

## Insurance legislation

## Personal injury firms thriving despite constant change

BY MICHAEL MCKIERNAN

For Law Times

Flipping through the drawers of his office recently, Alf Kwinter came across a few relics from one of the biggest fights of his battle-scarred career.

A stack of buttons printed with the message “No Fault. No Thanks” transported the co-founder of Toronto personal injury boutique Singer Kwinter back to 1990 when the slogan was the rallying call of opponents to Ontario’s Bill 68 that introduced no-fault insurance to the province.

The sight of them now raises a chuckle, says Kwinter, but at the time the atmosphere in the plaintiff personal injury bar was apocalyptic.

“I actually know people who left the jurisdiction and moved their entire firm to B.C.,” says Kwinter, who’s now into his fifth decade of practice.

“We were told it was all over.”

When Bill 68 passed, Kwinter himself half expected to return to criminal law, an area that had formed the backbone of his practice for the first decade after his call to the bar in 1972 before he made the switch to personal injury law. But 25 years on, after a multitude of major and minor revamps to the system, the firm persists.

Kwinter says he sees parallels between the no-fault crisis and the current climate in the personal injury bar where sustained accident-benefit cuts have raised fears about the long-term viability of personal injury practices. But Kwinter says the memories of past battles give him some comfort.

“I have a lot of confidence in the plaintiffs’ bar. We’ve always managed to be creative and imaginative enough to stay in business,” he says.

“For the last 25 years, the government has attempted to take away victims’ rights and they continue to do so. But no mat-

ter what they have tried, we’re always a step or two ahead of them.”

A number of measures unveiled in the latest provincial budget in April earned the wrath of personal injury lawyers, including:

- cut to the combined benefits for attendant care and medical and rehabilitation services for catastrophically injured victims to \$1 million from \$2 million.
- cut to the combined benefits for attendant care and medical and rehabilitation services for non-catastrophically injured victims to \$65,000 from \$86,000.
- two-year limit on non-earner benefits that were previously available following a six-month waiting period until claimants turned 65 and on a reduced basis after that point.
- reduction in the standard duration for medical and rehabilitation benefits to five years from 10 years except for children.
- promise to amend the definition of catastrophic impairment in line with updated medical information and knowledge, a plan viewed ominously by many plaintiff-side lawyers who expect the new definition to be more restrictive.

The Ontario Trial Lawyers Association condemned the proposals with former president Steve Rastin calling for an immediate moratorium on any changes pending consultations with stakeholders in the auto insurance sector.

“The changes announced yesterday are too sweeping and would impose too high a burden on injured accident victims, all to the net benefit of the insurance industry,” said Rastin in a statement on April 24, the day after the budget.

“We think it’s possible to meet the rate reduction objectives set out in the budget with-

out reducing coverage for the most seriously injured accident victims.”

John McLeish, a founding partner of Toronto personal injury firm McLeish Orlando LLP, says the budget proposals “make me angry.”

“As someone who has spent most of my professional life representing injured individuals, I think it’s a very mean-spirited piece of legislation,” he says, noting he finds the cuts to coverage for catastrophically impaired people particularly disturbing.

“These are drastic reductions in benefits to the people who need them most,” says McLeish.

He expects the Ontario Health Insurance Plan will end up picking up the slack in the long run.

“Catastrophically injured individuals are going to get a settlement that won’t be nearly enough,” says McLeish.

“They’re going to have to use the settlement money to survive and get the rehabilitation they need and they’re going to run out. Then they’re going to be left trying to make do with what they can get through OHIP and, at the end of the day, it’s going to be on the backs of the taxpayers who pay for it.”

Wendy Moore Mandel, a partner at Toronto personal injury boutique Thomson Rogers, says the budget measures are just the latest in a long line of efforts to keep politically sensitive insurance premiums in check. The pace has accelerated in recent times since Ontario’s Liberal government pledged to cut insurance rates by an average of 15 per cent over two years by August 2015.

“The insurance companies are a very significant lobby group with the government and carry a lot of political weight,” says Moore Mandel.

“We’ve seen consistent erosion not only of tort rights but also more recently of accident-benefit compensation available to those who have suffered seri-



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ous injuries.”

Kwinter says voters are much less likely to kick up a stink about slashed benefits than increased premiums because while everyone who drives pays for insurance, only a small minority have to rely on accident benefits to continue with their lives after a serious crash.

“All people care about is premiums, and the government knows that, so they carry on letting the insurance companies call the shots,” says Kwinter.

Traditionally, according to Moore Mandel, more generous accident benefits would offset the tightening of the thresholds on the tort side. But with accident benefits now facing a big squeeze as well, she predicts more intense and complex litigation in the future.

“When people are more squeezed financially, they’re going to look to recover as much as they possibly can on the tort side of the case,” she says.

“Counsel will be looking for ways to access further dollars on the tort side of the case because there simply isn’t enough available under the benefits.”

That could also mean more drivers facing third-party liability claims beyond their level of coverage, according to Moore Mandel.

“Most people are covered up

to \$1 million, but if something happens and you cause an accident in which someone suffers a catastrophic injury, your insurance may not be enough. If they don’t have access to the benefits in place now, then they could come after you to protect themselves,” she says.

Kwinter predicts the risk of cases like that will cause more insurance brokers to recommend clients purchase coverage up to \$2 million. Again, he hears echoes of the early 1990s.

“Back then, they thought they were putting us out of business and they made the same . . . claims about legal fees keeping premiums so high,” says Kwinter.

“But in many ways, each time they’ve changed the system, they make more work for us. I remember going to an American Bar Association meeting in the middle of it all in 1990 when we were all trembling and meeting a lawyer from Georgia where they have just introduced similar legislation. I asked him what he thought, and he said they loved it. I thought he was crazy, but he explained that the new rules took away all the crap. Sure enough, within a couple of years, our cabinet was still full, but instead of \$10,000-\$15,000 cases, it was full of \$200,000-\$300,000 cases.”

With a focus on higher-value cases, Kwinter says lawyers were able to experiment with new medical testing and improved methods of rehabilitation for clients.

“When I started out, nobody had heard of fibromyalgia and nobody had heard of rehabilitation clinics,” he says.

“We had the imagination to hire rehabilitation experts and to understand things like chronic pain and future-care costs. As soon as insurance companies throw up a barrier, we figure out how to get at them. So after 25 years, I’ve always felt there’s enough meat on the bone for us to be able to eat.” **LT**