

Lawyers sound alarm on insurance reforms

But government emphasizes premium savings from new benefits schedule

BY SUSAN HUGHES
For Law Times

New accident benefits rules set to take effect in September may mean bad news for victims, lawyers worry.

The changes deal with serious, non-catastrophic injuries from auto accidents. But while Darcy Merkur of Thomson Rogers in Toronto welcomes the new definition of catastrophic cases to include single-limb amputees, he's concerned about the delay in access to some of the more unique tests: the whole person impairment test and the market extreme impairment test. As a result, victims will now have to wait two years unless there's a brain injury.

"It's not very positive," says Merkur, who wrote a paper about the changes with colleague Leonard Kunka. "It may only apply to a fraction of cases because the majority of the serious cases have some element of a brain injury. Once you have some element of a brain injury, you're entitled to apply under those tests before the two-year mark if your injuries are unlikely to cease to be catastrophic. It's not a drastic change but it's not a welcome one."

For example, Merkur says someone with serious orthopaedic injuries and emotional problems but without brain impair-

ment will have to wait two years before being eligible to apply under those two tests. The solution, Merkur adds, is to ensure that treatment providers recognize some degree of brain impairment. In most serious cases, he notes victims lose consciousness and suffer a concussion, a form of brain impairment.

While there are no reductions in catastrophic benefits, the cost of examinations now comes out of the medical and rehabilitation settlement. Those expenses can be very significant, Merkur points out. For example, the costs for a neurological and psychological examination are "somewhere between \$3,500 and \$6,000, the standard being \$4,500. There's a lot of testing, analysis, the writing of the report," Merkur says. "No one is trying to make a fortune here. It's the fair market rate. There may be a way to hive off the neurological test to two different portions, with a \$2,000 maximum each, but that comes out of my client's money, and I'm not anxious to have them spend. It's an unfortunate indirect reduction in benefits. In a million-dollar case, it could be worth between \$50,000 and \$100,000. It's about a \$100,000 hit."

But that's not the worst scenario under the new statutory accident benefits schedule, according to Merkur, who notes it



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effectively halves the payments seriously injured victims of non-catastrophic injuries will receive. "There was a decision made by the politicians to reduce the benefits. I've got a number of cases now where less than two years after the accident, people have burnt through \$100,000 in medical benefits, never mind \$50,000. And again, out of that \$50,000 now comes assessment costs. So those people are going to be really stuck. In serious cases, they will burn through that \$50,000 in a year to a year and a half."

The government's aim, of course, was to put the brakes on premium increases for auto in-

surance by allowing people more flexibility in their policy choices. "The whole new system hinges on optional benefits," says Merkur. "Everyone's standard basic policy is substantially reduced — by more than half. Insured persons are welcome to pay more and to have more. But approximately only three per cent purchase these options right now."

Another significant amendment is to the definition of "incurred" under the new benefits schedule, one Merkur and Kunka's report describes as a "significant and horrendous change."

The word "incurred" comes up in almost every section dealing with qualification for benefits: caregiver, medical, and rehabilitation benefits; case manager services; attendant-care benefits; housekeeping; and home maintenance. It states, for example, that an expense is not incurred unless the insured person has received the goods or services and paid the expense and that the person who performed the service or provided the goods did so in the course of a regular occupation or profession or sustained an economic loss.

As a result, professional services merit compensation, but those by a family member do not unless that individual sustains an economic loss. Merkur says this change will penalize family members who want to care for an

injured relative and that the mandated benefits don't even come close to real market rates for services provided by professionals.

Kurt Bergmanis, a personal injury lawyer at Bergmanis Preyra LLP into Toronto, believes the changes involve a more stringent test than previous cases in which "there are grounds for arguing that an expense doesn't have to be paid. What is an economic loss? Missing work? It might be taking a cab across the city." But Bergmanis adds time can also be a way of measuring expenses. As a result, he says the effects of the changes, and whether the courts will look to earlier decisions on such matters, remain to be seen.

Merkur, too, thinks there may be some relief, especially since judges and arbitrators have the power to deem an expense "incurred" in cases where the insured unreasonably delayed or withheld payment of a benefit.

The government, meanwhile, is emphasizing the advantages of the changes. Ontarians, a Ministry of Finance note about the reforms says, will still have access to "income replacement, medical and rehabilitation, and other benefits."

"The changes proposed would allow drivers to save money by choosing coverage that best meets their needs and budgets," it adds. **LT**