

**Automobile Insurance Compensation –
A Discussion Paper on Government Proposals**

Submitted to:

**Honourable Walter Noel
Minister of Government Services and Lands
Government of Newfoundland and Labrador**

Submitted by:

**Joint Law Society of Newfoundland
and Canadian Bar Association Task Force**

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Preface

The **Law Society of Newfoundland** has been the governing body of the legal profession in the province since 1826. Under its statutory authority, the *Law Society Act*, the Society has authority to license and discipline members of the legal profession.

The **Canadian Bar Association** is a National Association representing over 37,000 individuals including lawyers, judges, notaries, law teachers and law students from across Canada. The members of the Association come from all the Provinces and Territories of Canada.

The Law Society and the Canadian Bar Association established a joint task force to review Government's proposals on Automobile Insurance. The Task Force sought input, feedback and opinion from lawyers familiar with insurance law from both the Plaintiff and Defence Bar.

The importance of Automobile Insurance to the legal profession, among other groups, is reflected in a decision of the Canadian Bar Association at the National level to recently establish a working group on no fault compensation. In some provinces, notably Nova Scotia and Saskatchewan, committees similar to our Task Force have been established to review ongoing developments.

The legal community, not unlike the insurance industry, will be perceived as speaking from a position of self-interest in terms of commenting on the current system of vehicle accident compensation and on the proposed reforms. The legal community, as do representatives of the insurance industry, bring a considerable amount of expertise to the debate in terms of discussing the potential reforms and in particular the implications for the consumer.

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Introduction

On October 4, 2001, the Honourable Walter Noel, Minister of Government Services and Lands released a consultation paper entitled "Proposals for Automobile Insurance Reform." In announcing the release of the paper, the Minister noted:

Consumers in our Province have sent a clear message to Government. They want reduced and stable insurance premiums. The paper is a response to that message.

The paper consists of 51 proposals. The Task Force does not intend to comment on each of the proposals. The paper, for example, outlines proposals on such matters as **Underwriting Guidelines, Facility Association, Monthly Premium Payment Plan, Unearned Premiums, the Property and Casualty Insurance Compensation Corporation (PACICC) and Capital**

Requirements. These topics extend beyond the mandate and expertise of the Task Force and no specific comments will be offered.

The Task Force can support in principle several proposals contained in the consultation paper, however it has neither the breadth of experience or expertise to offer substantive comments on these proposals. The Task Force supports in principle several of the initiatives and looks forward to the opportunity to review specific legislative change where required for the following: **Consumer Education, Brokers Disclosure to Consumers, and the Appointment of a Consumer Advocate** to intervene in Public Utility Board rate hearings with the cost to be paid by the Board and passed on to the industry in its assessments.

In reviewing the proposals, the Task Force recognizes the previous commitments by Government to effect changes to automobile insurance. These include the release of the report of the Select Committee on Property and Casualty Insurance in March 1998. As a result of that report, several reforms have taken place including the introduction of a graduated licence driver's program and the establishment of rating territories to be determined by the Public Utilities Board. The Task Force commends Government on these initiatives and looks forward in particular to a review by Government of its graduated driver's licence program and further details on possible changes to the rating territories.

Premise of Task Force Review

The underlying premise of the Task Force deliberations is that the process involving the determination of insurance rates has to be transparent. It must be clearly understood by the public. Transparency requires full disclosure by insurance companies on all facets of their operations. Government should not implement reforms based on anticipated premium increases which may be attributable to factors outside the normal mechanisms of insurance rate determination. These factors include, for example, the increased financial pressures arising from the September 11th terrorist attacks.

Government has to implement a process that will allow full debate of all issues especially if legislative changes are^aintroduced that materially alter the current system of automobile insurance compensation in this Province.

The process of reform to systems of automobile insurance compensation is evident throughout Canada. In the province of Ontario, for example, several changes have been made in the past decade including the imposition of a deductible on personal injury claims, in particular on pain and suffering awards, and limiting pain and suffering to cases where permanent and serious injury is demonstrated. Government acknowledges in the consultation paper that it has closely monitored developments in Ontario.

The Ontario experience is evolving. The changes introduced in that province have achieved neither a decrease in the number of accidents nor a reduction or stabilization of automobile insurance rates. Rate increases in the vicinity of 20% are being proposed this year in Ontario. Furthermore, a recent study commissioned by the Canadian Coalition Against Insurance Fraud concluded Ontario had the highest level of fraud across the Country.

Other provinces have also instituted reforms. The province of Saskatchewan instituted a pure no fault system in the mid-1990s. This process was subject to a five-year statutory review. The Saskatchewan Government recently announced that by the end of 2002, vehicle owners will be able to choose between no fault or the tort system, which is presently available in our Province. There has been widespread opposition in Saskatchewan to the system of reforms established in the mid-1990's, this opposition arising most notably from victims.

In 1997, the Government in British Columbia, proposed a pure no fault system of automobile insurance. This proposal was soundly rejected by the public and a tort system of compensation remains in place in that province today. There is evidence in British Columbia that premiums have remained stable and accidents have decreased owing in large part to a comprehensive highway safety program.

The provinces of Quebec and Manitoba have a full no fault system of automobile insurance. Reports from Quebec in particular have concluded that the no fault system has contributed, at least in part, to an increase in automobile accidents.

The Minister indicates in the consultation paper that the Newfoundland and Labrador proposals emanate principally from Ontario. In clarifying Government's proposals, the Minister indicates they do not form part of a no fault insurance system since they do not eliminate the right to sue for pain and suffering. The Task Force respectfully disagrees. *The proposals are a modified form of No Fault Insurance that specifically takes away the right of certain individuals to sue for pain and suffering.*

The Minister furthermore suggests that 70% of the Canadian population are subject to a modified system of automobile insurance. The Task Force maintains the presence of a modified system elsewhere in the country is not grounds in itself to impose significant changes in this province. This is particularly true given the spotty results achieved in other jurisdictions where higher premium rates and no material decreases in claims or accidents has generally been the experience.

The implementation of the proposals set out in the Discussion Paper, represents a radical departure in the system of automobile insurance compensation in this Province. The proposals, while considered in other jurisdictions, notably Ontario, are new to this Province and were not discussed in any manner as part of the Report of the Select Committee Report on Automobile Insurance in its report of 1998.

^a See article in *Canadian Insurance* November 2001 at pp. 11-12 "What is the Impact of September 11 on the Canadian Insurance Market?"

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Support for Specific Proposals

There are several proposals germane to the system of automobile insurance compensation about which the legal profession, based on its experience, can appropriately comment. The Task Force can support in principle the following proposals contained in the discussion paper:

(a) **Mandatory Accident Benefits.** The discussion paper proposes that accident benefits be mandatory and coverage limits for such particulars as medical benefits, weekly income benefits and death benefits, be increased. These are commonly referred to as Section B benefits. Government proposes to increase:

- the weekly indemnity for income loss from \$140.00 to \$300.00;
- medical benefits from \$25,000.00 to \$50,000.00

The Province of Newfoundland and Labrador is the only jurisdiction in Canada that does not have mandatory Section B coverage. While the Task Force recognizes that the imposition of this measure will increase costs to the consumer and quite possibly the increased profit of the insurance industry (provided of course that no other proposals are implemented) the Task force considers the proposals to merit further consideration. The appropriate levels of benefits and the requisite cost, benefits and impacts on the consumer and industry should be the subject of a determination by an independent tribunal such as the Public Utilities Board with the full involvement of the consumer advocate.

(b) **Seat Belt Initiative.** The discussion paper proposes a reduction in an award by 25% where failure to wear a seatbelt contributes to an injury. Generally speaking, the courts in this Province have already reflected this reduction in their judgments. Accordingly, the Task Force does not believe there is further need to impose a reduction. A legislative cap may only serve to severely restrict the ability of victims to justify a lower reduction especially in cases where they have actively taken steps to use their seat belts to avoid injury.

(c) **Structured Settlements.** The discussion paper proposes that an injured party be entitled to make application to the court for a structured settlement.

It has been established at common law that plaintiffs can receive their damage awards in a lump sum. The lump sum award can provide the plaintiff with compensation, which once invested, will produce an income and enable the plaintiff to meet the cost of future care and future pecuniary loss. These awards are then grossed-up to take into account the tax implications on the income earned in the lump sum payment.

Structured settlements are generally considered to be a settlement option that can provide significant benefits and a tax savings to the plaintiff at a reduced cost to the defendant. There is, however, no jurisdiction in our courts to order structured settlements.

The Task Force believes that the ability of the courts to order structured settlements could reduce the quantum of damage awards. This would benefit insurers. Claimants would also benefit. They would be receiving reasonable compensation on a tax-exempt basis. This proposal can be

supported in principle. However, it should only be implemented after the experience in other jurisdictions has been fully explored. Furthermore, if it were possible for the Court to order structured settlements in appropriate cases, the savings to the insurer and the associated cost of reserves necessary to fund a settlement in a serious personal injury case should be passed on to the consumer by way of reductions in premiums over time.

The Task Force suggests this matter should be considered by the Rules Committee which is established pursuant to the *Judicature Act* R.S.N. 1990 cJ-4. The experience and practice in other jurisdictions, notably, Ontario and Manitoba, should be fully explored

- (d) **Lost Wages Calculated on a Net Basis.** The Consultation Paper proposes that recovery of loss of income in automobile personal injury matters be on the basis of: “wage loss settlements be 100% of net wages.” The issue of net versus gross recovery of income loss has been debated in Canadian courts, and by the Supreme Court of Canada, for decades. For a considerable period this debate has been resolved in favour of the law of tort damages not taking the existence of taxation into account. The most recent Supreme Court of Canada consideration of this issue occurred in *Cunningham v. Wheeler* (1994, 113 D.L.R. (4th) 1 at 21-23, 42. Cory, held that “taxation of damages for lost income is a question which should be left to the legislature which can, if they wish readily pass amendments to make damages for lost income taxable.” The court added that this was “really a question of tax policy not of tort law.”

Following the direction of the Supreme Court of Canada, this Committee recommends that the Government deal with the public policy issues surrounding the issue of taxation of damages for lost income through taxation policy, rather than through changes to tort law. This may require consultation with the Department of Finance to assess the revenue implications for the Province and for individuals.

- (e) **Uninsured and Impaired Drivers** - Government proposes to introduce measures to deter uninsured and impaired drivers from driving. This is a laudable objective. The Task Force notes specific proposals in the paper including:

- increasing the minimum fines from \$1,000 to \$2,000 for first offences and \$3,000 for subsequent offences;
- enabling the Motor Registration Division to examine an effective method to have cancellations of insurance reported to them;
- impounding vehicles for 30 days;
- suspension of driver’s licence for 30 days that serve to deter impaired drivers in particular;

The Task Force supports these proposals.

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Other Proposals outside Scope of Consultation Paper

While not specifically identified in the paper, there are other proposals that Government may wish to consider, especially if it wishes to achieve its desired objective of making the system fairer to the consumer. These include:

(a) **Advance Payments to Plaintiffs.** In the preface to Government's consultation paper, the Minister outlined that one of Government's objectives was to ensure prompt settlement of claims. The Task Force recognizes there may be cases where settlement is not achieved within a reasonable period of time. The time for settlement will depend on such factors as the extent to which medical reports are obtained to confirm the extent of injuries. Furthermore, a plaintiff's response to the treatment of symptoms of his or her injury varies from case to case. The Task Force wishes to make it clear that it is in no way suggesting that plaintiff's counsel, or for that matter the insurer, seeks to achieve delays in the process of processing claims. There are instances, however, especially where there is no issue of liability and where the extent of the injuries is evolving, that a process of providing advance payments to the plaintiff is most desirable. There is currently no legislative provision to enable plaintiffs to apply for interim payments. The Task Force recommends that Government consider amendments to the *Judicature Act* and the Rules of Court to allow for the establishment of an advance system of payments to plaintiffs. This is an initiative that should be referred to the Rules Committee, and there should be consultation with representatives of the Law Society and the Canadian Bar Association, given the necessity for legislative change.

(b) **Monetary Jurisdiction of Small Claims Court.** The Task Force realizes there is a perception that the involvement of lawyers may drive up the cost of claims and slow down the decision-making process. The Task Force respectfully disagrees with this perception. Government may, however, wish to consider legislative change to the *Small Claims Act* to increase the jurisdiction for claims in amounts above \$3,000. While this may impose an additional cost to overnment in terms of administering the court system, it may facilitate easier access and achieve expeditious resolution of claims by individual consumers. In considering this proposal, Government should be sensitive to the need for consumers to be represented by agents that are regulated.

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The Major Reforms

Two proposals in the consultation paper: the restriction of a claim for pain and suffering to injuries causing permanent and serious disfigurement of a physical, mental or psychological function (pain and suffering threshold), and the imposition of a \$15,000 deductible on all pain and suffering awards (deductible), have generated considerable public debate since the release of the consultation paper. These two measures alone have significantly influenced public opinion in the Province of Newfoundland and Labrador. In a public opinion survey concluded early in the consultation process, when provided with further details on the proposals, 79% of individuals chose the right to claim for pain and suffering while only 14% chose lower insurance rates.

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Is there a Crisis to Necessitate Change?

The Task Force acknowledges the Minister's position that Government will not introduce a system which the public does not want nor one that will not guarantee stability in premium increases. For its part, the insurance industry has indicated substantial premium increases are imminent. They have also indicated that the industry will lose money. However, the extent of the "loss" has not been

quantified. In one press release, the industry indicated it will lose \$35,000,000 in the Province next year. In other public statements, the industry maintained it will make a profit regardless of whether reforms are in place or not. At a meeting which the Task Force held with the Minister and his officials on November 9, officials confirmed that the industry will make a profit of at least \$10,000,000 this year. It is generally accepted that insurance companies invest considerable amounts of money through the collection of premiums, and their rate of return and overall profit margins are good. The task force has not been provided evidence to challenge this perception.

As for anticipated premium increases, the best evidence available to date is a report released by the Public Utilities Board on November 8, 2001, entitled "Proposed Newfoundland Automobile Insurance Benchmarks for 2002." This was prepared by the Board's actuarial consultants MMC Enterprise Risk Consulting Limited. In that report, it was determined that the proposed benchmark requirements represent an overall reduction in rates in the Province of 5.4% for liability, with an increase of 7.1% for collision and 18.9% for MSRP.

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Decline in Young Drivers

The Task Force is not aware of the range factors that will precipitate a crisis in automobile insurance premiums. The fallout from the September 11 th terrorist attacks is one factor cited by industry. That does not explain the problems the industry complained of prior to that date.

There are trends, such as a substantial decline in the Province's young people aged 16-25 due to outmigration, that could resolve, in part, any looming crisis. Males aged 16-25 have consistently been a problem and the source of accidents. They represent groups for whom sizable pay outs have been made by the insurance industry. This is an issue that Government, industry and other interested parties could explore further. Any problems associated with this group and its effect on profitability in this Province may work themselves out on a natural basis.

- (a) **Pain and Suffering – Threshold.** The consultation paper suggests that claims for non-economic loss be restricted to injuries causing permanent and serious disfigurement or permanent and serious impairment of an important physical, mental or psychological function. While the Task Force has not yet seen any proposed legislative changes, it is assumed that the wording will be similar to that used in Ontario. In that province, the Court of Appeal has provided a very restrictive interpretation of the phrase "serious and permanent." In many cases, they have restricted damages for compensation that one would normally expect individuals to receive for pain and suffering as part of the present tort system. These include the following examples:

- A. A sixty-six year old housewife suffered a fractured left knee, a fractured right wrist, bruising to the chest, soft tissue injuries to her shoulder, right middle finger, left foot and ankle. Walking, standing, weight-bearing and use of stairs were permanently impaired.
(No Compensation).

- B. A twenty-five year old coronary care nurse suffered soft tissue injuries to her neck and shoulder and later developed numbness in two fingers and neck pain. She could not continue as a coronary care nurse.
(No Compensation).

- C. A seventy-four year old widow suffered soft tissue damage which impaired her ability to bend and lift. Her spleen was ruptured and had to be removed leaving a 15-inch scar down the centre of her abdomen.
(No Compensation).

The implementation of the proposed system places severe restrictions on an individual's right to sue. It represents a radical system in the method of compensating accident victims in this Province. The insurance industry, while acknowledging the restriction on a right to sue, points out in response that economic losses can still be recovered. Nevertheless, the task force maintains that the proposal will have the effect of restricting individuals who are on a fixed income or who receive no income, from obtaining fair compensation. These measures unfairly target and discriminate against the homeless, students, primary care givers and the aged in particular.

- (b) **Deductible.** At the outset, it is acknowledged that the Canadian Bar Association as part of its submission to the Select Legislative Committee, did accept a proposal to impose a deductible on personal injury claims. At that time, a \$5,000 deductible was proposed. It was accepted at that time that the imposition of a deductible would possibly discourage claims that might be regarded as trifling or frivolous.

Support for this principle was made shortly after the deductible was implemented in Ontario. In that province, it was believed that the imposition of a deductible would decrease claims, and curtail fraud. As noted previously, the opposite has proven true. Premium rates and fraud are on the increase in Ontario, and there is no evidence of a reduction in claims.

The imposition of a deductible has the effect of denying access to the court by the victims of automobile accidents who have serious personal injury, not just the so-called minor pain and suffering cases, however they may be defined. The imposition of a deductible may force individuals who otherwise have a valid claim to pay out of their pockets at the end of the day.

The imposition of a deductible is being restricted to injury. There is no suggestion that a deductible is to be placed on property related damage. This appears to suggest that more emphasis is being placed on property at the expense of damages to the person. This is even more perplexing when the recent PUB report included that the source of increase in premium is attributable to collision claims and not liability – personal injury.

The imposition of a deductible is a radical departure from the system of automobile insurance compensation in our province. The imposition of such a measure should only be considered if it can be clearly demonstrated that a need exists, and if such a need can be established, this measure will result in less use of the system for the so-called minor pain and suffering cases however they may be defined. The Task Force has not seen evidence of a problem in this regard. The only evidence provided to date is that the insurance industry seeks to remove from the current system of compensation over 90% of claims for “strains and sprains.”^b

The Task Force takes the position that there is insufficient evidence to support the major changes being proposed to the insurance compensation system.

Restriction of Right to Sue (Uninsured/Impaired Drivers) - The discussion paper contains a proposal to restrict the rights of uninsured and impaired drivers to sue at-fault parties except for injuries of a serious and permanent nature. The Task Force maintains that the restrictions on the right of uninsured and impaired drivers to sue may not represent an appropriate use of the civil system of justice. The proposals seek to use the civil system of justice when it is better left to the criminal justice system. The proposals specifically outlined in the paper, together with measures that already exist in the Criminal Code and provincial legislation, may be a sufficient deterrent.

The proposed restrictions on uninsured and impaired drivers may be overly punitive, in particular as it affects the innocent and dependants of transgressors. Furthermore, the proposals may have the undesired effect of transferring the burden for the rehabilitation of these individuals to the taxpayer, through the health care system and possibly the social assistance system. This would be especially the case for uninsured motorists whom Government estimates comprise a high percentage of all motorists in spite of legislative requirements to carry insurance.

Release of Insurance Bureau of Canada Telegram, November 7, 2001. The pie chart indicated 30% for strains and sprains plus other injuries and 59% for strains and sprains for a total of 89%.

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Where do we go from Here?

(a) **Support for Specific Initiatives.** The discussion paper contains a number of interesting proposals. Some of these proposals, with further discussion among interested parties, can result in legislative change where appropriate and necessary. These changes will benefit the consumer. These initiatives are noted in our submission. In our view, they can be implemented at minimum cost to the consumer, and in some cases at a reduced cost to industry. These initiatives include:

- mandatory accident benefits;
- enabling the court to order structured settlements;
- strengthening legislative measures to deter uninsured and impaired owners through use of the criminal system of justice;
- providing advance payments to plaintiffs; and
- increasing the monetary jurisdiction of the Small Claims Court.

(b) **Improved Traffic Safety and Enforcement Program.** The above noted initiatives should be considered in conjunction with an improved traffic safety and enforcement program. The Task Force has no expertise in this area, however it strongly encourages Government to consult with experts in the field. The Task Force does encourage Government to continue with its ongoing initiatives such as the graduated drivers licence program. The Task Force notes that the adoption of similar traffic safety and enforcement programs has proven extremely successful in many jurisdictions. They have achieved the desired results of reducing accidents and stabilizing premiums. The Task Force notes that within the St. John's Metropolitan Area, the establishment of the Royal Newfoundland Constabulary's new traffic enforcement unit on October 6 of this year has resulted in over 2,500 charges being laid against individuals. The unit consists of nine police officers and was created in a response to public concern about safety on streets and the high rate of collisions in the metro area. Some of the matters for which charges have been laid include:

- stop sign violations
- for expired registrations
- for running red lights
- for amber light violations
- drivers or passengers not wearing seat belts
- not having a valid driver's licence
- not having insurance
- driving while suspended from doing so, and
- miscellaneous charges under the Highway Traffic Act

The Task Force believes Government should encourage and make funding and other supports available to enable the Royal Newfoundland Constabulary and the Royal Canadian Mounted Police to introduce similar initiatives throughout the Province. Other proposals that should be considered in consultation with the experts in the field and which may achieve the desired result of decreasing accidents and thereby reducing premiums are as follows:

- The imposition of a levy to pay for ongoing road safety awareness and education campaign similar to the health levy to fund health care expenses caused by car crashes;
- The declaration of a road safety week to focus public attention on the problem;
- The banning of driver's use of hand-held cell phones;
- The reinstatement of vehicle safety inspections on a graduated basis; and
- The passage of a province-wide bicycle helmet law.

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A Final Thought – The Impact of the Charter

The Task Force has grave concerns that the threshold/no-fault scheme proposed in the Consultation Paper would be contrary to the Canadian Charter of Rights and Freedoms, particularly section 15 (1). The only case to deal with the Charter implications of a threshold/no-fault auto insurance scheme is *Hernandez v. Palmer* (1992), 15 C.C.L.I. (2d) 187 (O.C.J. G.D.). It is a trial court decision which was not appealed. The issues to be considered include:

(a) *Can a limitation or reduction of non-pecuniary general damages be justified for social reasons?*

Clearly, non-pecuniary general damages can be limited for social reasons. This was done in the form of a cap or maximum imposed in the famous trilogy cases in the late 1970's. However, several distinctions between what the Supreme Court of Canada did in the trilogy and the Newfoundland government proposals are worth noting.

The trilogy imposed a range, not a disentitlement or immunity.

The trilogy cases contained an important trade-off. In return for imposing a cap on non-pecuniary general damages, the Supreme Court of Canada gave strong directions to the lower courts to identify and fully compensate pecuniary loss.

While the insurance industry asserts that pain and suffering awards in “soft tissue injury” cases are driving rates up (and whether rates are being driven up at all is highly questionable), they have provided no proof of the assertion. It seems more plausible that fuller pecuniary awards in the more severe cases have a greater impact on rates.

(b) *Has Government proposed a reasonable trade-off?*

Hernandez found that there was a reasonable trade-off enshrined in the 1990 Ontario legislation, which granted substantially increased comprehensive no-fault benefits. It is difficult to describe the Newfoundland proposals in such terms.

Government's consultation paper proposes a very modest increase in no-fault benefits from \$140 to a \$300 weekly indemnity for income loss, and from a limit of \$25,000 to \$50,000 for medical benefits. A substantial number of (historically disadvantaged) individuals stand to be barred from access to judicial remedies with little or no off-setting access to no-fault benefits.

(c) *Are the Proposals Contrary to s. 15(1) – Enumerated or Analogous Grounds?*

The *Hernandez* case did not raise age, sex or physical and mental disability as an issue of discrimination against a historically disadvantaged group.

To the extent that women, minors, students, retired people and the mentally or physically disabled are characteristically underrepresented in the paid workforce, an issue of disproportionate impact on historically disadvantaged groups is raised.

If individuals in these s. 15(1) enumerated groups cannot claim damages for non-pecuniary loss, and have modest or no claims for pecuniary loss, then they are effectively shut out of exercising any tort rights at all.

(d) Is personal Immunity of tortfeasors Justifiable Under s.1?

As explained above, the Task Force is not persuaded that clear evidence exists of any significant upward pressure on third party liability rates. The Task Force is also not persuaded that clear evidence exists from other jurisdictions that a threshold/no-fault system would have any long-term restraining affect on premiums (See 2001 Article by Christopher J. Bruce and Angela Tu Weissenberger, “Recommended Reforms to Alberta’s Auto Insurance System: A Response.”) Accordingly, the Task Force doubts that any prima facie breach of Charter rights found to exist under the equality provisions of s. 15(1), would be found to be justified as a reasonable limitation in a free and democratic society, under the saving provision, s. 1 of the Charter.

However, if we assume (which is not our opinion) that the proposed limitations on access to justice pass constitutional scrutiny under s. 1 of the Charter, the justification of the proposed limitations would lie in the goal of maintaining “affordability” to the public of automobile insurance (with a suitable “trade-off” in enriched no-fault benefits).

The problem remains that it is difficult to see how Government could justify to the courts the immunizing of individual tortfeasors from paying the deductible to those who meet the threshold, or from paying the full general damages assessment to those who do not meet the threshold. In other words, the goal of reducing the liability of insurance companies to pay damages in order to maintain “affordability” of insurance, may not extend so far as to justify the immunization of individual tortfeasors from the consequences of their actions. Civil justice liabilities exist independently from insurance.

The Task Force concludes that there are substantial grounds to believe that the government proposals, if passed into legislation, would not pass constitutional scrutiny. Further, even if they did, at-fault drivers would find themselves obliged to pay very substantial amounts of damages which the insurance companies otherwise would be obliged to pay on their behalf. This may cause a considerable public uproar.

In summary, the Task Force adopts the position of Ben Trevino, Q.C., then President of the Law Society of British Columbia, in a 1997 Society Bulletin entitled “No-Fault Insurance and the Law Society’s Motto”:

“Further, the proposition that the majority in any province, for the alleged but unproven purpose of keeping down their own insurance premiums, would limit the right of access to the Court of the minority (injury persons) is offensive. It has serious Charter implications, aside from the obvious moral implications. I personally do not believe British Columbians are that type of people. If that constitutes naivete, I avow it. I will have to be persuaded that we have, as a society, become that mean-spirited, and that we wish to become a society that limits access to justice and that provides for no consequences or accountability for being “at fault” for an accident that causes pain and suffering for whatever duration to another human being. As the

Law Society (of British Columbia) motto reminds us:
“Law is the king of a free people.”

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Conclusions

The consultation paper contains major reforms to the automobile insurance system including the deductible and threshold. The latter has never been considered as part of prior consultation processes and the former has not achieved the desired results in other jurisdictions, notably Ontario, the jurisdiction in which Government has based its proposals. The public, through opinion polls generated in the course of discussions on the proposed reforms, does not wish to abandon its established legal rights to sue on a promise of achieving lower insurance rates.

The Task Force maintains there is insufficient evidence to support the major changes being proposed to the insurance compensation system in the form of a threshold and a deductible.

Protection of Consumers

One of the fundamental objectives in the consultation paper is the implementation of a system of automobile insurance compensation that is fair to consumers. The consultation paper does more than pay lip service to this objective. It specifically proposes that *a consumer advocate be discharged with the responsibility to intervene at Public Utility Board hearings*. This is essentially the same process that Government implemented some years ago concerning the determination of electricity rate increases. Government’s sensitivity to the needs of consumers is further reflected by appointment of a Petroleum Products Pricing Commissioner to regulate gas prices. These initiatives have been very successful in maintaining consumer confidence in the system and in keeping rates stable. The Task Force respectfully submits that the cost of insurance is no less important to the consumer than electricity and gas prices.

The Task Force encourages Government to fully avail of existing hearing processes before embarking on significant change. The Task Force has not seen evidence of a crisis in the automobile insurance compensation system. On the other hand, the insurance industry, despite statements by the regulator that no crisis exists, has indicated to Government that independent actuarial studies will confirm otherwise.

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Recommendations

The Task Force recommends as follows:

- (1) THE ACTUARIAL REPORT TO BE PROVIDED BY THE INSURANCE SECTOR AS PART OF ITS

SUBMISSION TO GOVERNMENT, TOGETHER WITH OTHER SUPPORTING DOCUMENTATION,
SHOULD BE PLACED BEFORE A HEARING OF THE PUBLIC UTILITIES BOARD,
WITH AN
ADEQUATELY FUNDED CONSUMER ADVOCATE, TOGETHER WITH OTHER INTERESTED
PARTIES, WHO WOULD HAVE THE OPPORTUNITY TO CONDUCT A THOROUGH
INVESTIGATION OF PERCEIVED PROBLEMS IN THE AUTOMOBILE INSURANCE
COMPENSATION SYSTEM.

(2) ANY LEGISLATIVE CHANGE AFFECTING THE THRESHOLD AND THE DEDUCTIBLE IN PARTICULAR SHOULD BE DEFERRED UNTIL THE FINDINGS AND CONCLUSIONS OF THE PUBLIC UTILITIES BOARD ARE PROPERLY CONSIDERED BY GOVERNMENT.

(3) GOVERNMENT MAY WISH TO CONSIDER LEGISLATIVE CHANGES TO ADDRESS:

- (A) MANDATORY ACCIDENT BENEFITS;
- (B) STRUCTURED SETTLEMENTS;
- (C) UNINSURED AND IMPAIRED DRIVERS (EXCEPT RESTRICTING RIGHT TO SUE);
- (D) ADANCE PAYMENTS TO PLAINTIFFS; AND
- (E) INCREASING THE MONETARY JURISDICTION OF THE SMALL CLAIMS COURT.

AS SOON AS IS PRACTICABLE AND UPON FURTHER CONSULTATION WITH INTERESTED PARTIES ON THE PROPOSED WORDING OF LEGISLATIVE AMENDMENTS.

(4) THE DETAILS SURROUNDING STRUCTURED SETTLEMENTS AND ADVANCED PAYMENTS
PROVISIONS IDENTIFIED ABOVE, SHOULD BE REFERRED TO THE RULES COMMITTEE,
ESTABLISHED PURSUANT TO THE JUDICATURE ACT.

(5) THE PROPOSAL TO CALCULATE THE RECOVERY OF WAGE LOSS ON A NET BASIS, SHOULD BE
DEFERRED, AND EXAMINED BY THE DEPARTMENT OF FINANCE TO ASSESS THE REVENUE
IMPLICATIONS FOR GOVERNMENT AND THE TAX IMPLICATIONS FOR CONSUMER.