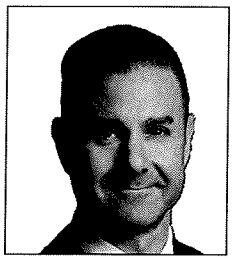
Suit Mix



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The availability of insurance covering cost awards against losing plaintiffs, and a Supreme Court of Canada ruling over an accused's right to be tried within reasonable time, are among the factors that insurers need to consider when facing personal injury claims.

Several recent trends in personal injury litigation could potentially shake up the industry. Among them are the availability of insurance covering opposing parties' legal costs, a tendency for more personal injury lawsuits to be filed well before the expiry of the limitation period and a tendency for insurers to go to trial rather than settle in cases where they believe a claim for pain and suffering will not meet the verbal threshold or exceed the statutory deductible specified in Ontario auto insurance law.

These are among the reasons it is safe to bet that 2017-2018 will see an increase in the number of personal injury lawsuits that go to trial. Gone may be the era where 96% to 99% of personal injury lawsuits are settled outside of the courtroom.

CLAIMS ISSUED EARLIER

Historically, claims in Ontario were being issued one to two days before the expiration of the two-year limitation period. This 11th-hour brinkmanship created uncertainty for insurers because they were in the dark as to whether a claim would be issued at all. During this waiting period, the insurer was hamstrung, unable to take proactive steps to ready their defence.

While some insurers did pursue productions or arrange for witnesses to be interviewed, these steps were limited at times by the extent to which plaintiff's counsel was willing to co-operate.

There is another problem with claims being issued shortly before the expiration of a limitation period. Unlike a fine wine, claims generally get worse over time, not better.

In recent years, there has been an uptick of claims being issued six months to one year after the loss and being pushed through the system as quickly as possible. The consensus of plaintiff-side lawyers consulted for this article is that increasing competition amongst personal injury

law firms is the major driver of this change. Issuing a statement of claim at an earlier stage is a practical way to clinch a retainer agreement with a prospective client before he or she walks down the street to the next shop.

What about the consequences for insurers? At first blush, this seems like a good thing for insurers because it leads to increased certainty and potentially earlier trial dates.

The *R. v. Jordan* ruling issued by the Supreme Court of Canada has thrown a wrench into this potential benefit. The *Jordan* decision, released July 8, 2016, established a new time limit in which courts must try people accused of criminal charges.

That ceiling is 18 months in some cases. Additional court resources allocated to criminal cases will lead to less resources for civil cases.

A closer look at the recent tendency to file personal injury lawsuits earlier reveals significant drawbacks. The effect of issuing earlier claims may be to substitute one type of uncertainty for a more troubling kind. And the benefits may not be worth it.

WINDOW OF TREATMENT

The critical drawback is that parties are going to discovery and litigating claims without enough information to make informed decisions. When a claim is issued only six months after an automobile accident and the discovery may be taking place 12 months after the accident, the available information will unlikely reflect an accurate assessment of the claim.

There will have been a very small window of medical treatment, short-term and long-term disability benefits are likely still being paid, and the plaintiff may not have returned to work or school yet. These issues will be more pronounced where the injuries are more serious (such as broken bones compared to soft-tissue injuries).

An individual with a serious orthopaedic injury or brain injury will not have reached maximum medical recovery. Their care needs and burn rate for treatment may not be representative of what they will be in the future. Because so much is unknown, it can be challenging for the insurer to accurately assess the claim.

Earlier claims may also give plaintiff's counsel leverage. A premature claim may create the illusion that his or her client's injuries and impairments are more significant than they are in reality. This is because documentary and oral discovery takes place during the acute phase of recovery — when the consequences of injuries are usually at their most severe.

The discovery transcript is held up as gospel by plaintiff's counsel when it is actually old news. This ties into an artificial sense of permanence: just because a plaintiff cannot work the assembly line today does not mean this will be the same a year from now.

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Although the main reason for early claims is a marketing response to steep competition, astute plaintiffs' counsel have likely figured out there is strategic advantage to be had.

Insurers need to be alive to this pitfall and, along with their defence counsel, ensure that they do not go to an examination for discovery or conduct a defence medical examination without adequate documentation regarding the plaintiff's medical history, employment history, injuries and treatment.

Where a trial may be scheduled to take place much sooner than used to in some jurisdictions (again subject to changes expected to be seen on account of *Jordan*), the "wait-and-see approach" of yesterday can be problematic.

COST PROTECTION INSURANCE

Since 2011, a new insurance product has crept into the Ontario market: adverse costs protection insurance or "after-the-event" insurance. This product eliminates the stark possibility that a plaintiff will be personally liable for adverse cost consequences if he or she loses at trial. This product may embolden a plaintiff to take his or her claim "all the way" without fear of losing their home or any other assets they may have.

This type of coverage is becoming increasingly more common — so common, in fact, that a philosophy gaining traction in legal circles is that lawyers have a duty to advise their clients of the availability of this coverage. It is becoming the standard of care.

Some personal injury firms are purchasing coverage for all of their files and reducing their cost per file by doing so.

On the surface, this does not look good for insurers. It takes leverage away from the insurer because the threat of an adverse costs award will no longer force a plaintiff to walk away from a non-meritorious case. Plaintiffs' counsel will no longer be out-of-pocket for their costly disbursements if they lose.

Both the plaintiff and his or her counsel may choose to "roll the dice" rather than taking a critical look at their own case and their chances of success.

BLOOD FROM A STONE

On the other hand, if an adverse cost award is made against a losing plaintiff at the conclusion of trial — the costs an insurer is owed would actually be paid. When articulating the potential impact of an adverse costs award at a mediation to a plaintiff, the response from plaintiff's counsel had typically been something along the lines of "my client is judgment-proof" or "you can't get blood from a stone". Rather than banking on the plaintiff having personal assets to go after, the costs award is guaranteed to be paid by another insurer.

Insurers will have even more incentive to go to trial because they can recover their costs. Trials are becoming less risky for plaintiffs, and less of a financial wash for the insurance company.

An unintended consequence is that a thin line exists between an emboldened plaintiff and a disillusioned one. Rather than simply providing a security blanket for litigants with legitimate claims, plaintiffs of the more irrational stripe may reject fair and reasonable settlement offers to "have their day in court".

The scope for irrational decision-making jeopardizes settlement. Whereas in the past, adverse cost consequences were a natural mechanism that guarded against overly zealous litigants rushing the docket, the proliferation of "after-the-event" insurance risks is dismantling a vital check built into the system.

Although considerably more appealing than a "bet-the-farm" scenario, the cost of "after-the-event" premiums is not exactly a steal for an impecunious plaintiff.

These products tend to cover a one-time payment, to be waived if unsuccessful at trial. Coverage is generally available with limits of $15,000 to $300,000. Supplemental coverage can be purchased as risk exposure evolves. Many lawyers are offering to pay the premium as a marketing strategy to lock down a retainer with a prospective client.

In a 2015 decision of Ontario's Superior Court of Justice, *Markovic v. Richards*, it was held that "after-the-event" premiums are not reimbursable by defendants as a compensable disbursement. Such an outcome would be unfair and unreasonable because although these policies provide comfort to a plaintiff, they are entirely optional and do nothing to advance the litigation.

Furthermore, the premiums are only payable if the plaintiff loses. The court also cautioned against the possibility that this insurance may act as a disincentive against well-reasoned settlement of claims. This reasoning was followed in the *Valentine v. Rodriguez-Elizalde* decision, released in 2016, by Ontario's Superior Court of Justice.

NON-THRESHOLD DECISIONS

Recent years have seen a steady increase in personal injury trials in Ontario. The system is ill-equipped to deal with this phenomenon. To illustrate this institutional failure, scheduling a 10-day trial in Toronto can involve waiting more than two years. Undoubtedly, "after-the-event" insurance has been a factor explaining why trial dockets are bursting at the seams.

A more recent factor is certainly the Supreme Court of Canada ruling in *R. v. Jordan*. Barrett Richard Jordan and Kristina Lorna-Marie Gaudet argued that their right to be "tried within a reasonable time," was violated. The Supreme Court of British Columbia ruled against Jordan. That ruling was upheld in 2014 by B.C.'s Court of Appeal but overturned by the Supreme Court of Canada, in a decision released July 8, 2016.

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In *Jordan*, the Supreme Court of Canada established a " ceiling beyond which delay is presumptively unreasonable," meaning that the Crown would have to convince a court that there are "exceptional circumstances." That ceiling is 18 months for cases going to trial in the provincial court and 30 months for cases going to trial in the superior court.

To rebut the presumption that the delay is unreasonable, "the Crown must establish the presence of exceptional circumstances," the high court ruled. "If it cannot, the delay is unreasonable and a stay will follow."

RELUCTANCE TO SETTLE

Naturally, as resources are moved around to accommodate for this ceiling, there will be fewer judges and courtrooms to accommodate civil cases. But working in tandem with this trend, is that insurance companies are increasingly taking tougher positions and not looking to resolve disputes on an economic basis. This is leading to more cases proceeding to trial or at least to the doorstep of trial.

A principled philosophy has taken over the cultures of many insurance companies. Many are taking defensible positions on claims where their assessment is that the claim for non-pecuniary general damages will not meet the verbal threshold and/or non-pecuniary general damages will not exceed the statutory deductible.

This threshold refers to a provision in Ontario insurance law limiting the liability of the owner of an automobile, the occupants of an automobile and any person present at the incident. Those parties are not liable for non-pecuniary losses unless the claimant either has a "permanent serious disfigurement" or a "permanent serious impairment of an important physical, mental or psychological function."

At present, the verbal threshold in Ontario is $37,385.117. For many insurers, the days of nuisance-value settlements for $10,000 are over.

Taking non-threshold positions and offering $0 forces plaintiffs' counsel to make a decision: abandon the client (by bringing a motion to get off the record) or run a trial. It seems that more plaintiff lawyers that had not run trials in the past (or at least were not known for running very many trials), are now doing just that.

Plaintiffs' counsel can no longer afford to have a reputation for being afraid of the courtroom in this hyper-competitive climate. Building a bread-and-butter practice on settlements is no longer as economically viable. Plaintiffs with access to "after-the-event" insurance may abandon their lawyers first if he or she gets cold feet, and tries to persuade them to drop their lawsuit.

It is far too early to say if the net effect of these changes are good for insurers or not. But there is certainly an impact that is being felt across the industry. There may be reverberations for years to come until the market for "after-the-event" insurance is saturated, and non-threshold claims are rooted out.

However, one thing is certain: even the most cautious investor would be wise to go long on the courtroom, and put their money on trials in 2018 and beyond.