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VIA E-MAIL: submissions@ontario.ca

Yvan Baker
Parliamentary Assistant to the Minister of Finance
c/o Budget Secretariat
Frost Building North, 3rd floor
95 Grosvenor Street
Toronto, ON M7A 1Z1

Dear Mr. Baker:

RE: Response to "Fair Benefits Fairly Delivered: A Review of the Auto Insurance System in Ontario"

The Advocates' Society (the "Society"), established in 1963, is a not-for-profit association of over 5,700 lawyers throughout Ontario and the rest of Canada. The mandate of the Society includes, amongst other things, making submissions to governments and other entities on matters that affect access to justice, the administration of justice and the practice of law by advocates.

Over 2,000 of our members practise in the personal injury field, both as plaintiffs' counsel and as defence counsel. The members of the Society's Task Force who drafted this submission (a list of the members of this Task Force appears at the end of this letter) represent both sides of the bar. These counsel are on the front lines of the auto insurance system in Ontario and see its strengths and shortcomings every day. As a result, we believe that our comments represent a unique and balanced perspective.

The Society is pleased to offer the following written submissions setting out its perspectives on the report of David Marshall, "Fair Benefits Fairly Delivered: A Review of the Auto Insurance System in Ontario" (the "Marshall Report"), which was prepared for the Ministry of Finance for the Province of Ontario. Throughout this letter, in square brackets, numbered references are made to the recommendations outlined in the Marshall Report.

General Comments

Common Ground

At the outset, the Society notes that there are issues and recommendations identified in the Marshall Report with which the Task Force agrees. The Society acknowledges and supports the efforts of the Province to examine and to address the Statutory Accident Benefits system.

The Society also thanks Mr. Marshall for his efforts in preparing a report which has drawn attention to several fundamental problems in that system.

The Task Force concurs with Mr. Marshall's observation that the current structure of Statutory Accident Benefits in Ontario is fundamentally flawed and will not self-correct. An overhaul of that structure is required. As Mr. Marshall has correctly observed, the current legislation and regulations are too complex – it is imperative that they be simplified.

Specifically, the Task Force concurs with the following recommendations by Mr. Marshall:

- A government-operated insurance system is neither necessary nor desirable in Ontario. [Recc. 1]

- There should be no reductions to the Statutory Accident Benefits available to motor vehicle accident claimants in Ontario. [Recc. 2]

- The development of the Financial Services Regulatory Authority is a positive step which will assist in the oversight of the Statutory Accident Benefits system. One of the mandates of that Regulatory Authority should be to monitor and to take steps to reduce delays in the delivery of Statutory Accident Benefits to claimants. [Recc. 14, 31]

- Insurers should be required to develop an internal review process in order to reduce the number of disputed claims. The Regulatory Authority should be empowered to take corrective steps when an insurer is generating an unusual number of claims in the external dispute resolution process (the "LAT"). [Recc. 15]

- A "Gatekeeper" function should be established within the LAT system in order to reduce the incidence of unnecessary disputes before the Tribunal. [Recc. 16]

The Society also notes that there are several recommendations which have been made by Mr. Marshall which fall outside of the mandate of the Society. These recommendations address issues pertaining to fee schedules for treatment providers [Recc. 10], consumer education [Recc. 20], insurance product development [Recc. 29], insurance pricing [Recc. 30], and the Regulatory Authority budget, staffing and mandate [Recc. 33, 34].

Areas of Concern

While the Task Force concurs with Mr. Marshall's recommendation that Ontario's governing legislation and regulations for Statutory Accident Benefits must be simplified [Recc. 18], it cannot concur with many of Mr. Marshall's recommendations regarding the manner in which this should be achieved.

The current system of Statutory Accident Benefits in Ontario is complex and has created fertile ground for disputes. These disputes are not being driven by lawyers, but rather by legislation and regulations which have placed claimants in an adversarial process with their insurers.

While simplifying the system will reduce conflicts between insurers and claimants, it will be impossible to eliminate disputes, regardless of the best intentions of all involved parties.

All claimants, and seriously injured claimants in particular, must have access to a system of Statutory Accident Benefits in which they can feel confident and which places their need for treatment and rehabilitation at the forefront. The Society supports a transition toward clear, simplified legislation and regulations that achieve this goal and that:

- Recognize the need for checks and balances to ensure that the need of injured claimants to have access to justice is appropriately balanced against the need of insurers to control costs in order to deliver an affordable Statutory Accident Benefits system;

- Recognize the crucial role of treating physicians and rehabilitation practitioners in assessing the need for treatment and in delivering that treatment to claimants; and

- Recognize the crucial role that competent and professional lawyers play in ensuring that benefits claimants have access to justice when disputes inevitably arise.

Unfortunately the Marshall Report does not outline any specific recommendations as to how Ontario's system can be simplified and improved in order to address the challenges identified in the current system. This is a significant shortcoming of the Marshall Report.

Specific Comments

Role of Insurers **[Recc. 19, 35]**

The Statutory Accident Benefits system envisioned by Mr. Marshall would see insurers become responsible for the delivery of healthcare to their insureds. The Task Force believes that this would fundamentally change the duty of care owed by insurers to claimants, would create new legal liabilities for insurers and regulated health professionals, and would increase the costs to insurers in delivering benefits.

Under the current system, healthcare and rehabilitation services are delivered by private practitioners who are chosen by claimants, most often in the communities where the claimants reside. Private case managers assist in co-ordinating services for catastrophically injured claimants.

Insurers are not currently equipped to deliver healthcare and rehabilitation, or to act as case managers. As many of these services must be delivered by regulated health professionals, insurers would be required to incur additional costs in hiring practitioners to deliver services or to provide oversight to practitioners who are delivering services. These imposed arrangements will be problematic both for insurers and for regulated health professionals:

- When faced with the competing objectives of delivering care to patients while managing the budgetary expectations of their employers, regulated health professionals will inevitably face conflicts of interest. These conflicts of interest have the potential of attracting patient complaints to regulatory bodies and creating exposure to disciplinary proceedings.

- Insurers will be exposed to liability for any errors and omissions in the delivery of services by the regulated health professionals in their employ, or for any failures in their oversight. Potential conflicts of interest in the delivery of health care services will also add exposure to claims for aggravated and punitive damages.

This is not in the best interests of any of the parties to the system, and is contrary to the objective of delivering benefits fairly and affordably.

Healthcare, rehabilitation and case management should continue to be delivered by private healthcare practitioners who are funded by benefits provided by insurers. Claimants should continue to have the right to direct their own healthcare and rehabilitation with practitioners of their choice in the communities in which they reside. Insurers should not be compelled to adopt a role for which they are not currently equipped and which will extend their exposure to legal liability and to potential conflicts of interest.

Programs of Care **[Recc. 6, 7]**

While programs of care can likely be successfully implemented in addressing minor injuries, it is unrealistic to suggest that this model can be successfully implemented in addressing complex or catastrophic injuries.

Even in those cases in which an optimal level of care is provided, there will always be claimants whose recovery is complex and who do not respond to traditional or expected treatment pathways. Pre-existing conditions (for example, diabetes or osteoporosis) can complicate the response to treatment and can increase the cost of post-accident care.

In the case of catastrophic injuries, programs of care cannot reasonably be expected to contemplate changes in a claimant's condition, or to contemplate future developments in medical care. Complex and catastrophic injuries are, by their very nature, dynamic and claimants must have access to a Statutory Accident Benefits system which is prepared to address their ongoing and future care needs.

Involvement of the Ministry of Health and Long-Term Care **[Recc. 3]**

The purpose and the objective of the Statutory Accident Benefits system is to reduce the financial burden on the healthcare system of providing rehabilitative treatment to injured accident victims. Mr. Marshall's recommendation that the Ministry of Health and Long-Term Care should be engaged to increase their level of involvement in providing care to claimants is contrary to this objective and will only serve to download the costs of the Statutory Accident Benefits system to taxpayers. The Society is opposed to this recommendation.

Independent Examination Centres **[Recc. 4, 8, 9, 17, 24]**

The recommendation that a system of Independent Examination Centres be established fails to acknowledge the poor history of Designated Assessment Centres. This system has already been exposed as an enormous source of complexity and expense to the Statutory Accident Benefits system and would be a step backwards both for insurers and claimants.

The Task Force raises the following specific concerns about a return to a system of Independent Examination Centres:

- Such Centres would have to be either insurer-funded or government-funded. This would create expense for insurers or taxpayers, and is contrary to the objective of reducing the cost of the system. The involvement of insurer-funded Centres would create inevitable suspicion among claimants and would lead to disputes about assessment findings.

- There is no contemplated involvement by treating physicians and practitioners. It is impossible to envision how treatment can be planned and delivered without the input and hands-on involvement of a claimant's treating practitioners, who are in the best position to speak to the individual complexities of each claimant.

- Necessary treatment would be delayed in order to undertake assessments which may not be appropriate or required, but which are taking place simply because they are mandated. Alternatively, treatment would have to be funded pending assessment, notwithstanding the fact that the treatment might not be supported by the assessment. This interim issue is impossible to balance without either incurring expenses or acting to the detriment of the claimant.

- No consideration appears to have been given to how a claimant's response to treatment would be gauged, or how changes in a claimant's medical or psychological condition would be managed. The full consideration of these issues would require the ongoing involvement of the Independent Examination Centres, with the attendant expenses of that involvement. This is contrary to the objective of reducing the cost of the system.

- It is inevitable that such Centres would be based in larger urban areas. The following issues are contemplated:

    - Injured claimants would be required to travel to attend assessments. This places a burden upon claimants and their families (particularly children and the elderly) who will be required to participate in travel. Additional expense will be incurred by insurers to fund the cost of travel for attendants, and disputes will arise regarding those situations in which attendants are necessary or appropriate.

    - Treatment recommendations would not reflect the realities of available medical and rehabilitative treatment in small and remote communities. This would create a system which would discriminate against injured claimants in these small and remote communities.

The Task Force also questions who would be responsible for overseeing quality control measures and peer assessments within an Independent Assessment system. Oversight managed and funded by insurers would attract suspicion by claimants, while oversight funded by the Province would download the expense of the Statutory Accident Benefits system to taxpayers.

Notwithstanding a robust system of peer assessments and quality control measures, no assessor is perfect and there will always be opportunities for error in independent examinations.

Although an assessment may be independent, subjective issues may influence recommendations or competing medical evidence may be overlooked, particularly in complex cases. The proposal that the findings and recommendations of the Independent Examination Centres would not be subject to dispute is extremely problematic. Any proposal which removes the right to challenge questionable or erroneous findings fails to provide access to justice for all parties to the system.

Dispute Resolution Mechanisms **[Recc. 8, 17]**

The right of claimants to dispute determinations of their insurers regarding the availability of benefits is an access to justice issue. Any recommendations which would remove this right are contrary to the principles of natural justice and open the door to systemic abuses. The Society strenuously objects to the suggestion that this is an appropriate or desirable direction for the Statutory Accident Benefits system.

In a truly independent system, there will be opinions and determinations with which both insurers and claimants disagree. While the Society acknowledges that it is desirable to reduce the number of claims destined for the dispute resolution system, it disagrees that removing the right to dispute is the appropriate means of achieving that objective. Both parties must have access to a simple, well-functioning forum in which these disputes can be addressed.

The recommendation that the right to dispute be removed fails to acknowledge the impact that other proposed measures will have in reducing the burden of disputes on the current Statutory Accident Benefits system. Simplified and understandable Statutory Accident Benefits legislation and regulations will reduce the number of disputes destined for the dispute resolution system. The implementation of internal review procedures by insurers and a gatekeeping function for disputes destined for the dispute resolution system will ensure that only those matters requiring adjudication have access to the resources of that system

Parties should have a right to mount a robust response when opinions are rendered and decisions are made with which they do not agree. Vulnerable parties require legal representation to advocate on their behalf in resolving those disputes; often, the involvement of lawyers can assist parties in understanding the position of the insurer before a dispute arises, or can result in an effective mediation of a dispute before a hearing is required. Removing lawyers from this system will only serve to increase disputes, not to alleviate them.

Lump Sum Settlements **[Recc. 11, 28]**

Often, there are practical and compelling reasons, both for claimants and for insurers, to close a claim with a lump sum settlement:

- An insurer may wish to terminate a claim with a lump sum settlement in order to close their file and to release their reserves.

- An insured may reach a stage in their recovery where ongoing benefits are required for intermittent care, but insurer oversight in providing those benefits is no longer necessary or helpful.

- There may be a concurrent tort claim, and the viable settlement of that claim may be dependent upon the reassurance that the Plaintiff will be receiving a specified sum from the Statutory Accident Benefits insurer.

- The same insurer may be liable to pay both the tort claim and the Statutory Accident Benefits claim, and may wish to negotiate a global settlement.

It is incorrect to suggest that lump sum settlements are an additional or unnecessary "cost" to the Statutory Accident Benefits system. In the current system, neither party is obliged to enter into a lump sum settlement. Instead, lump sum settlements reflect a compromise by the parties of their actual future obligations and entitlements.

Lump sum settlements often operate to the benefit of the parties. The insurer's overall payment obligations are often reduced; structured settlements with reversionary interests allow insurers to avoid substantial overpayments in catastrophic cases where life expectancy may be an issue. Claimants are given the freedom to manage their own benefits and care, without unnecessary interference or direction from third parties, thereby avoiding the stress and opportunity costs of denied benefits and resulting disputes.

Insurers and insured claimants should be able to govern how and when to end their legal and financial relationships with one another. Eliminating lump sum settlements removes this important right of insurers and claimants, forces parties to continue to maintain a relationship which may no longer be necessary or desirable, and creates the risk of future disputes. This is not in the best interests of any of the parties to the system, and is contrary to the objective of delivering benefits fairly and affordably.

With respect to the payment of lump sum settlements, the Society would advocate against paying settlement funds jointly to lawyers and clients. Requiring that funds be paid jointly will only serve to create delays in the processing of settlement funds when clients do not reside in the same location as their counsel and will create an unnecessary source of conflict between lawyers and their clients.

The Society would note that funds which are paid to lawyers in trust are, in fact, paid to the client. Lawyers are subject to stringent regulations with respect to the disbursement of trust funds. Funds are paid into and out of trust pursuant to client directions. All disbursements must be accounted for and reported to the client in writing, thereby creating transparency. In the event of fee disputes, clients have access to the assessment process through the Court, as well as the complaint process through the Law Society of Upper Canada.

Involvement of Lawyers **[Recc. 5, 12, 13]**

In an ideal, simplified system, there would be no disputes. This would eliminate the need to involve lawyers in the Statutory Accident Benefits system.

The only Statutory Accident Benefits system in which disputes will be completely eliminated is one in which claimants are offered unlimited access to the benefits of their choice. Such a system is not realistic or financially sustainable, regardless of whether it is delivered by private insurers or by a provincially-operated system.

Catastrophic impairment claims are not responsible for the current state of the Statutory Accident Benefits system. Catastrophic claims represent a small percentage of the overall claims administered through the Statutory Accident Benefits system. Even in a simplified Statutory Accident Benefits system, catastrophically injured claimants will invariably be the parties most in need of legal representation. The Society rejects any suggestion that lawyers can or should be removed from these claims.

Injured claimants, and in particular seriously or catastrophically injured claimants, children and the elderly, are vulnerable parties. These parties are often physically, emotionally and cognitively unable to protect their own best interests. While some injuries are obviously catastrophic, the medical, rehabilitation and attendant care needs of such claimants are often not straightforward and will be the subject of dispute. Further, the designation of complex injuries as catastrophic injuries can often be the subject of intense debate. These issues require a sophisticated knowledge of the relevant medicine and the law which are beyond the ability of most claimants, even in the absence of their impairments.

Vulnerable parties require the assistance of lawyers to ensure that they have access to justice following motor vehicle accidents. While one would hope that insurers would always regard the best interests of their insureds as paramount, the history of special awards against insurers confirms that they cannot always be relied upon to effectively manage the conflict between delivering benefits and maximizing profit.

In the absence of legal counsel, injured claimants will be at a disadvantage when dealing with insurers who are invariably assisted by counsel, whether on the front line or behind the scenes. Claimants require lawyers to act as their advocates in a system in which they will always have unequal bargaining power, regardless of the legislation and regulations which are implemented to protect them. The Society would strenuously oppose any recommendations which would remove this very important protection for injured claimants.

Insurers, as well, benefit from the involvement of counsel in the administration of claims on behalf of injured claimants. The involvement of counsel ensures that claimants or their legal guardians understand their legal rights and obligations and removes the potential for future disputes arising from a claimant's lack of capacity. Claimants with catastrophic and complex injuries also often require the assistance of Court-appointed guardians or trustees who themselves have obligations to account to the Court for the disbursement of benefits. In the absence of counsel, insurers could find themselves obligated to assist and direct claimants' legal guardians with respect to these ancillary functions or risk being exposed to liability.

Regulation of Lawyers and Contingency Fees **[Recc. 12, 13, 26, 27, 28]**

Mr. Marshall's report includes several recommendations regarding the regulation of lawyers and of contingency fees in Statutory Accident Benefits matters. Many of these recommendations appear to be based upon assumptions about the role of lawyers in driving disputes and about the manner in which contingency fees are being billed.

Mr. Marshall has cited statistics in his report regarding the payment of contingency fees in Statutory Accident Benefits matters. The Society questions the source of these statistics; as

data is not collected about the amount of contingency fees actually being billed, these statistics appear to be based upon an assumption that all lawyers are billing a 1/3 contingency fee in all Statutory Accident Benefits matters. This is an erroneous assumption; many experienced Plaintiff's lawyers, in fact, bill significantly less.

The legal profession in Ontario is regulated by the Law Society of Upper Canada ("LSUC"). The Law Society is aware that there are concerns about the delivery of contingency fee legal services in Ontario. LSUC is actively working to develop a standard contingency fee agreement which will create certainty and uniformity among the Plaintiff's bar and their clients, and to ensure that contingency fees are fair and reasonable. LSUC is also actively working with the bar to develop regulations and oversight with respect to advertising to ensure that marketing activities of the personal injury bar reflect the best practices of the profession.

It is neither necessary nor desirable for the Regulatory Authority to become involved in governing the legal profession in their delivery of legal services to Statutory Accident Benefits claimants. Additional regulation will only serve to complicate the delivery of necessary legal services and to confuse claimants about who is responsible for overseeing any disputes which may arise with their legal counsel. Responsibility for the regulation of lawyers, and for the regulation and oversight of contingency fees and advertising should remain solely within the jurisdiction of the Law Society of Upper Canada.

Section 233 of the Insurance Act **[Recc. 21]**

Eliminating the availability of Statutory Accident Benefits for claimants when fraud is alleged will only serve to download the cost of care for injured parties to taxpayers through the health care system. It will also be potentially harmful to those injured parties who have their access to care delayed while they respond to allegations which are subsequently revealed to be unjustified.

The current Statutory Accident Benefits system provides for limited benefits for those claimants who are injured while engaged in illegal activities. The Task Force would support similar limitations on claimants where fraud is established.

Automobile Accident Tort Claims **[Recc. 22, 23, 24, 25]**

The motor vehicle accident tort system is a different and separate system from the Statutory Accident Benefits system and should not form any part of the present discussion.

The tort system is managed effectively by the Courts. There is a well-functioning process for managing delays. There is also a system of oversight for settlements and legal fees for vulnerable claimants. It is unnecessary and counter-productive for the proposed Regulatory Authority to become involved in the tort system.

The benefits payable to claimants under the tort system and the Statutory Accident Benefits system are not mirror images of one another. Entitlements to ongoing Statutory Accident Benefits are different from future care entitlements in tort. Payments of Statutory Accident Benefits should not necessarily result in a complete offset of entitlements payable pursuant to the tort system. Entitlements to claim offsets are well-defined in legislation and at common law and do not currently require any additional clarification or intervention.

In administering the tort system, the Court must continue to be an independent and impartial body. The recommendation that a zone of deference should be given to assessments under the Statutory Accident Benefits system is contrary to the principles of judicial independence and fails to acknowledge the vital role of the Court in weighing evidence and making considered decisions after hearing arguments from both sides to a dispute. These are hallmarks of our judicial system that should not be subject to interference.

Involvement of the Court and/or the Licensing Appeal Tribunal **[Recc. 32]**

Mr. Marshall has recommended that the *Insurance Act* and its regulations should be amended to include only broad principles and entitlements for benefits. The Regulatory Authority would then be responsible for interpreting the legislation and, following consultation, creating policies, guidelines and rules that are enforceable. These policies, guidelines and rules would not be subject to Court challenges.

The Society strongly objects to any recommendation which would wholly transfer the interpretation of legislation to a Regulatory Authority without a right of appeal. The interpretation of legislation is a matter which is within the purview of the Court (and, with an appropriate delegation of authority, the Licensing Appeal Tribunal). The supervisory function of the Court in conducting judicial review of administrative decisions is a fundamental tenet of our justice system and should not be compromised under any circumstances. The judicial review function ensures consistent, predictable interpretations of the law and creates a perception of independence in decision-making which will instill public confidence in the operation of the Statutory Accident Benefits system.

Conclusion

Thank you for providing The Advocates' Society with the opportunity to make these submissions. I would be pleased to discuss these submissions with you at your convenience.

Yours truly,

Sonia Bjorkquist
President

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