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Do we want to be like our southern neighbour?

Proposed rule could encourage petty lawsuits

Most standard homeowner insurance policies carry third-party liability coverage of $500,000 or $1 million. If someone is injured on the insured's premises, the liability coverage should kick in and will contribute damages to the injured third party up to the coverage limit in the policy.

Automobile policies have a typical limit of $1 million to cover injuries to third parties.

Is $1 million enough liability coverage? If someone is injured on your property or by your automobile, damages for lasting pain and suffering and medical care, not to mention loss of income for the rest of a career, can run into the millions.

If there is still money owing to the injured third party once the insurance company pays out the maximum under the policy, the personal assets and income of the insured are exposed to a claim for the rest of the court-awarded damages. For this reason, I often advise clients with significant assets to purchase an "umbrella" policy for liability only.

An umbrella policy provides an extra layer of liability protection for the insured. For a very nominal premium, an insured can have an additional $1 million or more of coverage over all other policies - including the personal residence, car, boat, cottage, recreational vehicle such as a snowmobile, and even investment properties.

If it was ever important to have an umbrella policy, it is about to become even more critical to have additional liability coverage in view of a proposal now under active consideration by the Law Society of Upper Canada. The proposal, put forward by the society's professional regulation committee, could well unleash the floodgates of litigation.

Back in the days of King Edward I in 1305, the English Parliament passed a law to prohibit champerty. Historically, champerty is an "officious intermeddling" to encourage a lawsuit that would not otherwise be brought, with a view to receiving a share of the disputed proceeds.

The Law Society in Ontario currently prohibits lawyers taking on cases based on contingent fees, but it has proposed a new rule that would allow lawyers to accept cases where the lawyer's fee is contingent on winning the case. If this happens, the lawyer gets a piece of the pie rather than an hourly rate. If he loses the case, he gets nothing.

The current prohibition is honoured more in the breach than in the observance, and both the Law Society and the courts have favoured changing the rules. Recently, two court cases in Ontario have given the judicial nod of approval to contingent fee arrangements, although one is on its way to the Court of Appeal.

Should Ontario allow contingent fees in litigation? The argument in favour of contingent fees is it allows greater access to justice for plaintiffs who cannot afford to pursue their claims in court.

The argument against lawyers sharing in the proceeds of the litigation was best stated by Walter K. Olson in his book, *The Litigation Explosion -What Happened When America Unleashed the Lawsuit*. (*http://www.walterolson.com.*)

Olson says Americans spend much time, money and sadistic ingenuity beating each other up in court because the legal system is actually set up to encourage lawsuits. Americans make it easy and tempting to sue their fellow citizens.

Accident? Injured? Bored with your spouse? Tired of working overtime to pay off those credit cards? Spill coffee on your lap at McDonalds? Trip on your shoelaces at K-Mart? Let us sue, the ads say. If you don't win, we don't get paid.

When innocent defendants are hauled into court, it's often cheaper to pay a settlement than be tied up in litigation for years.

Fear of lawsuits paralyzes whole areas of commerce, medicine, recreation and family life.

Ultimately, a society where litigation is encouraged by lawyers getting a piece of the action will have to pay for the fallout of a litigious mindset.

Prices of goods and services will have to increase as we all pay for the liability risks of the manufacturers of the goods and the service providers.

Home insurance and car insurance premiums will rise and some products like new miracle drugs could be held off the market for fear of massive class-action lawsuits if something goes wrong.

What kind of society do Ontarians want? One where there is better access to justice through contingency fees, or one where we are not as litigation-happy as our American cousins? If the Law Society proceeds with this proposal, ordinary citizens may have no say in the matter.

CLARIFICATION: In this column on April 28, 2001, I related the story of the aborted purchase of a Lake Joseph cottage by Wayne and Janet Gretzky. In it, I discussed the role of Ross Wilson, an agent with Prudential Sadie Moranis Real Realty. Wilson was the agent for the vendors of the cottage.

It is possible I left the impression that Wilson did in fact say that the changes *to the offer* proposed by the Gretzkys were acceptable to his clients. In fact, Ross Wilson did not give any such assurance, and the article should have pointed this out. It was not my intention to imply that Wilson gave assurances to the purchasers' agent that were contrary to his clients' instructions, and there was no suggestion of this in the court's decision.

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