EVER ESCALATING CLAIMS
THE EVOLVING AUTO INSURANCE PRODUCT
STRESSES ON THE SYSTEM

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For those of you who self insure, let's say the first million. For those of you who own fleets, for those insurers of cars and trucks and for everyone with an automobile policy of insurance, the following is a discussion of the stresses on the auto insurance product in Ontario.

The Ontario Automobile Insurance Anti-Fraud Task Force

The Final Report of the Ontario Automobile Insurance Anti-Fraud Task Force was released. This task force was appointed to advise the government of Ontario on the extent of automobile insurance fraud and what to do about it. Its findings were as follows:

The accounting firm of KPMG had been retained to provide an estimate of fraud and the cost to the auto insurance product. KPMG's estimate of fraud ranged from $766 million to $1.56 billion dollars in 2010. This amounts to between $116 and $236 per average premium paid in Ontario in that year.

The impact is even greater in the GTA. There was an 83 percent increase in accident benefit costs in Ontario between 2006 and 2010 which occurred in the GTA.

With an 83 percent estimated fraud occurring in the GTA, the impact on average premium per insured vehicle in 2010 was $267 at the low end of the range and $540 at the upper end of the range.

The Auto Insurance Task Force had heard from many individuals and groups who had been involved on the front lines of the fight against auto insurance fraud. For example:

The task force was informed by owners of rehabilitation clinics that they had been unable to attract patients who had been involved in automobile collisions without paying substantial referral fees to tow truck operators, body shops, paralegals and/or referring physicians.

In a Pilot project involving the College of Psychologists of Ontario 14 percent of the psychologists participating found that their credentials were being used by clinics they did not recognize.

Auto insurers have launched civil actions against a number of clinics for fraudulent misrepresentation and the Superintendant of Financial Services has laid charges against 10 clinics for the offence of committing an unfair or deceptive act or practice. One investigator informed the Task Force:

The (sign in) sheet for the first day of surveillance in which only 20 people were in and out had 98 names signed in. The clinic was charging $150/visit which works out to $14,700 for that one day…I was able to determine that 90 percent of the referrals to that clinic came from one doctor in Toronto. Claimant files were completely empty except for a referral sheet from the doctor which included a map of how to get to the clinic along with a sheet on whom to invoice at the insurance company…An employee listed as the "driver" received cash payments several times a month with no explanation. It was simply listed as "cash". I was able to tally just how much this "driver" was receiving and determined it to be anywhere from $25,000 to $37,000 a month – in cash – for well over a year.

September 2010 Reforms

There was an increase in medical/rehabilitation benefits, costs of assessments and attendant care that stressed the accident benefits auto system to the point legislative changes were made. A premium of approx. $1,000 to $2,000 per automobile could not sustain the radical increase in the quantum of accident benefit payments.

The first interim report of the Honorable Justice Cunningham has been issued October 2013 and provided the following information:

In spite of all the changes over the years, costs continued to increase. In particular, the period between 2006 and 2010 was marked by a rapid rise in accident benefits claims and costs, mainly in the Greater Toronto Area (GTA). Because insurance is a closed loop system, premiums for consumers increased.

During the same 2006-2010 period, the number of accidents and injuries report to the police decreased, while the number of accident benefit claims increased. In other words, there were fewer accidents and injuries but more claims. This trend was not consistent with the experience in other provinces. During the 2006-2010 period, accident benefit claims costs in Ontario increased by more than 100 percent. Some of the more significant increases were as follows:

- Housekeeping expenses increased by 178 percent
- Attendant care benefit costs increased by 67 percent
- Caregiver benefit costs increased by 186 percent
- Assessment and examination expenses increased by 228 percent

Also during this period, the cost of assessments and examinations rose to almost equal to the cost of medical and rehabilitation treatment. These increases occurred in a period during which:

- Personal injury collisions declined by 7.1 percent
- The number of persons reported injured declined by 9.1 percent

In response to these issues and in an ongoing effort to control costs and to reduce premiums, the government introduced substantial changes to the SABS in September of 2010. The new SABS had lower mandatory statutory accident benefits but provided consumers with the ability to "buy up" to previous levels. However, very few consumers are actually purchasing optional accident benefits.

Justice Cunningham proposed substantial changes regarding the accident benefits adjudication process at FSCO. These include:

1. The DRS adjudicative function will no longer be housed at FSCO. The adjudicative functions should be established in an independent public sector tribunal or in the private sector.

2. Health care providers will be permitted to initiate disputes in Ontario, providing they pay the costs, instead of the current situation where they indirectly access the system at no cost through a claimant.

3. Elimination of Director's Delegates. The small number of appeals could be handled by a single judge of the Superior Court.

4. Mediation will no longer be mandatory, in its current form rather the mediation and pre-arbitration hearing will take place at the same time before an arbitrator.

5. Graduated arbitration filing fees depending on how far the claim advances in the system.

6. The use of advocacy offices as an alternative to legal representatives when claims are small.

7. Use of a list of acceptable treatments lessening uncertainty and the number of disputes around what is reasonable and necessary.

8. An expedited process for simple cases below a monetary threshold of $25,000.

Catastrophic Impairment

There is mounting pressure on the automobile insurance product due to the number of individuals meeting the definition of catastrophic impairment. This increases attendant care exposure to $1 million and med/rehab exposure to $1 million for the accident benefits insurer.

In the decision of Justice H.A. Rady in *Dominion of Canada and Chambers*, 2013 ONSC 6122, the plaintiff argued she was catastrophically impaired as a result of the cumulative effects of three separate car accidents. Dr. Gale for the plaintiff indicated she met the definition of catastrophically impaired based on criteria 7, whole person impairment rating of 55% or more; and criteria 8, a class IV or V impairment due to a mental or behavioural disorder as result of the cumulative effects of the three accidents. Dominion stressed that if the plaintiff's contention was

correct, she would have access to three times the available benefits resulting in exposure of potential claims in excess of $6 million. The court determined the common sense interpretation is to define catastrophic impairment by reference to a single accident. In this case, neither the first nor second accidents alone were sufficient to render the plaintiff catastrophically injured. It was the third accident that may have transformed the plantiff's non-catastrophic situation into a catastrophic one.

Tort Side of the Automobile Insurance Product

With reduced benefits available post-September 2010 legislative reforms from the accident benefits side of the product, there has been increased pressure being placed on the tort side of the automobile insurance product.

A particular tension is attendant care and med/rehabilitation benefits that pass over to the tort side on a serious and permanent threshold.

Given the cap on general damages, which is approx. $350,000, it is the non-pecuniary damages, and, in particular, increasing future care cost damages, that have led to higher damage awards recently.

The purpose of an award for future care is to restore, as best as possible with a monetary award, the injured person to a position he/she would have been in had the accident not occurred. However, from a practical standpoint, it is difficult to assess the quantum of these heads of damages as it cannot be predicted with certainty since the plaintiff's condition may improve, stay the same or worsen.

One of the most well-known cases regarding future care costs is *Sandhu (Litigation Guardian of) v. Wellington Place Apartments* (2006) O.J. 2448. This was a jury trial in which almost $11 million was awarded for future care costs for a brain injured infant who had fallen from a fifth storey apartment window.

The defendant appealed the jury award and argued that the jury erred in awarding more than the highest amount sought by the plaintiff. The plaintiff's highest estimate for future care costs was $9,605,000. This figure represented attendant care, rehabilitation support, responsible persons for night-time, speech and language therapist, job coach, occupational therapist, physiotherapist, neuropsychology expert, psychology/counseling, family support, cognitive rehabilitation, summer activity, case management and transportation costs.

The Court of Appeal upheld the Jury award. It stated that the plaintiff used lower hourly rates in parts of its assessment than those rates that the expert witnesses suggested. It was within the power of the jury to accept the evidence of the experts and award a higher amount than the figure recommended by the plaintiff.

After the jury award, the trial judge decided the issue of future care costs relating to guardianship.

The judge awarded:

- $268,000 for a non-corporate guardian (based on 10 hours per week at $15 per hour)
- $1,127,000 for a corporate guardian; and
- $400,000 for future legal fees that will be incurred.

The Solution

Legislative reforms and responsible adjudication of their interpretation. Reviews of the automobile insurance product at shorter intervals to respond to the inevitable reaction to legislative changes.

An upcoming fifteen (15%) decrease in premium? Time will tell.