ONTARIO TRIAL LAWYERS ASSOCIATION

OTLA's Response to the Anti-Fraud Task Force Status Update

8/17/2012

The Ontario Trial Lawyers Association (OTLA) welcomes the opportunity to provide comment on the Ontario Anti-Fraud Task Force Status Update. OTLA and its members wish to affirm our support for measures to combat insurance fraud in Ontario and, in particular, fraudulent claims for benefits under the Statutory Accident Benefits Schedule.

OTLA is a professional association of more than 1,300 plaintiff personal injury lawyers, law clerks and law students. Our purpose is to promote access to justice for all Ontarians, preserve and improve the civil justice system and advocate for those who have suffered injury and losses as a result of the wrongdoing of others.

Overall, the Task Force has generated excellent recommendations that merit consideration. We should, however, be cautious of implementing any solution that would add new layers of regulation that could discourage individuals, including legitimate service providers and accident victims, from participating in the system. The vast majority of auto insurance victims have a legitimate need for benefits. When people are injured in car crashes, their priority is to get better as soon as possible. They should not be thwarted in their recovery by an auto insurance system that inherently views every legitimate claim with skepticism and doubt. If our insurance system becomes too complicated or cumbersome for individuals to access services, they will end up not getting the treatment they require. That will impact negatively on the individual, on the OHIP system that will be forced to provide long term medical care, and on the social welfare system that will support them financially.

The Task Force notes that "measures already introduced…may have helped to reduce the flow of money to unnecessary and/or fraudulent treatments". Until the result of those measures, including the full impact of the September 2010 auto insurance changes in Ontario is quantified and analyzed, there can be no justification for making any further changes to the policy that would reduce benefits for legitimate accident victims. It must be noted that the auto insurance changes in 2010 that saw benefits for the treatment of so-called minor injuries reduced from $100,000 to $3500 has already substantially reduced claims costs and must also have had an impact on auto insurance fraud. Clearly, eliminating broad insurance coverage for legitimate claimants also eliminates some fraud in the system (by removing the incentive for such fraud) but does so at the expense of providing care for people with legitimate injuries.

OTLA has long stressed that any changes to the *SABS* must be based on the need to achieve a balance among what we call the "four Ps" – protection, premiums, profits and predictability. Simply put, it means that we must always ensure sufficient insurance coverage at fair prices for consumers while allowing insurers to earn a reasonable return on equity and providing predictability over the long term. Fighting insurance fraud by cutting coverage broadly not only upsets the fine balance among these four pillars but also makes a mockery of the fundamental function of insurance as "a promise to pay" in the event of loss. Mandatory insurance must mean more than just guaranteed profits for insurers. OTLA enthusiastically welcomes and endorses the conclusion reached by the Task Force that greater focus on investigation and enforcement is required: "we are convinced that the most effective and quickest way to

combat auto insurance fraud is through actions to curtail the flow of revenue to organized and premeditated fraudsters."

Data

Unfortunately, the full extent of fraud is still not really known. The independent review by KPMG and E&Y was inconclusive, although those reviews certainly support the anecdotal evidence that fraud is a significant problem that must be addressed.

Opportunistic Fraud

Legitimate claims that lead to inevitable disputes about treatment and care should not be labeled or seen as red flags for fraudulent claims, just because an insurer disagrees with the claims that are being submitted. The Working Group needs to clearly define what is to be considered as auto insurance fraud. There is a significant danger that, if fraud is defined too broadly, the likely result will be wasted investigative resources, and increased red tape for legitimate victims and their treatment providers.

OTLA is concerned about the use of the term "opportunistic fraud" in the report. Opportunistic fraud is defined as follows: *an individual pads the value of his or her auto insurance claims by claiming for benefits or other goods and services that are unnecessary or unrelated to the collision that caused the claim.*

The report details examples of premeditated and organized fraud but loosely includes the term opportunistic fraud as a way to expand any proposed regulations to individual claimants who make claims that their insurer deems to be "unnecessary". Whether or not a benefit is "unnecessary" is the subject of regular disputes between insurers and their insureds. That is exactly what the dispute resolution process at FSCO is designed to deal with. This type of dispute is entirely different from the organized and premeditated fraud that ought to be the main focus of the Task Force's work.

Licensing and regulation of clinics

OTLA supports all reasonable measures to ensure that only legitimate, qualified treatment providers work within Ontario's auto insurance system. The system must be designed in a way so that it does not discourage good treatment providers from providing services to MVA victims. On the other hand, there should be a zero tolerance for premeditated fraud and organized fraud. Any treatment provider involved in such behaviour should not be permitted to operate within the auto insurance system.

Regulation of the towing industry

This appears to be a significant part of the problem, and needs to be addressed in a coordinated fashion. The current regulation of this industry apparently leaves gaps that permit,

or encourage, a referral system that is predicated on improper referral payments. A coordinated approach, including greater scrutiny of all financial arrangements, enforcement and a public awareness campaign, needs to be undertaken.

Unfair or Deceptive Acts or Practices (UDAP)

OTLA would welcome greater emphasis on the enforcement of current Unfair or Deceptive Acts or Practices (UDAP) by FSCO. Historically the enforcement by FSCO has been minimal. The last round of UDAP changes included provisions to address insurer abuse. FSCO must be seen to be vigorously defending the interests of legitimate claimants by ensuring that insurer abuses are dealt with harshly. Unfortunately, when insurance adjusters abuse their power by denying benefits to legitimate claimants, the tools to enforce this abuse are rarely used. Violations on the part of insurers have been met with nothing more than a "slap on the wrist."

OTLA must object strenuously to the ill-conceived and unnecessary suggestion that UDAP provisions could apply more broadly to include lawyers. The Law Society of Upper Canada has the jurisdiction and mandate to oversee the actions of lawyers. There is simply no evidence to suggest that the Law Society is failing to provide adequate oversight in this area. To add another layer of regulation would be unnecessary, expensive, and serve no useful purpose given the regulatory oversight that currently exists. Instead, FSCO should work with the Law Society to ensure that all alleged inappropriate behaviour will be investigated and, where appropriate, prosecuted in a consistent manner.

Lawyers owe a fiduciary obligation to their clients, not to insurers. Lawyers do not bill insurers and are not paid by insurers; they are paid by their clients pursuant to private retainer contracts. Health care providers, tow truck drivers, and assessors, among other stakeholders, do bill insurers directly. Often, the insured person will not be aware that invoices are submitted in their names nor will they have any knowledge about the amounts being invoiced.

Regulating the actions of lawyers under UDAP will put lawyers in a situation where they are in conflict with their client, to whom they owe a fiduciary obligation. There was absolutely nothing in the review conducted by the Task Force that would justify the regulation of lawyer conduct through the UDAP provisions.

Additional examinations under oath

OTLA believes that this recommendation is unnecessary. It would create another layer of inconvenience and expense that could well result in legitimate victims not being able to access the benefits they require. The transaction costs, including retaining lawyers on both sides, and then attending at a Court Reporter's office for several hours, far outweigh any benefits. This is an example of additional regulation that is not required as the tools already exist within the system to accomplish the stated goals. Section 33 of the SABS provides an insurer with ample opportunity to request information they require. If the insured person does not respond to a reasonable request, the treatment or benefit is not payable.

$500 fee for missing a medical examination

OTLA believes that this recommendation has no place in this report. A missed appointment does not constitute fraudulent activity. If an insured person misses an examination that they were required to attend, there are consequences set out in the SABS. However, often there are legitimate reasons for not attending such an examination. As this is not related to fraud in any way, it is not something that ought to be considered by this Task Force.

Immunity from civil liability

OTLA does not agree that the civil liability immunity protection provisions of the Insurance Act should be enhanced. If an insurer does something improper, they should be held accountable just as an insured is held accountable for improper behaviour. If an insurer wrongly and without proper evidence accuses an insured of committing fraud, there are serious consequences for that individual. Those individuals should have civil remedies available for recourse, just as any other individual would have if they suffer harm improperly caused by another. It should also be noted that current Privacy legislation allows the insurance lobby group, the Insurance Bureau of Canada, " to disclose personal information in order to:

- detect and prevent insurance fraud through its Investigative Services Division,

- assist insurers to properly and efficiently set premiums and settle claims,

- provide assistance and support to law enforcement agencies and other investigative bodies in their efforts to detect and prevent insurance fraud" *IBC Insurance Privacy and You, page 3*

As the Task Force notes, there is a responsibility on the part of the industry to do more to combat fraud. It is surprising, for example, that all insurers do not participate in the sharing of data required to aid in the detection of suspicious claims. Clearly, industry cooperation and coordination is a fundamental precondition to addressing organized criminal fraud rings.

OTLA would welcome the opportunity to make an oral presentation to the Task Force when consultations continue later this month as we have an important and unique perspective to offer.