage under an auto insurance contract, it is the use or operation of the automobile that the tortfeasors own, occupy, or drive that is relevant.[45]

When determining whether a tortfeasor meets the definition of a protected defendant, the automobile to focus upon is the one that was used or operated in a manner that caused the plaintiff's injuries or losses.[46]

In that regard, section 267.3 of the *Insurance Act* defines a "protected defendant" as "a person who is protected from liability by subsections 267.5(1), (3) and (5)," and sections 267.5(1), (3), and (5) all incorporate the following wording (emphasis added):

> *the owner of* ***an*** *automobile*, *the occupants of* ***an*** *automobile* and *any person present at the incident* are not liable in an action in Ontario for … damages … arising directly or indirectly from the ***use or operation*** *of* ***the*** *automobile.*

Additionally, Justice Borins held in *Young v Donway Ford Sales Ltd*[47] as follows:

> Section 266(1) [now s 267.5], generally speaking, eliminates conventional tort claims in all cases except those in which the injury sustained by the victim has been fatal or serious. However, *it addresses the issue from the perspective of the person whose fault in "the use or operation of an automobile" has resulted in the injury of another person*, and proceeds to grant immunity from liability to three categories of persons. *The first two categories are*

44 *Martin v 2064324 Ontario Inc (Freeze Night Club)*, 2013 ONCA 19 at paras 77-78.

45 E.g. *Citadel General Assurance Co v Vytlingam*, 2007 SCC 46 at paras 5-7, 12; *Martin v 2064324 Ontario Inc (Freeze Night Club)*, 2013 ONCA 19 at paras 1-2, 65; *Definity Insurance Company v Intact Insurance Company*, 2024 ONSC 3195 at paras 4-5, 7-9, 36.

46 *Young v Donway Ford Sales Ltd*, 1995 CanLII 7245 (ON (GD)).

47 *Young v Donway Ford Sales Ltd*, 1995 CanLII 7245 (ON (GD)) (emphasis added).

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> *owners and occupants of "an automobile." This raises the question—which automobile? In my view, the automobile referred to by the words "an automobile" must mean "the automobile," referred to later in the subsection as being the automobile, the use or operation of which resulted in the plaintiff's injuries.*

Examples involving rather unusual or less intuitive scenarios are discussed in the following sections. In each of the examples, the plaintiff was making an uninsured claim against their own auto insurer or seeking indemnification from the tortfeasor's auto insurer.

a. Assaults/Battery

In *Martin v 2064324 Ontario Inc (Freeze Night Club)*,[48] the plaintiff was assaulted in a parking lot while loading his car after an event. He was then forced into his car and later forced to help his assailants shift the gears of his standard transmission. The plaintiff was assaulted in the car as well, and at one point his head struck the trunk of his car. He was then forced out of his car at another parking lot, where he was assaulted again.[49] The assailants then drove over his foot when they drove away. The Court of Appeal for Ontario held that other than the plaintiff's foot injury, it was the ongoing assaults—not the use or operation of a motor vehicle—that caused the plaintiff's injuries. Any use or operation of the plaintiff's car was merely *incidental* to those injuries. However, whether the foot injury was caused by the use or operation of the plaintiff's car was a triable issue.

b. Throwing Objects at Moving Automobiles

In *Citadel General Assurance Co v Vytlingam*,[50] the defendants, who were under the influence of alcohol and drugs, dropped a large boulder from an overpass onto a moving motor vehicle driving on the highway below, causing bodily harm. The tortfeasors used a co-defendant's vehicle both to transport the boulder and other rocks to the overpass and to flee the scene. The Supreme Court of Canada held that the defendants' liability did not arise from the use or operation of the co-defendant's automobile. Yes, transporting materials like rocks can be part of the normal use of an automobile, but the act of throwing the boulder was an independent act that broke the chain of causation. The defendants were not using the automobile as an "automobile" at the time the boulder was thrown.

48 2013 ONCA 19.

49 In tort law, a battery is harmful or offensive physical contact with another person's body without that person's consent. An assault, by contrast, is the *reasonable apprehension* of immediate physical harm or offensive contact. Both are intentional torts. However, in everyday language, people often refer to an assault when they are actually referring to battery.

50 2007 SCC 46.

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c. Shootings

In *Lumbermens Mutual Casualty Co v Herbison*,[51] a hunter left his truck running, stepped out of it, and shot what he believed was a deer. Instead, he accidentally shot someone in his hunting party. The Supreme Court of Canada determined that while the hunter was initially using his vehicle for transportation, which is an ordinary use of an automobile, the shooting itself broke the chain of causation. It was an act independent of the use or operation of the automobile in question; the automobile "merely create[d] an opportunity in time and space"[52] for the damage to occur.

Similarly, in *Russo v John Doe*,[53] the plaintiff was hit by a bullet fragment from a drive-by shooting. The Court of Appeal for Ontario determined that the injury was caused by the shooting and not by driving. The shooting was a distinct intervening act, independent from the use or operation of an automobile.

d. Suicide Attempts

In 2000, the Nova Scotia Court of Appeal had to decide whether an unusual suicide attempt involving an automobile caused damage arising out of the use or operation of an automobile. In *Holdbrook v Emeneau*,[54] the defendant, Emeneau, drove to a warehouse he partly owned with the intention of killing himself. He parked his company truck inside the warehouse, found a container with gas in it, poured the gas on the front passenger seat of his vehicle, and then lit it on fire with a match, causing an explosion. The warehouse and its contents were destroyed by the resulting fire. The Nova Scotia Court of Appeal determined that the warehouse fire was not caused by the ordinary use of an automobile. The truck was not used as an automobile; it was used "as a receptacle to accumulate and store gas fumes."[55]

However, the Nova Scotia Court of Appeal in *Holdbrook* relied upon a test in *Amos v Insurance Corp of British Columbia*[56] in reaching its conclusion. In Ontario, the *Amos* test is used to determine if there has been an "accident" entitling claimants to no-fault statutory accident benefits. It is not the test that applies in Ontario to indemnity claims under section 239 of the *Insurance Act*.[57]

With that said, given the facts in *Holdbrook*, it is likely that the use or operation of the truck would be considered merely incidental to the warehouse fire for the purposes of any indemnity claim under Ontario's *Insurance Act*. Therefore, the defendant

51 2007 SCC 47.

52 *Lumbermens Mutual Casualty Co v Herbison*, 2007 SCC 47 at para 10.

53 2009 ONCA 305.

54 2000 NSCA 48.

55 *Holdbrook v Emeneau*, 2000 NSCA 48 at para 43.

56 1995 CanLII 66 (SCC).

57 Indemnity claims being negligence claims against the liable tortfeasors or uninsured or underinsured claims against one's own auto insurer.

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Emeneau's auto insurance coverage likely would not be triggered. Furthermore, the innocent owners of the destroyed warehouse would likely not be entitled to make uninsured or underinsured claims.

PRACTICE TIP

In Ontario, the test for determining whether there has been an "accident" under the SABS is not the same as the test for liability under section 239 of the *Insurance Act*.[58] For SABS purposes, lawyers apply the two-part entitlement test—the purpose test (was the vehicle being used for its ordinary purpose?) and the causation test (did that use directly cause the impairment?).[59] Keeping these branches separate will ensure counsel applies the appropriate legal standard and assesses accident-benefits claims correctly.

III. Protected Defendants

A. Who Are Protected Defendants?

Protected defendants are defendants in a motor vehicle action that receive certain protections that limit their liability to pay damages and, in many cases, preclude lawsuits against them entirely. Protected defendants benefit from the threshold and the statutory deductible as well as from restrictions on the amount the plaintiff can recover for economic losses and health care expenses. Typically, protected defendants include the owner, operator, and occupant of a motor vehicle and any person present at the scene of the accident.

Non-protected defendants are defendants in a motor vehicle action who were not present at the scene of the accident. Examples of non-protected defendants include garages and repair shops, road authorities (municipal and provincial/territorial), and bars or restaurants where the defendant driver may have been drinking prior to the accident (often referred to as commercial host liability cases).

This area of the law is heavily driven by legislation, and any analysis of whether a defendant is protected or non-protected begins with section 267.5 of the *Insurance Act*.

Note that the protections offered by section 267.5 are designed to benefit insurers that are licensed to provide automobile insurance in Ontario. Out-of-province defendants do not receive the protections offered by section 267.5 of the *Insurance Act* unless they have filed an undertaking pursuant to section 226 of the *Insurance Act*, as explained in a subsequent section.

58 SABS, s 3(1); *Martin v 2064324 Ontario Inc (Freeze Night Club)*, 2013 ONCA 19 at paras 23, 37, 68; *Citadel General Assurance Co v Vytlingam*, 2007 SCC 46 at paras 5-9.

59 *Martin v 2064324 Ontario Inc (Freeze Night Club)*, 2013 ONCA 19 at paras 23, 37.

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1. Legislated Definition

Section 267.3 defines a "protected defendant" as a person who is protected from liability by sections 267.5(1), (3), and (5) of the *Insurance Act*. Each of those sections begins with the same phrase (emphasis added):

> Despite any other Act and subject to subsections (6) and (6.1), the *owner of an automobile*, the *occupants of an automobile* and *any person present at the incident* are not liable in an action in Ontario.

The legislation accordingly creates three clear categories of people who are protected defendants:

1. owners of automobiles,
2. occupants of automobiles, and
3. persons present at the incident.

a. Owners of Automobiles

The registered owner of a motor vehicle will be considered to be an owner within the meaning of section 267.3 of the *Insurance Act*, though this designation is rebuttable to account for those unusual cases where the registered owner has neither possession nor control of the vehicle.[60] Section 192(2) of the HTA makes clear that the owner of a motor vehicle is liable for losses caused by the negligence of anyone operating the vehicle, unless the vehicle was operated without their consent.

Further, section 267.3 of the *Insurance Act* adds that an operator of a commercial vehicle and a lessee of a motor vehicle are owners for the purposes of the legislation. It defines an owner as "includ[ing] an operator as defined in subsection 16 (1) of the *Highway Traffic Act* and a person who is a lessee for the purposes of section 192 of that Act."

b. Occupants of Automobiles

Section 224(1) of the *Insurance Act* defines "occupant" as (1) the driver of an automobile; (2) a passenger, whether being carried in or on the automobile; or (3) a person getting into, on, out of, or off the automobile. The courts have established that an objective test is to be used in determining whether a person is an occupant of a vehicle.

60 See e.g. *Dyck v Kent & Essex Mutual Insurance Company*, 2023 ONSC 3725, where the Court held that registration of ownership is treated as proof of ownership unless rebutted. The Court followed the Supreme Court of Canada's decision in *Hayduk v Pidoborozny*, 1972 CanLII 136 (SCC). In *Dyck* at paras 35-38, the registered owner successfully rebutted the presumption of ownership by demonstrating that it had agreed to sell the vehicle, the purchaser had paid in full and received all paperwork to transfer ownership, and the registered owner did not retain control or possession of the vehicle after a certain date.

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PRACTICE TIP

The court determines whether a person is an "occupant" within the meaning of the *Insurance Act* by assessing the circumstances from the perspective of an objective observer.

AXA Insurance Company v Markel Insurance Company of Canada[61] involved a priority dispute between insurers. Mr Ferguson was a tractor-trailer driver who had driven a load to a delivery yard. While at the yard, he was struck by a piece of wood that flew off another vehicle. The issue in the case was whether Mr Ferguson was an "occupant" of his vehicle at the time of the accident. The Court of Appeal for Ontario held that the definition of "driver" is a status and does not turn on the activity being engaged in at the time of the accident. It simply requires that the person "be the driver of the vehicle."[62]

The Court stated:

> Keeping in mind these considerations, the question is whether in all the circumstances at the time of the incident Mr. Ferguson was the driver of the tractor trailer. Would an objective observer of this incident on January 30, 1996 who had in mind these considerations answer affirmatively if asked whether Mr. Ferguson was the driver of the tractor trailer?
>
> In my view, the answer is clear. When he was injured Mr. Ferguson was in close physical proximity to the vehicle. He had driven it there and was waiting to unload it after which he undoubtedly would have driven it away. It is also safe to infer that at the time he was hit he maintained some element of control over the vehicle. Certainly there is no evidence that anyone else had taken over control of it nor had assumed the role of driver. In my view therefore, at the time he was injured he was the driver of the tractor trailer for the purposes of s. 268(5.2) of the Act.[63]

This reasoning similarly applies to the definition of "passenger." In *McIntyre Estate v Scott*,[64] the plaintiff had been a passenger on her husband's motorcycle when it began to rain. The two took refuge under an overpass to wait out the storm. The plaintiff had gone to grab some dry clothes from a saddlebag when she was struck by an approaching vehicle. The issue was whether she was an occupant of the vehicle at the time of the accident.

---

61 2001 CanLII 24143 (ONCA) [*AXA*].

62 *AXA*, 2001 CanLII 24143 at para 14 (ONCA).

63 *AXA*, 2001 CanLII 24143 at paras 21-22 (ONCA).

64 2003 CanLII 31493 (ONCA). This case was later considered in *Kahlon v ACE INA Insurance*, 2018 ONSC 784 at para 48. There, the plaintiff was a long-distance truck driver who was injured in Florida. He had come upon a lineup of trucks and had exited his rig to find out the reason for the holdup. He was struck while standing near his vehicle. The Court had no issue finding he was a "driver." While the case was overturned on appeal for other reasons, the finding that he was a "driver/occupant" remained untouched.

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The Court stated that "[t]he word 'passenger,' like the word 'driver' identifies a status rather than a physical activity."[65] Notably, the Court also held that finding the plaintiff to be an "occupant" was consistent with the general principle that insurance legislation should be liberally construed in favour of providing coverage to an insured.

The Court affirmed its prior use of the objective test it had earlier endorsed in *AXA*. Justice Sharpe wrote:

> I would apply the *Axa* "objective observer" test. In my view, an objective observer of the accident would describe Deborah McIntyre as a passenger of the motorcycle at the time she was struck by the uninsured driver. Her presence at the scene of the accident was entirely explained by the fact that she was a passenger on the motorcycle. She and her husband had stopped by the roadside to avoid the rain. She intended to resume the journey as soon as the rain stopped. She remained in close proximity to the motorcycle and did not leave it for any other purpose. Finally, she did not engage in any other activity except to wait for the rain to abate.[66]

The case of *Djepic v Kuburovic*[67] considered whether a person loading a mattress onto the top of a van was an occupant of a motor vehicle. While the plaintiff and the defendant were loading the mattress, a bungee cord loosened and struck the plaintiff in the eye, resulting in permanent blindness.

The Court held that the plaintiff did not meet the definition of occupant. Standing near the van—without its being clear whether there was any physical contact with the van—was insufficient to constitute being an occupant of the vehicle.

c. Persons Present at the Incident

Generally, the phrase "persons present at the incident" has been interpreted narrowly. Much of the jurisprudence considering its application addresses the vicarious liability of employers for "persons present at the incident." With the passing of section 267.5(10.1) of the *Insurance Act*,[68] many of the cases were rendered moot, as the section makes anyone vicariously liable for a person present at the incident a protected defendant.

The courts have been clear that "present at the incident" means physically present at the incident. Protected defendant status does not extend to those peripherally associated with an accident.

65 *McIntyre Estate v Scott*, 2003 CanLII 31493 at para 15 (ONCA).

66 *McIntyre Estate v Scott*, 2003 CanLII 31493 at para 19 (ONCA).

67 2005 CanLII 2807 (ONSC).

68 Section 267.5(10.1) came into effect on October 1, 2003. See Bill 198, *Keeping the Promise for a Strong Economy Act (Budget Measures), 2002*, SO 2002, c 22, s 120(5).

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PRACTICE TIP

A person must be physically present at the scene of the accident to be considered present at the incident.

For example, in *Donway Ford Sales*, the plaintiff sued a garage after a wheel came off his truck while driving. The Court held that the employee who had negligently installed the tire was not a person present at the incident and the garage was not a protected defendant. Justice Borins considered whether the definition of "incident" should be equivalent to "accident." Ultimately, the Court concluded that, as no one from the garage was present when the wheel fell off the truck, the garage was not a protected defendant. Justice Borins wrote:

> In my view, the words "the incident" should be given a construction which furthers the purpose of s. 266 of the Act and effects harmony with the Statutory Accident Benefits Schedule where "accident" is used throughout, and is defined as "an incident" in which personal injuries are caused by the use or operation of an automobile. Thus, "the incident" referred to in s. 266(1) is the accident giving rise to the loss or damage from the use or operation of an automobile for which the injured person seeks to recover non-pecuniary damages. *In other words, "incident" means the accident in which loss or damage was caused the plaintiff by the use or operation of an automobile. In this case, the accident which caused the plaintiff's injuries occurred when the wheel fell off his truck. No representative of the defendant was present when the accident occurred. Therefore, as the defendant was not a "person present at the incident," s. 266(1) has no application in the circumstances of this case, and the plaintiff's action can continue.*[69]

Circumstances where a person present at the incident will receive protected defendant status include:

- cyclists and pedestrians who cause accidents,
- a police officer directing traffic, and
- a municipal work crew present at a work site.

As mentioned earlier, section 267.5(10.1) provides protection for anyone vicariously liable for owners, occupants, or persons present at the incident:

> **Vicarious liability**
>
> (10.1) Despite any provision of this Part, a person vicariously liable for the fault or negligence of a protected defendant is not, in respect of the person's vicarious liability, liable for any amount greater than the amount of damages for which the protected defendant is liable.

Thus, employers of protected defendants are also protected defendants.

69 [1995] OJ No 3518 (QL) at para 18, 1995 CanLII 7245 (GD) (emphasis added).

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2. Out-of-Province Insurers

The protections offered by section 267.5 of the *Insurance Act* apply only to insurers licensed to provide automobile insurance in Ontario. Thus, out-of-province insurers of owners, occupants, and persons present at the incident are not protected defendants.

The rationale behind this policy is that Ontario automobile insurers provide coverage for statutory accident benefits, uninsured and unidentified coverage, and minimum policy limits. Ontario insurers participate in, and are part of, the balance that has been struck between policy coverage and insurance premiums. Out-of-province insurers should not benefit from only one part of the balance by being considered protected defendants. However, an out-of-province insurer may choose to opt into this system.

Section 226.1 of the *Insurance Act* provides:

> **Out-of-province insurers**
>
> 226.1 An insurer that issues motor vehicle liability policies in another province or territory of Canada, the United States of America or a jurisdiction designated in the *Statutory Accident Benefits Schedule* may file an undertaking with the Chief Executive Officer, in the form provided by the Chief Executive Officer, providing that the insurer's motor vehicle liability policies will provide at least the coverage described in sections 251,[70] 265[71] and 268[72] when the insured automobiles are operated in Ontario.

Out-of-province insurers who have signed the Protected Defendant Undertaking pursuant to section 226.1 of the *Insurance Act* are listed publicly by the Ontario government.[73]

PRACTICE TIP

If a plaintiff is injured in an accident by an out-of-province defendant, do not assume that the defendant is a protected defendant. Check the list maintained by the Ontario government and the effective date of the undertaking to determine whether the defendant gets the benefit of sections 267.5(1), (3), and (5).

70 *Insurance Act*, s 251 provides minimum limits of $200,000, exclusive of interest and costs, against liability resulting from bodily injury or death of one or more persons and loss of or damage to property.

71 *Insurance Act*, s 265 provides coverage for bodily injury, death, and property damage caused by uninsured and unidentified drivers.

72 *Insurance Act*, s 268 provides statutory accident benefits coverage.

73 See Financial Services Regulatory Authority of Ontario, "Protected Defendant Undertaking" (last modified 2 October 2026), online: <http://undertaking.fsco.gov.on.ca/protected_defendant.aspx>.

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B. How Do Protected Defendants Benefit?

The protections available to protected defendants are fully explored in Chapter 4. Generally speaking, the provisions of the *Insurance Act* reduce defendants' financial liability and, in many cases, take away a plaintiff's right to sue, as it is not cost-effective for plaintiffs to pursue a lawsuit. Moreover, section 267.8 confirms that protected defendants may deduct specific collateral benefits—excluding certain government-funded ones[74]—thereby reducing the damages they are required to pay.

TABLE 1.1 Insurance Act Protections—Sections 267.5 and 267.8

PROTECTIONS OFFERED BY SECTIONS 267.5 AND 267.8	
267.5(1)	**Income Losses** • Removes defendant's obligation to pay income losses suffered in the seven days following the incident. • Restricts plaintiff's ability to claim damages for past income losses (up to the date of trial) to 70% of gross income (O Reg 461/96, as calculated pursuant to s 4.0.1). • Restricts plaintiff's ability to claim damages for past loss of earning capacity (up to the date of trial) to 70% of losses (O Reg 461/96, s 4.0.1).
267.5(3)	**Threshold: Health Care Expenses** Removes defendant's obligation to pay health care expenses unless plaintiff has: • died, or • sustained – permanent serious disfigurement; or – permanent serious impairment of an important physical, mental, or psychological function (O Reg 461/96, ss 4.1, 4.2).
267.5(5)	**Threshold: Non-Pecuniary Loss (General Damages)** Removes defendant's obligation to pay non-pecuniary general damages unless plaintiff has: • died, or • sustained – permanent serious disfigurement; or – permanent serious impairment of an important physical, mental, or psychological function (O Reg 461/96, ss 4.1, 4.2).

74 E.g. benefits payable by Ontario Works and the Ontario Disability Support Program, for which the plaintiff is frequently required to execute an assignment prior to receipt of benefits.

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PROTECTIONS OFFERED BY SECTIONS 267.5 AND 267.8	
267.5(7) & (8)	**Deductible** Imposes a deductible on plaintiff's non-pecuniary (general) damages that applies unless the plaintiff has died or the damages exceed a certain amount. The deductible applies to: • damages for non-pecuniary loss for injury; • damages for non-pecuniary loss under section 61(2)(e) of the *Family Law Act* (claims for loss of guidance, care, and companionship).
267.8	**Collateral Benefits** ***Past Income Losses*** Protected defendants can deduct: • payments received or available for income loss or loss of earning capacity from the statutory accident benefits claim for income loss and loss of earning capacity, • payments received or available before the trial of the action for income loss or loss of earning capacity under the laws of any jurisdiction or under an income continuation benefit plan, and • payments received before the trial of the action under a sick leave plan arising by reason of the plaintiff's occupation or employment. ***Past Health Care Expenses*** Protected defendants can deduct: • payments received or available for statutory accident benefits in respect of the expenses for health care; and • payments received under any medical, surgical, dental, hospitalization, rehabilitation, or long-term care plan or law. ***Future Collateral Benefits (for Income Loss or Health Care)*** There are two mechanisms to allow protected defendants to deduct collateral benefits from future damage for income loss or health care expenses. These are: 1. **Trust—section 267.8(9)**, which requires a plaintiff to hold in trust payments received for income loss; payments received for loss of earning capacity; and health care expenses payments received from their statutory accident benefits claim, an income continuation benefit plan, a sick leave plan, or any medical, surgical, dental, hospitalization, rehabilitation, or long-term care plan or law. 2. **Assignment—section 267.8(12)**, which allows the defendant to seek a court order assigning the plaintiff's rights in respect of collateral benefits to the defendant.

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IV. Unprotected Defendants

A. Unprotected Defendants—Unrestricted Tort Exposure

Unlike protected defendants, who benefit from statutory immunity and other procedural protections under the *Insurance Act*, unprotected defendants do not enjoy these safeguards. For present purposes, an unprotected defendant:

- cannot invoke the legislative bars that limit or eliminate liability for protected defendants,
- may be sued by an injured plaintiff in the same manner as any other ordinary tortfeasor, and
- lacks access to certain procedural or substantive protections afforded under the *Insurance Act*.

B. Protected and Unprotected Defendants

Significant complications can arise when a plaintiff is injured in an incident that gives rise to claims against multiple defendants, some of which are protected while others are not. The *Insurance Act* does not mandate separate legal proceedings for protected and unprotected defendants; Ontario's liberal joinder rules normally result in all claims being adjudicated in a single action. Furthermore, a defendant is subject to the same substantive law for determining tortious liability regardless of protected or unprotected status.

Section 267.7 of the *Insurance Act* creates a mechanism for the allocation of responsibility for a plaintiff's damages in a case where there is a mixture of protected and unprotected tortfeasors. This will also be discussed in Chapter 3.

V. Accidents in the Course of Employment

A. WSIB Regime—Schedule 1/Schedule 2 Industries

Ontario's workplace safety regime, the Workplace Safety Insurance Board (WSIB) regime, provides benefits to workers who have been injured because of accidents arising out of and in the course of their employment. Benefits that an injured worker may be entitled to include health care costs, loss of earnings, loss of retirement income, and non-economic losses.[75] Benefits are also available to a worker's survivors if the worker dies because of the accident. Those benefits include funeral costs, bereavement counselling, and death benefits (lump sum and monthly payments to survivors). A "survivor" is the spouse, child, or dependant of a deceased worker.[76]

The governing legislation is the WSIA. The WSIB has also created several policies to help interpret the WSIA legislation.

75 The WSIB version of pain and suffering/loss of enjoyment of life damages.

76 *Workplace Safety and Insurance Act, 1997*, SO 1997, c 16, Schedule A, s 2(1) [WSIA].

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The WSIA applies to Schedule 1 and Schedule 2 industries. The list of Schedule 1 and Schedule 2 industries is found in O Reg 175/98 under the WSIA.[77]

Schedule 1 industries include mining, manufacturing, transportation and storage, retail and wholesale trades, construction, and several service industries (e.g., hospitality workers and full-time domestic workers). Those are just some general examples, and that list is certainly not exhaustive.

Schedule 2 industries generally include the construction and operation of railways, with some exceptions; the construction or operation of certain shops, plants, or other works for those railways; telephone companies licensed by the federal government; provincial/territorial governments; and municipal governments, though some municipal governments have opted to become Schedule 1 employers instead. There are other Schedule 2 industries as well.

B. WSIA Territorial/Jurisdictional Limits

To receive WSIB benefits, the automobile accident must happen within the territorial and jurisdictional limits of the WSIA. Benefits are available for accidents that happen in Ontario for workers employed in Ontario at the time.[78]

For other more complex situations, see sections 18 and 19 of the WSIA and Policy Document No 15-01-08: Out of Province.[79]

C. Limitations on the Right to Sue

In some circumstances, people who have been injured in automobile accidents or their family members ("survivors" as defined by the WSIA[80]) may have recourse to WSIB benefits as an alternative to starting a private lawsuit for damages, or they may have no choice but to proceed through the WSIB regime. When someone's right to pursue a lawsuit for damages is completely extinguished, WSIB is said to have "exclusive jurisdiction."

The key provisions are sections 28(1), (2), and (3) of the WSIA, which read:

> **Certain rights of action extinguished**
>
> 28(1) A worker employed by a Schedule 1 employer, the worker's survivors and a Schedule 1 employer are not entitled to commence an action against the following persons in respect of the worker's injury or disease:
>
> 1. Any Schedule 1 employer.
> 2. A director, executive officer or worker employed by any Schedule 1 employer.

77 *General*.

78 WSIA, ss 13(1), 13(3), 18, 19.

79 WSIB, "Out of Province" (3 March 2008), online: <https://www.wsib.ca/en/operational-policy-manual/out-province>.

80 WSIA, s 2(1).

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Same, Schedule 2 employer

(2) A worker employed by a Schedule 2 employer and the worker's survivors are not entitled to commence an action against the following persons in respect of the worker's injury or disease:

1. The worker's Schedule 2 employer.
2. A director, executive officer or worker employed by the worker's Schedule 2 employer.

Restriction

(3) If the workers of one or more employers were involved in the circumstances in which the worker sustained the injury, subsection (1) applies only if the workers were acting in the course of their employment.

What this means is that if a Schedule 1 worker is injured because of an automobile accident arising out of and in the course of their employment, then that Schedule 1 worker cannot sue *any* of the following:

- Schedule 1 worker,
- executive officer,
- director, or
- employer.

However, in order for at-fault Schedule 1 workers to receive the protection of section 28 of the WSIA, they too must have been acting in the course of their employment at the time of the automobile accident.

If a Schedule 2 worker is injured because of an automobile accident arising out of and in the course of their employment, then that Schedule 2 worker cannot sue:

- *their own* Schedule 2 employer; or
- any worker, director, or executive officer of *their own* Schedule 2 employer.

However, Schedule 2 workers still have the option of suing:

- other Schedule 2 employers; and/or
- any worker, director, or executive officer of other Schedule 2 employers.

Where a worker's right to sue is taken away under the WSIA, the worker's survivors are also not entitled to make any claims with respect to the automobile accident under section 61 of the *Family Law Act*.[81] These are known as *Family Law Act* claims. They are specific statutory claims that can be made by certain family members when

81 RSO 1990, c F.3. See also WSIA, ss 27(1)-(2).

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another family member has died or been injured in an automobile accident (and other types of accidents as well). *Family Law Act* claims may include:

- loss of care, guidance, and companionship;
- reasonable funeral expenses;
- reasonable out of pocket expenses;
- reasonable travel expenses;
- loss of income and dependency losses; and/or
- reasonable allowance for housekeeping, nursing, or other services provided by those family members because of the accident.[82]

When an employer, director, executive officer, or other worker is not liable to pay damages to the injured worker or survivor because of section 28 of the WSIA, the court is required to determine what damages were caused by these WSIA-protected tortfeasors, regardless of whether they are parties to the action, and these protected tortfeasors are not liable to pay for any of the damages they caused. They are also not liable to pay any contribution or indemnity to any party related to the damages they caused.[83]

Only the Workplace Safety and Insurance Appeals Tribunal (WSIAT) may determine whether the WSIB regime has exclusive jurisdiction over an accident because of section 28 of the WSIA.[84] While the WSIB policies are not binding on the WSIAT, they are of persuasive value.[85] Applications to the WSIAT are made pursuant to section 31 of the Act.

PRACTICE TIP

Counsel on both sides will want to know very early on whether WSIB has exclusive jurisdiction over an automobile accident, before too much time and money is spent on a lawsuit that cannot exist. Either can make the application to the WSIAT for a determination under section 31 of the WSIA.

D. Schedule 1 and Schedule 2 Workers

The limitations on the right to sue apply to Schedule 1 and Schedule 2 "workers." Generally, workers are persons who have entered into or who are employed under a

82 *Family Law Act*, ss 61(1)-(2).

83 WSIA, s 29.

84 WSIA, s 31.

85 *Decision No 814/06*, 2006 ONWSIAT 1730 at paras 42-44; *Decision No 506/04*, 2004 ONWSIAT 1028 at para 11; *Decision No 755/02*, 2002 ONWSIAT 1488 at para 38.

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contract of service or apprenticeship. The definition is found in section 2(1) of the WSIA. Note, however, that the definition of "workers" does not include:

- some home-based workers, or
- casual workers who are employed to do work outside the employer's own industry.[86]

Workers also generally do not include the following:

- independent operators;
- sole proprietors;
- partners in partnerships; and
- executive officers in corporations, with some limited exceptions.[87]

Non-workers are treated as workers in the following scenarios:

- In the construction industry, independent operators, sole proprietors, partners, and executive officers are all deemed to be workers.[88]
- Independent operators, sole proprietors, and partners may voluntarily elect to become "workers" by making an application to WSIB.
- Employers may also apply to WSIB to have an executive officer covered as a worker, but only with the executive's consent.[89]

Whether the right to sue is extinguished can come down to whether the injured party is a "worker" or an "independent operator." If an independent operator is injured in an automobile accident arising out of and in the course of their work, the independent operator will not be prevented from suing anyone under section 28 of the WSIA unless they work in the construction industry or have elected to become a WSIB worker. This is because they are not "workers" unless an exception applies. Similarly, that same independent operator will not have any entitlement to elect WSIB benefits unless one of those two noted exceptions apply. Again, this is because the independent operator is not a "worker."

Policy Document No 12-02-01 outlines the criteria used to distinguish between workers and independent operators.[90] It should be read along with the definition of workers in sections 2(1) and 11(1) of the WSIA and the definition of independent operators in sections 2(1) and 12.1 of the WSIA.

86 WSIA, s 11(1).

87 WSIA, ss 12(1)-(7), (11).

88 WSIA, ss 12.1-12.2.

89 WSIA, ss 12(1), (3), (5).

90 WSIB, "Workers and Independent Operators" (5 December 2024), online: <https://www.wsib.ca/en/operational-policy-manual/workers-and-independent-operators>.

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E. Arising Out of and in the Course of Employment

For the limitation on the right to sue to apply, the worker must have been injured by an accident *arising out of and in the course of their employment*.[91] When it comes to automobile accidents, this means the accident arises out of the worker's employment and the worker is also in the course of their employment at the time of the accident.

For Schedule 1 industries, at-fault Schedule 1 workers must also be acting in the course of their employment at the material time to be protected from a lawsuit.[92]

Under the WSIA, if the accident arose out of the worker's employment, then it is presumed that the worker was in the course of their employment unless the contrary is shown. Similarly, if the worker was in the course of their employment at the time of the accident, then it is presumed that the accident arose out of the worker's employment unless the contrary is shown.[93] The onus of proof is a balance of probabilities (that something is more likely than not).[94]

Whether an automobile accident arises out of and in the course of a worker's employment often becomes an issue in the following circumstances:

- the accident happens when the worker is driving to work to start their shift,
- the accident happens when the worker is driving from work at the end of their shift,
- the accident happens in the parking lot at work,
- the accident happens during lunch or some other break, or
- the accident happens while the worker is running an errand or attending or leaving a personal appointment during their normal working hours.

The critical factors for determining whether or not an accident arises in the course of employment are time, place, and activity.[95] The more those factors indicate that the accident was work-related, the more likely the accident will be said to have arisen out of the course of the worker's employment.

Typically, workers are considered to be in the course of their employment when they reach their employer's premises. In other words, as a general rule, workers are *not* in the course of their employment when they are travelling to and from their workplace. However, this rule of thumb does not apply when the conditions of employment require the worker to travel away from the employer's premises (e.g., transport truck drivers).[96]

91 WSIA, ss 13(1), 27(1), 28.

92 WSIA, s 28(3).

93 WSIA, s 13(2).

94 *Decision No 1672/04*, 2009 ONWSIAT 150 at paras 64, 142-47, 156; *Decision No 1225/09*, 2009 ONWSIAT 1964 at paras 19-22, 32.

95 WSIB, "Accident in the Course of Employment" (12 October 2004), online: <https://www.wsib.ca/en/operational-policy-manual/accident-course-employment>.

96 WSIB, "On/Off Employers' Premises" (5 December 2024), online: <https://www.wsib.ca/en/operational-policy-manual/employers-premises>.

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As for automobile accidents that occur away from the workplace during lunchtime or during a break, or while the worker is running an errand or attending or leaving a personal appointment, the worker will be in the course of employment if they are doing something *incidental* to their work.[97]

With that said, in WSIAT *Decision No 2838/07*,[98] the worker was injured in an accident during a two-hour break between client appointments. During her break she met a co-worker at a coffee shop. The meeting was personal in nature and not controlled by her employer. Typically, her breaks between client appointments were predominantly personal in nature as well. She was involved in an automobile accident on her way to her second client appointment from the coffee shop. She was not paid for her travel to her appointments that day. In that case, the WSIAT concluded the worker's right to sue was not removed.

Similarly, in WSIAT *Decision No 202/24*,[99] a worker was injured in the parking lot of her work after arriving an hour early for her shift. She slipped and fell in the parking lot when she left her vehicle to throw out garbage. The worker planned to walk to a coffee shop for breakfast, which was five minutes away. Her right to sue was not extinguished.

Those cases can be contrasted with the outcomes in WSIAT *Decision No 1572/16* and WSIAT *Decision No 1548/22*, where the worker was barred from proceeding with a lawsuit.[100]

Surprisingly, there are no WSIB policies that directly define when an accident *arises out of* employment. However, there are several policies that address when an accident happens *in the course of* employment. Important WSIB operational policies to consider are the following:

- Policy Document No 15-02-02: Accident in the Course of Employment[101]
- Policy Document No 15-03-03: On/Off Employers' Premises[102]
- Policy Document No 15-03-04: Employers' Premises, Parking Lots, Roads, Plazas, Malls, Boundaries[103]

97 WSIB, "Accident in the Course of Employment" (12 October 2004), online: <https://www.wsib.ca/en/operational-policy-manual/accident-course-employment>; *Decision No 2838/07*, 2008 ONWSIAT 673; *Decision No 1572/16*, 2017 ONWSIAT 457; *Decision No 1548/22*, 2022 ONWSIAT 1779; *Decision No 202/24*, 2024 ONWSIAT 268.

98 2008 ONWSIAT 673.

99 2024 ONWSIAT 268.

100 2017 ONWSIAT 457; 2022 ONWSIAT 1779.

101 WSIB, "Accident in the Course of Employment" (12 October 2004), online: <https://www.wsib.ca/en/operational-policy-manual/accident-course-employment>.

102 WSIB, "On/Off Employers' Premises" (5 December 2024), online: <https://www.wsib.ca/en/operational-policy-manual/employers-premises>.

103 WSIB, "Employers' Premises, Parking Lots, Roads, Plazas, Malls, Boundaries" (12 October 2004), online: <https://www.wsib.ca/en/operational-policy-manual/employers-premises-parking-lots-roads-plazas-malls-boundaries>.

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- Policy Document No 15-03-05: Travelling[104]
- Policy Document No 15-03-08: Personal Activities/Removing Self from Employment[105]

F. Electing Between WSIB and a Lawsuit

Where a worker or survivor is entitled to WSIB benefits and is also entitled to start a lawsuit against an at-fault party, the worker or survivor must elect one or the other and notify WSIB of the election.[106]

The election must be made within three months after the date of the accident or, if the accident results in the death of the worker, within three months of the worker's death.[107] Where no election is made or if notice of the election is not given, the worker or survivor will be deemed to have elected a lawsuit unless there is evidence to the contrary.[108] However, in these situations of concurrent entitlement, WSIB should provide the worker or survivor with an actual election form, because it can be a basis for withdrawing an election.

While there is a three-month deadline for electing between WSIB benefits and a private lawsuit seeking damages, the WSIB may extend the three-month deadline if it considers it just to do so.[109]

Apart from the election deadline, any claims for compensation under the WSIA must be made as soon as possible after the worker's accident or occupational disease and, in any event, within six months thereafter.[110] Similarly, survivors must file a claim as soon as possible after a worker's death but not more than six months later.[111] However, as with elections, the WSIB may permit claims to be made after the six-month deadline if it is just to do so.[112]

Perhaps not surprisingly, a worker who elects to proceed with a lawsuit may end up settling their case for less than the cost of the benefits they would have received from WSIB. Similarly, a worker who elects to sue may be awarded a trial judgment that is

104 WSIB, "Travelling" (5 December 2024), online: <https://www.wsib.ca/en/operational-policy-manual/travelling>.

105 WSIB, "Personal Activities/Removing Self from Employment" (12 October 2004), online: <https://www.wsib.ca/en/operational-policy-manual/personal-activities-removing-self-employment>.

106 WSIA, s 30(2).

107 WSIA, s 30(4).

108 WSIA, s 30(6).

109 WSIA, s 30(5).

110 WSIA, s 22(1). For occupational diseases, the clock starts from when the worker learns that they suffer from the disease.

111 WSIA, s 22(2).

112 WSIA, s 22(3).

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less than the cost of the benefits they would have been given by the WSIB. In those situations, the worker is entitled to receive the additional missing benefits from the WSIB. However, when it comes to settlements, WSIB must approve the settlement before it is made.[113]

PRACTICE TIP

Before electing to pursue a lawsuit, workers should consider that they will not be entitled to OHIP health coverage for their injuries caused by the accident.[114] This loss of coverage can be a critical factor in deciding whether to proceed with litigation or remain under the WSIB system.

G. Withdrawing an Election for WSIB Benefits (De-electing WSIB Benefits)

Once an election is made to receive WSIB benefits, there is no presumptive right for workers to withdraw their election and proceed with a lawsuit.[115]

With that said, the WSIB may exercise its discretion and permit workers to de-elect WSIB benefits and start a civil claim.[116] The discretion rests with the WSIB and not the WSIAT. If a worker wishes to challenge the WSIB's refusal to permit a de-election, then they must seek judicial review before the Divisional Court of the Ontario Superior Court of Justice. The WSIAT does not have jurisdiction.

H. Important WSIB Policies

As noted earlier in this chapter, WSIB has created several operational policies that apply directly and indirectly to motor vehicle accidents. The policies are not binding on the WSIAT, but they are given significant deference.

A list of important policies is as follows:

- Policy Document No 12-01-01: Who Is an Employer?[117]
- Policy Document No 12-02-01: Workers and Independent Operators[118]

113 WSIA, s 29(14).

114 *Health Insurance Act*, RSO 1990, c H.6, s 1; *Ontario (Minister of Health) v Clements (Dist Ct)*, 70 OR (2d) 569, 1989 CanLII 4350 (H Ct J).

115 WSIB, "Third Party Rights of Action" (2 January 2020), online: <https://www.wsib.ca/en/operational-policy-manual/third-party-rights-action>.

116 WSIB, "Third Party Rights of Action" (2 January 2020), online: <https://www.wsib.ca/en/operational-policy-manual/third-party-rights-action>.

117 WSIB, "Who Is an Employer?" (9 April 2021), online: <https://www.wsib.ca/en/operational-policy-manual/who-employer>.

118 WSIB, "Workers and Independent Operators" (5 December 2024), online: <https://www.wsib.ca/en/operational-policy-manual/workers-and-independent-operators>.

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- Policy Document No 15-01-05: Third Party Rights of Action[119]
- Policy Document No 15-01-06: Third Party Motor Vehicle Accident Claim Costs[120]
- Policy Document No 15-01-08: Out of Province[121]
- Policy Document No 15-02-01: Definition of an Accident[122]
- Policy Document No 15-02-02: Accident in the Course of Employment[123]
- Policy Document No 15-03-03: On/Off Employers' Premises[124]
- Policy Document No 15-03-04: Employers' Premises, Parking Lots, Roads, Plazas, Malls, Boundaries[125]
- Policy Document No 15-03-05: Travelling[126]
- Policy Document No 15-03-08: Personal Activities/Removing Self from Employment[127]

VI. Limitation Period and Notice Provisions

In Ontario, the limitation period for most motor vehicle actions is the basic two-year period prescribed by the *Limitations Act, 2002*.[128] However, certain claims—such as those against government road authorities or private insurers—are subject to additional statutory timelines that must be met.

Motor vehicle claims may also be governed by specific notice requirements that are separate and apart from issuing the statement of claim prior to the expiry of the limitation period. For example, the *Insurance Act* imposes a requirement that the plaintiff

119 WSIB, "Third Party Rights of Action" (2 January 2020), online: <https://www.wsib.ca/en/operational-policy-manual/third-party-rights-action>.

120 WSIB, "Third Party Motor Vehicle Accident Claim Costs" (2 January 2020), online: <https://www.wsib.ca/en/operational-policy-manual/third-party-motor-vehicle-accident-claim-costs>.

121 WSIB, "Out of Province" (3 March 2008), online: <https://www.wsib.ca/en/operational-policy-manual/out-province>.

122 WSIB, "Definition of an Accident" (12 October 2004), online: <https://www.wsib.ca/en/operational-policy-manual/definition-accident>.

123 WSIB, "Accident in the Course of Employment" (12 October 2004), online: <https://www.wsib.ca/en/operational-policy-manual/accident-course-employment>.

124 WSIB, "On/Off Employers' Premises" (5 December 2024), online: <https://www.wsib.ca/en/operational-policy-manual/employers-premises>.

125 WSIB, "Employers' Premises, Parking Lots, Roads, Plazas, Malls, Boundaries" (12 October 2004), online: <https://www.wsib.ca/en/operational-policy-manual/employers-premises-parking-lots-roads-plazas-malls-boundaries>.

126 WSIB, "Travelling" (5 December 2024), online: <https://www.wsib.ca/en/operational-policy-manual/travelling>.

127 WSIB, "Personal Activities/Removing Self from Employment" (12 October 2004), online: <https://www.wsib.ca/en/operational-policy-manual/personal-activities-removing-self-employment>.

128 SO 2002, c 24, Schedule B.

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put the defendant on notice of the claim within 120 days of the accident. This provision is not always followed in practice, but it is a part of the legislation.

Further, the plaintiff is often required to provide notice of a potential claim arising out of the condition of the roadway to government road authorities. The failure to comply with such provisions can prove fatal to the plaintiff's right to sue the road authority.

A. Notice Periods

1. Insurance Act

Section 258.3 of the *Insurance Act* imposes notice and disclosure requirements on the plaintiff, which read as though they are a prerequisite to a legal action. In practice, while these provisions are often complied with, failure to comply does not render an action invalid. Rather, the legislation directs the court to consider non-compliance in calculating prejudgment interest[129] and awarding costs.[130]

The section provides as follows:

> **Notice and disclosure before action**
>
> 258.3(1) An action for loss or damage from bodily injury or death arising directly or indirectly from the use or operation of an automobile shall not be commenced unless,
>
> (a) the plaintiff has applied for statutory accident benefits;
>
> (b) the plaintiff served written notice of the intention to commence the action on the defendant within 120 days after the incident or within such longer period as a court in which the action may be commenced may authorize, on motion made before or after the expiry of the 120-day period;
>
> (c) the plaintiff provided the defendant with the information prescribed by the regulations within the time period prescribed by the regulations;[131]
>
> (d) the plaintiff has, at the defendant's expense, undergone examinations by one or more persons selected by the defendant who are members of Colleges as defined in the *Regulated Health Professions Act, 1991*, if the defendant requests the examinations within 90 days after receiving the notice under clause (b);
>
> (e) the plaintiff has provided the defendant with a statutory declaration describing the circumstances surrounding the incident and the nature of the claim being made, if the statutory declaration is requested by the defendant; and
>
> (f) the plaintiff has provided the defendant with evidence of the plaintiff's identity, if evidence of the plaintiff's identity is requested by the defendant.

129 *Insurance Act*, ss 258.3(8), (8.1).

130 *Insurance Act*, s 258.3(9).

131 *Court Proceedings for Automobile Accidents That Occur on or After November 1, 1996*, O Reg 461/96 [Regulation 461/96] lists the information that is to be provided to the defendant and generally includes details of the plaintiff's insurer and nature of the loss, a copy of the plaintiff's applications for accident benefits, and copies of the plaintiff's medical records (at the defendant's expense).

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PRACTICE TIP

The plaintiff's notice letter is usually sent to the defendant owner and operator at the address listed on the Motor Vehicle Accident Report and/or identified on a Ministry of Transportation search of the driver's licence and licence plate number. Plaintiff's counsel should include enough detail to comply with Regulation 461/96 and should request that the defendant forward the letter to their insurer.

2. Road Authorities

In cases where a road authority may be liable for the plaintiff's losses, there are strict notice provisions, which require notice to be given soon after the accident. The *Municipal Act, 2001*[132] governs claims against municipalities. In particular, section 44(10) provides as follows:

> **Notice**
>
> (10) No action shall be brought for the recovery of damages under subsection (2) unless, within 10 days after the occurrence of the injury, written notice of the claim and of the injury complained of, including the date, time and location of the occurrence, has been served upon or sent by registered mail to,
>
> (a) the clerk of the municipality; or
>
> (b) if the claim is against two or more municipalities jointly responsible for the repair of the highway or bridge, the clerk of each of the municipalities.

The *Public Transportation and Highway Improvement Act*[133] governs claims against the province. In particular, section 33(4) reads:

> **Notice claim**
>
> (4) No action shall be brought for the recovery of the damages mentioned in subsection (2) unless notice in writing of the claim and of the injury complained of, including the date, time and location of the happening of the injury, has been served upon or sent by registered letter to the Minister within ten days after the happening of the injury, but the failure to give or the insufficiency of the notice is not a bar to the action if a judge finds that there is reasonable excuse for the want or insufficiency of the notice and that the Crown is not thereby prejudiced in its defence.

Notice provisions that apply in road authority cases are discussed more fully in Chapter 4.

132 SO 2001, c 25.

133 RSO 1990, c P.50.

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PRACTICE TIP

The plaintiff may not know which government entity is responsible for the road at the time of providing notice. It is wise in many cases to put both the municipal government and province on notice of the claim. There is no downside to doing so, as the government will simply write back advising that the area where the accident occurred is not within its jurisdiction, if this is indeed the case. Some municipalities may have information on their websites about how to provide notice, but the general rule is to properly serve a written notice to the municipality clerk within ten days.

The Motor Vehicle Accident Report also contains several boxes where the police are to list the jurisdiction(s) in which the accident occurred. This is another way the roadway authority may be identified, but it is always best to check in case the report contains an error.

3. First-Party Claims for Insurance Coverage (Uninsured, Unidentified, and Underinsured)

In cases where the defendant driver is uninsured or the motor vehicle is unidentified and there is no identifiable insurance coverage, the injured party can sue their own insurer for the damages, interest, and legal costs they are entitled to recover from the defendant driver.

Regulation 676[134] requires that the insurer be notified within 30 days[135] of the collision and provided with as much evidence and details of the accident as possible within 90 days of the collision.[136]

If the defendant driver is underinsured or inadequately insured, the insurer must be "promptly" notified.[137]

These first-party notice provisions are discussed more fully in Chapter 6.

B. Limitation Periods

1. Limitations Act, 2002

The basic limitation period identified in section 4 of the *Limitations Act, 2002* applies to motor vehicle actions. Simply put, the plaintiff must sue within two years of discovering their claim. In most cases, the limitation period expires on the two-year anniversary of the accident.

134 *Uninsured Automobile Coverage*, RRO 1990, Reg 676 [Regulation 676].

135 Regulation 676, ss 3 (unidentified automobiles), 6 (uninsured automobiles); OAP 1, s 5.3.4.

136 Regulation 676, s 6; OAP 1, s 5.3.4.

137 OPCF 44R, s 15.

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2. Road Authorities

Section 4 of the *Limitations Act, 2002* applies to road authority cases, imposing a two-year limitation period. When the defendant is the province, the additional requirements set out in section 18(1) of the *Crown Liability and Proceedings Act, 2019*[138] require that proceedings against the Crown cannot be commenced until at least 60 days after the claimant has served notice of the claim and sufficient particulars. The section reads:

> 18(1) No proceeding that includes a claim for damages may be brought against the Crown unless, at least 60 days before the commencement of the proceeding, the claimant serves on the Crown, in accordance with section 15, notice of the claim containing sufficient particulars to identify the occasion out of which the claim arose.

This *notice of the claim* is distinct from the *notice claim* provision detailed in section 33(4) of the *Public Transportation and Highway Improvement Act*. Section 33(4) provides the notice of the incident. To comply with section 18(1), plaintiff's counsel typically writes to the province, then issues the statement of claim 60 days later. In cases where the limitation period is about to expire, the plaintiff sends the letter and then issues the claim (even if it is technically past the two-year limitation period).

Table 1.2 outlines a scenario in which the plaintiff's claim will be valid even though the statement of claim was technically issued more than two years after the accident.

TABLE 1.2 Notifying and Suing the Province—Example Scenario

DATE	EVENT
January 1, 2025	Single motor vehicle accident where the plaintiff is injured due to the buildup of ice on a provincial roadway.
January 10, 2025	Plaintiff puts the province on notice of the accident and claims that icy roadway conditions contributed to the injury.
December 1, 2026	Plaintiff writes to the province in accordance with section 18(1) of the *Crown Liability and Proceedings Act*.
January 30, 2027	Plaintiff issues statement of claim. Technically, this is past the two-year anniversary of the accident; however, section 18(1) of the *Crown Liability and Proceedings Act* allows for the claim to be issued in this manner.

Limitation periods in the road authority context are discussed more fully in Chapter 4.

138 SO 2019, c 7, Schedule 17.

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3. First-Party Claims for Insurance Coverage (Uninsured, Unidentified, and Underinsured)

In cases where the plaintiff is relying on first-party insurance coverage because the defendant is uninsured, unidentified, or underinsured, the limitation period begins to run when the plaintiff first makes a demand for indemnification and the insurer fails to satisfy that demand.[139]

This topic is discussed more fully in Chapter 6.

C. Discoverability

1. Legislative Framework

The doctrine of discoverability is directly incorporated in Ontario's *Limitations Act, 2002*. Sections 5(1) and (2) provide as follows:

> **Discovery**
>
> 5(1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).
>
> **Presumption**
>
> (2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

In motor vehicle claims, section 5(1)(a)(iv) is frequently litigated in cases where the plaintiff takes the position that they did not discover they met the threshold criteria immediately after the date of the accident. Note that, pursuant to section 5(2), the plaintiff must overcome a rebuttable presumption that they knew they could bring a claim on the day of the accident.

139 *Schmitz v Lombard General Insurance Company of Canada*, 2014 ONCA 88 at para 26 states that the "limitation period starts to run the day after the demand for indemnity was made."

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PRACTICE TIP

The plaintiff can rely on section 5 of the *Limitations Act, 2002* to bring a claim more than two years after the accident if they did not discover they met the threshold until after the day of the accident.

2. Key Cases

The discoverability doctrine was significantly shaped by the Supreme Court of Canada in *Peixeiro v Haberman*.[140] The case involved an Ontario motor vehicle accident tort claim that had been started more than two years after the accident. The plaintiff, Mr Peixeiro, relied on the common law doctrine of discoverability, which, at the time, had not yet been codified in the *Limitations Act, 2002*.

The evidence was that Mr Peixeiro was involved in a motor vehicle accident in October 1990. He consulted his family doctor and was told he had sustained soft tissue injuries. X-rays did not disclose any significant findings. It was accepted that he would not have met the statutory threshold of having sustained a serious physical injury.[141]

In June 1993, Mr Peixeiro underwent a CT scan that demonstrated a herniated disc, which had been caused by the accident. He started a lawsuit for the October 1990 accident in July 1994.

The Supreme Court of Canada held that the discovery doctrine applied to postpone the limitation period. The limitation did not start to run until the plaintiff could have reasonably discovered that his injury met the statutory threshold for a tort action under the *Insurance Act*. The Court concluded:

> Under s. 206(1) [of the] *HTA*, there is no cause of action until the injury meets the statutory exceptions to liability immunity in s. 266(1) of the *Insurance Act*. The discoverability principle applies to avoid the injustice of precluding an action before the person is able to sue. Time under s. 206(1) does not begin to run until it is reasonably discoverable that the injury meets the threshold of s. 266(1). It was agreed that the respondents first learned of the herniated disc in June 1993. The respondents were reasonably diligent in this respect. *It cannot be said that they ought to have discovered the serious nature of the damage earlier. As the action was commenced in July a year later within the limitation period, it cannot be statute-barred.*[142]

PRACTICE TIP

If the plaintiff is relying on discoverability, they should plead discoverability as per section 5 of the *Limitations Act, 2002* in the statement of claim.

140 1997 CanLII 325 (SCC).

141 *Peixeiro v Haberman*, 1997 CanLII 325 at para 32 (SCC).

142 *Peixeiro v Haberman*, 1997 CanLII 325 at para 44 (SCC) (emphasis added).

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The *Peixeiro* decision addressed the threshold component of the Ontario motor vehicle accident scheme in the context of discoverability. In 2010, the Court of Appeal for Ontario considered whether discovering that one's claim exceeded the statutory deductible similarly extended the time in which to start an action in *Everding v Skrijel*.[143] There, Ms Everding had commenced her claim seven years after the collision, but within two years of an MRI of her cervical spine that demonstrated a disc bulge at two locations. The Court held that while Ms Everding knew she had a chronic pain condition as a result of the collision several years before starting the lawsuit, she did not know that her condition was sufficiently serious to make a lawsuit cost-effective to pursue. Prior to the MRI, her claim would have been worth less, as the full extent of her medical diagnosis was unknown. Justice Feldman stated:

> Clearly, it is not the policy of the law or the intent of the limitations provisions to require people to commence actions before they know that they have a substantial chance to succeed in recovering a judgment for damages. These provisions of the Insurance Act were enacted as part of a scheme that provides compensation with no-fault benefits for injuries that are not considered to be serious or permanent, but allows actions to proceed where the injuries are sufficiently significant that a substantial monetary award is likely to be recovered. Consequently, the test for the discoverability of the existence of such a claim for limitation purposes must be in accordance with this same policy.[144]

Thus, if a plaintiff does not know their injury is serious enough to surpass the statutory deductible and recover damages, their limitation period will not start to run. The rationale behind this policy is that it would be unfair to require a plaintiff to start a lawsuit when they could not expect the value of their claim to exceed the statutory deductible.[145]

The cases just discussed address legislative restrictions on non-pecuniary losses created by the statutory threshold and deductible. What, then, of cases where the plaintiff has suffered economic losses that are not subject to the threshold and deductible? Are there two limitation periods—one for non-pecuniary losses and one for pecuniary losses?

Put differently, can a plaintiff who is relying on discoverability for non-pecuniary losses start a lawsuit more than two years after the accident and still advance pecuniary losses? The answer is yes.

3. Pecuniary Versus Non-Pecuniary Losses

In *Ng v Beline*,[146] Justice Perell considered a tort claim where the plaintiff had commenced her claim more than two years after the accident. The defendants argued that Ms Ng's pecuniary damages were statute-barred. Justice Perell held:

143 2010 ONCA 437.

144 *Everding v Skrijel*, 2010 ONCA 437 at para 11.

145 See also *Voisin v Hartin*, [2000] OJ No 5009 (QL), [2000] OTC 931 (SC).

146 2008 CanLII 51931 (ONSC).

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> In my opinion, the spirit and thrust of the Chenderovitch judgment is that with respect to the operation of limitation provisions, a plaintiff with an automobile accident claim should receive the most favourable treatment possible, and this means that the measure of whether he or she has a claim is governed by the discoverability of the claim for non-pecuniary damages, which is the claim that is subject to the threshold test. This approach, in effect, continues the approach from Peixeiro. *In practical terms, the pecuniary claims may shelter under the limitation period for the non-pecuniary claims if those claims are not statute-barred*.[147]

Justice Perrell made clear that each cause of action is not subject to an independent limitation period analysis. If the non-pecuniary claim is out of time, then the pecuniary claims are also struck. Conversely, if the non-pecuniary claims have been brought within the limitation period—including with the benefit of discoverability—then all claims, including pecuniary losses, should proceed. The decision was upheld at the Divisional Court,[148] and subsequent case law has followed Justice Perrell's reasoning.[149]

In 2024, the Court of Appeal for Ontario again affirmed the applicability of the discoverability doctrine to Ontario motor vehicle accident cases in *Sanei v Debarros*.[150] The case involved a plaintiff who was injured in a motor vehicle accident on February 2, 2013, but had not started an action until March 2, 2016.

The evidence was that the plaintiff's physical and psychological impairments had begun almost immediately after the accident and had been consistent since that time. The plaintiff had discussed his injuries with his treating physicians and with insurance examiners. The plaintiff argued that the limitation period did not start to run until he had obtained a medical opinion that his impairments met the threshold.[151]

The Court held that the plaintiff had known of his injuries and had medical evidence of his injuries that had triggered the discovery of the claim and had started the limitation period running more than two years prior to when he started the claim. Interestingly, the motion judge did not identify the precise date when the plaintiff discovered his claim and the limitation period commenced. The Court held that while this was an error, it was not a fatal error. The foundation for the motion judge's decision was clear, and the plaintiff knew or ought to have known that a civil claim would be a remedy for his loss prior to March 2, 2014.

147 *Ng v Beline*, 2008 CanLII 51931 at para 22 (ONSC) (emphasis added).

148 *Ng v Beline*, 2009 CanLII 31601 (ONSC (Div Ct)).

149 See e.g. *Pereira v Contardo*, 2014 ONSC 6894.

150 2024 ONCA 104.

151 Regulation 461/96, s 4.3 requires the plaintiff to adduce evidence from a physician that their impairments meet the permanent and serious criteria of the threshold. The Court confirmed that the evidentiary hurdle a plaintiff must meet to establish they meet the threshold is different from evidence that triggers a plaintiff's discovery of a cause of action and starts the limitation period running.

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D. Minors and Mentally Incapable Persons

Section 6 of the *Limitations Act, 2002* provides that no limitation period runs when a claimant is a minor and is unrepresented by a litigation guardian in relation to their claim. Section 7 similarly provides that no limitation period runs when a claimant is incapable of proceeding because of their physical, mental, or psychological condition and is unrepresented by a litigation guardian in relation to their claim.

1. Starting the Limitation Period: Reaching the Age of Majority

Once a minor reaches the age of majority (18), their limitation period starts to run. Generally, this means that a minor's limitation period will end on their 20th birthday, if the basic limitation period of two years prescribed by section 4 of the Act applies.

2. Starting the Limitation Period: Ceasing to Be Incapable

Likewise, if a person ceases to be incapable, their limitation period starts to run. In assessing whether a plaintiff is incapable of proceeding because of their physical, mental, or psychological condition, the court will look to a number of factors and will be guided by the presumption in section 7(2) that the person is presumed to have capacity.

Note that the capacity to instruct counsel is considered to be at the "higher end of the competency hierarchy."[152] A person is required to understand both financial and legal issues to make decisions about their legal options.

In *Carmichael v GlaxoSmithKline Inc*,[153] the Court of Appeal for Ontario affirmed that the list of *Huang/Hengeveld* indicators are appropriate indicia of capacity that, while not exhaustive, are helpful to assess capacity under section 7(1)(a). These factors, identified at paragraph 94 of the decision, are:

(a) a person's ability to know or understand the minimum choices or decisions required to make them;
(b) an appreciation of the consequences and effects of his or her choices or decisions;
(c) an appreciation of the nature of the proceedings;
(d) a person's ability to choose and keep counsel;
(e) a person's ability to represent him or herself;
(f) a person's ability to distinguish between the relevant and irrelevant issues; and,
(g) a person's mistaken beliefs regarding the law or court procedures.

152 *Carmichael v GlaxoSmithKline Inc*, 2020 ONCA 447 at para 87.

153 2020 ONCA 447.

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PRACTICE TIP

Plaintiff's counsel should keep in mind that parts of the lawyer's file may have to be produced if the capacity of the client, during the time when the lawyer was acting, is at issue. Certain contents of the lawyer's file may be relevant to determining a person's capacity. See, for example, *McQueen v Mitchell*.[154]

3. Starting the Limitation Period: Representation by a Litigation Guardian

Sections 6 and 7 of the *Limitations Act, 2002* prescribe that the limitation period does not run when the person is a minor and does not have a litigation guardian. These sections have been interpreted to mean that a litigation guardian has been appointed as part of the litigation.[155] Practically speaking, this means that a person has sworn an affidavit in accordance with Rule 7.01(2) of the *Rules of Civil Procedure*[156] in which they, *inter alia*, consent to act as litigation guardian, state that they have no conflict of interest with the person under disability, and acknowledge their liability to personally pay costs awarded against them.

Note that in *Shaw v Barber*,[157] the Ontario Superior Court of Justice determined that the Public Guardian and Trustee's appointment as statutory guardian of property did not automatically make it a litigation guardian for the plaintiff. The limitation period did not begin to run until the Public Guardian and Trustee formally acted in that capacity and had investigated the matter.

Once a litigation guardian is acting in the litigation for the minor or mentally incapable person, the limitation period begins to run. Since the proceeding will usually have been commenced when the litigation guardian starts to act, the practical significance of the limitation period running usually arises only when the plaintiff seeks to add a party to the action. For example, in *Auger v Wood*,[158] the Court refused to allow the plaintiff, through his litigation guardian, to add a party to the litigation because more than two years had passed since the action had been commenced. The fact that the plaintiff was a minor was immaterial to the Court's analysis. The limitation period started to run when the litigation guardian began to represent the plaintiff, and it had expired by the time the plaintiff sought to add a new party. Notably, the Court was

154 2022 ONSC 649.

155 See *Azzeh v Legendre*, 2017 ONCA 385. See also *McQueen v Mitchell*, 2022 ONSC 649, where the Court held that a family member instructing counsel on behalf of a person under disability does not make that person a litigation guardian for the litigation.

156 RRO 1990, Reg 194.

157 2017 ONSC 2155.

158 2014 ONSC 5306.

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clear that plaintiff's counsel is required to be reasonably diligent.[159] Plaintiff's counsel must take positive steps to investigate the accident prior to the limitation period expiring. In this case, the Court held that had plaintiff's counsel taken active steps to investigate, the potential defendants would have been identified sooner.

E. Suing an Estate

Pursuant to sections 38(2) and (3) of the *Trustee Act*,[160] there is a two-year limitation period that applies when suing an estate. The legislation provides as follows:

> (2) Except in cases of libel and slander, if a deceased person committed or is by law liable for a wrong to another in respect of his or her person or to another person's property, the person wronged may maintain an action against the executor or administrator of the person who committed or is by law liable for the wrong.
>
> **Limitation of actions**
>
> (3) An action under this section shall not be brought after the expiration of two years from the death of the deceased.

Discoverability does not apply in cases where an estate is a party. Proceedings must be commenced within two years of the death of the deceased party. Thus, a plaintiff in a motor vehicle action who seeks to rely on discoverability to start a claim more than two years after the accident will find their action out of time.

Consider the scenario outlined in Table 1.3.

TABLE 1.3 Suing an Estate—Example Scenario

DATE	EVENT
January 1, 2024	Motor vehicle accident. Plaintiff sustains injuries but doesn't yet realize has impairments that meet the threshold.
December 1, 2024	Defendant dies (unrelated to the motor vehicle accident).
January 1, 2025	Plaintiff has sufficient evidence to discover that their impairments will meet the threshold.
January 1, 2027	Plaintiff issues statement of claim.

159 See e.g. *Carone v Peel Condominium Corporation No 766*, 2016 ONSC 7821. See also *Soper (Guardian of) v Southcott*, [1998] OJ No 2799 (QL), 1998 CanLII 5359 (CA), where the Court stated at para 21:

> Limitation periods are not enacted to be ignored. The plaintiff is required to act with due diligence in acquiring facts in order to be fully apprised of the material facts upon which a negligence or malpractice claim can be based.

160 RSO 1990, c T.23.

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In this scenario, the plaintiff's claim has been issued one month too late and will be statute-barred by section 38(3) of the *Trustee Act*. The claim had to be issued by December 1, 2024, which is the two-year limitation period in the Act. Had the defendant not died, the plaintiff would have issued their claim in time, as the limitation period would not have expired until January 1, 2025.

Note that the two-year limitation period created by the *Trustee Act* also applies to claims brought by an estate. Sections 38(1) and (3) provide that when the estate is a plaintiff, the executor or administrator of the estate must bring the claim within two years of the plaintiff's death.

In *Kakinoki v Islam*,[161] the Court considered a case where the defendant driver, who was neither licensed nor experienced, caused a single vehicle collision after failing to negotiate a curve on a country road. He lost control of the vehicle, causing the death of one of his passengers. The deceased passenger's family members sued the driver well within two years of the accident. However, years into the litigation, they discovered that an amber light near the curve may not have been functioning and may have contributed to the accident.

The plaintiffs sought to add the Township of King as a party to the action, relying on the doctrine of discoverability. The Court noted that the plaintiffs' claims under the *Family Law Act* derived from the claim of their family member—the deceased passenger. Accordingly, their claims against the Township of King were subject to the limitation period under section 38(3) of the *Trustee Act*.[162]

The Court held that the plaintiffs could not rely on discoverability to extend the *Trustee Act* limitation period of two years, as the Act stipulates a firm two-year limitation period. Ultimately, the Court ruled that the plaintiffs could not proceed against the township.[163]

In *Levesque v Crampton Estate*,[164] the Court of Appeal for Ontario made it clear that the two-year limitation period imposed by section 38(3) of the *Trustee Act* is not subject to discoverability.[165] As Justice Strathy wrote:

> The Limitations Act, 2002 is based on discoverability. Section 18(1) deems the claim to be discovered on the date the claim is served on the person who seeks contribution or indemnity. *In contrast, s. 38(3) of the Trustee Act is a "hard" or absolute limitation period. It is triggered by a fixed and known event—the death of the party against whom a claim is made.*

161 2015 ONSC 5141.

162 See *Kakinoki v Islam*, 2015 ONSC 5141 at para 22. See also the Court of Appeal for Ontario decision in *Camarata v Morgan*, 2009 ONCA 38.

163 In *Kakinoki v Islam*, 2015 ONSC 5141 at para 39, the Court further rejected an argument that the doctrine of special circumstances allowed for the plaintiffs' claim against the township.

164 2017 ONCA 455.

165 See also *Ingram v Kulynych Estate*, 2024 ONCA 678.

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The purpose of the Trustee Act limitation period is clear. It is to provide a remedy for a limited time, without indefinite fiscal vulnerability to the estate: Waschkowski, at para. 9.[166]

166 *Levesque v Crampton Estate*, 2017 ONCA 455 at paras 51-52 (emphasis added).

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