

# ONTARIO INTRODUCES AMENDMENTS TO SIMPLIFIED PROCEDURE – WHAT DOES THIS MEAN FOR INSURERS?

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## Keepin' Things Simple: A Guide to Rule 76 Simplified Procedure

Rule 76 of the Rules of Civil Procedure<sup>[1]</sup> was instituted to streamline cases of smaller monetary value. The Rule as enacted in 2010, made Simplified Procedure mandatory for civil cases in which a Plaintiff claimed \$100,000 or less (exclusive of interest and costs).

Its objective was and continues to be, to limit litigation costs for claims that exceed the monetary jurisdiction of Small Claims Court but are modest enough to be resolved in a timely and cost-effective manner. Another goal of Rule 76 is to reduce unnecessary waste of precious court resources.

## Rule 76: Simplifying the Complex, or Injecting Complexity into the Simple?

Rule 76, as we previously knew it, failed to achieve its objectives. Litigants, especially in personal injury actions, were not using Simplified Procedure at the rate legislators had anticipated. Plaintiffs in personal injury cases, especially involving motor vehicle accidents, routinely claimed in excess of the \$100,000 threshold, thereby opting to commence their claim under the Ordinary Procedure. This practice was not necessarily rooted in a desire to duplicitously evade Simplified Procedure; rather, it was simply a practical reality of the inherent uncertainty of personal injury damages.

Rule 76 was being overlooked by personal injury lawyers arguably for two principal

reasons: First, notwithstanding the adverse cost consequences built into Rule 76, Plaintiff's counsel realize that personal injury claims tend to settle. Therefore, claimants tend to eschew the cost risks associated with over claiming, on the basis that the possibility to suffer the cost consequences likely would not materialize. Second, personal injury claimants often file their claims before the damages resulting from their injuries have fully crystallized. Thus, the common practice has been to automatically claim beyond \$100,000 out of an abundance of caution and in order to avoid limiting the amount of damages that could be recovered.

## **Game-changer! Amendments to the *Courts of Justice Act* mean New Year, New Rule 76**

In response to the perceived shortcomings of Rule 76, amendments were proposed to improve the effectiveness of Rule 76 and to encourage its use. The changes to Rule 76 were accepted and are now in effect as of January 1, 2020. The goal of the new Rule 76 is simple: make Simplified Procedure more timely and cost-effective and encourage more litigants to use it. Noteworthy changes to Rule 76 include:

- i. An increase of the maximum claim from \$100,000 to \$200,000;
- ii. A maximum of three experts that parties can rely upon at trial;
- iii. A cost awards cap of \$50,000, and disbursements cap of \$25,000 (excluding H.S.T)
- iv. A strict limit of 5 days for a Rule 76 trial;
- v. Examination-in-chief is conducted by way of affidavit evidence; and
- vi. The elimination of the right to a jury trial (Except in claims involving slander, libel, malicious arrest, malicious prosecution, and false imprisonment. These actions must continue as ordinary actions.)<sup>[2]</sup>

## **Onward and Upward? Not so Fast**

The rationale underlying the \$100,000 to \$200,000 increase is that it will be sufficient to capture many of the claims, including personal injury claims, that were previously not brought under Simplified Procedure. However, this reasoning assumes that Plaintiffs are suddenly capable of accurately forecasting the quantum of their damages, or will now be willing to limit their claims to \$200,000.

While the higher monetary limit may capture straightforward personal injury claims, such as slip and fall actions where the Plaintiff does not advance an economic loss claim, the

inherent complexity that characterizes personal injury claims has not abruptly dissipated. Ultimately, the monetary increase and potential benefits resulting from utilizing Rule 76 may still be insufficient to effect the change necessary to incite claimants to limit their claims to \$200,000 from the outset. Accordingly, it stands to reason that the changes to Rule 76 may not fundamentally impact the litigation of most personal injury claims.

The most contentious of the proposed changes to Rule 76 is the elimination of the jury trial, as the concept of the jury trial is fundamental to our notion of justice. While defendants typically tend to prefer jury trials in personal injury actions, plaintiffs do not. That said, given that the new threshold of \$200,000 is still low in light of the large monetary claims typically brought by personal injury litigants, it is unlikely that we will see a substantial increase in personal injury actions being commenced under Rule 76.

## The New Rule 76 and Subrogated Claims

The recent changes to Rule 76 may have a more significant impact on subrogated actions commenced by insurers, given that the quantum of damages in subrogated actions are usually finite and have crystallized by the time a Statement of Claim is issued. In the past, in an effort to expedite the action and keep legal fees at a minimum, it was not uncommon for insurers to forgo recovery of amounts over \$100,000, in order to commence and/or maintain an action within the Simplified Procedure. The monetary increase to \$200,000 will allow insurers to claim higher damages, while still reaping the benefits of Rule 76.

## A look to the future

While the new Simplified Procedure surely constitutes a step in the right direction, the 2020 changes to the Rule are fresh. Only time will tell whether litigants and their lawyers are persuaded to utilize Simplified Procedure more frequently to expedite the litigation process and limit legal fees, or if insurers will simply continue to receive claims commenced under the Ordinary Procedure at the same rate as before the changes were enacted.

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[1] Rules of Civil Procedure, RRO 1990, Reg 194, r 76.

[2] Does not apply to actions commenced prior to January 1, 2020.

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