

SYMPOSIUM REVIEW - TWENTY YEARS OF NO-FAULT AUTOMOBILE INSURANCE

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Volume 66, numéro 3, 1998

RÉGIMES D'INDEMNISATION ET ASSURANCE AUTOMOBILE
COMPENSATION REGIMES AND AUTOMOBILE INSURANCE

URI : <https://id.erudit.org/iderudit/1105221ar>

DOI : <https://doi.org/10.7202/1105221ar>

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Éditeur(s)

HEC Montréal

ISSN

0004-6027 (imprimé)

2817-3465 (numérique)

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Citer ce compte rendu

Moreau, R. (1998). Compte rendu de [SYMPOSIUM REVIEW - TWENTY YEARS OF NO-FAULT AUTOMOBILE INSURANCE]. *Assurances*, 66(3), 357–365.
<https://doi.org/10.7202/1105221ar>

La dernière session, avant la clôture de la conférence par Daniel Gardner, porta sur l'avenir des régimes d'indemnisation sans égard à la responsabilité, grâce à deux conférenciers, Jeffrey O'Connell, professeur de droit, Virginia University, et auteur de la loi dite *Auto Choice Reform Act of 1997*, et Geneviève Viney, professeur de droit, Université Paris I, et auteure de trois ouvrages dans la collection «Traité de droit civil».

Le président ne manqua pas de rappeler la publication prochaine des textes du colloque dans un numéro spécial de la revue *Les Cahiers de droit*.

Le dîner de clôture fut offert dans le cadre magnifique du Manoir Montmorency.

Nous avons retenu, dans ce numéro spécial, trois des textes présentés à l'occasion de cette conférence, à savoir ceux de Mme la juge Thérèse Rousseau-Houle, de M. Jean-Louis Gauvin et de M. Craig Brown. Le lecteur observera, dans les conclusions de l'article de M. Gauvin, une interrogation très pointue à savoir si, dans l'environnement actuel, la gestion par une société à caractère monopolistique, jouissant des droits et privilèges d'un mandataire du gouvernement, est toujours la solution la plus appropriée. Nous terminons ce numéro spécial sur les régimes d'indemnisation et l'assurance automobile par une étude de M. Didier Richaudeau sur l'état du marché de l'assurance automobile en France.

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■ TWENTY YEARS OF NO-FAULT AUTOMOBILE INSURANCE

Quebec city, the Quebec capital and city designated as the World Heritage Site by Unesco, has been the host of an international symposium on no-fault automobile insurance, on June 4th and 5th, 1998, jointly organized by the faculty of law of the Université Laval and Québec's automobile insurance corporation, the Société de l'assurance automobile du Québec, in conjunction with the 20th anniversary of Québec's public automobile insurance plan.

Without delay, we would like to express our gratitude to the president of the symposium committee, Mr. Daniel Gardner, for its kind cooperation in authorizing our Journal to cover the symposium

by permitting to its editor-in-chief to take part of it, to have the symposium texts, and to the echo speakers' subjects.

The official program, selecting knowledgeable domestic and international experts, was divided in two parts:

- The Pre-Symposium day, on June 3rd, 1998, activity which has taken place at the Société de l'assurance automobile du Québec headquarters;
- The Symposium days, on June 4th and 5th, 1998, activity which was held on the campus of Laval University, in Québec.

■ THE PRE-SYMPIOSIUM

The Pre-symposium, under the theme *Twenty years of Québec's automobile insurance plan*, permitted to the symposium participants to exchange with the experts of the Société on the public automobile insurance plan that operates in Québec. In the morning, Jean-Yves Gagnon, Chairman of the Société, presented a report on 20 years of the public automobile insurance plan in Québec, and Linda Bellware, from SAAQ, Actuarial department, spoke about financial aspects.

After lunch, Claude Fleury, Support services for accident victims' compensation, discussed on principles and methods of operation of the public automobile insurance plan, then, Marc Giroux, from SAAQ, Policy and programs for accident victims, spoke on traumatology and rehabilitation, and finally, André Viel, from SAAQ, Studies and strategies in automobile insurance, explained to the participants the research studies in matters of compensation and road safety.

■ THE SYMPOSIUM

The first day was devoted to the operation of no-fault automobile insurance plans and the second day to the questions of the compensation of automobile accident victims.

□ June 4 - Operation of various no-fault automobile insurance plans in the world

Following Daniel Gardner's words of welcome, Thérèse Rousseau-Houle, judge from the Appeal Court of Québec, gave a

bright and sound retrospective titled *The Québec plan, twenty years after its inception*, which is published in its integrality in this issue. She began with the Québec Automobile Insurance Act genesis. Then, she explained Court interpretations of the Act, which served to reinforce its underlying principles while favouring victim compensation, thanks to a broad interpretation of the concept of accident. Finally, in the last part on the future of the Act, firstly the author discussed a very controversy issue: compensation for guilty drivers. She mentioned that if the Act would deny their rights to receive benefits, such a provision would involve two categories of victims; also proof was not established that such denial of compensation would be more efficient with regard to distortions created in the whole system. In that last part of her speech on the future of the Act, she discussed the SAAQ financial results. She recalled that the large surplus in the Société's stabilization reserves, transferred from time to time to the Government, are not legally owned by the insureds and that its financial strength, thanks to its sound financial management, was not a legal problem but subject to the political choice of the Government. About compensation, she pointed out the necessity to constantly reexamine the levels of indemnities, a safe-guard protecting the future of the regime and allowing an adequate technical ratio. Considering that the law evolution depends on the economic and social environment, she mentioned that the evaluation methods could be questioned on the ground of the market employment statistics and that the waiting periods for unemployed victims could be reajusted. She also discussed the question of the uniformity of premiums, saying that the issue could be questioned without changing the principles of the regime.

The morning session was animated by Robert Tétrault, professor of law, Université de Sherbrooke. In their presentation, Jeffrey Schnoor, Craig Brown, Neil Weatherston and Stephen Sugarman talked about some recent experiences of adopting no fault regimes, respectively in Manitoba and in Ontario, or failing to adopt such regimes, in British Columbia and in California.

In Manitoba, Jeffrey Schnoor related the historic events which led to the reform. That province became the second jurisdiction in North America, after Québec, to abolish the traditional tort system and to adopt a pure no-fault compensation plan for victims of automobile accidents. The plan was adopted in 1994 under *The Manitoba Public Insurance Corporation Act*. Then, he reviewed the scope of the plan, including consideration of a judgment of the Manitoba Court of Appeal on the subject, in the case *McMillan v. Rural Municipality of Thompson*. That case dealt with two individuals

who suffered serious injuries when their automobile plunged into an unmarked gap on a road after the bridge was washed out. It concerned the definition of «bodily injury caused by an automobile», forming the basis of an important challenge to the scope of Manitoba's no-fault plan. A restrictive interpretation of the words «caused by» would have for effect to enter in conflict with the objectives identified by the legislator. The Appeal Court rejected that interpretation, in the same manner than in the *Productions Pram* judgment, delivered in Québec in 1992. Finally, the speaker presented an overview of the plan's operation, including the compensation provided by it and the provisions for review and appeal of decisions.

In Ontario, Craig Brown mentioned that the province has had at least four successive and different regimes of no-fault automobile insurance within the past decade. He related the story of those changes including some of the historical background. This speech is published in the present issue.

In British Columbia, Neil Weatherston outlined a possible new future for an improved compensation regime, because the present system of compensation tends toward uncertainty, unpredictability and is susceptible to produce exaggerated claims. He described what reforms have been explored in British Columbia, particularly in 1997, such as enhancement to the accident benefits coverage, reducing the need for tort action, primarily limiting them to non-economic loss and lost opportunity; operational effort to resist exaggerated claims for compensation for non-economic loss when the injuries are minor and temporary.

In California, Stephen Sugarman computed the factors showing why this state nor any of the other states has adopted anything approaching a no-fault auto insurance scheme even close to Québec's regime. Emphasis was given to several factors for that failure in particular: State politics, public perceptions or negative attitudes towards government and the insurance industry, traditions, such as the ideological strength of individualism and ideological weakness of collective responsibility, and fears about safety, costs and slippery slope. Finally, the possibility that one or more U.S. states might in the future evolve towards the Québec solution remains possible for a few states.

At lunch, Jean-Louis Gauvin, the guest speaker, the person who initiated the reform by chairing the study committee on automobile insurance in Québec (1971-1974), retraced the endemic context before the reform: Québec roads were the dramatic scene of

2,000 deaths and 50,000 injured each year and the automobile insurance premiums were constantly increasing. Gauvin's Committee mandate was divided in two parts: a) road accidents and measures to take, in order to improve road safety and to reduce both accident frequency and severity; b) compensation scheme on physical injuries and material damages. About physical injuries, the report focused on compensation for all victims (universal plan) based on the economic loss concept; about material damages, the main changes were oriented in the direct indemnity, as covered by the insurer of the victim, without recourse toward the third party insurer. Then, the speaker described with acuteness the evolution of the regime up till now, and gave some recommendations in order to improve it: the lack of information about the nature of the actual regime for most part of the population and the SAAQ's possibility to offer not only one but several plans. Questioning the existing system, the speaker was asking if the monopolistic management by the Société de l'assurance automobile du Québec is always the adequate solution. Such a question is legitimate because a no-fault auto insurance scheme does not necessarily deal with a public administration. Mr. Gauvin's speech is published in extenso in this issue.

In the afternoon's first session, animated by Louis Perret, dean of faculty of law (civil law section), University of Ottawa, the audience had an overview of some other no-fault plans:

– France actual regime was qualified by speaker Hubert Groutel as a long way in the case law labyrinth, from the promulgation of the French Statute of July 5, 1985 (called Badinter Act), such an Act *born without having been created*, respecting an improvement in the situation of victims of road accidents but instituting, without realizing it, a no-fault indemnification system. Year after year, the regime was drilled by various case law interpretations by the Cour de Cassation, who realized from the outset that the new system was no longer one of liability, but that the same court then took ten years to discover exactly what the system had become. The speaker related with verve that indecisive period where this case law went from one system to the other.

– Swedish system of compensation, presented by Bill Dufwa, was adopted under the new *Motor Traffic Damages Act* passed in 1975. The Act is constructed in such a way that one can speak of no-fault insurance, meaning the obligatory traffic insurance carries strict liability for damages, whereas the driver's liability for negligence against a third party has been preserved. Driver's own negligence does not deprive him of the right to compensation, but in

exceptional cases of intentional or seriously negligent acts or drunk driving can cause the readjustment of the compensation.

– Compensation regime in New Zealand, described by John Michael Miller, is a comprehensive one because compensation for motor vehicle injuries is included as part of the overall no fault accident compensation scheme under the *Accident Rehabilitation and Compensation Insurance Act (1992)*, which act is covering all types of accident, in any circumstances (on the road, at home, in a hospital, at work or at play). A person injured in a motor vehicle accident is therefore compensated in the same way as these other accident victims. The speaker reviewed the covered damages, the coverage benefits and the sources of funding. The motor vehicle part of the no fault scheme presents few problems and is well accepted apart from the recurrent question of compensating drunken drivers for their injuries. He mentioned the considerable public dissatisfaction with the 1992 Act, which brought lawyers back into the compensation process and led to an increase in punitive or exemplary damages claims.

To close that first day's activities, a roundtable animated by Daniel Gardner, permitted to a group of several speakers to discuss on strengths and weaknesses of no-fault insurance systems, in the following Countries or Provinces: Saskatchewan, USA, New Zealand, Manitoba, Québec, Australia and Ontario.

A cocktail was served in Québec Chapel of the Petit Séminaire, in Old Québec, an unique site for the launch of the first book on the history of the Québec automobile insurance plan, written by Claude Belleau, professor of law, Université Laval. This work is analysed in the Book review of this issue. At that launch, Jacques Brassard, ministre des Transports, mentioned that the primary purpose of the *Automobile Insurance Act* is to compensate people fastly and easily for their loss of earning power as a result of an automobile accident. Then, President Jean-Yves Gagnon identified the general milestones in the development of the Société de l'assurance automobile du Québec since its creation twenty years ago. Finally, professor Belleau recalled that the Société was created in 1977 in response to a broad consensus regarding the lack of an inadequate automobile insurance system in Québec. At that time, the cost of insurance was steadily rising and many accident victims found themselves without compensation.

□ June 5 - Compensation of automobile accident victims

The morning session, animated by France Thibault, judge at the Québec Superior Court, was devoted to economic losses, and regrouped three speakers.

Daniel Gardner titled his conference: *To compare the incomparable: compensation to injured victims under the Quebec automobile insurance plan and under the general law*. Firstly, he illustrated the undeniable advantages arising from the no-fault indemnification plan (timely processing, absence of legal expenses, etc.). Then, despite these advantages, the speaker demonstrated how the Québec automobile insurance plan offers better compensation to seriously injured victims than does the provisions under the general law, this so called *eldorado* for victims of accident.

Harold Luntz spoke on the same theme in an Australian perspective. He described briefly the scope of the no-fault motor accident schemes which operate in Australia, then, he settled out and evaluated the benefits payable under these regimes. In his conclusion, he suggested that most benefits for loss of an economic nature should be integrated with the Australian social security system.

Bruce Feldthusen recalled that Ontario has substantially and many times changed its no-fault legislation in the past decade. With the *Automobile Insurance Rate Stability Act*, the Government appears to have found a very successful compromise especially between three interest groups: the lawyers have been allowed an increase, although limited, the right to sue in tort; the insurers have achieved more certainty, with strict time and monetary limits on benefits for non-catastrophic injuries; the insureds have seen their premiums reduced.

After a short break, the next session, animated by Lisette Savard, lawyer at the SAAQ, was devoted to non-economic losses. Three speakers were also invited.

René Letarte, judge at the Québec Superior Court, gave an overview of the two Québec eminent legal systems in order to contrast their fundamental differences. Under the *Automobile Insurance Act*, non-monetary losses are determined on the ground of a strict assessment grill far less flexible than the quantum calculation methods derived from the civil law.

Then, Yvonne Lambert-Faivre, professor of law, Université Jean-Moulin, Lyon, and author of «Droit du dommage corporel. Systèmes d'indemnisation», examined compensation for non-economic losses under the Badinter Act of July 5, 1985, which are

must ruled by three basic principles: a total remediation, the indemnification principle and in concreto appraisal. She concluded her speech by mentioning that the legal system of compensating non-economic losses addresses three problems: the indemnification of victims left in a chronically vegetative state, the successoral devolution of the right to compensation of extra-patrimonial injuries and the system of subrogatory recourse by the third-party payers.

Finally, Roger Henderson, professor of law, University of Arizona, and co-drafter of the *Uniform Motor Vehicle Accident Reparations Act of 1992*, related the historical influences on the tort-liability insurance system and summarized modern developments in the law of damages for non-economic losses in the United States, which awards have taken an increasing importance. Not only have courts constantly expanded the areas in which claimants are permitted to recover pain and suffering awards, but, at the same time, they have liberalized the definition of pain and suffering itself. He concluded by offering a possible scenario of how future efforts to reform the tort-liability system in the United States may occur as we move into the 21st century.

After lunch, André Bois, lawyer, chaired the session devoted to property damage compensation. Successively, three speakers addressed to the participants: Claude Belleau, professor of law, Université Laval, and author of the book «L'assurance automobile sans égard à la responsabilité», Hélène Lamontagne, First Vice-President, Corporate Affairs, Groupe Desjardins, General Insurance, and Kevin McCulloch, General Counsel, Manitoba Public Insurance. Each of the first two speakers explained the main elements of the new Québec regime compensating property damage, which the master card is the Direct Compensation Agreement, by first examining the reasons that led to the direct indemnification plan. The part played by the Groupement des assureurs automobiles and its evolution were also discussed. The last speaker presented among others the Manitoba Public Insurance mandate, which was established in 1971, and the basic Autopac program components.

Finally, the last session, before the closing speech by Daniel Gardner, turned on the future of no-fault automobile insurance. The speakers were Jeffrey O'Connell, professor of law, Virginia University, and drafter of the *Auto Choice Reform Act of 1997*, and Geneviève Viney, professor of law, Université Paris I, and author of three publications in the collection «Traité de droit civil».

The chairman of the symposium committee recalled to the participants the next publication of the proceedings in the journal *Les Cahiers de droit*.

Closing dinner was offered in the magnificent site of the Manoir Montmorency.

In this special issue, we reproduce three of the speeches given at that symposium, first Mrs. Justice Thérèse Rousseau-Houle's speech, then Mr. Jean-Louis Gauvin's speech and finally Mr. Craig Brown's speech. The reader will observe, in the conclusion of Mr. Gauvin's speech, a very accurate interrogation, in the present context, on the pertinence of maintaining the actual monopolistic SAAQ management, vested with the rights and powers of a Government agent. Finally we conclude this thematic edition on compensation regimes and automobile insurance by Mr. Didier Richaudeau's analysis on the French automobile insurance market.