



**ONTARIO
BAR ASSOCIATION**
A Branch of the CANADIAN BAR ASSOCIATION

OBA Submission

on the

The Five Year Review of Automobile Insurance

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Submitted to:

Willie Handler
Senior Manager
Automobile Insurance Policy Unit
Financial Services Commission of Ontario

Submitted by:

Gregory Goulin
President
Ontario Bar Association

Richard C. Halpern
Chair
Automobile Insurance Working Group
Ontario Bar Association

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About the Ontario Bar Association

The Ontario Bar Association (OBA) is the voice of the legal profession in Ontario. As a branch of the Canadian Bar Association, the OBA represents more than 17,000 lawyers, judges, law professors and law students across the province. The OBA is a voluntary association which provides a broad range of services to its membership, including education and representation in relations with government on matter of importance to OBA members and the public. The OBA advances reasoned positions to governments, the public and the Law Society of Upper Canada for the benefit of our members and to improve the law and the administration of justice in Ontario.

Introduction

The OBA has been at the forefront in Ontario on matters concerning access to justice, working closely with the government, consumer groups and others to improve the justice system for all participants. For instance, in June 2007 the OBA hosted the Justice Stakeholder Summit to develop recommendations for improved accessibility to Ontario's legal system.

In keeping with the OBA's commitment to improve the justice system for all Ontarians, in April, 2008, in partnership with the Ontario Trial Lawyers Association and the United Senior Citizens of Ontario, the OBA hosted a two day Insurance Summit. Stakeholders from consumer groups, legal groups, the health care profession, government and others met for two days at the OBA's premises to discuss how automobile insurance could be reformed.

The Working Group on Automobile Insurance Reform was established by the OBA to review and promote changes to automobile insurance that enhance the value of the product to the consumer while recognizing important values such as access to justice, equity and fairness.

In this submission, the OBA has been governed by the following guiding principles:

- to promote access to justice, and remove the barriers thereto;
- to promote fairness and equity;
- to enhance the value of automobile insurance to consumers;
- to decrease complexity of automobile insurance claims for consumers;
- to maintain affordable automobile insurance premiums;
- to ensure that consumers' interests are protected by the automobile insurance system;
- to ensure a vibrant, competitive automobile insurance industry.

The OBA welcomes this opportunity to respond to the Superintendent of the Financial Services Commission's request for submissions from the on the review of automobile insurance under Part VI of the *Insurance Act*.

Summary of Recommendations

With regard to Restrictions on Tort rights:

1. The repeal of sections 4.1 and 4.2 of Ontario Regulation 461/96 (the regulation defining the verbal threshold).
2. The repeal of section 5.1(1) of Ontario Regulation 461/96 (the \$30,000 deductible applicable to non-pecuniary general damages).
3. The repeal of section 5.1(2) of Ontario Regulation 461/96 (the \$15,000 deductible applicable to claims under section 61(2)(e) of the Family Law Act);
4. Eliminate the deductible on fatal accident claims entirely;
5. Repeal of Insurance Act sections 267.5(3) (the verbal threshold -- protection from health care expenses), 267.5 (5) (the verbal threshold -- protection from non-pecuniary loss), together with amendments to the balance of section 267.5 as required.

With regard to First Party Benefits:

First party (no-fault) benefits need reform so that they are more efficient and responsive to the needs of those injured in automobile accidents, provide costs savings to insurers, and allow a more fair and equitable tort system. Significant cost savings can be achieved by:

1. Reducing the complexity of the first party benefit system.
2. Lowering transactions costs, particularly related to assessments.
3. Limiting both the amount and duration of benefits for minor soft tissue injuries.
4. Adopting the concept of proportionality so that the cost of determining entitlement to benefits is in proportion to importance and value of the benefit at stake.

The proposals made in this submission regarding tort and first party benefit reforms go hand in hand. Restoring a fair and equitable, balanced automobile insurance system, ensuring affordability for consumers, and ensuring that the insurance market is competitive, profitable and vibrant, require that the tort changes and the first party benefit changes must be implemented at the same time. Any changes to first party benefits that are not accompanied by enhanced tort rights will fail to address important matters of fairness, equity, and access to justice, and will leave the consumers in Ontario with a further diminished product.

Tort Changes

The Verbal Threshold

Claims for non-pecuniary general damages are limited by the verbal threshold found in section 267.5 of the Insurance Act and further restricted by Ontario Regulation 461/96, as amended by Ontario Regulation 381/03 (the “defining regulation”).

The defining regulation, affecting accidents occurring on and after October 1, 2003, was passed in response to concerns about the decreased profitability of insurers, particularly during the period 1999 to 2002. The defining regulation was intended to provide additional restrictions on tort rights with a view to saving claims costs and restoring insurers to more favourable levels of profitability. Based on Insurance industry economic data it is now clear that the defining regulation was not needed in 2003 to restore the insurance industry to fiscal health and that the industry was recovering before the defining regulation was passed. Economic results for each and every year since 2003 have demonstrated that these changes were not necessary.

As indicated above, the repeal of the verbal threshold must be accompanied by reform of first party benefits. The defining regulation, however, can and ought to be immediately repealed by Cabinet. This can be done without affecting the affordability of the insurance product and even before entertaining needed cuts to first party benefits.

A verbal threshold, with or without the defining regulation is not required in Ontario. In Ontario, tort claims are subjected to two restrictions: The verbal threshold and the monetary deductible. Both designed to eliminate minor claims from the tort system. It is redundant to have both.

All working groups at the Insurance Summit recommended eliminating the threshold. The Honourable Coulter Osborne, former Associate Chief Justice of Ontario, also supported this recommendation. Mr. Osborne was commissioned by the Attorney General of Ontario to review civil justice in this province. In his Civil Justice Reform Project Report dated November 2007 Mr. Osborne devoted a section to automobile claims, despite the fact that the matter of automobile insurance did not appear specifically in the Terms of Reference from the government. He recognized that automobile insurance reform is necessary to increase access to justice and that the current restrictions on tort rights were an impediment to access to justice.

Mr. Osborne raised three important issues regarding the verbal threshold. First, he questioned the merit of having both a threshold and a deductible. Mr. Osborne expressed concern about using the threshold to exclude claims that manage to exceed the deductible. This illustrates the fact that having both is redundant and suggests that those who exceed the deductible ought not to then be excluded by a verbal threshold. Second, Mr. Osborne expressed concern about the transaction costs associated with a threshold. Under the current legislation the outcome of claims where the threshold is in issue

remains uncertain until the matter concludes at a trial. As a result, parties to these claims must commit significant financial resources for legal fees, expert opinions and expert testimony without knowing the outcome of a threshold motion at the conclusion of trial. This is inefficient, unfair and a waste of personal and judicial resources. This procedure is contrary to the tenor of the recommendations made in Osborne's Civil Justice Reform Report and the current approach of the Ontario government to access to justice issues. Finally, Mr. Osborne recognized the defining regulation discriminates against children and the elderly as compared to other claimants.

Mr. Osborne's recognition that the verbal threshold has "access to justice implications" is important and echoed by the OBA. As a result of these views, Mr. Osborne urged the Superintendent of Financial Services to consider changes to the tort rules in automobile insurance matters as part of the five-year review.

The Deductible

The deductible for non-pecuniary general damages was increased from \$15,000 to \$30,000 for accidents occurring on and after October 1, 2003. The deductible for claims under section 61 (2) (e) of the Family Law Act was increased from \$7,500 to \$15,000 at the same time.

At the Insurance Summit Mr. Osborne characterized the deductible as a "tax on pain". The Insurance Summit also heard from a family affected by deductibles in the death of a young man. The family described how it felt victimized, once by the loss of the son, and once again by the deductible. There is no ethical or philosophical basis for applying the deductibles in fatality cases. Further, in fatality cases, multiple deductibles can add up to hundreds of thousands of dollars on damage assessments for loss of care, guidance and companionship, which, in most people's views are extremely modest.

The overwhelming recommendation from discussion groups at the Insurance Summit was that the deductibles should be reduced to the pre-October 2003 levels and should be eliminated in fatal accident claims. The OBA supports these recommendations as a reasonable balance between the desire to eliminate from the justice system minor cases, keeping costs of automobile insurance at reasonable levels, and maintaining access to justice for those injured in automobile accidents.

First Party Benefits

The current first party benefit system is a bloated and inefficient system that is consuming premium dollars at unprecedented rates. Significant reforms to the first party benefit system are called for now in order to deliver the restored tort rights discussed above, and to reduce exorbitant costs associated with the current system. The 5-year review is the opportunity to address these problems and reach timely solutions that will benefit consumers and accident victims. Minor changes or adjustments to the first party benefit system will fail to deliver long term stability, will increase complexity, and will be a disservice to consumers in Ontario. The OBA hopes that the Financial Services

Commission and the Ontario government use this opportunity to implement real and lasting improvements to automobile insurance.

Recent data reveals a disturbing trend in first party claims frequency and severity. In the last three years, first party claims frequency has risen each year and average claims severity has risen from \$272.57 per vehicle in 2000 to 384.64 per vehicle in 2007. At the same time, claims ratios for first party benefits have increased such that premiums earned per vehicle in 2007 almost matched average claims per vehicle, a result that lowers profitability for insurers. Despite this trend, the additional costs do not result in increased benefits being paid to injured accident victims. Rather, this trend is a function of increasing assessment costs and other transaction costs in the first party benefit system.

The automobile insurance industry has identified assessment costs as an important variable in causing upward pressure on premiums. Ontario's largest automobile insurer has attributed the majority of treatment costs under the first party system to assessment costs. Significantly lowering assessment costs would allow restoration of tort rights currently limited by the verbal threshold and deductible and would be a meaningful contribution to lower pressure on premiums.

The Statutory Accident Benefits Schedule (SABs) is an unduly complicated scheme of procedures, forms and assessments that attempts to govern entitlement to benefits. The SABs is incomprehensible to most accident victims. It is not consumer-friendly. Some consumers are unable to access their entitlement to benefits due to the complexity of the SABs and the plethora of forms. The current system is so complex and expensive that it dramatically undermines the purpose of a first party benefit system: to allow easy and timely access to a specified level of benefits to promote quick recovery in the acute phase of an injury. The current system clearly offends any potential laudable goal of a first party system. At the same time, the inefficiencies, expense and bureaucracy of the current system resulted in the unnecessary restriction to access to justice for innocent accident victims. . That is, the costs associated with complexity and inefficiency have led to tort limitations and thus are visited on innocent accident victims, who are required to bear the burden of losses caused by others.

The SABs is an administrative nightmare that is very costly to run. Insurers are required to spend vast sums on assessment costs when verifying entitlement to benefits, which sums are often out of keeping with the claim being investigated. There are too many rules, too much procedure, too many forms and too many deadlines – all contributing to expense, delay and an unwieldy bureaucracy. From time to time there have been amendments to the SABs which were in response to perceived problems, abuse and even fraud. Unfortunately, the resulting patchwork of amendments has only succeeded in increasing complexity, procedure and expense. This cannot be serving the interests of automobile policy holders and insurers. Fundamental reform is needed immediately.

The OBA is aware of other approaches to cost reduction. In particular there has been considerable discussion and review of the current definition of “catastrophic impairment” under the SABs. Attempts to further modify the definition are misguided. Rather, a look at the product as a whole (which involves consideration of the balance between tort rights

and first party benefits) is required, including the fundamental public policy interests that must be considered in any such review. This is not an exercise that involves research into medical issues or the predictability of medical outcomes. It concerns the resources and services we intend to make available to those who have suffered more profound injury. To the extent benefits are to be limited in the first party system, it is that much more important to the public interest to ensure that there are fewer limits on tort rights, permitting innocent accident victims from being denied the compensation that fairness and equity demand they receive.

Conclusions

This five-year review represents an important opportunity to address the significant shortcomings of the current automobile insurance regime. The interests of all Ontarians require the restoration of a more equitable balance between tort rights and first party benefits. First party benefits require fundamental reform for two compelling reasons: first, cost savings on the first party benefit side are essential to restore fairness to tort rights; and second, the first party benefit in its current state is unsustainable. The OBA believes that addressing these shortcomings now will result in a dramatically improved automobile insurance system that will provide the coverage that Ontarians need and expect; at price levels that result in good value for the premium dollar; and, in a climate that encourages insurers to write policies and invest in our province.