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MVA victims left unrepresented

By Darryl Singer

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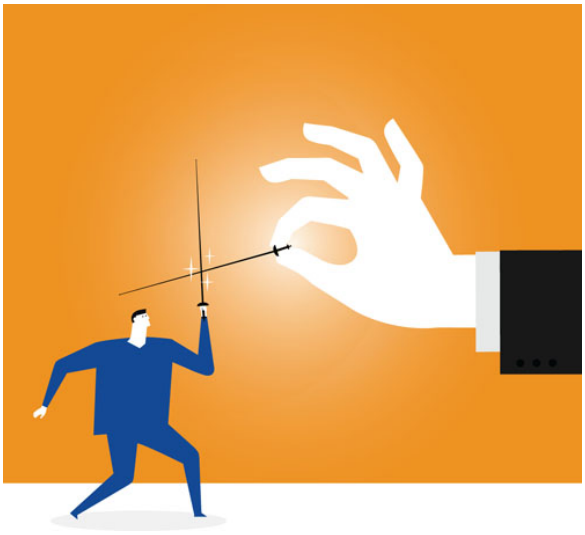

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Recent changes to the law surrounding motor vehicle accidents in the name of expedient and fair justice has had the perverse effect of leaving many injured victims unable to find legal representation. There are a number of reasons for this, which cumulatively creates this unfortunate situation. I shall deal with each in turn below.

The Licence Appeal Tribunal (LAT) now solely adjudicates AB disputes arising on or after April 1, 2016. The rules and procedures for AB disputes at the LAT boast a faster, simpler, more streamlined process, with the promise that disputes will be concluded within six months. Gone is the burdensome and glacially paced (but experienced) Financial Services Corporation of Ontario (FSCO) tribunal. Accident benefits claimants have also lost the right to choose between commencing an action in court or opting for the arbitral tribunal. All disputes must now be pursued in the LAT.

The change of import to this article is the elimination of cost awards. Unlike in court or at FSCO, LAT abolishes the "loser pays" system in AB matters, long considered integral to encouraging settlement and forcing litigants to properly assess their case. LAT has no discretion to award legal costs to the successful party, subject to bad faith of the party. Judging by the early decisions, including the very recent (Nov. 2, 2016) decision in *J.T. v. Intact Insurance* 2016 ONLAT 78333, it is unlikely that insurers will be found to have engaged in bad faith when they deny otherwise meritorious AB claims, even when the insurer forced the unnecessary litigation. As many, if not the majority, of AB disputes involve relatively small sums of money that is often for benefits which are actually paid to third party service providers, costs awards ensured the successful applicant's lawyer would vigorously oppose unfair denials by the insurer.

The statutory deductible under s. 267.5(7).3 of the *Insurance Act* is set to climb higher each year. It currently sits at almost $37,000 and will increase again in January. Further, recent cases such as *Valentine v. Rodriguez-Elizalde* 2016 ONSC 3540, continue a line of cases which started in 2014 that seem to increase the threshold for non-pecuniary damages under s. 267.5(5) of the act, making the test that injured parties have to meet to recover general damages pushed further out of reach.

I now see insurers, emboldened by the changes, routinely denying meritorious claims. On the majority of the small and mid-size files I handle, the knee-jerk reaction to soft tissue injuries seems to be: Minor Injury Guideline (MIG) on AB, deny threshold on tort. Even when I present solid medical evidence of legitimate injuries that rise above, they view such evidence as suspect because it came from the injured party's doctors, and instead choose to rely upon their own "independent" medical examination. It is a no-win situation absent taking the matter to arbitration or trial, as the case may be.

Many colleagues and I have a list of insurers where we will turn down the file if that insurer is on the other side.

While as lawyers we cannot shy away from representing the rights of victims against Big Insurance, the reality is that we are also running a business. A high volume contingency personal injury practice requires more staff than other areas of law, requires us to pay disbursements up front, and to carry the operating costs of the file, without being paid for anywhere from 18 months to five years on most files. If the case has merit, then the idea is to settle or proceed to a hearing and when successful, be awarded costs. Insurers simply refuse to settle many legitimate claims these days. With no prospect of settlement on the small but deserving files, no costs at LAT and a stricter interpretation of the tort threshold by the courts, it now means turning away clients who genuinely need representation. To give you an example from my own practice, five years ago I took 80 per cent of MVA clients with injuries who came through my office. Last year, this went down to half, and now only about 20 per cent. Speaking with my competitors reveals that this is the new normal. Yet this does not mean that the 80 per cent turned away do not deserve compensation.

The result is that many legitimately injured accident victims are left with one of two choices: either give up and go home without their due, or engage in a David and Goliath fight where Goliath has chemical weapons and David has a broken slingshot and half a rock.

It is my belief that the cumulative effect of these changes is tilting the relatively level field into a Sisyphean hill that many lawyers simply cannot afford to climb, leaving Ontario accident victims to be crushed by the rock of injustice as it rolls back down the hill.

Darryl Singer is the principal of SINGER Barristers Professional Corporation in Markham where he practises civil litigation with an emphasis on personal injury matters. He is the author of Accident Benefits, A Practical Desk Reference.

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