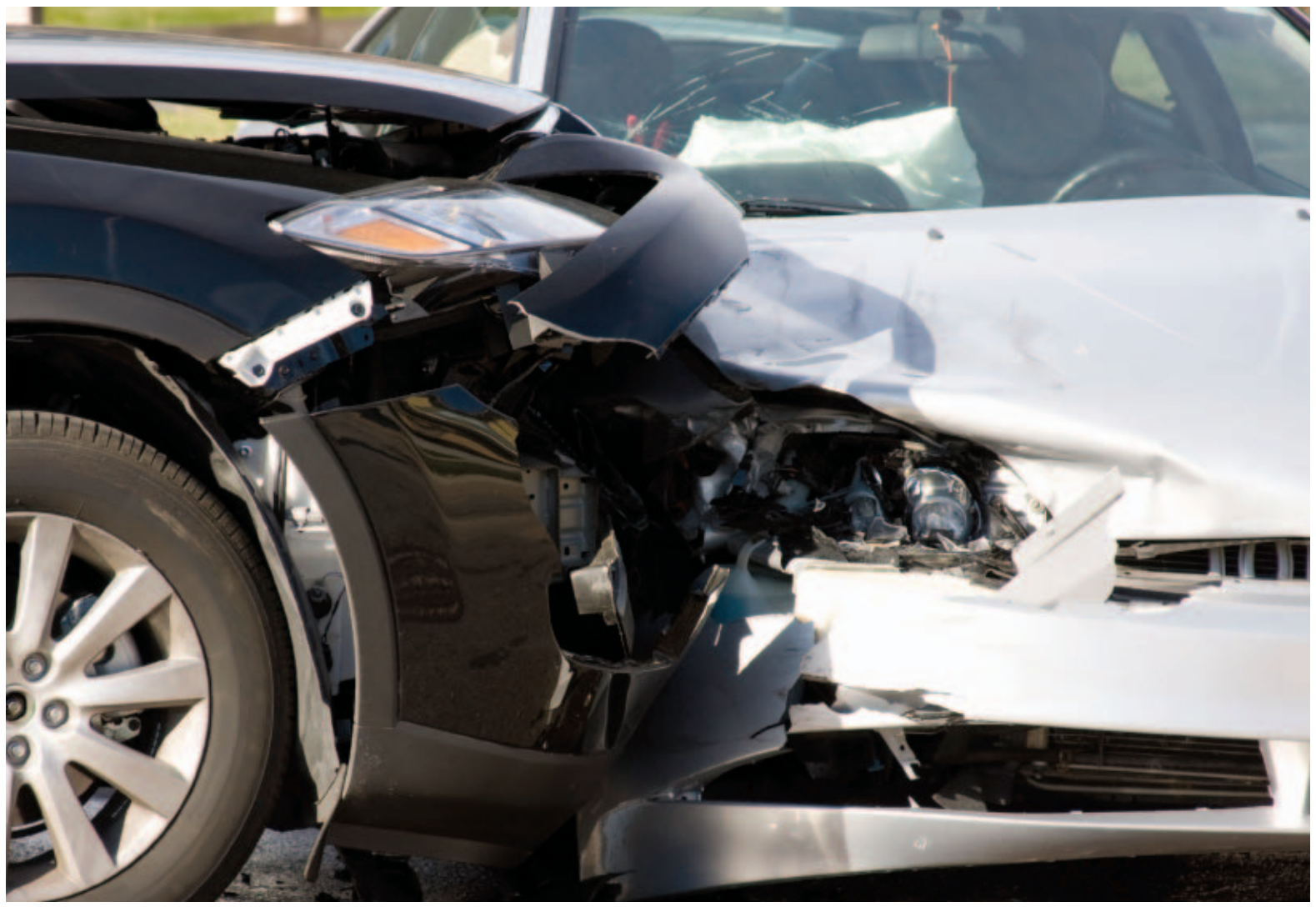
Why Ontario motorists will need more insurance

DARCY MERKUR



ISTOCKPHOTO.COM

The government needs to educate the public on the limitations of the new standard automobile insurance policy.

Ontario's new *Statutory Accident Benefit Schedule* reduces the accident benefits available to motorists covered by standard automobile insurance policies and restricts access to those benefits. It will have a negative impact on motor vehicle accident victims in Ontario.

The new *Statutory Accident Benefits Schedule* (new Ontario Regulation 34/10—the "new SABS") becomes effective Sept. 1. The changes are being introduced by way of a completely new regulation, rather than by way of an amendment to the current *Statutory Accident Benefits Schedule* (Ontario Regulation 403/96—the "old SABS").

While the new SABS has been designed to allow consumers to purchase optional benefits to either restore the reduced accident benefits or to enhance those benefits further, optional benefits exist under the old SABS and only approximately three per cent of insured persons purchase optional coverage. Accordingly, it is unrealistic to think that motorists will suddenly understand the need to purchase optional coverage to properly protect themselves in the event of a motor vehicle accident.

Quite simply, most people opt for the cheapest insurance they can purchase. Many feel their insurance premiums are currently far too expensive. Generally, motorists will not purchase optional coverage as it would increase their insurance premiums.

For optional benefits to be meaningful, the public must be educated on the limitations of the new standard automobile insurance policy. An education program is required to ensure that consumers recognize how the current benefits have been reduced and the value in purchasing some of the available optional benefits.

The government has taken on the goal of educating the public on optional benefits, but in doing so, it must ensure that the public education program requires brokers to properly explain the effect of the optional coverages to motorists when they are renewing their policies. There also needs to be some mechanism to verify that insured persons have actually considered the optional coverages, and made an educated decision to either purchase the optional coverages or reject them.

One significant change in the new SABS is that claimants will now be paying medical assessment and examination costs out of their limited medical and rehabilitation benefits. Because of the reduced limits on medical and rehabilitation benefits, claimants will be forced to weigh the value of reasonable and necessary assessments with the need to fund ongoing treatment.

> "Injured victims will face a tremendous hurdle in recovering compensation for the attendant care provided by their family members.

Another extremely troubling change which permeates the new SABS is the new definition of the term "incurred." Virtually every benefit available under the SABS refers to expenses which must be "incurred" by the insured person and the new SABS contains a restrictive definition of the term "incurred."

The definition of "incurred" in subs. 3(7)(e) of the new SABS tries to restrict payment of benefits to situations where the claimant has paid for the service, and the service is being provided by a person who is doing so as part of their regular occupation or profession, or is otherwise suffering an economic loss by virtue of providing the service. One example of where this will create injustice is the common situation where a non-employed family member provides necessary attendant care to an injured family member. By virtue of the change in definition of "incurred," injured victims will face a tremendous hurdle in recovering compensation for the attendant care provided by their family members.

Thankfully, where injured persons have a viable tort case, they will, in their tort claim, be able to advance the value of the attendant care services provided by persons such as family members at market rates and without regard to the new SABS definition of "incurred."

The new SABS significantly reduces the benefits available to motor vehicle accident victims suffering from non-catastrophic impairments. Specifically, the new SABS reduces the following benefits in non-catastrophic impairment cases:

- Medical and rehabilitation benefits have been reduced to $50,000 from $100,000—and assessment and examinations costs now come out of medical and rehabilitation limits in all cases;
- Attendant care benefits have been reduced to $36,000 from

See **SABS** Page 14

Plaintiffs' evidence included 23 expert reports

Notice
Continued From Page 9

ISTOCKPHOTO.COM

Concern over the complexity of issues and the time needed for proper analysis caused a court to strike a jury notice.

further assistance of counsel. For this reason, in the particular circumstances of this case, I am persuaded the jury notice should be struck," he concluded.

The appeal court agreed. "Counsel for the respondents and the Chambers judge, in his reasons, referred to a number of cases where a jury notice had been struck. In all such instances, the court was concerned about the complexity of the issues in the context of the time needed to render a just decision," Justice Nancy Bateman wrote in her decision, citing *Leadbetter v. Brand*, [1979] N.S.J. No. 724 (S.C.) and *Crocker v. MacDonald*, [1992] N.S.J. No. 461 (S.C.), among others.

In *Anderson*, the plaintiffs' evidence initially included 23 expert reports, primarily from medical specialists. Two more reports were submitted after the notice of trial. The individual defendants and the hospital involved also filed expert reports. In their written submission, counsel for the plaintiffs stated they anticipated calling four expert witnesses on the issues of standard of care and causation, and two or three experts on damages. However, they acknowledged that other experts might also be called, depending on how the trial progressed.

Ultimately, the trial court decision concludes that a judge is in "a better position to weigh and consider the theories," said Wagner, inaugural president of the Atlantic Provinces Trial Lawyers Association. "It breathes life into the notion that judges are in a better and preferred position."

That argument was dismissed by the appeal court. "With respect, to suggest, as have the appellants, that this case stands for the proposition that a judge may strike a jury notice simply because it would be more conveniently tried by a judge sitting alone, is a distortion of the carefully crafted and case specific reasoning in the judgment under appeal," said Justice Bateman.

The unquestionable skill of juries was an issue highlighted by Justice MacAdam in his decision. "In the large majority of cases, including most medical malpractice lawsuits, this distinction [between judge and jury] is not so significant as to warrant the striking of a party's *prima facie* right to a jury. If jurors can decide murder and other serious criminal cases, often with contradictory complex technical, including scientific, evidence, they can certainly decide civil cases, including when there is contradictory complex technical, including scientific, evidence," he stated.

Indeed, said Wagner, "our role would be to explain the evidence in a way that the jury could understand."

In the end, however, complexity was conjoined with the issue of timeliness, and the balance shifted in favour of judge over jury.

"The contradictory expert evidence can then be expected to not only involve weighing and considering what the other experts say happened, and with what effect on [the plaintiff], but also weighing theoretical scientific opinions," Justice MacAdam stated in his decision.

He added that, "Such weighing cannot, and for the sake of all parties, should not, be conducted hastily, particularly when the person or persons weighing the suggested opinions, is/are not trained in the scientific or technical discipline involved in the question at issue." ■

Accident victims must monitor their expenses

SABS
Continued From Page 13

$72,000—and note the implications of the word "incurred" discussed above;

- Housekeeping benefits ($100 per week) have been eliminated and replaced with optional benefits; and,
- Caregiver benefits ($250 per week plus $50 per week for each additional person in need of care) have been eliminated and replaced with optional benefits.

The changes in the new SABS will force accident victims to become more conscious of how quickly they are exhausting the available benefits. Undoubtedly, the reductions in accident benefits set out in the new SABS will have detrimental impacts on the rehabilitation of many seriously injured persons in Ontario. Hopefully, the public will be educated on the need for optional benefits and the purchase of optional benefits will become the norm rather than the exception. ■

Darcy Merkur is a partner at Thomson, Rogers in Toronto practising plaintiff's personal injury litigation, including plaintiff's motor vehicle litigation. He has been certified as a specialist in civil litigation by the Law Society of Upper Canada and is the creator of the Personal Injury Damages Calculator.

U.S. decisions already consider optimism bias

Optimism
Continued From Page 9

While contending that there are "lots of details" to be worked out and more research needs to be conducted to carefully think about the relationship between optimism bias and tort law, Metcalf believes that Parisi's standpoint has the potential of eventually making headway.

"Tort law really has a distributive and justice aspect to it," said Metcalf. "We're concerned about sharing the burden of liability and putting the burden on people who are, in a sense, at fault. A tort is in some sense conduct that is wrongful. But if people are cognitively limited in the sense that they are not actually voluntarily undertaking an action that is wrongful, then that relates to whether we think it is really just to impose liability on them."

Erik Knutsen, a law professor also at Queen's who teaches insurance and tort law, believes that optimism bias is already implicitly taken into account by the courts.

"In tort law, the standard everyone has to meet is that of a reasonable person, an objective standard of care," pointed out Knutsen, a member of the Research Advisory Board of the Law Commission for Ontario. "If we either explicitly as Parisi does, or implicitly as I argue, know that people have optimism bias, then the reasonable person test in tort law as it exists already accounts for this."

Knutsen

Parisi concurs, to a point. He acknowledges that in cases involving product liability, appellate courts, at least in the U.S., appear to consider optimism bias. In *Sherk v. Daisy-Heddon*, the court of first instance refused to determine that a BB gun with lethal power was unreasonably dangerous because the child failed to read the warning against pointing the gun at a person—a ruling that was overturned by the appeal court. The same thing happened in *Skyhook Corp v. Jasper*, when a court of first instance held that a crane manufacturer was not responsible for insulating its cranes against shock because crane operators failed to comply with warnings. That decision was also overturned.

"In between the lines, this is a consideration that juries and courts evaluate more prominently in product liability cases than other areas of law," Parisi told *The Lawyers Weekly*. "We're saying that this is an issue that doesn't only involve producers and consumers but in other situations as well." ■

We want to hear from you!
E-mail us at: tlw@lexisnexis.ca