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Insurance Policy Unit
Financial Institutions Policy Branch
Ministry of Finance
95 Grosvenor Street
Frost Building North, 4th Floor
Toronto, ON
M7A 1Z1

Dear Sir/Madam:

RE: Proposed Amendments to Insurance Act Regulation 34/10 (Statutory Accident Benefits Schedule – Effective September 1, 2010) (the "SABS")

INTRODUCTION

The Advocates' Society (the "Society") is pleased to offer the following written submissions setting out its perspectives on the proposed amendments to Regulation 34/10 (Statutory Accident Benefits Schedule – Effective September 1, 2010) under the *Insurance Act*, R.S.O. 1990, c. I.8 (the "SABS').

The Society is a not-for-profit association of over 5,200 lawyers throughout Ontario and the rest of Canada. Our members practise as advocates in the resolution of disputes before courts, administrative tribunals, government bodies, arbitrators and other forums for dispute resolution. The mandate of the Society includes, amongst other things, making submissions to governments and other entities on matters that affect access to justice, the administration of justice and the practice of law by advocates.

Over 1,500 of our members practise in the personal injury and insurance fields, both as plaintiffs' counsel and as defence counsel. The members of the Society's Task Force who drafted this submission (a list of the members of this Task Force appears at the end of this letter) represent both sides of the bar and this submission is the product of vigorous debate over the competing interests of claimants and insurers. As a result, we believe that the Society's comments represent a unique and balanced perspective.

Proposed Amendments to Benefit Levels and Durations

The goal of the accident benefits system has always been to rehabilitate accident victims to the point where they can resume living productive lives. The Society is concerned that the proposed reductions in benefit levels and durations will unduly limit reasonable benefits that would have otherwise accrued to accident victims. In particular, the Society is concerned that:

- Changing the standard benefit level for medical and rehabilitation benefits to $65,000 and including attendant care services benefits under this benefit limit will actually *reduce* the current combined benefit level for these two items by $21,000. The current standard benefit level for medical and rehabilitation benefits is $50,000 and the current benefit level for attendant care benefits is $36,000, yielding a current combined total of $86,000 for these two benefits. In this regard, the Society notes that the recent changes to the definition of "incurred" and the reduction in attendant care benefits to no more than the actual economic loss have already curbed the ability to recover attendant care benefits. Further collapsing the total quantum of medical/rehabilitation and attendant care benefits is premature until the full effect of those recent changes has flowed through the system, including a determination of whether the recent changes will in fact result in decreased premiums as intended;

- Including attendant care services with the $1 million medical and rehabilitation benefit for catastrophic impairments will *reduce* the current combined benefit level for these two items by $1 million. The current level for *each of* medical and rehabilitation benefits and attendant care services for catastrophic impairments is $1 million;

- Limiting the duration of non-earner benefits to 2 years after the accident will impose a significant burden on accident victims who suffer from long-term injuries following their accidents, particularly on those who, at the time of the accident, were students or unemployed but who are otherwise employable (and who therefore are prevented from claiming an income replacement benefit and may only have recourse to a tort claim for income loss); and

- Reducing the standard duration of medical and rehabilitation benefits from 10 years to 5 years for all claimants except children and those with catastrophic impairments will limit benefits for certain accident victims who are most in need of them, particularly in light of the proposed amendments to the determination of catastrophic impairment (please see the Society's submissions on this point below);

The Society is concerned that the amendments above have been proposed without the benefit of a quantitative analysis reflecting how these changes will have a positive impact on auto insurance rates. Moreover, the reductions in benefits will have a significant impact on those injured in (and particularly those catastrophically impaired by) auto accidents. For those with tort claims, the reduced availability of accident benefits will simply result in higher claims being advanced and awarded in the tort system. For those without tort claims, a reduction in the availability of accident benefits will simply result in shifting the burden of paying for these services to taxpayers through the provision of social services and through the Ontario Health Insurance Plan. The long-term societal cost of the reduction of benefits under the SABS, therefore, needs to be closely analyzed and considered.

Proposed Amendment Requiring Goods and Services Not Explicitly Listed in SABS to be "Essential"

The current version of the SABS requires goods and services not explicitly listed in the SABS to be paid on a "reasonable and necessary" basis. The proposed amendments would require that these goods and services be paid only on an "essential" basis.

The Society first notes that the change in language from "reasonable and necessary" to "essential" arguably does not effect any actual change. "Essential" is defined in various dictionaries, and particularly under *Black's Law Dictionary*, as "necessary" or "requisite". As such, the impact of changing the language to "essential" is unclear and risks opening the door to litigation over the interpretation of the SABS.

To the extent that the change in language from "reasonable and necessary" to "essential" does create a higher threshold for goods and services not explicitly listed in the SABS as distinct from those that are, the Society does not support this change in language. There is no reason why these two classes of goods and services should be differentiated. There is no scientific or logical basis to support that certain medical and rehabilitation benefits should be allowed if "reasonable and necessary" versus those that must be "essential".

With regard to the requirement that the "other goods and services" be agreed upon by the insurer, the proposed amendments do not provide any clarification as to how such a process would be any different than the current process. For example, would such a process only apply to "goods and services" under $250 for which a treatment plan is not required? Or, is it intended to apply for goods and services over $250? Would a treatment plan still be required? Would pre-approval of other goods and services be required under the proposed process? The Society is concerned about the proposal's lack of specificity in this regard.

Proposed Amendments to the Determination of Catastrophic Impairment

The Society notes that the proposed amendments to the determination of "catastrophic impairment" under the SABS are generally stated in non-specific terms, *e.g.* that the definitions of paraplegia or quadriplegia, total and permanent loss of use of an arm or leg, and mental and behavioural impairments are to be revised with "detailed criteria" and "new diagnostic tools". In addition, the proposal for combining physical, mental and behavioural impairments is unclear. In this regard, the Society's submissions focus on considerations it believes should be taken into account in any changes to the determination of catastrophic impairment. The Society's submissions here reiterate many of the submissions it made on May 13, 2011, in the Final Report of the Catastrophic Impairment Expert Panel.

General Comments

The Society notes that there are fewer than 1,000 files annually that involve catastrophically impaired individuals. For the very small number of seriously brain injured claimants, spinal cord victims, and serious amputees, the enhanced benefit is strongly needed. Beyond those cases, as recognized by the caselaw, "catastrophic impairment" is a *label* and not a *benefit*. This means the limits, in many cases, are not reached in any event. In the Society's view, any change to the determination of what constitutes catastrophic impairment would create uncertainty that is disproportionate to any demonstrable current problem with the determination.

While a scientific approach to a determination of catastrophic impairment may be helpful in establishing objective protocols for assessments and testing, the injection of a scientific protocol

into a regulatory instrument used for the determination of catastrophic impairment would open up the regulation to disputes over interpretation and increased litigation, and therefore result in confusion and undue complexity. Judges and arbitrators will make their decisions based on their own interpretations of the SABS, not on scientific evidence in the broad sense.

Paraplegia and quadriplegia

The Society does not support a change to the definition of paraplegia and quadriplegia that would require an injured person to meet a list of criteria (based on the American Spinal Injury Association classification system) in order to qualify for catastrophic impairment status, regardless of the diagnosis or the extent of the injury. An "autonomous screening system" requiring that an individual, before being determined catastrophically impaired, must have had some significant connection with the public healthcare system, does not advance the cause of access to justice for injured persons.

Determinations of quadriplegia and paraplegia rarely require litigation. In addition, the incorporation of external classification criteria (such as that of the American Spinal Injury Association) incorporated by reference into the SABS creates further complexity and risks further confusion and unpredictability of the SABS' application.

Total and permanent loss of use of an arm or a leg

Like the issues of paraplegia and quadriplegia, amputations of an arm or a leg have not historically often resulted in a need for litigation. As such, any changes to the definition here must be carefully considered so as to not create undue complexity. The Society's position is that the current definition is clear, as it identifies the level of seriousness of an injury that constitutes a catastrophic impairment.

Total blindness

The Society does not support an amendment to the definition of "total blindness". There is no evidence that such a change needs to be made as there are few cases that address the question of what constitutes total blindness.

Traumatic brain injury

The Society submits that the GCS remains a useful scale to assess the presence of a traumatic brain injury due to its simplicity and immediacy, and has been ruled on by the Court of Appeal for Ontario (see *Liu v. 1226071 Ontario Inc. (Canadian Zhorong Trading Ltd.)*, 2009 ONCA 571). The Society agrees that the GOS-E may be used in conjunction with the GCS as an assessment tool for adults. However, acceptance by the injured person as a neurological rehabilitation inpatient in a recognized rehabilitation centre should not be a requirement for a traumatic brain injury under the SABS. Such a change would discriminate against the many citizens who live in rural or remote areas, particularly Northern Ontario, where they may not necessarily have access to a "rehabilitation centre" due to its lack of availability.

Automatic catastrophic impairment designation of children in certain cases

The Society notes that pediatric catastrophic impairment is relatively rare among insured persons. Where pediatric individuals have serious injuries, there is rarely (if ever) any dispute with respect to their catastrophic impairment status. These cases do not proceed to litigation and are not a burden on the system. As such, the Society would support an automatic catastrophic

impairment designation of children in certain cases, but would like to see more clarity around what would constitute these "certain cases".

Combination of impairments

The Society notes that, despite the recommendations in the Final Report of the Catastrophic Impairment Expert Panel and the subsequent report of the Superintendent of Financial Services on the definition of catastrophic impairment under the SABS, the proposed amendments contemplate the combination of impairments. The Society agrees with this aspect of the proposed amendments.

Quantification of mental and behavioral impairments for the purposes of combining

The proposed changes to the SABS would require that the determination of percentage impairment to allow for combining mental and behavioral impairments be based on the 6th edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*. The effect of shifting to the diagnostic tool under the 6th edition of the *Guides* on the current categorization of mental/behavioural impairments as a percentage is unknown. No scientific evidence or calculations have been provided that would suggest that such a shift will in any way change the number of cases which are currently determined to be catastrophic impairment cases, and whether any such change would result in a savings. It is also not clear whether such a change would disinherit a large number of individuals who, under the current SABS, would be found to be catastrophically impaired.

The Society recommends that the current wording under the SABS remain unchanged, and that the Superintendent issue guidelines which outline approved methods of calculating mental and behavioural impairments. The Society proposes that the following methods should be listed under these guidelines as approved methods to determine the level of mental or behavioural impairment:

- The "California Method", whereby an injured person's impairment is given a score under the Global Assessment of Function ("GAF") scale, and this GAF score is then converted to a percentage as provided by the *Schedule for Rating Permanent Disabilities* (released under the provisions of the *Labor Code of the State of California*); or

- Chapter 4, Table 3 of the American Medical Association's *Guides to the Evaluation of Permanent Impairment*.

In the Society's view, these methods are workable methods which will allow for the more effective identification of issues by the parties and, in turn, allow the parties to keep their litigation streamlined.

Impact of Changes to the Dispute Resolution System

The Society notes that other initiatives have recently been undertaken to reduce auto insurance premiums. In particular, the streamlining of the auto insurance dispute resolution system will soon be implemented. The rationale for that particular initiative was that it would result in substantial savings to insurers within the system. The Society submits that the cost savings resulting from this and other initiatives should be evaluated before any amendment is made to the SABS which would further reduce benefits to auto accident victims.

The Society is grateful for the opportunity to make submissions in these proposed amendments and would be pleased to discuss these submissions further.

Yours very truly,

Martha McCarthy
President

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