

In defence of lawyers' contingency fees

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Recent months have seen an unprecedented wave of negative coverage of personal injury lawyers. Much of the coverage has focused on the perceived prevalence of excessive or confusing fee arrangements and in particular contingency fees – the familiar “you don’t pay unless we win” deal in which a lawyer’s fee is contingent on achieving a financial recovery for the client.

The latest development in this campaign is a private member’s bill from Liberal MPP Mike Colle, which proposes capping contingency fees at 15 per cent of the monetary damages recovered on behalf of a client. Such attacks on the legitimacy of contingency fees are misguided and if accepted will harm the injury victims they ostensibly aim to protect.

Professional representation in the negotiation and litigation of an injury claim is essential in our adversarial justice system which, for better or for worse, pits vulnerable injured plaintiffs against well-resourced defendants. The cost of litigation is enormous and is beyond the reach of most Ontarians, let alone those suffering the aftermath of an injury. Contingency fees are necessary to ensure that as many people as possible are able to obtain competent representation and ultimately access to justice.

In taking on a case on a contingency basis lawyers assume significant risks. Not only do lawyers assume the risk that they will not be paid if the claim fails, they almost always pay the out-of-pocket expenses or “disbursements” required to fund a lawsuit. These disbursements include the costs of independent medical experts and can easily run into the tens of thousands of dollars. If the lawsuit ultimately fails, the lawyer is the one who bears the cost of these disbursements.

Lawyers who agree to act on a contingency basis also agree to deferred payment of their fees, unlike in a typical lawyer-client relationship in which a retainer is provided up front or invoices are rendered for immediate payment.

The cap on contingency fees proposed by Colle ignores these realities. The proposal is unworkable in practice and would have the effect of foreclosing access to representation for thousands of Ontarians who have suffered serious and life-altering injuries. The most severe impact would be felt by plaintiffs with complex cases or cases involving potential financial recoveries that are modest but nonetheless extremely important to the injury victims involved.

Take for example a medical malpractice lawsuit against a doctor. After five years of hard-fought litigation, a two-week trial and \$50,000 in disbursements, which will only be recovered if the plaintiff wins, a judge awards the plaintiff \$250,000 in damages. A 15 per cent fee would amount to \$37,500 – less than the disbursements the lawyer has risked to take the case to trial.

In Ontario, any client who believes their lawyer’s bill is too high can ask for an assessment of the bill by an independent court-appointed officer whose job it is to ensure that lawyers’ bills are fair and reasonable. In addition, every single settlement entered into on behalf of a minor or a mentally incapable person is vetted by a Superior Court judge to ensure the settlement is proper and the fees are appropriate.

Legislative and regulatory attention should be focused on identifying and addressing these exceptional cases, not tearing apart an important tool for protecting access to justice for all Ontarians regardless of their economic means. Action to ensure that legal advertising is not misleading is also appropriate and is in fact already being undertaken by the Law Society of Upper Canada, the body that governs lawyers in Ontario.

Unfortunately, much of the recent coverage plays into the harmful caricature of the personal injury lawyer as an ambulance chaser. This stereotype unfairly undermines the reputation of all lawyers who act for injury victims.

The truth is that personal injury lawyers are by and large compassionate advocates for their clients and are motivated by a desire to ensure their clients receive strong representation and, ultimately, fair and adequate compensation.