



Shifting GEARS

The guiding principles for Ontario auto reform should include affordability, predictability, competition and fairness — and should apply the principle of indemnity rather than entitlement



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I've been asked for my wish list for auto reform in Ontario. Although I understand the appeal of a simple road map to the perfect system, the reality of auto product reform is more complex and fluid than that. A number of factors contribute to this, not the least of which is that we are not at the present time in a crisis situation that would limit the options and require an immediate, politically-driven resolution. In addition, we are not creating a new product in a vacuum of stakeholder interests. Finally, the product itself represents an integration of decisions and compromises; like multiple levers operating a complex machine, individual changes must be considered in a context of give

and take among competing and conflicting policy goals.

Instead of a simple road map then, what follows is a discussion of what in my view should be the guiding principles for auto product reform. Recognizing where we are today, I include a list of options that, if implemented in accordance with the guiding principles, could enhance and improve a system that works, but still could work better.

AFFORDABLE AND FAIR

The auto product is different in every province in Canada, as a result of being redesigned or tweaked to respond to political imperatives at various times.

Having been involved in a host of product reform initiatives in many jurisdictions, I have observed that, while the devil is truly in the details when it comes to outcomes, the real imperative is to ensure the product design decisions are made based on principles of affordability, fairness and indemnification, with the effect of encouraging healthy competition.

The fundamental challenge is how to balance the conflicting requirements that a system be both affordable for consumers and fair to injured persons. In attempting to find that balance, some considerations must be factored in so that the dynamics of the system will operate in the consumers' overall interest.

What does 'fair' mean to injured persons? To me, it must mean the application of the principle of indemnification rather than entitlement. The goal of the system should be to restore injured persons to their pre-accident state to the extent that is reasonably achievable. While helping people to improve themselves or their situation is a laudable goal, it is not — and should not be — the goal, or unintended outcome, of any system of insurance.

Consumers are best served when companies enthusiastically seek their business, and when companies must compete to achieve and retain these relationships with consumers. Competition drives innovation, puts downward pressure on costs and raises the bar for service. It is unreasonable to expect that businesses will be bullish in an environment in which costs are unpredictable and their ability to price based on these costs is either constrained

their businesses if they lack confidence in their ability to predict claims costs. To be stable and predictable, costs must be contained to a reasonable extent, given that the premium collected today must be sufficient to pay today's losses over the next several years.

Since the late 1980s, there have been many attempts to create a hybrid no-fault system. Generally, economic loss has been no-fault and rule-based; non-economic loss has been subject to the tort regime and available only to more seriously injured persons. These hybrid systems have required tinkering or overhaul roughly every three to four years. Given this, there is a very real risk of consumers becoming jaded by these multiple attempts to balance fairness and affordability. All stakeholders influencing design of the system must strive to enhance its resilience and longevity.

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or threatened by political forces external to the risks being insured.

Predictability is also important because insurers must sell the auto product to all comers without knowing its actual cost. Yes, we have good estimates, but they will always be wrong. It may take many years to know the actual profit, if any, earned from a specific sale. Hence being able to predict costs with reasonable accuracy and ease is a desirable feature of any system. In this regard, the insurers' desire to know what they are likely to earn aligns with consumers' desire to know what they are likely to have to pay. Keeping transaction costs low and capable of being controlled will contribute to predictability, to the benefit of both consumers and insurance company shareholders.

STABILITY

Stability is also a worthy objective: consumers have a realm of expectation between renewals and insurers need a reasonable basis on which to rely in reserving. Prudent insurers will hesitate to grow

enough. Unnecessary treatment and excessive assessment, combined with cumbersome processes and an insufficient degree of transparency, increase costs for lesser injuries to the benefit of those abusing the system. For Ontarians who sustain more serious injuries, the compensation needed to indemnify very young accident victims can exceed current policy limits. As well, a small number of those whose injuries fall between minor and major, and who have not purchased optional additional coverage, may not be adequately compensated.

In order to be fair, the system must be seen to be fair by consumers; this is possible only if the system is capable of being understood. A degree of simplicity — or at least, the absence of complexity — is a key attribute in fostering the confidence and trust of consumers. As well, other measures in place to maintain consumers' trust must be transparent: conflicts of interest or other potential risks to consumers' interests should be revealed and understood.

Fairness also requires smooth and timely delivery of accessible benefits. People who are injured should be able to proceed with their recovery without battling the system to be indemnified for the economic losses associated with their injury. Indemnity, not entitlement, as the basis for coverage must be a vital part of the foundation of the system.

Achieving a balance between what are ultimately conflicting priorities is not easy; regrettably, we have not achieved the ideal in any jurisdiction. Nevertheless, it is surely worthwhile to seek a common set of objectives in support of an affordable, fair system that is truly aligned with consumers' interests. Only when this is achieved for consumers can the interests of all other legitimate stakeholders be properly addressed.

With the above discussion of guiding principles in mind, what changes could be made to the current Ontario auto product? There are no simple answers. Again it must be understood we are not starting afresh in the absence of complex integrated past decisions, nor are we being driven to respond to a crisis. To be effective, any or all of the following suggestions must be considered and implemented in a way that preserves an acceptable balance between affordability, fairness and indemnification and encourages competition.

In the period immediately prior to the introduction of the first hybrid no-fault product, the tort system in my view was not working at that time. I recall it was excessively adversarial. There were delays, abuses of process and considerable transaction costs. Based on this observation, I would say any increased reliance on the tort regime would require judgments to be timely, information to be disclosed and a level of compensation earned by the legal community to be fair to lawyers and accident victims. The regime must offer timely and affordable outcomes for plaintiffs.

Rule-based systems, or those that are heavily dependent on process, require active and ongoing management to deter abuse. This means those charged with protecting consumers' interests must be vigilant, as well as willing and able to intervene on consumers' behalf.

In Ontario today, in my view, minor or relatively minor injuries are still being overcompensated, while some of the most seriously injured people may not receive

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- Make the auto product first payor or mandate commutation of any first payor benefits payable under other insurance policies.
- Limit no-fault accident benefits to indemnification only, reducing benefit levels to the lowest possible, given that our health care system already offers extensive

- no-fault treatment. In this scenario, access to the tort regime for excess health care costs would be available for serious injuries.
- Reduce the number of assessments permitted for non-serious injuries.
- Adjust timelines to ensure timely delivery of treatment, but only treatment that is necessary.

- Permit the establishment and use of preferred provider networks, if the insured has elected this approach at the time of purchase.
- Don't adjust the verbal threshold for non-economic loss before the courts have defined in practical terms what it means. Once the threshold has been defined, adjust it only if change is needed and the cost of doing so is affordable for consumers.
- Subject to affordability, set the deductible for non-economic loss at a level that eliminates only non-economic loss payments for minor injuries.
- Enhance the capability of judges to handle complex personal injury cases, either through broadly-based training and/or the establishment of a specialized court.
- Enhance the training and staffing of regulatory authorities and increase their emphasis on enforcement to eliminate, or at least punish, abusers of the system, including insureds, practitioners and insurers. Also, enhance disclosure of market conduct and related practices, as well as regulatory interventions and penalties.
- In pricing, permit a timely response by insurers to changes in underlying costs and trends, recognizing that a competitive environment affords the best protection of consumers' interests.

Can these suggestions be implemented in ways that improve and enhance the current product, as well as achieve a balance between affordability and fairness? I think so. Of course, sweeping and more fundamental changes, if carefully devised, also could achieve balance. Once an approach is chosen, then the process of practical, contextual compromise can begin. Whether the approach is modest or ambitious, it is a lot easier to compromise effectively in the absence of a crisis. In any event, it must be remembered that while the objective of the system is to affordably indemnify those who are injured, those who are paying will not accept abuse, inefficiencies and overcompensation. ☐



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