Play it Again, Sam

Opinion/Analysis

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Key features of Ontario's latest auto reform package have been attempted before – and ended in heartbreak.

Once again, Ontario has announced another package of auto insurance reforms.

With a provincial election just months away, the Ontario government recently announced yet another plan to make auto insurance affordable for Ontario drivers. The plan is focused on addressing fraud and providing better access to care.

The announcement by Charles Sousa, Ontario's minister of finance, along with attorney general Yasir Naqvi, follows several months of consultation with a broad range of stakeholders regarding David Marshall's report, *Fair Benefits Fairly Delivered: A Review of the Auto Insurance System in Ontario*, released in April 2017. Marshall's report contained 35 recommendations to reform the auto insurance system.

I reviewed Marshall's report and the province's subsequent announcement in December 2017 with interest. I spent more than 20 years of my professional life designing similar reform packages and have a good sense of how the Ontario system will respond to Marshall's proposed reforms.

Although the government's plan announced in December 2017 purports to flow from Marshall's report from last spring, only the creation of a new network of independent evaluation centres [IECs] originated from Marshall's report. Programs of care and contingency fees, announced in December and mentioned in Marshall's report, are work already underway by the government. Marshall, an advisor to Ontario's finance minister on auto insurance and pensions, never dealt with fraud.

For me, Ontario's plan is an admission that the Marshall report does not provide much in the way of workable solutions for the government. It would be a stretch to suggest that there will be savings derived from the proposed IECs. The system will not cease to be adversarial with the introduction of the IECs just as the Designated Assessment Centres (DACs) had no impact. Lawyers and insurers will continue to access their own medical opinions.

With an election on the horizon, there is little time for the government to implement their plan. What will happen to this plan following the election is unknown at this time. Other than providing more resources to combat fraud, there is little here to provide premium relief for consumers. Considering how long it takes to prosecute a fraud case, those savings are years away.

WHAT'S IN ONTARIO'S PLAN

The government will be establishing a panel to guide the enactment of proposed reforms, which include:

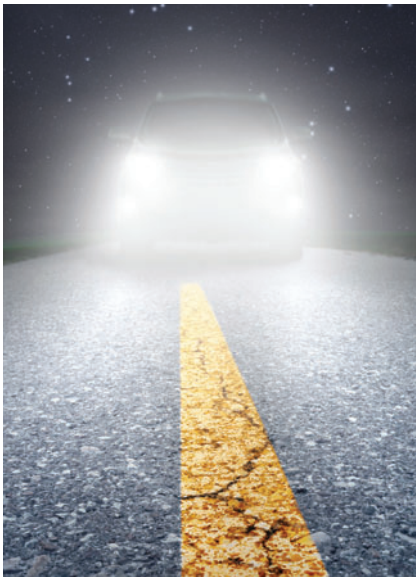
- Standard treatment plans (programs of care) for common collision injuries (soft tissue injuries) and changing the emphasis from cash payouts to ensuring appropriate care.
- Reducing disputes by instituting independent examination centres.
- Launching a Serious Fraud Office in spring 2018.
- Directing the Financial Services Commission of Ontario (FSCO) to review territorial rating factors used by insurers.
- Ensuring that lawyers' contingency fees are fair, reasonable and more transparent.

Programs of Care

I initiated the Programs of Care project before I left FSCO in 2011 and agree with its introduction. Led by Dr. Pierre Côté, the work on developing programs of care was completed in three years. Long overdue, this aspect of the Marshall recommendations and subsequent government announcement has been in development for six years.

Programs of care were first developed by the Workplace Safety and Insurance Board (WSIB) to deal with low back pain. The initial whiplash associated disorder guidelines were created in 2003 based on the WSIB low back pain program of care. FSCO had undertaken to develop programs of care for a range of soft tissue injuries. An interim solution was the introduction of the minor injury definition and minor injury guideline in 2010. The expectation is that programs of care will simplify access to treatment and reduce disputes in the system. If that does occur, it will potentially reduce some of the transactional costs in the system.

Will statutory accident benefits (SABS) be simplified when the programs of care are introduced? Will the number of disputes drop? That did not occur with the introduction of the minor injury guideline. It can't be assumed that programs of care will significantly



change the landscape. The WSIB experience will not necessarily be duplicated in the Ontario auto insurance system because the structures of the two systems will continue to be fundamentally different.

The government would like to move away from cash settlements. Prior to the introduction of the Ontario Motorist Protection Plan (OMPP) in 1990, it was standard procedure to settle minor lawsuits. The introduction of the OMPP was intended to address the needs of accident victims with minor injuries so that they could access wage loss and rehabilitation without the need to sue. Cash settlements undermine the principles of no-fault.

In his 2014 report, *Ontario Automobile Insurance Dispute Resolution System Review*, Douglas Cunningham, now an arbitrator and a former associate chief justice of the Ontario Superior Court of Justice, acknowledged that cash settlements could be counter-productive. But he compromised in the end by recommending that settlements be prohibited in the first two years of a claim. A settlement prohibition is more feasible in a pure no-fault system such as the WSIB. However, Ontario's auto insurance system provides access to tort. If there is a tort claim, the lawyers often push for a cash settlement with the first-party payer because the third-party payer is only responsible for damages in excess of the SABS.

Independent Examination Centres (IECs)

The government continues to support Marshall's recommendation that a network of IECs be created to provide neutral assessments of auto collision injuries. Fortunately, the government has backed away from locating IECs in public hospitals.

However, IECs are a bad idea. It sounds like a great concept, but it's been tried before and failed. I had the policy lead when the former DACs were introduced in 1994. The language we used back then was identical to what appeared in the recent government plan. IECs reflect Marshall's lack of institutional memory and understanding of the auto insurance industry.

I learned a few things through the DAC experience. When you are conducting over 100,000 assessments each year, you need a lot of physicians and other allied health professionals. That means you will have to rely on the same professionals who provided assessments to legal representatives and insurers. No matter what measures you take through standard guidelines and protocols, fee schedules, accreditation, no one will consider these assessors to suddenly become neutral. The criticisms directed at the current assessors will follow them when they join IECs.

IECs will require substantive oversight just like the DACs did. This will not only require a government bureaucracy to support IECs, but will likely increase administrative requirements for the assessment providers. Currently,

the average insurer examination costs under $1,400 based on HCAI data. The last DAC fee schedule (dated February 2004) contained much higher fees: assessing treatment, $2,000; assessing disability, $3,900; assessing attendant care needs, $2,600; and no cap on catastrophic impairment assessments. I predict assessment costs will rise under the IECs.

Marshall uses New Jersey's dispute resolution mechanism as an example of where a neutral medical review is successfully being used. Marshall has misinterpreted the New Jersey system. I spoke to officials from New Jersey on behalf of Justice Cunningham as part of his review of the auto insurance dispute resolutions system. The New Jersey medical reviews are peer reviews; they do not involve an examination of the claimant. They are not automatically conducted — one of the parties needs to request a review. The claimant and insurer still conduct their own medical assessments, upon which the neutral medical reviewer comments. As well, the arbitrator does not always follow the opinion of the medical reviewer. As is the case in New Jersey, establishing IECs will not eliminate the need for provider and insurer-initiated assessments.

Despite the insurance industry's strong support of the creation of IECs, I do not believe insurers will be willing to give up insurer exams. They are an important component in any private disability system. Instead, IECs have the potential to add another layer of assessments and costs, similar to the experience with the DACs.

Serious Fraud Office

For the third time in the past five years, the government has announced their intent to create a Fraud Office to deal with auto insurance fraud. Fraud was not mentioned by Marshall but raised by stakeholders during consultations. It would be nice if it happens this time.

Territorial Rating

This aspect of the plan has me puzzled. Directing the regulator to look at territorial rating can only go two ways: 1) the status quo, or 2) adjusting some rates up and others down. Ultimately, the review will not reduce rates overall and I sense the government knows this. Reducing rates in the GTA will only increase rates in other regions of the province.

Contingency Fees

The Law Society of Upper Canada has been working on new rules for lawyers regarding contingency fees for more than a year. They've asked the government to approve new regulations to provide the legal regulator with the ability to enforce the new rules. This overlaps with a recommendation made by David Marshall and was included in the government auto insurance plan. Cracking down on contingency fee abuses will put more money in the pockets of claimants but will not reduce auto insurance rates.