CANADIAN DEFENCE LAWYERS

SUBMISSIONS OF CANADIAN DEFENCE LAWYERS TO MARSHALL REPORT

September 13, 2017

CDL will provide submissions as commentary to the various recommendations of Mr. Marshall with additional commentary at the end.

Report Pre-amble

Out of brevity, we have condensed Mr. Marshall's report to the following prior to addressing our recommendations:

Mr. Marshall identifies a number of problems:

- Injury rates are down
- Yet there are 30,000 health care providers registered to treat 60,000 injured people in any given year
- the average Worker's Comp claim injury, throughout Canada, takes 76 days to get back to health, in contrast to Ontario's auto injury average of 14 months.

CDL notes that the WSIB is a closed system and government run to some extent. This may have a direct impact on outcomes and file cycle times, as cited by Mr. Marshall, owing to the different structure. However, we agree with the premise that uncomplicated soft tissue injuries are found in both systems and offer a basis of comparison that shows the auto system takes too long for injured parties to get to recovery.

- the average AB claim generates $9,000 of assessment costs.
- as an aggregate, assessments went from $282M in 2012 when the cap of $2k was added, to $347M in 2013, which represented 20% of the whole cost to the AB system.
- In contrast, WSIB paid $30M for assessment costs for 170,000 injured workers in the same time frame.

Again, we point out that there are structural differences with WSIB, particularly with the Catastrophic definition, which increases the overall cost of assessments. However, we agree that the attempt to control costs through a $2,000 cap on assessments has not had a positive effect on either cost or quality of reports. The use of assessments in Ontario auto leads to the beginning a dispute and settling of a claim. Our members see the impact of this, not only in Accident Benefits disputes, but also in the interface between AB and Tort disputes. Fixing both systems together will be a key success factor in creating a sustainable auto insurance product.

- One third of claims go into dispute
- $1.4 billion is paid in the system to people other than claimants

As this number likely reflects how insurers track payments, the number may actually be higher. As much as 30 to 40% can go to the claimant's lawyer in a contingency arrangement. As these payments are not transparent, it is unknown how much money this may be taking from injured claimants.

Review of Marshall Report Recommendations (and commentary)

1. The government should not move to a government-run auto insurance system at this time. There is an opportunity to learn from past experience and fix the problems in the current auto insurance delivery system in Ontario as described in this report.

CDL agrees.

2. Ontario's current No-Fault Benefits should not be reduced.

CDL agrees, and indeed, it would appear that absent a recognition by the Ministry of Health that it will bear additional expense for the treatment of Catastrophically injured car accident victims once their accident benefit proceeds run out, the limits have been reduced too much for the most seriously injured accident victims already.

3. The Regulator should undertake serious discussions with the Ministry of Health and Long-Term Care to develop a service for lifetime management of care for seriously injured accident victims. Eventually, as the Province develops this expertise, the expertise and even services could expand to address other injuries outside of the auto insurance system. This would allow for continuing improvements in care to develop and recommendations for preventative measures to be generated while ensuring that patients are being treated by a reliable and sustainable system.

One of the recurring themes in Mr. Marshall's report is the failure of integration within the auto system. Whether it is the interface between OHIP and insurance benefits, the interface between AB and Tort or how auto works with other collateral benefits, injured claimants are not being well served by the current system. It is anathema that those suffering spinal injuries in diving accidents or trips and falls do not get pressured to leave hospital within a week of injury, yet MVA victims do, on the guise that there is an insurer there to fund rehabilitation costs in private facilities. Injured Ontarians should get the same treatments from the Province regardless of the source of their injury and their status as an auto insured. Auto insurers should not be seen as the "first payor" of primary health care. CDL agrees with this recommendation and feels it dovetails with the creation of similar spinal modalities between MVA and non-MVA accident victims. Particularly for Catastrophic cases, CDL would like to understand the ultimate cost as that will have an impact on cost of the product.

4. There should be a minimum of disputes and delays in accessing single lump-sum awards for those who are Catastrophically injured. Such awards, should be efficiently and quickly determined by an Independent Examination Centre and based on objective measures, such as the American Medical Association guide, supplemented, where appropriate, by specialized and well -established guidelines.

5. Insurers should make sure that seriously injured persons are given top priority and do not need to hire lawyers or other professionals to get their entitlement.

CDL agrees with Mr. Marshall that Catastrophically injured persons should not encounter roadblocks to get appropriate levels of care. They should also not be subject to compromised settlements that may undercompensate them for their true expenses, given the propensity for legal fees to be part of that settlement. The system needs to be simpler so that there is no conflict between insurers and their clients that requires a lawyer, particularly in serious injury cases. One roadblock we can see is the pressure and delay on Accident Benefits created by Tort claims and the lawyers involved in them. We are happy to work with this recommendation to help delineate and separate AB and Tort to prevent this friction that just causes delay for accident victims and insurers.

6. The regulator should move as quickly as possible to create programs of care for the most common types of automobile injuries. The programs should be based on the evidence based findings of the Common Traffic Injury Guidelines.

It is CDL's view that care must be taken in delivering on this recommendation. The MIG has been very successful in halting much abuse from facilities, paralegals and other unscrupulous actors in the system. However, that is because the MIG benefited from tight language where there were relatively few opportunities to exit the MIG. If CTI is vague and amorphous, it will lead to further abuses which will actually create more exposure on claims rather than less. This would negatively impact on premiums. CDL's members have been involved in the disputes involving minor injury and would be happy to share our experience and expertise in this area to help identify areas of potential friction within programs of care.

7. The regulator should be provided with a sufficient budget to monitor and continuously improve the outcomes of existing programs of care and partner with the government on research into the development of new programs of care as the need arises – for example, for neurological injuries, injuries from concussions, spinal cord injuries, chronic pain and post-traumatic stress disorder. Consideration should be given to leveraging existing programs of care that have been developed by other jurisdictions.

8. The government should empower the Regulator with the authority and direction to establish a roster of Independent Examination Centres (IEC) which should be hospital-based and must be able to provide a multidisciplinary team to provide appropriate diagnoses of injured patients and recommended treatment plans.

The former DAC system ultimately did not work for several reasons including governance, supply and demand, regional issues and differences and a lack of deference. While DACs were viewed as biased towards the insurer, it was the experience of CDL members that both insurers and claimant's counsel did not support the system. This recommendation will be one of the most challenging to implement because both insurers and their clients must accept the decision as final in the majority of cases. Some key success factors will include :

1. The Regulator creating an independent system that is transparent;
2. All regions having the same experience and benefit;
3. Successful quality control and tracking to ensure the integrity of the system;
4. Preventing the proliferation of claimant or insurer generated reports that challenge the decision, and
5. Deference by Judges on appeals

CDL has concern about the negative impact this recommendation could have if the system is not well designed and successfully implemented. However, we do like the move from a system where reports support one side or the other to one where IECs focus on the claimant's progression and recovery.

Insurers must follow, without dispute, the recommendations of the IEC for future treatment within the financial limits of the insurance policy as provided by law. The dispute resolution process must respect the evaluation of the IEC without resorting to competing opinions from either party to a dispute.

CDL notes that this type of deference could lead to Judicial Review of the IEC decision and this should be considered when drafting the enacting legislation. CDL and its members would be happy to support the process of drafting these sections as we have extensive expertise in both Administrative Law and the triggers for Judicial Review, which may be helpful in avoiding these challenges to the IEC.

9. The Regulator should conduct regular quality control studies of the outcomes of Future Care recommended by IECs to monitor the quality of such recommendations and ensure their effectiveness. As part of this process, the Regulator should consider instituting a system of professional peer review of roster assessors to ensure quality is maintained.

10. The Regulator should undertake a complete overhaul of the pricing schedules for treatment by providers and evaluators to bring them more in line with prices being paid by other similar bodies, such as Workers' Compensation Boards, and to emphasize outcomes rather than the number of treatments.

CDL agrees.

11. There should be no cash settlements in the Accident Benefits portion of the Ontario auto insurance system for those benefits specified in the legislation as being for Medical and Rehabilitation care. Where the legislation provides for cash payments, for example for lost wages and lump-sum payments for Catastrophically injured persons, these would, of course, continue to be paid.

While CDL agrees with this recommendation, the major hurdle it will face, which is not addressed in Mr. Marshall's recommendations, is the Collateral Benefits offset of Accident Benefits to Tort claims. CDL feels that this is a part of our current system that does not work. Currently we use a process of Assignment of benefits which pits insurers against claimants and each other and leads to arguments over whether tort heads of damages match with AB benefit payouts. CDL would recommend that the Government look at a system where there is clear flow through of the value of benefits from AB to Tort and no Assignments are necessary. If a claim is worth 2 million dollars in Tort, then the 1 million of AB coverage would be deducted automatically and on the front end, instead of being dealt with by Assignment after trial.

12. There is clear urgency to make the Accident Benefits system simple and accessible without the need for legal representation. Since accident victims are in a vulnerable position and contingency-fee arrangements are not very transparent, the government should consider:

- Banning or restricting advertising and referral fees, and restricting contingency fees in personal injury cases, as the Law Society reports is being done in some jurisdictions such as in England, Wales and Australia.
- Requiring contingency-fee arrangements to be filed with the Regulator, who should inquire into their fairness on a spot-check basis and work with the relevant authorities to curtail abuses if they arise.
- Settlement cheques should be made payable jointly to the accident victim and the lawyer. This will allow the accident victim to clearly understand the relationship between the total settlement and what he or she eventually receives.
- Claimants should be informed in writing, possibly on a final settlement schedule, of their right to appeal the fees charged by their lawyer, and where to apply to do so.

CDL has been recognized for its submission to the Law Society of Upper Canada regarding Contingency Fees and continues to work with the legal industry on this issue. CDL agrees strongly with this recommendation as it is a challenge which our members face every day in the negotiation of Settlement Disclosure Notices in Accident Benefits claims.

CFAs on AB claims are generally too high where there is limited risk in prosecuting a no fault claim. Taking 30% of a $1M Accident Benefit cash out is hard to justify if there is no "heavy lifting" required by counsel to secure such a settlement, and yet it seems to be happening.

13. The Regulator should monitor the overall use of legal representation in the Accident Benefits system to analyze why claimants are needing to resort to legal advice. Also, the Regulator should examine if the system should be further simplified, barriers should be removed or other practices changed to reduce the need for the time and expense of legal involvement.

For this recommendation to be successful, the product itself must be simplified significantly. Our current system is too complex and this leads both insurers and claimants to seek legal representation. To the extent that this recommendation coincides with a wholesale simplification of the SABS, we support it. However, we feel strongly that significant reform on the complexity of the product must occur first for this to be meaningful.

14. The Regulator should monitor, on a continuous basis, the length of time insurance companies are taking to provide benefits to claimants and determine if undue delays are causing financial harm to accident victims.

15. Insurers should be required to establish an internal appeal process to provide an early resolution to claims and reduce the number that have to proceed to the external dispute resolution system. The Regulator should monitor the effectiveness of the internal appeal process and be empowered to order corrective action if a particular insurer is generating an unusual number of claims to the dispute resolution process.

From the perspective of CDL, an internal review system would likely divert some claims from the dispute system. However, to do so would have a cost to insurers in set up and maintenance. While this is a good idea, more study should be done to confirm that this is a cost effective approach that will

ultimately benefit the system. Otherwise, internal review may not achieve its goal of lowering costs and diverting claims from dispute.

One practical concern is whether claimant's counsel want to settle part of the AB dispute in this way. There is a practical benefit to them to keep the AB open if there is an ongoing Tort claim. As mentioned before, this interface between AB and Tort would need to be addressed first for this recommendation to be successful.

16. The gatekeeper function at the Licence Appeal Tribunal should insist that a claim has gone through the insurer's internal appeal process before allowing it to proceed further. The gatekeeper should also determine that, if new information is being introduced in the claim, it should go back to the original decision-maker to see if it changes the decision before the appeal proceeds.

CDL supported Justice Cunningham's recommendation for a gatekeeping function at that LAT to keep claims that were unready from entering the system. Likewise, CDL supports this recommendation but we do not feel it needs to be linked to the internal review process which will take time to implement. We have also made submissions in this regard above. This should be considered in any implementation.

If there is one immediate fix that can be implemented to the system, which should save on litigation costs, it is the requirement of the LAT to actively engage in a gatekeeping function. Implementing the gatekeeping function at LAT would keep unmeritorious disputes out of the system.

17. In relation to medical condition and treatment, the opinion of the Independent Examination Centre should be taken as definitive by Arbitrators. If, in exceptional circumstances, the Arbitrator has reason to be concerned about the Independent Examination Centre opinion under consideration, the Arbitrator can ask for a second opinion from a second Independent Examination Centre from the Regulator's roster. Competing examination opinions from experts hired by either the claimant or the insurer should not be permitted.

18. There is an urgent need to revise and simplify the legislation and current set of regulations and focus on desired outcomes and less on the details of process.

CDL agrees.

19. The new Regulator should be given authority to make regulations (already underway). Rules should support insurers to be in direct contact with their clients so that they can manage care and recovery for their clients.

CDL agrees. The Regulator is in the best position to act quickly to correct parts of the system that are not working and they have an expertise in the area. The Regulator's guidelines in this area should also include a mandate to simplify the system for consumers wherever possible and not add complexity.

20. Consumer education in the field of auto insurance is a key component of a well-functioning system. In conjunction with making the rules and regulations governing the system simpler, the government should seriously address the need for enhanced consumer education. The recommendations of the Ontario Auto Insurance Anti-Fraud Task Force and the creation of an "Office of Driver Adviser" should be considered.

21. Repeal subsection 233 (2) and amend 233 (1) so that SABS claims and Tort claims are subject to exactly the same rule that applies to other auto insurance claims.

CDL agrees.

22. The government should consider implementing ways to make the system for automobile accident Tort claims more streamlined, particularly:

- Creating a prescribed list of documents that must be produced.
- Allowing for earlier examination under oath for both claimants and expert witnesses.
- Providing for some form of Case Management that encourages cases to proceed with a minimum of delay.

CDL agrees.

23. The Regulator should monitor the awards and costs of the Tort system to determine if changes need to be made to the No-Fault system to avoid having to sue under Tort and to recommend changes to the Tort system if costs appear to outweigh benefits from a public policy point of view.

CDL Members find it interesting that Mr. Marshall is making a link between AB and Tort damage awards. This suggests to CDL that Mr. Marshall recognizes the problems with our previous reforms, that being they did not consider how change in the first party system(AB) can have a dramatic and unexpected impact on the third party system (Tort). We agree with this as it is a good start but much more needs to be done to clarify this interface. Historically, the "wait and see" approach has not benefited the consumers as problems magnify and this leads to more reforms. CDL thinks a very agile and proactive Regulator is a necessity to make this recommendation meaningful.

24. The Independent Examination Centre's opinion as to the claimant's medical diagnosis and future care needs, should be given a zone of deference by the courts in Tort cases. This means that the opinion of the Independent Examination Centre should be taken as definitive unless there is compelling reason to doubt it.

CDL finds this recommendation interesting as there is an obvious link between minor injuries and the Threshold in tort, despite there being two separate definitions. The recommendation seeks to craft a regulation that compels a Court to grant deference to the findings in the report. This will be very difficult to do. Judges have inherent jurisdiction over the interpretation of law and are subject only to appeal. This is a daunting task.

CDL points out that most personal injury actions in Ontario are heard by a jury instead of by judge alone. Many plaintiff's lawyers seek to remove access to juries in Ontario; however, juries represent the community perspective in their damage awards and are an integral part of the system. A key success factor will be to analyze how this zone of deference may apply in the context of a jury trial. CDL has participated in the recent process reviewing the use of Juries in Simplified Rules cases and has specific insight on this issue.

25. There should be full deductibility of Accident Benefits awards from tort awards.

CDL agrees that there are too many disputes over what is deductible from AB to Tort. We support defining the interaction between AB and Tort clearly so that first party benefits are about recovery and Tort is about compensation. If there is an entitlement in AB, there can be no recovery for the same benefit in tort, from the outset. That way, both systems can stand alone with their own focus. Greatly reducing Contingency Fees in Accident Benefits and restricting the buildup of the AB claim so it can be used in the Tort claim, will keep lawyers out of the system and decrease disputes.

26. Contingency fees in Tort cases should be made fully transparent to the client, including notification that fees can be appealed.

CDL agrees.

27. Claimants should be informed in writing, possibly on a final settlement schedule, of their right to appeal the fees charged by their lawyer.

CDL agrees.

28. Settlement cheques should be made payable jointly to the claimant and his or her lawyer to allow the claimant to fully understand and accept the disposition of the funds.

We agree.

29. To the extent possible, the regulatory regime should be overhauled to encourage insurers to innovate and introduce new products even on a trial or experimental basis.

30. The government should undertake a comprehensive review of auto insurance pricing alternatives with a view to providing more competition in the marketplace.

31. A new, independent Regulator with its own Board of Directors for automobile insurance be established either as part of the new Financial Services Regulatory Authority or a new separate office specifically for auto insurance.

32. The *Insurance Act* and regulations should be amended to include only broad principles and entitlements for benefits. The Regulator should be responsible for interpreting the legislation and, following appropriate consultation with stakeholders, creating policies, guidelines and rules that are enforceable and not subject to challenge in the courts as long as they are in keeping with the letter and spirit of the legislation.

33. The new Regulator needs to be equipped with the staff and expertise to act as a central governor over the automobile insurance marketplace including the conduct of all the players and providers within that marketplace.

34. The new Regulator should be required to set standards of performance for the marketplace and to be accountable to the government for meeting those targets.

35. Insurance companies must change their role from managing costs to delivering care to their customers. They will need to change their claims management and related practices in the process. They will also need to innovate and compete on service and cost.

CDL, through defence of the public on Tort claims and representation of insurers on Accident Benefits claims, has seen the impact of the successive auto insurance regimes on the Ontario consumer. The system has become complex and unwieldy, without injured claimants seeing the benefit. It is time for a reset of the system and CDL members support this but great care must be taken in doing so to ensure a workable fix.

We agree that insurers should focus on getting people better and getting them necessary treatment faster. Health care has always been the primary role of the Ontario government through the Ministry of Health and Long Term Care. To the extent that Mr. Marshall suggests that there be a greater integration between government and auto insurance, we agree with these changes. We also see where government/Regulator defined programs of care and government run IECs can benefit the system if successfully implemented. These keep the Ontario government as the primary provider of care for the Ontario public. Insurers would then administrate these programs will a clear focus on getting people better.

We stress that clarity on the interface between AB and Tort is a major source of friction within the system. Insurers have another important role to play in defending drivers under their third party liability coverage. We cannot lose sight of this role in an attempt to fix the first party Accident Benefits system. Accordingly, care must be taken in considering any changes to the two systems. The friction that exists today causes delay and disputes that drain resources and increase costs. If insurers are to focus on care in AB then the rules in Tort should reflect this change.

Respectfully,

The Canadian Defence Lawyers