‘Compensation crisis’ debate emerges

JOSEPH CAMPISI JR

There has always been a debate around the issue of auto insurance. During the “insurance crisis” from the 1960s to the 1980s, there was a concern about the efficacy of tort law in compensating accident victims. Following the introduction of the no-fault benefits scheme in Ontario in 1990, this debate cooled somewhat as enhanced accident benefits were made available to all auto accident victims, regardless of fault.

However, a new debate has emerged: the “compensation crisis.” On Sept. 1, 2010, Ontario witnessed the enactment of the fifth threshold/no-fault regime since 1990. Rather than take the time to create reforms or design a system of compensation that delivers meaningful compensation at an affordable cost, the Liberal government simply opted to slash benefits to save insurers money. This has resulted in a real crisis in compensation for injured victims involved in a motor vehicle accident.

After September 2010, consumers who have not purchased optional benefits and who have not suffered a catastrophic impairment will no longer receive caregiving or housekeeping assistance. Most concerning, however, is that their entitlement to attendant care benefits and medical and rehabilitative treatment has been reduced more than 50 per cent.

Under the previous regime, victims were entitled to $100,000 worth of medical and rehabilitative treatment plus the cost of all medical assessments. Not only has this benefit been reduced to $50,000, but the cost of assessments is now deducted from this limit.

Further, if the claimant suffers a defined “minor injury,” he or she is entitled to receive only $3,500 in treatment. Income Replacement Benefits were enhanced somewhat, even though the maximum benefit payable remained at $400 a week. The calculation now is based on 70 per cent of the gross income of the claimant, whereas it used to be based on

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A second reason for the increase in personal injury damages awards is the willingness of courts to recognize the cost of guardianship and management fees. Judges will award management fees where it is clear that the injured plaintiff will not have the ability to manage his or her own financial affairs and investments and will require a professional to do so.

Management fees on large damages awards can be considerable. In *Gordon v. Greig*, the management fee was more than $520,000; in *MacNeil v. Bryan* it topped $830,000.

Guardianship fees are intended to cover legal fees that the injured person will incur to amend management plans, bring motions to the court for advice and direction, and pass accounts. In *Sandhu v. Wellington Place*, for example, the plaintiff was awarded $400,000 to cover such legal fees.

Over the coming years, the continued increase in the cost of health care expenses at rates greater than the rate of inflation can be expected to continue to drive personal injury awards upward. To ensure that a seriously injured client is fairly compensated, it is critical that counsel develop the necessary evidentiary foundation to prove future economic losses. This includes appropriate support by specialist physicians and other health practitioners for each item recommended by the life care planner, and a solid evidentiary foundation to establish the need for management and guardianship fees, where appropriate. ■

Rikin Morzaria and John McLeish are partners at McLeish Orlando, a critical injury law boutique.

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80 per cent of the claimant's net income. To illustrate the deficiency of this compensation, in 1990 this benefit was limited to the lesser of $600 per week or 80 per cent of gross weekly income.

Clearly, the level of compensation that existed previously to protect the public has been dismantled.

This is not to suggest that the previous regime was flawless. In the doctoral study that I conducted, the empirical evidence gathered pointed to a number of deficiencies with both the tort and no-fault systems of compensation, namely:

- Accident benefits are too complex and costly to administer;
- Funding the cost of medical and rehabilitative treatment;
- Problems with administering the verbal tort threshold, which limits the rights of the innocent to pursue tort claims;
- Problems with the deductible;
- The lack of awareness of the average consumer.

Rather than tackle the deficiencies, all the government did was reduce the administrative and transaction costs associated with delivering no-fault compensation by slashing benefits. Put differently, the government missed out on an opportunity to create a fair and efficient system of compensation.

There is a real tension between delivering meaningful compensation and holding down costs. However, to create a truly fair and efficient compensation system, the focus must be on remedying the inefficiencies in delivering compensation, rather than simply cutting benefits. For the first time ever, in 1990, tort rights were restricted in order to facilitate enhanced no-fault benefits for all accident victims. In other words, some victims lost the right to sue a tortfeasor so that all injured individuals would receive enhanced accident benefits.

Since 1990, the rights of the innocent to pursue tort claims have been restricted further with a "new" threshold and an enhanced $30,000 deductible. At the same time, the quality and quantum of accident benefits following the September, 2010, changes are significantly less generous compared with those available 22 years ago following the enactment of the first threshold/no-fault regime.

Not only does an accident victim have to contend with fewer available benefits, but also has to endure long delays to dispute the denial of benefits with the insurer. Currently, it can take up to a year or longer to have a dispute with an insurer mediated by the Financial Services Commission of Ontario. In the 2001-2002 fiscal year, there were 12,897 applications for mediation received by the commission. That number had jumped to 36,504 in 2010. Indeed, the amount of disputes between insurers and their insureds is increasing. A recent report suggested that insurers deny 42 per cent of submitted treatment plans.

The "compensation crisis" in Ontario is real. The changes to the system of compensation following the enactment of the first threshold/no-fault system in 1990 set in motion a process of a devolution in compensation. The clients that walk into the offices of plaintiff counsel are unaware of the inadequate compensation structure. What is troubling is that the government introduced these changes to the public by saying that people now have a choice when purchasing auto insurance. Depleting the existing insurance product while charging the same or a higher premium for it is not offering consumers choice.

Although no-fault benefits were conceived of as a step forward for all injured individuals, the recent changes have actually resulted in all victims having to take two steps back in terms of receiving sufficient and efficient compensation. ■

Joseph Campisi Jr. is a plaintiff personal injury lawyer at Carranza LLP and an adjunct law professor at Osgoode Hall.