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NO-FAULT AUTOMOBILE INSURANCE IN ONTARIO: A LONG AND COMPLICATED STORY

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Résumé de l'article

Au cours de la dernière décennie, l'Ontario a connu pas moins de quatre régimes différents d'assurance automobile sans égard à la responsabilité. Avant 1990, le versement d'indemnités modestes, sans égard à la responsabilité, était venu s'ajouter au régime de droit commun de la responsabilité civile, sans diminuer le droit de poursuite des victimes. En 1990, le gouvernement du Parti libéral a augmenté les indemnités, tout en éliminant les recours de droit commun à moins de faire la preuve de blessures sérieuses et à caractère permanent. Par la suite, ces droits de poursuite (de même que le niveau des indemnités) ont été modifiés à deux reprises en distinguant, à chaque occasion, les pertes économiques et les pertes non économiques. L'auteur relate ici cette évolution législative, en la replaçant dans son contexte historique.

NO-FAULT AUTOMOBILE INSURANCE IN ONTARIO: A LONG AND COMPLICATED STORY

by Craig Brown

ABSTRACT

Within the past decade, Ontario has had no fewer than four successive and different regimes of no-fault automobile insurance. Prior to 1990 there was an "add-on" scheme whereby modest first-party no-fault benefits were added on to the tort system without any formal impairment of tort rights. In 1990 the Liberal government introduced a "modified" plan whereby no-fault benefits were increased but tort was modified in that a plaintiff was ineligible to sue unless s/he met a threshold of permanent and serious injury. Subsequently, the eligibility rules for suing in tort (along with benefit levels) have been changed twice with, in each case, separate restrictions for economic and non-economic loss respectively. This paper relates the story of those changes including some of the historical background.

RÉSUMÉ

Au cours de la dernière décennie, l'Ontario a connu pas moins de quatre régimes différents d'assurance automobile sans égard à la responsabilité. Avant 1990, le versement d'indemnités modestes, sans égard à la responsabilité, était venu s'ajouter au régime de droit commun de la responsabilité civile, sans diminuer le droit de poursuite des victimes. En 1990, le gouvernement du Parti libéral a augmenté les indemnités, tout en éliminant les recours de droit commun à moins de faire la preuve de blessures sérieuses et à caractère permanent. Par la suite, ces droits de poursuite (de même que le niveau des indemnités) ont été modifiés à deux reprises en distinguant, à chaque occasion, les pertes économiques et les pertes non économiques. L'auteur relate ici cette évolution législative, en la replaçant dans son contexte historique.

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On November 1, 1996, the *Automobile Insurance Rate Stability Act*[1] came into force in Ontario. This was the culmination, or at least the latest instalment, of a long and involved story which demonstrates once again the complications of reform in the area of auto insurance with all the conflicting interests and values as well as technical problems involved. This paper relates that story.

A BRIEF HISTORY

The idea of no-fault automobile insurance was given its first legislative form in Canada in the province of Saskatchewan in 1946[2]. But, at the time, this was too radical for the rest of the country and it was to be another two decades before other provinces such as Ontario followed suit. Nonetheless, all the provinces had for several decades been passing legislation which gradually advanced the goal of compensating victims of motor vehicle accidents at least those whose injuries were caused by wrongdoers. These enactments modified tort and insurance law to widen liability and ensure the existence of funds to meet damage awards[3].

Although a compensation goal has long been attributed to tort law[4], that goal is frustrated if the victim is unable to identify a person whose negligence can be proven or if such person is unable to pay the damages awarded. To increase the chances of these two conditions being met, overtime, several measures were adopted. The burden of proof in cases where the plaintiff was injured by reason of the operation of an automobile was reversed so that the defendant had to disprove wrongdoing[5]. Owners of vehicles were made strictly liable for the negligence of people operating vehicles with the owners' knowledge and consent[6] and owners' liability insurance was extended to cover the liability of persons driving insured vehicles with the owner's consent[7]. The proceeds of automobile liability insurance were made recoverable directly from the insurer by the third party plaintiff if a judgment was not satisfied by the defendant insured[8]. Significantly, this right of direct recovery by the victim prevails even in the face of a material misrepresentation or a breach of a term of the policy by an insured. A financial responsibility law was enacted to make it more likely that the defendant would have insurance at all[9]. This law required, under threat of penalty, that a motorist responsible for an accident prove that s/he could pay, by insurance or otherwise, any damages resulting. An unsatisfied judgment fund was created to provide money

for victims who could demonstrate that they had been injured by tortious conduct but that either the defendant could not pay or could not be identified[10].

These last two measures have been superseded by a compulsory automobile insurance law which requires all owners of licensed motor vehicles to have liability insurance and that the policies include uninsured and unidentified motorist coverage[11]. Another innovation was optional under-insured motorist coverage which was approved by the Superintendent of Insurance, the government's regulator. This protects against the possibility that the insured will be injured by a tortfeasor who has some liability insurance but which is insufficient to cover the amount of damages sustained[12].

Note the connecting theme of these developments, particularly the most recent. A system relying solely on third party fault as the determinant of eligibility for compensation necessarily relies upon the assets and/or insurance of third parties as the source of that compensation. To be sure that his/her losses will be met should she be injured, a person has to make arrangements with his/her own insurer. Nonetheless the fault system requires proof that a third party was negligent. Regardless of the innocence of the victim, the implication of a third party is vital. Without it, whatever devices exist to encourage the purchase of insurance, provide funds where uninsured or unidentified motorists are involved, or top-up inadequate sources of compensation, no payment is available at all. It is this fact that no-fault addresses.

■ NO-FAULT IN ONTARIO: THE FIRST STEPS

☐ The 1960 Select Committee on Automobile Insurance

The no-fault idea, as applied to automobile accidents, was not seriously considered in Ontario until the 1960s. In 1960, the legislature appointed a Select Committee on Automobile Insurance which, was called upon to:

> examine, investigate, enquire into, study and report on all matters relating to persons who suffer loss or injury as a result of motor vehicle accidents [...] including all aspects of compulsory insurance and other related and relevant plans, including

the experience of other jurisdictions and to make such recommendations as are deemed advisable with respect thereto[13].

After producing interim reports in March and December of 1961, the committee tabled its final report in March of 1963[14]. It recommended that a limited amount of first-party insurance be an integral and mandatory feature of the standard automobile insurance policy[15]. In so far as it was a first-party plan, it resembled the medical payments option which was already available, for an additional premium, as an adjunct to motor vehicle policies[16]. However, the proposal went much further in that it included death benefits, funeral expenses, loss of income benefits, and payments of dismemberment and loss of sight, as well as medical payments. These benefits were to be available to drivers and passengers of insured vehicles, and also to pedestrians struck by such vehicles. In addition, coverage extended to the named insured and members of his/her household while an occupant of, or when struck by, any private passenger automobile[17].

The plan was to be run by private insurers. They would provide the mandatory coverage and, subject to the supervision of the Superintendent of Insurance, set their own premium rates. In terms of its effect on tort law, it was an "add-on" plan. A victim's common law right to sue was not impeded but the amount of limited accident benefits, recoverable without proof of fault by an insured victim, would be deducted from any subsequent tort award or settlement paid to the victim by a liability insurer[18].

The recommended benefit package included lump-sum death benefits up to $5,000 plus a further $1,000 for each additional dependant, medical benefits up to $2,000 for reasonable expenses for necessary medical, surgical, dental, ambulance, hospital services (excess of government hospital benefits) and professional nursing, funeral expenses up to $350, income replacement payments of $35 a week for a maximum of 208 weeks to those totally disabled, and a benefit for totally disabled "housewives" of $25 per week for up to 12 weeks. A lump-sum payment was also to be provided for dismemberment and loss of sight in addition to sums paid for specific economic loss. The amounts payable were set out in a schedule and ranged from $2,500 to $5,000, depending on the severity of the injury[19].

The cost of this coverage was estimated at 12.6 per cent of the average premium then payable for $35,000 of automobile liability insurance. This translated to an average additional premium, for the first party cover, of less than eight dollars per year[20].

☐ The Osgoode Hall Study

There was no immediate legislative response to the committee's recommendations. However, progress, towards the introduction of some form of no-fault automobile insurance gained further impetus with the publication in 1965 of the results of a study conducted under the supervision of Prof Allan Linden (as he then was) of Osgoode Hall Law School[21]. This study still stands as one of the most significant empirical investigations of the adequacy of compensation available to victims of automobile accidents ever undertaken in Canada. The researchers focused on a random sample of the people killed or injured as a result of motor vehicle accidents in the vicinity of Toronto in 1961. Interviews were conducted in 1964 with victims and relatives to ascertain levels of compensation received and its adequacy. Information as to costs incurred was also obtained from, lawyers', doctors', hospital and court records[22].

The study made several important discoveries. Among the most significant was that a majority of those surveyed received no compensation at all from the tort system. Of those who sustained economic loss, fewer than 30 per cent recovered the full amount of that loss. Victims with more serious injuries were found to be less likely to obtain full compensation for economic loss than those with minor injuries[23]. Fewer than half the victims attempted to obtain tort compensation and, of those who did, half abandoned their claims[24].

The study also documented serious delays, particularly in cases of serious injury, from the time of accident to the time of recovery, if any was forthcoming at all[25]. Overall, the story of the tort system as it related to personal injury and death arising from automobile accidents was clearly one of inadequacy in terms of the number of victims compensated, amounts paid and promptness of response. Moreover, it was apparent that the existing non-tort sources of compensation were not filling the gap in the tort system.

> [Apart from the cost of hospital care] other types of loss [...] were poorly looked after; only 24.9 per cent of the total medical costs [...] 24.9 per cent of income losses and only 7.2 per cent of funeral expenses were reimbursed. Thus, substantial gaps remain in the non-tort coverage programs and these will persist even if a medicare program is established[26].

☐ The 1966 Amendments to the Insurance Act

In 1966 legislation was passed in Ontario giving effect to some of the proposals of the Select Committee[27]. The most significant

departure from the recommendations was the failure to make the coverage mandatory. The legislation laid down some general principles with which any insurance of the type envisaged had to comply. But the purchase of such insurance remained optional. In view of the published findings of the Osgoode Hall study this was a curiously weak legislative response. As Marvin Baer wrote after the legislation had come into force:

> Once it has been decided that there are large numbers of victims who receive no compensation and should receive it even when no one is at fault, and that the present voluntary system of arranging accident insurance doesn't seem to be providing this, and that automobile owners as a group should pay for this compensation, a compulsory insurance scheme must be the result. Otherwise you just duplicate something already available on a voluntary basis[28].

The legislation was proclaimed in August 1968[29]. Besides acknowledging that accident benefits, as they were called, could be sold and purchased it provided for such matters as who would be insured, when the insurance was first loss as opposed to excess insurance, and the right of the defendant in a relevant tort case to offset the victim's accident benefits against his/her tort liability. (This right of set-off arose only if the tortfeasor carried accident benefits insurance him/herself and applied only to the level of benefits that s/he carried.) Although an insurer could provide the specific terms of the policy[30] this, like all automobile policy provisions, remained subject to the approval of the Superintendent of Insurance[31]. As is often a consequence of this approval process, a standard contract emerged[32]. It provided a package of benefits broadly similar to those proposed by the Select Committee. These included schedules of fixed lump-sum payments for death and specific forms of dismemberment as well as loss of sight. An injury not listed did not attract a lump-sum payment even if permanent and serious. Disability payments were payable weekly, but only in the case of total disability. The policy made no provision for partial disability. Where payment was made for dismemberment or loss of sight, the amount of the payment was subtracted from the total disability benefit. Similarly, any amount paid to an injured victim while alive was deducted from the death benefit payable if the victim died within the requisite time as a result of the automobile accident[33].

The standard policy also contained a number of exclusions. No valid claim could arise from an accident which occurred during a race or speed test or while the vehicle was being used for any illicit

trade or transportation. All but death benefits were denied to persons driving or riding with someone driving while under age or unqualified and to those driving drunk or under the influence of drugs.

☐ The 1971 Amendments: Mandatory Coverage

By 1971 it was claimed that 70 per cent of Ontario motorists had procured this voluntary coverage[34]. Yet pressure continued for a more extensive no-fault scheme. Another committee on automobile insurance had been established in 1970 and in June 1971, the Minister of Financial and Commercial Affairs introduced a bill making the no-fault benefits a mandatory part of any automobile liability insurance policy sold in the province. With one important exception, the levels of benefits were enriched[35]. The details of the plan were not, as before, left totally to the process controlled by the Superintendent. Rather a schedule[36] was appended to the Insurance Act providing most of the specific terms of the mandatory coverage[37]. The rather untidy way by which the legislation was passed and implemented with last minute amendments by regulation and some necessary further clarification in the new standard form policy – was subject to some justified criticism[38]. However, with the cooperation of insurers, the transition to the new regime seems to have been achieved reasonably smoothly, which is not to say that problems of interpretation, attributable to the complicated way in which the plan was promulgated, did not persist[39].

Apart from increases in benefits, the most significant change in the benefit package was the removal of the lump sums for dismemberment or loss of sight. Because, under the previous system, such benefits were reduced when disability benefits were available to a claimant (thereby making such payments generally less significant) and because tort law continued to be available, in appropriate cases, to provide non-pecuniary damages, this must have been regarded as the most readily dispensable item. The desire of the insurers to contain costs to the levels of the previous plan suggest that something had to be trimmed[40].

Disability payments, available for up to two years in cases of total inability of a claimant to perform the essential duties of his/her job, and for any longer period while totally unable to perform any job for which s/he was reasonably suited, were doubled. A qualified claimant was entitled to 80 per cent of lost salary, up to maximum of $70 per week. Payments commenced from the date of injury[41]. Generally an unemployed person did not qualify for disability bene-

fits unless "engaged in occupation or employment for any six months out of the 12 months preceding the accident". An otherwise unemployed "housekeeper" was, if "completely incapacitated", entitled to receive $35 per week for not more than 12 weeks[42].

For death resulting from and occurring within 180 days (or two years if continuously totally disabled) of an automobile accident, lump-sum benefits were available to surviving members of the deceased's household. The amount depended on the age and status in the family of the deceased. The maximum "principal sum" payable (for the death of the head of the household the highest income-earner) was $5,000, with an additional $1,000 payable for each survivor after the first. Lesser amounts were available to survivors upon the death of the spouse of the head of household ($2,500) and dependent children ($500 if under the age of five, $1,000 if between the ages of five and 21). Funeral expenses were payable up to $500 for any one person[43].

The schedule also provided medical and rehabilitation benefits to a maximum of $5,000 per person to cover costs which were incurred within four years of the accident and which were in excess of those covered by medical or hospital care programs[44]. Insured persons included not only the named insured but also passengers in the described automobile and pedestrians struck by that vehicle. The named insured and members of his or her family living in the same house were also covered when occupants of any automobile[45]. Tort rights were affected in that the amount of no-fault benefits paid or available to the claimant were to be deducted from any damages payable by the tortfeasor[46].The exclusions which were applicable to the earlier optional coverage continued to apply to the new scheme.

■ MORE STUDIES AND REPORTS

□ The Ontario Law Reform Commission of 1973

The introduction of the 1971 legislation did not end discussion about an even more extensive no-fault automobile insurance scheme for Ontario. Indeed, at that time an insurance industry spokesperson was quoted as saying that this legislation was viewed as merely a first step[47]. The next important development was the publication in 1973 of a report by the Ontario Law Reform Commission on motor vehicle accident compensation[48]. The empir-

ical base for the report was information gathered in other studies: the Osgoode Hall study[49], a University of Michigan study[50], the British Columbia Royal Commission on Automobile Insurance[51] and an Oxford University study[52].

The findings of the Osgoode Hall study have been described previously. In broad terms these confirmed or were confirmed by the other studies. Compensation flowing from the tort system was shown to be inadequate, poorly distributed and subject often to serious delay. Further, noting the widespread use of liability insurance, the Law Reform Commission pointed out that loss distribution, rather than loss shifting, had become the "normal method" of compensating accident victims and therefore:

> [...] the question no longer is whether individual defendants can afford to bear all the losses they inflict, but whether the collectivity engaged in the activity which generates the harm, and in the case of motoring this virtually means society at large, can afford to bear it. In light of the considerable amounts spent on the activity of motoring already, a negative answer would seem perverse[53].

That society had chosen to spread losses (by the widespread use and legal encouragement[54] of liability insurance) rather than saddle individual wrongdoers with them, meant that the historical purpose of tort law (to make blameworthy individuals liable) was no longer being pursued. This, together with the fact that those aspects of tort which had been retained resulted in inequities, inadequacies and delays in the processing of claims, fuelled the argument for the complete abolition of tort as it applied to automobile accident cases.

The Law Reform Commission indicated a clear preference for a first-party, no-fault compensation system. It proposed a "pure"[55] no-fault plan which would compensate automobile accident victims for all pecuniary losses resulting from personal injury, death or property damage arising out of the operation of an automobile. Non-pecuniary loss would not be compensated, but all other losses, specifically (a) unlimited medical, hospital and rehabilitation expenses, (b) other consequential expenses such as transportation costs and telephone bills, (c) loss of income, (d) death benefits and (e) compensation for collision and property damage, would be compensated[56].

Income-replacement payments would be available for any disability whether permanent or temporary, total or partial. The basic plan would have been subject to a limit of $1,000 per month, but

individual motorists were to be allowed to purchase higher levels where actual income was higher. "Housewives", retired persons or unemployed persons would be compensated on a basis related to what they could reasonably expect to gain if they chose to seek employment. Payments would continue for as long as earning capacity remained limited[57].

Death benefits would be available in respect of every fatal injury. There would be funeral expenses of up to $1,000. A further lump sum of $1,000 would be available to dependents for other needs arising immediately after the fatal accident plus periodic payments (up to $1,000 per month with additional coverage available on an optional basis) sufficient to allow continuation of their normal standard of living[58].

In common with the then existing scheme in Ontario, the Law Reform Commission's scheme would have excluded from coverage loss occasioned during the commission of criminal offence and deliberately inflicted self-injury[59]. In contrast to other schemes, however, the plan would not have excluded losses arising where the driver was under the influence of alcohol or drugs. The Commission considered that this should be left to the criminal law and that forfeiture of insurance benefits was too severe a penalty[60].

☐ The Variplan Proposal

The Law Reform Commission proposal was left to gather dust on library shelves. It provoked no legislative action. Nonetheless, other groups were thinking about no fault and in 1974 the Insurance Bureau of Canada, the trade association of automobile, casualty and property insurers, produced a proposal for a modified no-fault plan entitled "Variplan"[61]. "Variplan" would have denied the right to sue for economic losses where they were within the limits of the no-fault benefits and for non-economic losses unless the victim suffered death, serious permanent injury or more than six months inability to perform any and every duty pertaining to her occupation or employment. Benefits were to be payable for medical and rehabilitation expenses (up to $20,000 per person, excess of government plans and other insurance); lost income for a maximum period of three years (at the rate of 80 per cent of gross income to a maximum of $1,000 per month); up to $20 per day for "expenses incurred in obtaining ordinary and necessary services in lieu of those that would have been performed by the injured person for her own or dependent's benefit and not for income"; funeral expenses up to $1,000; and lump-sum death benefits of $5,000 for the death

of the head of the household or spouse of the head of the household, with an extra $1,000 per surviving dependent beyond the first. The plan called for a penalty of 1 per cent per month to be imposed on insurers not making payment within 30 days from receipt of proof of loss.

"Variplan" aroused strong opposition from lawyers and, like the Ontario Law Reform Commission Report before it, provoked no legislative action.

☐ The 1977 Select Committee Report

In the mid-1970s a Select Committee of the Ontario legislature commenced an extensive examination of the entire insurance industry. The committee began by giving its attention to automobile insurance and published its first report on that subject in 1977[62]. In that report the committee elected not to make any major recommendations as to the desirability of adopting any fundamentally new no-fault program[63]. Rather, it chose to postpone making any recommendations like that until a later report. However, the committee did recommend increases in the amounts of benefits then payable as medical expenses and accident benefits[64] to keep up with inflation. For example, the amount payable for medical and rehabilitation expenses was to be increased from $5,000 to $25,000; the amount for funeral expenses was to be increased from $500 to $1,000; and the maximum disability benefits were to be doubled to $140 per week (for lost income) and $70 (for unpaid housekeepers). Revision of death benefits was also proposed. In particular the committee felt that:

> no distinction should be made in the amount of death benefits on the basis of whether the deceased was a "head of household"or a "spouse in a two-parent household" . Instead the benefit in the event of the death of a spouse should be the same as that payable upon the death of the "head of household". This benefit should be increased to $10,000[65].

For deaths involving other dependents, the recommended amounts were $1,000 (dependent under five years of age) and $2,000 (dependents over five years of age)[66].

These recommendations were implemented in March 1978 by regulations amending Schedule E (as it then was) of the Insurance Act[67].

☐ The 1978 Select Committee Report

After the Select Committee had given full consideration to the no-fault question, a majority of its members recommended the adoption of a highly modified plan[68]. Making specific reference to a no-fault scheme's capacity to compensate all victims and the reduced adjusting and settlement costs involved, the majority felt that fault should cease to "be the fundamental factor to be considered in determining whether compensation should be paid for motor accident losses[69]".

It was also felt that the advantages of no-fault were "even more compelling" with respect to bodily injury, than for other kinds of loss. It was therefore proposed that a new scheme supersede the combined tort-accident benefit system for personal injury and death caused by automobile accidents. Compensation would be paid on a no-fault basis for:

(i) medical expenses without monetary limit;

(ii) rehabilitation expenses without monetary limit;

(iii) partial or total loss of income, subject to a reasonable weekly maximum amount;

(iv) actual costs incurred for replacement housekeeping or childcare services (subject to a reasonable weekly maximum);

(v) death benefits payable on a scale similar to that already in place for accident benefits and any reasonable funeral expenses; and

(vi) actual loss of support (subject to reasonable maximum) where the amount exceeded the lump sum death benefit; such excess to be paid in periodic payments which may be revised or terminated in the event of the recipient's death and remarriage or an expiry of the period for which the deceased would have provided support[70].

Unlike other schemes, it was proposed to compensate the economic losses of even those involved in accidents while committing a crime or while driving impaired. The rationale was that to do otherwise would create externalities which would have to be borne by agencies such as government health insurance[71].

In addition to coverage in these terms for economic loss, there was also to be provision for lump-sum payments – to innocent victims – for non-economic loss. The amounts of these payments would be calculated according to a fixed schedule of injuries and would be modest as compared to amounts available in tort[72].

Tort recovery was totally excluded for economic loss (insureds could purchase additional layers of no-fault benefits if they faced potentially heavier losses than were covered by the basic plan), but would be available for non-economic loss (up to $100,000) in cases of:

(a) serious and permanent injury resulting in substantial and medically demonstrable permanent impairment affecting the resumption of customary activities; or

(b) permanent loss of an important bodily function; or

(c) significant permanent scarring or disfigurement[73].

☐ The Slater Task Force

The 1978 recommendations with regard to no-fault were not implemented[74]. However, the matter again became a matter of public debate. Early in 1986 the Ontario Government established a task force chaired by Dr David Slater to examine problems that had arisen relating to the availability and cost of liability insurance generally. In his report[75], Dr Slater dealt extensively with automobile insurance. He emphatically recommended the adoption of a no-fault automobile insurance scheme, but did not offer details. While he did not set himself against the retention of some residual tort liability, he did recommend that the no-fault concept be extended, in time, to cover all cases of disability not just those caused by automobile accidents. He did not, however, favour a government-run scheme, even for automobile insurance.

☐ The Osborne Inquiry

Dr Slater's strong recommendation was not presented with supporting data or extensive reasoning. Nevertheless, it was controversial and attracted both support (mainly from the insurance industry) and opposition (chiefly from the legal profession). At the same time the cost of auto insurance was becoming a hot political issue and the new Democratic Party had served notice that it was going to make public no-fault insurance the keystone of its campaign in the forthcoming provincial election. The government responded by setting up another inquiry. It asked Mr Justice Coulter Osborne of the Ontario High Court to conduct an "Inquiry into Motor Vehicle Compensation in Ontario". The terms of reference were set out in an Order-in-Council dated 6 November 1987[76].

Osborne J. commissioned numerous reports and conducted extensive investigations. He also received many submissions.

However, the most significant players were the insurance industry and the personal injury bar. The insurers, through their trade association, the Insurance Bureau of Canada, proposed a modified no-fault plan by which most law suits would be abolished[77]. Only victims with permanent and serious injuries would be allowed to sue for non-economic loss (but others could sue for economic loss in excess of the no-fault benefits). All victims who sustained personal injury would be entitled to no-fault benefits. The proposal differed from the earlier Variplan[78] in that the threshold for law suits was tightened and the benefit package was enriched considerably. Most insurers had become persuaded of the relative simplicity and cost effectiveness of no-fault. On the other hand, lawyers engaged in motor vehicle accident work saw a serious threat to their livelihood and quickly organized a well-funded and highly active opposition to the idea of no-fault. They countered with recommendations for retaining the existing add-on no-fault scheme with more generous benefits coupled with some significant reforms of tort law including abolition of the collateral source rule and increased use of structured settlements[79].

The report of the Inquiry was an impressive compendium of information about all aspects of the automobile insurance industry in Ontario[80]. It contained numerous observations and recommendations about the costing, marketing and other aspects of the business of insurance. But the central aspects of the report dealt with no-fault. It rejected publicly run insurance although it was not uncritical of the delivery system provided by the private sector. In terms of the preferred type of plan, the report favoured enriching the existing add-on plan without formally impairing the right to sue. Various recommendations for reforming the way in which tort damages are assessed were also accepted. Two key factors seem to have yielded these conclusions. First, the costings done for the report indicated that tort reform would produce sufficient savings to allow for enriching the no-fault benefits without curtailing tort rights and still achieve a modest saving in premium levels[81]. Second, Osborne J openly professed his value preference for the universal right to sue. Clearly choices about no-fault are at root value choices. Some place a high value on distribution (however narrow) of compensation based on some notion of "wrongdoing". Others place a higher value on a wider distribution of the funds available for compensation. Whatever a particular report recommends, it is helpful and refreshing to have this fundamental point articulated.

Some months after receiving the Osborne Report, the Liberal government announced that it planned to implement some of the

tort reform measures that had been recommended[82]. The no-fault scheme which was announced drew heavily on the benefit package proposed by Osborne J[83]. But the central point – no impairment of formal tort rights was ignored.

■ LEGISLATIVE INTERVENTIONS OVER THE LAST DECADE

☐ The Ontario Automobile Insurance Board

Even after the Osborne inquiry had been established, it was clear that automobile insurance as a political issue was very much alive. Auto insurance premiums continued to rise and the New Democratic Party continued to push for a public insurance corporation[84]. Before the Osborne Report was filed the government had established the Ontario Automobile Insurance Board whose main function was to regulate the premium levels for automobile insurance[85]. The Board was empowered to set rates or ranges of rates which would be binding on the industry in general. These rates were to be set after public hearings. They could be varied by individual companies only with the express approval of the Board. A specific constraint on the Board in setting rates was that it was no longer allowed to use age, sex or marital status as classifications.

Not long after the board began its work, it became apparent from evidence furnished by its own consultants as well as various insurance companies, that it would have to approve substantial increases in premium levels[86]. It also became apparent that severe dislocation would result with the abolition of age, sex and marital status classification[87]. It also became clear that the existence of the Board was not deflecting any of the political heat from the government[88].

☐ The Ontario Motorist Protection Plan

In this context the government, which apparently had not been enthusiastic about the recommendations of the Osborne Report, rediscovered the cost-saving potential of no-fault. Some officials had come across an article published in the Virginia Law Review and written by Prof. Jeffrey O'Connell and Robert Joost which advocated allowing individual motorists a choice between no-fault insurance and a tort-based policy[89]. A quiet approach was made to

the insurance industry to see if it was feasible to offer motorists this choice. After some discussion among its members, the Insurance Bureau of Canada agreed to pursue the matter and eventually produced a submission to the government proposing a form of the O'Connell/Joost choice proposal[90]. The government then referred this proposal along with two variations of modified no-fault (based respectively on the New York and Michigan schemes) to the Ontario Automobile Insurance Board for its consideration[91]. The benefit packages applicable to each scheme so referred were those suggested by Osborne J. for his add-on proposal. Almost at the same time, the Board announced a "benchmark" premium increase of 7.6 per cent[92] but the government delayed implementation of the abolition of age, sex and marital status classification pending the formulation of a new no-fault scheme.

The Board conducted lengthy hearings and in relatively short order produced a voluminous report[93]. In that report the Board was lukewarm towards all three proposals but favoured least the choice idea[94]. The Board gave its most favourable treatment to the threshold plan and indicated that, not surprisingly, a more tightly worded threshold would yield greater savings.

Subsequently the government announced it intended to introduce a threshold scheme which it called the Ontario Motorist Protection Plan[95]. The plan, which came into effect on June 21, 1990, entailed a threshold which was to be tighter than that used in either New York or Michigan. The obvious expectation was that the savings would be greater than those indicated by the Board. The threshold was worded as follows[96]:

> (1) In respect of loss or damage arising directly or indirectly from the use or operation [...] of an automobile and despite any other Act, none of the occupants of an automobile or any person present at the incident are liable in an action in Ontario for loss or damage from bodily injury arising from such use or operation in Canada, the United States or any other jurisdiction designated in the No-Fault Benefit Schedule involving the automobile unless, as a result of such use or operation, the injured person has died or has sustained:
>
> (a) permanent serious disfigurement; or
>
> (b) permanent serious impairment of an important bodily function caused by continuing injury which is physical in nature.
>
> (2) Subsection (1) does not relieve any person from liability other than the owner of the automobile, occupants of the automobile and persons present at the incident.

(3) In an action for loss or damage from bodily injury arising directly or indirectly from the use or operation of an automobile, a judge shall, on motion made before or at trial, determine if the injured person has, as a result of the accident, died or has sustained:

(a) permanent serious disfigurement; or

(b) permanent serious impairment of an important bodily function caused by continuing injury which is physical in nature.

The most significant aspect of this threshold was the requirement that impairment be permanent as well as serious[97]. In this regard the government, seemingly without knowing it, adopted the recommendations of a legislative committee which met 11 years previously[98]. Another important point is that the question of whether the threshold had been satisfied in a particular case was one for the judge alone as a matter of law. It was not a matter of fact for the jury. A problem had emerged in Michigan where juries tended to find most injuries to be "serious"[99].

Tightened thresholds of this type do not signify a callous disregard for the pain of accident victims. The new plan reflected a change in emphasis from giving solace to making better and providing practical assistance, through a broadly defined concept of rehabilitation, without hassle. For those whose injuries were so severe that they can never be restored to full capacity, the plan both provided full no-fault benefits and preserved the right to sue for damages including those for pain and suffering.

The basic benefit package provided up to $500,000 in medical benefits not already paid by the provincial health scheme, and rehabilitation benefits (broadly defined to include home renovations, transportation, lifeskill training and so on), up to $500,000 for long-term care, up to $600 per week in wage replacement over and above sickpay (subject to a minimum of $185 per week, available even to non-earners), death benefits in the order of $25,000 to a surviving spouse and $10,000 to other dependents, and funeral expense cover up to $3,000[100]. Enriched benefit packages were available to those who wanted them.

The changes also dealt with property damage in motor vehicle accidents[101]. The right to sue in these cases was removed. However, the fault principle remained in that a person insured under the standard liability policy, could claim from his/her own insurer to the extent that some other person was at fault in the accident. Insurers were no longer subrogated to rights against persons actually at

fault[102]. Insureds could still carry collision coverage against the possibility that no other person will be judged at fault in the accident.

The plan also introduced a novel regime for dispute settlement[103]. Before any litigation may be commenced, a claimant disputing any matter relating to an entitlement to a no-fault benefit must submit the matter to a mediation process provided by the Ontario Insurance Commission. If mediation fails, the claimant must then choose between suing the insurer in court or launching an arbitration. If the choice is arbitration, the proceedings are in accordance with the *Insurance Act* (rather than the *Arbitration Act).* The arbitrator is not chosen by the parties but is appointed by the Insurance Commission. Procedure is governed by the "Dispute Resolution Practice Code" devised specifically for the purpose and includes provision for an appeal to the Commission's Director of Arbitrations.

☐ Bill 164

The Ontario Motorist Protection Plan did not gain universal acceptance. It was roundly disliked by the personal injury bar because it cut so profoundly into tort rights. In addition, the New Democratic Party continued to promote its vision of public auto insurance which, it said, would include restored tort rights. Thus, when the New Democrats were elected in 1991, more change was expected.

But the change that followed differed from many of those expectations. First the new government was persuaded to abandon its public insurance proposal, ostensibly on the grounds of the high start-up costs of such an enterprise and the unemployment it would cause. This created a problem for a government for which auto insurance reform had been such an important cause in opposition. It had to produce some change. Since restoration of tort rights had been part of the platform, that seemed the obvious choice.

However, when confronted with actuarial forecasts, the government realised that simply re-expanding tort would have disastrous effects in terms of premium levels which, after all, was the underlying public concern driving the whole matter as a political issue. The dilemma was that if there was no adjustment of tort rights the government would be seen to have reneged on both of its key promises with regard to auto insurance. So it was necessary to find a way to increase tort rights while reducing or at least stabilising premiums. The response (contained in Bill 164 by which name

the reforms were known even after they were enacted and after they came into effect on January 1, 1994) was to loosen the threshold but only in relation to non-economic loss. Thus a claimant could sue for that category of damages if s/he was merely seriously, as opposed to permanently and seriously, injured and even if the injury was merely psychological[104]. But access to tort for damages for economic loss was completely foreclosed.

So, while the government could claim that tort access had been increased in one respect, the net effect of Bill 164 was actually to decrease the role of tort dramatically. To offset this, the plan contained significantly increased maximum levels of no-fault benefits for economic loss. For example, the maximum weekly income replacement benefit was $1,000, the limit on the medical/ rehabilitation benefit was $1 million with no time constraints, and the maximum death benefit was $200,000. There was also more extensive coverage for students and caregivers[105].

No changes were made to the OMPP dispute resolution scheme nor to its treatment of property damage.

☐ The Automobile Insurance Rate Stability Act

Bill 164 seemed to please no one. Lawyers did not like the total restriction on tort claims for economic loss. Insurers claimed the new regime increased rather than decreased the cost of providing coverage. Moreover, the complexity of the regulations governing entitlements complicated the claims process and arguably increased adjusting costs. In the result, premium levels started to rise again. So consumers were unhappy. Meanwhile the Progressive Conservative Party was promising to revisit the whole question of auto insurance yet again should it gain power.

And, of course, that is what transpired. The *Automobile Insurance Rate Stability Act* took a direction 180 degrees different from Bill 164 in terms of its treatment of tort rights. Access to tort damages for economic loss in excess of no-fault benefits was restored (subject to upper limits) and access to damages for non-economic loss was again restricted to those *permanently* as well as seriously injured[106]. Maximum no-fault benefit levels were scaled back. Without the purchase of optional richer coverage, the maximum for income replacement is $400 per week. Except in catastrophic cases, the maximum health care benefit is $100,000 and is subject in most cases, to a 10 year limit. The death benefit is $25,000 plus $10,000 per dependant[107].

The previously existing system for dealing with property damage remains basically the same and the dispute resolution mechanism was kept in place with the further option of private arbitration under the *Arbitration Act* for no-fault benefit entitlement disputes.

■ CONCLUSION

The story of no-fault auto insurance in Ontario is characterised by complexity and not a little irony. It is complex if only because of the frequent radical shifts in direction by successive governments. Auto accident files still current in law firms and insurance companies are being handled in one of four completely different ways depending on the date of the accident. Insurers have had to retool their underwriting and claims handling practices totally four times within the last decade. The story is ironic in that the more things have changed, the more they have revived the past. Bill 164 evoked memories of the 1978 Select Committee Report with its abolition of tort for economic loss. The *Automobile Insurance Rate Stability Act* strongly resembles Variplan and the proposal put by the Insurance Bureau of Canada to the Osborne Inquiry. It is particularly noteworthy that the personal injury bar, so scathing of those early proposals, was, albeit with a few reservations, welcoming of the latest scheme.

In the political climate of Ontario, a Quebec style scheme has never been on the cards. Even when a New Democratic government was in power the promised public insurance corporation failed to materialise. And, of all the proposals for reform over the years, only two, the Ontario Law Reform Commission Report and the Slater Report expressed a preference for pure no-fault, with no residual tort. None of the key players, especially the insurance industry and the legal profession, ever seem to have wanted that and all the proposals that received close government scrutiny involved some role for tort.

In the end it can be argued that a reasonable scheme is in place. No-fault benefits for basic needs are available quickly and subject to cheap and relatively expeditious dispute resolution procedures. Motorists who face greater loss are free to opt for more generous benefit coverage or to buy separate disability coverage. Innocent victims are able to sue for most of their excess economic loss and the truly seriously injured or the dependants of fatal accident victims are able to sue for non-economic damages. In compari-

son to the original tort system, seriously injured victims are better off now because they have lost almost no rights to sue plus they have the speedy availability of no-fault benefits. Only the non-permanently injured have lost any tort rights of substance – the right to sue for non-economic damages – but they have gained access to immediate no-fault benefits including those designed to address the phenomena that give rise to non-economic loss – pain and the need to readjust while healing proceeds. A long time ago Allen Linden talked about "peaceful coexistence[108]" between tort and no-fault. The present Ontario scheme is a reasonable attempt at making that concept work.

☐ Notes

1. *Automobile Insurance Rate Stability Act*, S.O. 1996, c. 21.

2. *Automobile Insurance Act*, R.R.S. 1946, c. 11.

3. See J. GREEN, "A Fish Out of Water: Classical Fault on the Highway", (1970) 35 *Sask. L. Rev.* 2; C. BROWN, *No-Fault Automobile Insurance in Canada*, Toronto, Carswell, 1988, p. 4.

4. See G. WILLIAMS, "The Aims of Tort Law", (1951) 4 *Current Legal Probs.* 137, 151.

5. *Motor Vehicles Act*, S.O. 1906, c. 46, s. 18.

6. *Highway Traffic Act*, S.O. 1930, c. 48, s. 10.

7. See now, *Insurance Act*, R.S.O. 1980, c. 1.8, s. 239 (1).

8. *Id.*, s. 258.

9. *Highway Traffic Act*, R.S.O. 1950, c. 167, s. 79ff.

10. *Id.*, s. 97.

11. *Compulsory Automobile Insurance Act*, R.S.O. 1990, c. C.25.

12. J. NEWCOMBE, *The Standard Automobile Policy Annotated*, Toronto, Butterworths, 1986, pp. 77-99.

13. LEGISLATIVE ASSEMBLY OF ONTARIO, *Final Report of the Select Committee on Automobile Insurance*, Toronto, Quenn's Printer, 1963, p. 3 [hereinafter *Final Report*].

14. *Ibid.*

15. *Id.*, at 8.

16. R.G. ATKEY, "Perspective for No-fault Accident Compensation in Ontario", (1966) 5 *U.W.O. L. Rev.* 1.

17. See the *Final Report*, *op. cit.*, note 13, p. 6 for details of coverage and benefits.

18. R.G. ATKEY, *loc. cit.*, note 16, 15.

19. *Final Report*, *op. cit.*, note 13, p. 7.

20. *Ibid.*

21. A.M. LINDEN, *Report of the Osgoode Hall Study on Compensation of Victims of Automobile Accidents*, Toronto, 1965. Another strong influence on developments was the publication in the US of the Keeton-O'Connell study, R. KEETON and J. O'CONNELL, *Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance*, Boston, Little, Brown & Company, 1965.

22. A.M. LINDEN, "Peaceful Co-existence and Automobile Accident Compensation", (1966) 9 *Can. Bar J.* 5.

23. *Id.*, at 7.

24. *Id.*, at 9.

25. A.M. LINDEN, *op. cit.*, note 21, Chapter V.

26. *Id.*, p. 8.

27. *Insurance Act*, S.O. 1966, c. 71, s. 11 [hereinafter *1966 Insurance Act*].

28. M.G. BAER, "Annual Survey of Canadian Law: Insurance", (1969) 3 *Ottawa L. Rev.* 553, 555.

29. *Ibid.* The recommendations of the Select Committee were not made public until January 1969. Baer suggests that this was to give other provinces a chance to enact similar legislation. *Id.*, at 553. See also ONTARIO LEGISLATIVE ASSEMBLY, *Legislature of Ontario Debates*, 1st Session, 28th Legislature, 28 May 1968, p. 3202. By 1968 similar legislation was in place in every province except British Columbia and Quebec.

30. *1966 Insurance Act.*

31. See currently *Insurance Act*, R.S.O. 1990, c. I.8, s. 227 [hereinafter *1990 Insurance Act*].

32. See M.G. BAER, *loc. cit.*, note 28.

33. Note that medical payments were already provided under a standard optional endorsement to automobile insurance policies. See R.G. ATKEY, *loc. cit.*, note 16, 13.

34. J. MANTHORPE, "Ontario to Introduce No-fault Insurance on Compulsory Basis", *The [Toronto] Globe and Mail* (25 June 1971) 1, col. 1.

35. *Ibid.* For the legislation which emerged see *Insurance Act*, S.O. 1971, c. 84, s. 14.

36. *Id.*, Schedule E [now Schedule C].

37. This term is to be contrasted with "compulsory" which, in this context, means required for all vehicles in the province. Mandatory means it is a required part of insurance coverage, if purchased.

38. M.G. BAER, "Annual Survey of Canadian Law-Insurance", (1973-74) 6 *Ottawa L. Rev.* 193. The schedule was amended first by regulation (see O. Reg. 539/71) and then by statute: see *Insurance Act*, S.O. 1972, c. 66, s. 18.

39. For an example see the provisions dealing with priorities as discussed in C. BROWN and J. MENEZES, *Insurance Law in Canada*, Toronto, Carswell, 1982, pp. 359-361.

40. L. WELSH, "No Rise in Auto Premiums Planned for Limited Accident Benefits", *The [Toronto] Globe and Mail* (25 June 1971) B1.

41. Under the previous schemes since there had been a seven-day waiting period.

42. For disability benefits, see *Insurance Act*, *supra*, note 35, Schedule E, subsection 2, Part II.

43. For death benefits generally, see *id.*, Schedule E, subsection 2, Part I.

44. *Id.*, Schedule E, subsection 1.

45. *Id.*, Schedule E, subsection 3 (1).

46. *Insurance Act*, S.O. 1971, c. 84, s. 17.

47. L. WELSH, *loc. cit.*, note 40.

48. ONTARIO LAW REFORM COMMISSION, *Report on Motor Vehicle Accident Compensation*, Toronto, Ministry of the Attorney General, 1973.

49. A.M. LINDEN, *op. cit.*, note 21.

50. A. CONARD *et al.*, *Automobile Accident Costs and Payments – Studies in the Economics of Injury Reparation*, Ann Arbour, University of Michigan Press, 1964.

51. BRITISH COLUMBIA, ROYAL COMMISSION ON AUTOMOBILE INSURANCE, *Report of the Commissioners*, R.A.B. WOOTTON (chairman), Victoria, Government of British Columbia, 1968.

52. HARRIS and HARTZ, *Report of a Pilot Survey of the Finonciol Consequences of Personal Injuries Suffered in Road Accidents in the City of Oxford During 1965*, 1968.

53. ONTARIO LAW REFORM COMMISSION, *op. cit.*, note 48, p. 89.

54. See *Compulsory Automobile Insurance Act*, *supra*, note 11, s. 14.

55. "Pure" no-fault refers to scheme in which no tort rights whatsoever are retained.

56. ONTARIO LAW REFORM COMMISSION, *op. cit.*, note 48, p. 89.

57. *Id.*, pp. 108-109.

58. *Id.*, p. 109.

59. *Id.*, p. 110.

60. *Id.*, p. 95.

61. INSURANCE BUREAU OF CANADA, *Report of Special Committee on Automobile Insurance (Variplan)*, January 1974.

62. SELECT COMMITTEE ON COMPANY LAW, *The Insurance Industry: First Report on Automobile Insurance*, Toronto, V.M. SINGER (Chair), 1977.

63. *Id.*, p. 68.

64. As established in the 1971 legislation; see *Insurance Act*, *supra*, notes 35 and 36.

65. SELECT COMMITTEE ON COMPANY LAW, *op. cit.*, note 62, p. 71.

66. For the recommendations concerning all benefit levels, see *id.*, pp. 71-72.

67. *Insurance Act*, O. Reg. 161/78.

68. SELECT COMMITTE ON COMPANY LAW, *The Insurance Industry: Second Report on Automobile Insurance*, Toronto, J.R. BREITHAUPT (Chair), 1987, pp. 63-68. A "modified" no-fault plan (as opposed to a "pure" one) abolishes some but not all tort liability.

69. *Id.*, p. 63.

70. *Id.*, p. 64.

71. *Id.*, p. 65.

72. *Ibid.*

73. *Id.*, p. 66.

74. Note, however, the similarity between that proposal and the one now before the legislature. See *infra*, notes 96 and 98 and accompanying text. A separate but relevant recommendation – that automobile liability insurance be compulsory – was adopted. See *supra*, note 53. It is relevant because mandatory no-fault insurance became compulsory.

75. D. SLATER, *Report of Ontario Task Force on Insurance*, Toronto, 1986.

76. ONTARIO, Order-in-Council 2962/86, 6 November 1986.

77. INSURANCE BUREAU OF CANADA, *Inquiry into Motor Vehicle Accident Compensation in Ontario*, Submission to Hon. Justice C.A. Osborne, April 1987.

78. *Supra*, note 61.

79. See, *e.g.*, CANADIAN BAR ASSOCIATION, *Inquiry into Motor Vehicle Accident Compensation in Ontario*, Submission to Hon. Justice C.A. Osborne; March 1987.

80. The Hon. Justice C.A. OSBORNE, *Report of Inquiry into Motor Vehicle Accident Compensation in Ontario*, Toronto, Queen's Printer, 1988. For analysis of the report see C. BROWN and B. FELDTHUSEN, "The Osborne Inquiry into Motor Vehicle Accident Compensation in Ontario", (1988) 8 *Windsor Y.B. Access Just.* 318; L. KLAR, "The Osborne Report: 'No' to No-fault", (1989) 68 *Can. Bar Rev.* 301.

81. There is reason to doubt the validity of these costings. Osborne J. thought that the availability of generous no-fault benefits would reduce the incentive to sue. Experience in the US has shown just the opposite – the security of the benefits allows recipients to pursue lawsuits more vigorously. See C. BROWN and B. FELDTHUSEN, *loc. cit.*, note 80.

82. Statement by M. ELSTON, Minister of Financial Institutions in Ontario Legislature, 9 February 1989.

83. See *infra*, note 100 and relevant text.

84. MAYCHAK, "NDP vows to continue fight for government-run insurance", *The [Toronto] Star* (19 April 1988) A1.

85. *Ontario Automobile Insurance Board Act*, S.O. 1988, c. 18. See M. GOODERHAM, "Ontario passes legislation to set mandatory auto insurance rates", *The [Toronto] Globe and Mail* (12 February 1988) A10, col. 3.

86. A. BARNES, "Revised auto rates could take steep hike when time to renew", *The [Toronto] Globe and Mail* (4 August 1988) B3, col. 1.

87. GORHAM, "Some win but many will lose", *The [London] Free Press* (14 February 1989) A1, col. 3.

88. Canadian Press, "50.000 protest insurance plan" *The [Toronto] Globe and Mail* (4 January 1989) A3.

89. J. O'CONNELL and R. JOOST, "Giving Motorists a Choice Between Fault and No-fault Insurance", (1986) 72 *Va. L. Rev.* 61. See SPEIRS, "No-fault car insurance may be made optional", *The [Toronto] Star* (11 June 1988) D5, col. 1.

90. IBC Choice Proposal, submitted December 13, 1988.

91. WALKER, "Ontario orders study on no-fault auto insurance", *The [Toronto] Star* (10 February 1989) A8, col. 4.

92. GORHAM, *loc. cit.*, note 87. In fact increases up to 17 per cent were allowed.

93. ONTARIO AUTOMOBILE INSURANCE BOARD, *An Examination of Threshold No-fault and Choice No-fault Systems of Privately Delivered Automobile Insurance*, Toronto, 14 July 1989.

94. K. MACKIE, "No-fault insurance plan bypassing minor injuries backed by Ontario panel", *The [Toronto] Globe and Mail* (19 July 1989) A1, col. 2.

95. MINISTRY OF FINANCIAL INSTITUTIONS, *Press release* (15 September 1989).

96. *1990 Insurance Act*, s. 266.

97. In Michigan the impairment must merely be "serious".

98. See *supra*, note 73 and accompanying text.

99. In fact judicial interpretation of this threshold turned out to be less restrictive than might have been predicted. The term "serious" has been given a subjective application so that what is serious for one claimant may be less so for another. See, *e.g.*, *Meyer v. Bright*, (1993) 15 OR (3d) 129 (CA).

100. For details of benefits see R.R.O. 1990/672.

101. *Insurance Act*, *supra*, note 31, s. 263.

102. However, in limited circumstances an insurer may seek reimbursement from the insurer of the person at fault. See R.R.O. 1990/664, s. 6.

103. *Insurance Act*, *supra*, note 31, ss. 279-288.

104. *Id.*, s. 267.1 (2). The full terms of the qualifying criteria include death, serious disfigurement, or serious impairment of an important physical, mental or psychological function.

105. For the full range of benefits, see O. Reg. 776/93.

106. *1990 Insurance Act*, s. 267.5. The restictions on suing for economic loss are that no tort claim may be made for income loss in the first seven days after the accident, for loss of income or earning capacity in excess of 80 % of net loss of income or earning capacity between the date of the accident and the date of the trial, or for any health care expenses unless the claimant is catastrophically injured (a condition given specific definition in the regulations; see O. Reg. 403/96, s. 2).

107. For the complete range of benefits, see O. Reg. 403/96.

108. See A.M. LINDEN, *loc. cit.*, note 22.