

## Have the Politics of Rate Regulation Produced a Better No-Fault Regime for Ontario ?

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### Résumé de l'article

Au cours des dix dernières années, l'Ontario a modifié trois fois et de façon substantielle son régime d'assurance automobile sans égard à la responsabilité. Ces réformes sont le reflet des pressions exercées par les assureurs et les avocats. Cependant, le principal motif avancé était, surtout pour la dernière révision, la volonté du gouvernement de réglementer le taux des primes d'assurance. Un heureux compromis semble avoir été trouvé avec la *Automobile Insurance Rate Stability Act*. Les avocats ont vu les possibilités de poursuites accrues, quoique de façon limitée. Les assureurs ont obtenu plus de certitude dans leurs prévisions, en raison de délais restreints et du plafonnement des indemnités dans le cas de blessures moins importantes. Les primes d'assurance ont été en partie réduites à cause d'une diminution des indemnités, mais surtout par un transfert des coûts générés par les accidents d'automobile vers d'autres sources d'indemnisation. La loi entraîne ainsi une forme de subvention de la conduite automobile. Il y a également des lacunes au niveau de l'indemnisation, surtout en ce qui concerne l'assistance médicale à long terme, qui touche principalement les membres les plus vulnérables de la société. Ces insuffisances pourraient et devraient être facilement corrigées. Jusqu'à maintenant, le contrôle exercé sur les primes a semblé donner à l'Ontario un meilleur régime d'assurance automobile sans égard à la responsabilité.

## Have the Politics of Rate Regulation Produced a Better No-Fault Regime for Ontario ?

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Bruce FELDTHUSEN\*

*Ontario has changed its no-fault legislation substantially three times in the past decade. These changes have reflected the interest group lobbying of the insurance industry and the practising bar. However, the main and explicit motivation, especially for the latest revision, has been the government's desire to regulate rates. With the Automobile Insurance Rate Stability Act the government appears to have struck a very successful compromise. The lawyers have been allowed an increased, albeit limited, right to sue in tort. The insurers have achieved more certainty, with stricter time and monetary limits on benefits for non-catastrophic injury. Rates have been reduced in part through lower benefit levels, but primarily by throwing the cost of automobile accidents on to other collateral sources. There is, therefore, some subsidization of driving inherent in the legislation. There are also compensation gaps, especially in long term health care, that affect mainly the most vulnerable members of society. Both these shortcomings could and should be easily corrected. So far, it would appear that the politics of rate regulation have generated an improved no-fault automobile accident compensation scheme for Ontario.*

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As you will have learned from my colleague, Craig Brown, Ontario has enjoyed (if enjoyed is the word) three different no-fault automobile insurance schemes during this decade<sup>1</sup>. Nor is it entirely a coincidence that Ontario has also enjoyed three different political parties in power during the

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1. C. BROWN, « No-fault Automobile Insurance in Ontario: A Long and Complicated Story », (1998) *Cahiers de Droit* 63-86 (special issue).

nineties. Each was the architect of a new regime. The first was a threshold scheme, the *Ontario Motorist Protection Plan*, which came into effect on June 21, 1990<sup>2</sup>. The second was a much more generous plan known as Bill 164 that came into effect on January 1, 1994<sup>3</sup>. The third and present scheme, generally referred to as Bill 59, came into effect on November 1, 1996. Its proper name, in more ways than one, is the *Automobile Insurance Rate Stability Act*<sup>4</sup>.

The purpose of this paper is to take a critical look at the core provisions of the newest scheme as it deals with economic loss. I will not deal with the minutiae, beyond noting that there is enough of it to make an *Income Tax Act* drafter proud. I will concentrate primarily on the provisions governing compensation for lost income and earning capacity, and those governing recovery for health or future care costs.

In brief, the new Act curtails the economic no-fault benefits considerably from what they were under Bill 164, and even from what they were under the Ontario Motorist Protection Plan. Except in the case of the catastrophically injured, the new *Statutory Accident Benefits Schedule*<sup>5</sup> provides only basic compensation for a limited time. Most automobile accident compensation will be obtained from other public and private insurers, especially from Ontario Health Insurance Protection (OHIP)<sup>6</sup> and under employment benefit plans. Insurers are required to provide optional extra cover for those who want it and do not have it in their employment or otherwise. Duplicated cover, and the wasteful effects of the collateral source rule, are discouraged. The right to sue in tort for economic loss is preserved for excess loss only.

Obviously, automobile insurance is, and has been for some time, a major political issue in Ontario. As one would expect, the two most prominent interest groups whose demands have shaped the outcomes are the practising bar and the insurance industry. The Act testifies to the success of both lobbies. The insurers have achieved strictly defined monetary and temporal limits to replace the open-ended risks they dread to underwrite. The lawyers have achieved an expanded right to sue for excess economic loss. More fundamentally, whereas Bill 164 might have been viewed as the

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2. *Insurance Act*, R.S.O. 1990, c. I.8, as amended by *Ontario Motorist Protection Plan*, S.O. 1990, c. 2.

3. *Ibid.*; S.O. 1993, c. 10.

4. *Ibid.*; *Automobile Insurance Rate Stability Act*, S.O. 1996, c. 21 [hereinafter *Insurance Act*].

5. *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996*, O. Reg. 403/96, as amended by O. Reg. 462/96 [hereinafter *Statutory Accident Benefits Schedule*].

6. See *infra*, note 60 and accompanying text.

first step towards a pure no-fault scheme, the new legislation manifests an entirely different philosophy. Effectively, the new scheme adopts what Professor Luntz refers to as the welfare model of accident compensation<sup>7</sup>. It remains politically useful, and economically of no great moment, to retain tort for excess loss.

It bears repeating that each of the last three provincial governments has also been a major player with its own independent agenda<sup>8</sup>. I am not referring to the governments' public interest agenda in devising a fair and efficient compensation system. Rather I am referring to the governments' concern with automobile insurance rate regulation; specifically, the desire to accommodate the barristers and the insurers while at the same time keeping mandatory auto insurance premiums low enough to avoid disaster at the polls. Automobile insurance in Ontario is private, not public. Nevertheless, at least since 1987, political parties have seen rate control as a «hot» political issue<sup>9</sup>. Most citizens drive, and most are aware of any changes in their auto insurance premiums. Premiums are of more immediate concern to voters than the remote prospect of future injury. Voters are aware that the government effectively controls the rates. Governments realize they might well succeed at the polls by keeping rates down, and could lose support should they preside over a period of increase.

It follows that it may be both unfair and unproductive to criticize the Ontario no-fault scheme primarily on compensation grounds. It is no coincidence that the Act is titled the *Automobile Insurance Rate Stability Act*. If the scheme and the rates stay stable for the next few years, something that has not happened in some time, the legislation will be judged a great success. It will have achieved the goals set by the government, and satisfied the price-conscious (and possibly short-sighted) desires of the electorate. This is precisely what I think will occur. If so, then complaints by those automobile accident victims whose compensation needs are being poorly served by the no-fault scheme are going to prove futile, unless their interests happen

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7. I have had the advantage of reading Professor Luntz's excellent paper prepared for this conference, «Compensation for Loss of an Economic Nature: An Australian Perspective». The similarities of our opinions on most issues has given me great comfort.

8. Rate regulation through benefit adjustment is an old story. See B. FELDTHUSEN, «Prices and Politics: Automobile Insurance Rate Regulation in Ontario», (1989) 1 *Can Ins. L. Rev.* 283. The present government admitted outright in interviews prior to passing the legislation that the government was «mainly interested in addressing the instability of auto insurance rate structures and the hefty increases with which consumers were faced. See J. FURLONG, «Ontario considers revisions to no-fault insurance», (1995) 15:20 *Lawyers Weekly* 16.

9. B. FELDTHUSEN, *loc. cit.*, note 8, at 298.

to coincide with those of the bar or the insurers. Those victims will have to look elsewhere in the public or private realm for relief.

There is no question that no-fault economic loss benefits have been substantially reduced in the new Act from what they were under Bill 164, and even from what they were under the *Ontario Motorist Protection Plan*. That in itself does not necessarily mean the new scheme is worse than its predecessors. What it does mean is that the level of benefits available from the «quasi-public» no-fault automobile scheme is diverging sharply from what would be obtained in a successful tort suit on behalf of a seriously injured plaintiff. What it also means is that «quasi-public» no-fault automobile benefits are coming back into line with the level of benefits available from other public schemes such as worker's compensation<sup>10</sup>. Although this may not have been the motivation of the lawyers, insurers or government, one impact of the new rate stabilization scheme may be to effect an important step on the path towards integration of the compensation of auto accident victims with that of other victims of accidents and illness<sup>11</sup>.

## 1. Income Replacement and Earning Capacity

### 1.1 The Benefits

Income replacement benefits are dealt with under the *Statutory Accident Benefits Schedule*<sup>12</sup>. Section 4 deals with claimants who were employed or about to be employed at the time of the accident, or employed for at least half the year prior to the accident<sup>13</sup>. The basic test for compensation during the two years after the accident is a «substantial inability to perform the essential tasks of the employment».

In common with most no-fault plans elsewhere, relatively minor claims are excluded from the scheme. In Ontario, as it is the case in Quebec, this is accomplished by providing that no benefits are available for the first seven days after the accident<sup>14</sup>.

For most claimants, the income replacement benefits will be temporary. After the two year period, the victim is not entitled to any loss of

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10. For example, under the *Workplace Safety and Insurance Act*, S.O. 1997, c. 16, Schedule A, which came into force on January 1, 1998, the basic income replacement rule provides for 85 % of weekly average net income.

11. This is discussed as a desirable goal by Professor Luntz, *supra*, note 7.

12. *Statutory Accident Benefits Schedule*, ss. 4-11.

13. The non-earner benefit is defined in s. 12 of the *Statutory Accident Benefits Schedule*, and is available to someone who suffers a «complete inability to carry on a normal life». It is usually in the amount of \$185/week, with a 26-week waiting period.

14. *Statutory Accident Benefits Schedule*, s. 5 (2) (a).

income or earning capacity benefits<sup>15</sup>. There is an exception if there exists a « complete inability to engage in any employment for which he or she is reasonably suited by education, training, or experience », in which case the benefits continue until age 65 and are then reduced<sup>16</sup>. This is one of several thresholds in the legislation that creates a compensation gap<sup>17</sup>. In this case, persons whose earning capacity is seriously and permanently reduced, but less than to the extent of complete inability, fall into the gap. Those who are fortunate enough to have been injured by a solvent defendant may turn to tort. The others will be treated like any other similarly situated person in Ontario with a like disability<sup>18</sup>.

The basic rule for quantifying income replacement is that the plan will pay 80 % of the victim's pre-accident after tax earnings to a maximum of \$400<sup>19</sup>. This is a decrease from 90 % of net weekly income to a maximum of \$1,000 under Bill 164, and 80 % of gross earnings under the *Ontario Motorist Protection Plan*<sup>20</sup>. Eighty per cent of earnings received free of tax as compensation for personal injury was putting more money in the hands of most accident victims than they were receiving from their pre-accident earnings net of tax. Professor Luntz refers to this as the « moral hazard » problem<sup>21</sup>. It violates the spirit if not the letter of the indemnity principle. It was just plain wasteful. The 80 % net rule is a sensible quantum, similar to that employed in other plans.

The \$400 limit should be assessed in conjunction with other sources. The plan is the secondary source of cover, paying only after amounts received or available from other public or private income replacement

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15. *Id.*, s. 5 (2) (b).

16. Under the *Statutory Accident Benefits Schedule*, s. 6 (1) (a) and (b), the minimum payment after 104 weeks is \$185/week. The amending formula used when the beneficiary reaches age 65 is found in s. 9.

17. Compare Luntz's discussion of the Victoria plan, *supra*, note 7, at s. 2.4.2. In contrast, Victoria does extend health care benefits to those below the threshold, whereas Ontario does not. See the prose beginning at note 44, *infra*.

18. The distributional consequences of this are discussed *infra*, section 3.

19. *Statutory Accident Benefits Schedule*, ss. 6 (1) (a) and 7 (1). Under s. 6 (1) (b) the minimum of \$185 is payable after the first two years. Under s. 5, benefits run for more than two years only if there exists a « complete inability to engage in any employment for which he or she is reasonably suited by education, training, or experience ». The \$400 limit does not necessarily apply if the insured had elected to purchase optional cover; available under s. 27.

20. *Statutory Accident Benefits Schedule — Accidents on or after January 1, 1994*, s. 10 (1), (2) and (9), *Statutory Accident Benefits Schedule — Accidents before January 1, 1994*, s. 12 (4) and (5).

21. *Infra*, note 60, at 2.4.4.

schemes<sup>22</sup>. Thus, a victim would turn first to any other sources of compensation, and look to the no-fault scheme only for excess loss, if any<sup>23</sup>. Drivers without good sources of other collateral benefits who wish to insure their earnings for more than \$400/week must purchase the optional income replacement cover available under the scheme<sup>24</sup>. These are the claimants most affected by the lowering of the limit from \$1,000 to \$400. Claimants with generous employment benefits would have replaced most of their income long before requiring the full \$1,000 from the former no-fault scheme<sup>25</sup>.

The part of the *Statutory Accident Benefits Schedule* dealing with these benefits is titled: *Income replacement benefit*. This suggests that these provisions are designed to restore a victim's pre-accident earnings or capacity. This is an indemnity model, not an entitlement model. This is what Professor Luntz has called the restitution model. The scheme is also regressive, and mirrors the tort system in this respect. Industry representatives are unaware of any insurers who adjust their rates to reflect the earnings of their insureds. Thus, the rates paid by less wealthy drivers reflect the risk they will have to restore high earners to their pre-accident standard of living, while receiving much lower benefits themselves.

In reality, all of this is qualified considerably by the \$400 cap. The cap adds a welfare or social security impact to the scheme. It is unclear whether this occurred by accident or by design. The impact may be a side effect of rate reduction policies. Regardless, the scheme will provide at most compensation for the loss of roughly an average Ontario earner's income<sup>26</sup>. Higher than average income earners will have to protect themselves through other plans, including employment plans or optional cover. This strikes me as just and appropriate. It is one thing for the state to guarantee all its citizens basic income maintenance; it is quite another to mandate complete no-fault lifestyle insurance. This is one advantage of a system that no longer

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22. *Statutory Accident Benefits Schedule*, ss. 7 and 60 (1).

23. There are some exceptions that may prove significant. One is that provided a claimant has applied for a collateral benefit and has not yet received it, the amount of that (disputed?) benefit will not be deducted from the no-fault award. Second, even if sick leave payments are available, they are not deducted unless they are actually being received. Third, payments under the *Employment Insurance Act*, S.C. 1996, c. 23 are not deducted. See *Statutory Accident Benefits Schedule*, s. 7 (1) 1.ii and (2) (b). Also, a disability payment payable under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (hereinafter CPP) is presumably not to be deducted based on the interpretation of identical wording in an earlier act. See *Culargi v. White*, [1998] O.J. No. 1628 (C.A.).

24. *Statutory Accident Benefits Schedule*, s. 27.

25. The distributional consequences are discussed *infra*, section 3.

26. The Ontario ministry of Finance reported on February 9, 1998 that Ontario personal per capita income was \$23,896 per year. This information can be located at <http://www.gov.on.ca/fin/english/oecoeng.htm> (consulted at the beginning of May 1998).



pretends to be an alternative to tort law. It can better divorce itself from aspects of tort law that do not correspond to social accident compensation goals. Those who can prove fault on the part of a solvent defendant may still bring an action to recover the loss of excess earnings in tort.

## 1.2 The Tort Rights

As a result of Bill 59, there is no *per se* ban on tort actions for economic loss, nor any provision written in the language of the traditional Ontario thresholds<sup>27</sup>. The old verbal threshold now applies only for non-economic loss<sup>28</sup>. This would seem to be a major improvement in the fortunes of the personal injury plaintiffs' bar over what they were under the previous regimes. The plaintiff's bar seems to be very pleased<sup>29</sup>. Nevertheless, despite the absence of any outright bar, there are some provisions that are referred to by members of the bar as «hidden thresholds». A more careful look suggests that although there is considerably more scope for tort actions than under Bill 164, the new regime may effectively render tort unavailable or unattractive for most victims unless they have been very seriously injured<sup>30</sup>. This is as it should be.

Section 267.5 (1) of the *Act* precludes any liability for damages suffered in the first seven days after the accident<sup>31</sup>. It also caps claims for pre-trial income and earning capacity losses at 80 % of net loss. That cap must be read in conjunction with s. 267.8 (1) which states that the damages to which the victim would otherwise be entitled must be reduced by all collateral payments for lost income or earning capacity received or available before trial, including payments for statutory accident benefits<sup>32</sup>, public and pri-

27. All three of the Ontario plans have been threshold plans, employing different combinations of adjectives such as «serious», «permanent» and «physical». Needless to say, the thresholds in the earlier legislation have produced the predictable volume of litigation quibbling over the meaning of these words. The so-called trilogy of leading decisions includes: *Meyer v. Bright*, (1993) 15 O.R. (3d) 130 (C.A.); *Grossi v. Bates*, (1995) 21 O.R. (3d) 564; and *Chilman v. Dimitrijevic*, (1996) 28 O.R. (3d) 536. See generally, J. VIGMOND, «Threshold Update: The Chronically Painful Saga Continues», (1998) *Practical Strategies For Advocates VII*—«Four Tort and Accident Schemes Ago» (The Advocates Society).

28. *Insurance Act*, s. 267.5 (5).

29. See e.g., R. OATLEY, «Economic Loss Is Back!» (unpublished paper prepared for the Canadian Bar Association Ontario, September 27, 1996) describing the Bill as a «dream».

30. See for example D. MARSHALL, «No Fault No Money», (1997) 21:3 *Can. Law.* 17 at 19, quoting R. BOGOROCH, «The glory days of personal injury are over». Other lawyers who do not wish to be quoted have indicated that tort activity under the new scheme is far less than they had anticipated.

31. *Insurance Act*, s. 267.5 (1).

32. *Id.*, s. 258.3 (1) (a) makes application for the benefits a condition precedent to commencing an action.

vate income continuation benefits and benefits from sick leave arising from employment<sup>33</sup>. The deductions are only to be made from heads of damage in respect of whose purposes match the purpose of those heads — income replacement collateral benefits reduce lost income awards, and so on<sup>34</sup>. These deductions leave the possibility for only relatively small claims in respect of pre-trial income loss. More important, it means that the less seriously injured who have substantially recovered and returned to work during the normal waiting period for trial will not find the tort suit worthwhile. This is a desirable improvement for the tort system<sup>35</sup>.

The greatest potential for actions in tort lies in the area of damage to future earning capacity. There is no restriction on the right to sue for this. Nor, as there is with pre-trial earnings, is there any statutory cap. The difference between a right to 80 % pre-trial earnings net of tax available before trial, and 100 % of gross earnings available after trial, may encourage lawyers to get their claims to trial sooner.

The main disincentive to claiming earnings loss derives from the treatment of future collateral benefits, governed by s. 267.8 (9) of the Act. This section requires a plaintiff who has recovered damages for lost income or earning capacity to hold in trust all related collateral benefit payments received, including statutory accident benefits, and public and private benefits including sick leave. Section 267.8 (10) requires the plaintiff to repay these benefits on a *pro rata* basis to the defendants who have provided them. The purpose of this arrangement is to prevent double recovery by the victim. It removes any incentive to sue for losses already covered by collateral sources. Section 267.8 (17) provides that the collateral sources do not have any rights of subrogation in respect to any benefits paid. Thus, they cannot compel the victim to initiate a law suit for their benefit.

The somewhat cumbersome trust arrangement was designed to deal with a problem that had manifested itself in the previous regimes. The courts were suggesting that it may have been necessary to deduct from damages to

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33. *Id.*, s. 267.8 (1). The rule regarding *Canada Pension Plan* benefits from the *Culargi* case, (*supra*, note 23) would apply here also. In addition, under s. 267.8 (2), any collateral benefits paid within the first seven days of the incident shall not be used to reduce the damage claim. Also, under s. 267.8 (15), payments already received or which will become available under the *Workers Compensation Act*, R.S.O. 1990, c. W.11, which has recently been amended by the *Workplace Safety and Insurance Act*, S.O. 1997, c. 16, Schedule A, on January 1, 1998, will not be used to reduce damages awarded under s. 267.8 (1).

34. *Bannon v. McNeely*, [1998] O.J. No. 1673 (C.A.).

35. Recall that the *Report of the Osgoode Hall Study on Compensation of Victims of Automobile Accidents*, 1965 discovered the opposite — minor claims in tort fared better than serious ones. See A. LINDEN, «Peaceful Co-existence and Automobile Accident Compensation», (1966) 9 *Can. B. J.* 5 at 7.

which the plaintiff was otherwise entitled the present value of amounts that the plaintiff was predicted to recover in the future from collateral sources<sup>36</sup>. The problem with this, at least from the perspective of the plaintiffs' bar, was that the plaintiff might not, in fact, ever receive those collateral benefits in those predicted amounts. Equally, one could argue that the plaintiff might never experience the predicted future losses on which the basic tort damage award was premised. The new legislation opts instead for what amounts to a periodic review and accounting of collateral payments, without a periodic review of the premises on which the tort damages were paid. Naturally, few plaintiffs will want to be bothered with operating such a trust plan. Section 267.8 (12) allows a judge to order, on conditions, that the plaintiff assign to the defendants any right to collateral payments.

## 2. Health Care

### 2.1 The Benefits

The basic health care entitlements are defined in Part V of the *Statutory Accidents Benefits Schedule*. The plan is required to meet « reasonable and necessary expenses » for medical, rehabilitation, and attendant care needs<sup>37</sup>. The sum of the medical and rehabilitation benefits may not exceed \$100,000, and the amount of the attendant care benefit shall not exceed \$72,000<sup>38</sup>. The medical and rehabilitation benefits are not ordinarily payable for longer than ten years, nor the care benefit for more than two years, after the accident<sup>39</sup>. Some relief from these time restrictions may be obtained from judicial decisions under the earlier schemes indicating that an expense that is known within the period to be certain to be incurred in the future is an expense incurred within the period for the purposes of obtaining no-fault benefits<sup>40</sup>.

There are exceptions to the above in the case of « catastrophic impairment », a term which is defined in considerable medical detail in the regula-

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36. The leading cases are *Coderre v. Lambert*, (1993) 14 O.R. (3d) 453 (C.A.); *Whittle v. Ontario (Minister of Transportation and Communications)*, (1995) 24 O.R. (3d) 394 (Gen. Div.); *Orchover v. Wright*, (1996) 28 O.R. (3d) 263 (Gen. Div.); *Sharp v. Hall*, (1997) 44 C.C.L.I. (2d) 200 (General Division); *Chrappa v. Ohm*, [1998] O.J. No. 1678 (C.A.); and *Bannon v. McNeely*, [1998] O.J. No. 1673 (C.A.). See also *Cox v. Carter*, (1976) 13 O.R. (2d) 717 (H.C.); *Stante v. Boudreau*, (1980) 29 O.R. (2d) 1 (C.A.).

37. *Statutory Accident Benefits Schedule*, ss. 14 (2), 15 (2), 16 (2).

38. *Id.*, s. 19 (1) and (2).

39. *Id.*, s. 18 (1) and (2).

40. See e.g., *Placken v. Canadian Surety Co.*, (1990) 47 C.C.L.I. 268 (Ontario Dist. Ct.); *Smith (Committee of) v. Wawanese Mutual Insurance Co.*, (1996) 38 C.C.L.I. (2d) 223 (Ont. Gen. Div.).

tions<sup>41</sup>. The time limits for the medical and rehabilitation benefits do not apply in the case of catastrophic impairment. The cap on the sum of medical and rehabilitation benefits in catastrophic cases is \$1,000,000, compared to \$100,000 in other cases<sup>42</sup>. The limit for attendant care is \$6,000 per month to a total of \$1,000,000, not \$3,000 per month to a limit of \$72,000 as in other cases<sup>43</sup>. In effect, the care benefits that were available to anyone who reasonably required them under Bill 164 are now available only to those who cross the «catastrophic impairment» threshold.

Interestingly, hospitals are under financial pressure to discharge patients as quickly. That means that the amount of medical expenses born by the provincial health care plan, OHIP, decreases when the victims are discharged into settings not covered by OHIP. Thus, more pressure is placed on the no-fault limit than would be the case with longer hospital stays.

The fundamental concern with health care costs is the level of no-fault cover. Is it fair and adequate? One could posit an ideal society in which every citizen would be guaranteed a decent standard of living, including access to all basic necessities such as food, shelter, clothing, education, security, and so on, and most certainly health care. There would not exist compensation schemes, *per se*. A caring society would provide the best health care benefits it could afford. It would provide them equally to everyone, including the victims of illness and accident. It would not distinguish between and amongst victims of different sorts of accidents. The same disability would be treated equally, whether it was incurred by disease, an accident in the workplace or the home, or an accident on the highway. From that perspective, successful tort plaintiffs would probably do relatively well compared to, for example, someone who becomes seriously ill or who is injured at home. Similarly, Ontario no-fault claimants probably fare relatively better than many others with similar disabilities.

For present purposes, only a more conservative critique is possible, accepting as given the basic stated premise of the no-fault plan — victims of automobile accidents are entitled to «reasonable and necessary» medical costs, rehabilitation and attendant care. On that standard, one would have to argue that the scheme is not fair and adequate. The simple reason is that the scheme imposes limits on claims that are otherwise «reasonable and necessary». If a person reasonably requires more funds for a longer period

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41. *Insurance Act*, s. 267.5 (3) defined in the *Statutory Accident Benefit Schedule*, s. 2 (1).

42. *Statutory Accident Benefits Schedule*, s. 19 (1) (b) and (2) (b).

43. *Statutory Accident Benefits Schedule*, ss. 16 (5) and 19 (2).

than the Schedule allows, the scheme, by definition, does not provide a reasonable level of cover.

There are two classes of plaintiffs who will potentially be deprived of reasonable health care benefits. The first consists of persons who may fall into another « gap », similar to although differently defined than the earnings gap noted above<sup>44</sup>. Although seriously and permanently injured, these are victims whose injuries fail to meet the definition of « catastrophic impairment<sup>45</sup> ». The second consists of those whose injuries are catastrophic, but whose reasonable needs cannot be met through the benefits available for catastrophic impairment.

Note that there is a huge gap in the benefit levels between the ordinary and the catastrophic case, which does not necessarily mirror a huge gap in reasonable and necessary health care requirements. The scheme provides quite well for the relatively less seriously injured victims. By definition, those who fall within the gap are the relatively more seriously injured whose injuries are relatively more likely to be permanent. This is exactly the wrong distribution of benefits if accident compensation is the goal.

If the industry predicts that a large number of victims will fall in the benefit gap, then Ontario's scheme is defective because it leaves too many people without basic necessary health care cover. Alternatively, if only a few serious cases are expected to have reasonable needs beyond the statutory limits, why not cover everyone for this remote contingency and spread the risk among all drivers ? The answer undoubtedly turns on how much of a premium reduction is really attributable to these limits.

Much the same argument applies to the cover limits for catastrophic injury. If many catastrophic victims will not receive reasonable and necessary health care benefits for as long as required, the scheme is defective by failing the most vulnerable in society. If only a few are at risk, let us insure them. Why throw such a terrible risk by lot to a few victims instead of spreading it harmlessly to all drivers ?

Insurers are required to offer optional health care cover with much higher monetary limits and without time limits<sup>46</sup>. To the extent that there exists a market for such cover, it will consist of relatively risk-adverse and wealthy drivers. Average drivers do not arrange their affairs on the assumption that they will suffer injuries whose costs exceed the policy limits, even

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44. See *supra*, note 17 and accompanying text.

45. *Statutory Accident Benefits Schedule*, s. 2 (1).

46. *Id.*, s. 27 (1) 3.

if they know what those limits are<sup>47</sup>. More important, the need for reasonable health care, unlike the need for income replacement, does not vary with income level. As discussed below, it will be the most vulnerable members of society who will suffer the most from this gap in cover.

## 2.2 Tort Rights

Those who have suffered catastrophic impairment may bring an action in tort to recover their excess loss<sup>48</sup>. It is not yet clear whether persons whose reasonable and necessary health care needs fall within the gap identified above may also sue in tort<sup>49</sup>. Section 267.5 (3) precludes liability for «damages for expenses that have been incurred or will be incurred for health care<sup>50</sup>». I suspect this was intended to operate as a complete bar in non-catastrophic cases to claims for expenditures of the nature described in the regulations. Put otherwise, in the ordinary case, recovery for health care expenditures was intended to be on a pure no-fault basis. If this interpretation is correct, there will be some, one hopes only a few, persons whose injuries are not catastrophic, but whose reasonable expenses exceed the limits in the regulations. They will not be able to recover the excess in tort. However, the act is not drafted as precisely as one might like. There is room for an argument that the plaintiff is precluded only from suing in respect of no-fault health care funds that have been or will be actually provided<sup>51</sup>. In that case, the main difference between catastrophic and non-catastrophic injuries would be the no-fault claim limits to the duration and amount of the benefits. If so, we will experience the curious result that more and larger tort claims for health care loss will be brought by seriously injured plaintiffs who are not catastrophically injured than by those who are.

In cases where tort claims for health care losses are permitted, the rules governing payments from collateral sources are similar to those discussed

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47. Most of my law students are unaware there exists any no-fault auto coverage in Ontario, let alone what the benefit levels are.

48. *Insurance Act*, s. 267.5 (4).

49. It is perhaps not of great moment from an accident compensation perspective whether or not there exists a complete bar for health care claims in the ordinary case. The administrative savings that accrue from pure no-fault plans are best achieved when there is a complete bar to litigation. In Ontario, there survives a limited right to sue for excess earning capacity loss and non-pecuniary loss.

50. «Health care» is defined in the *Insurance Act*, s. 224 (1) to include all goods and services for which payment is provided by the medical, rehabilitation, and attendant care benefits provided for in the *Statutory Accident Benefits Schedule*. Section 14 of the *Statutory Accident Benefits Schedule* provides a detailed definition of the health care expenses covered by the legislation.

51. R. OATLEY, *op. cit.*, note 29.

earlier in respect of income and earning capacity. Section is 267.8 (4) requires a reduction in damages for all payments received before the trial under the scheme or other public and private plans. Future collateral payments are imposed with a trust exactly as discussed earlier<sup>52</sup>.

Claimants may settle their claims by negotiating «cash outs» of their statutory accident benefits, albeit with some risks if the case later goes to trial<sup>53</sup>. In the past insurers have demanded discounts ranging from 20 to 50 %. Apparently, insureds have been willing to accept this, in part in order to avoid the need to be «compelled to attend on assessments, medical appointments, and participate in rehabilitation programs mandated by the accident benefit insurer<sup>54</sup>». With the lower benefits now available, the value of the cashouts will be considerably less, and hence less attractive. The ability to settle for a lump sum circumvents the advantages to a variable periodic payment scheme. Interestingly, the Act allows a judge to order a structured damage award instead of a lump sum in specified circumstances where this would appear to be necessary to protect the plaintiff<sup>55</sup>.

### 3. Collateral Sources, Resource Allocation, and Benefit Distribution

Perhaps the most significant and certainly one of the most sensible aspects of the no-fault legislation in Ontario and its predecessors is the abolition of the common law collateral source rule by which damages are quantified without reference to payments received or available from collateral sources. Under the common law rule, the plaintiff is left overcompensated unless the collateral source is willing and able to exercise its rights of subrogation, often a wastefully expensive proposition. By one means or another, the no-fault plans have made the collateral sources the primary source of compensation, and the tortfeasor the secondary source. In addition, under the new act, the no-fault benefits themselves are designated as secondary sources of compensation, with the claimant required to turn first to other public and private sources of compensation<sup>56</sup>. Reducing the amount of duplication in coverage, and reducing wasteful loss shifting through subrogation, are notable achievements. The legislature ought to consider

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52. *Insurance Act*, s. 267.8 (9), (10), (12) and (17), also see *supra*, note 36 and accompanying text.

53. See e.g., *Orchover v. Wright*, (1996) 28 O.R. (3d) 263. See generally R. BOGOROCH, «Cashing Out Accident Benefits Claims under the Statutory Accident Benefits Schedule», (1998) *Practical Strategies For Advocates VII*—«Four Tort and Accident Schemes Ago» (The Advocates Society).

54. Taken from sample settlement form provided by R. BOGOROCH, *loc. cit.*, note 53.

55. *Insurance Act*, s. 267.10.

56. This is a complete reversal of the Bill 164 scheme which had designated the auto scheme as the sole source of compensation.

passing legislation to abrogate the common law collateral rule across the board in tort law.

However, there is a problem with what has been done with these savings. Most have been channelled into the auto sector alone in the form of lower premiums. This is because a driver who is injured must turn first to another source of compensation, most likely an employment benefit plan. This means that the cost of accidents caused by driving are assigned first to activities that did not cause the accidents, such as employment<sup>57</sup>. Driving is therefore underpriced. Too many people drive and they experience more accidents than would be the case were the true costs of driving reflected in the auto premiums. Similarly, too few people are engaged in the employment sectors because they are paying for accidents they did not cause<sup>58</sup>. This is what one would expect from a scheme designed to control automobile insurance rates, although not what one would expect from a government determined to reduce payroll taxes. For the foreseeable future, Ontario is likely to continue to cross-subsidize drivers in this manner. The only exception exists in respect to OHIP benefits. All insurers are required to make annual payments to the health plan according to a formula, thus allocating at least some of the health care costs to drivers<sup>59</sup>. OHIP does not subrogate<sup>60</sup>.

The second aspect of the decision to subsidize automobile rates relates to the distributional consequences. Ontario effectively has designated employment as the sector first responsible for income replacement and extra health care benefits. However, employment is not universal and hence can not provide universal cover, especially for important health care needs. Many people are self-employed, unemployed, under-employed, or employed in positions that provide few benefits. This trend may be increasing. These people are disproportionately the young and the elderly, the poor, women, members of minority racial groups, immigrants, and the less well-educated. Ideally, affordable reasonable and necessary health care needs

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57. One exception is for benefits available under the *Worker's Compensation Act*. Unless the injured worker has elected to bring an action in lieu of claiming worker's compensation benefits, the worker's compensation benefits are the primary source of compensation, not the no-fault benefits. This makes sense from an economic deterrence point of view — the employment is the effective cause of the auto accident. See s. 59 of the *Statutory Accident Benefits Schedule*.

58. By this I mean that the accident would have happened whether or not the particular employment relation existed; for example, if it occurred on a weekend drive to the golf course. This is not the case when an automobile accident occurs in the course of employment, as discussed in note 57.

59. *Insurance Act*, s. 14.1.

60. *Health Insurance Act*, R.S.O. 1990, c. H.6.



should be provided to every citizen by the state. The present auto scheme unnecessarily increases the gap between the well-employed «haves» and the «have nots»<sup>61</sup>. The unemployed also subsidize the auto rates paid by the employed, because the unemployed will not be eligible for income replacement benefits<sup>62</sup>.

## Conclusion

Historically, there has been a tendency to compare no-fault benefits to tort damage awards, however misguided such a comparison may have been<sup>63</sup>. As a matter of political expedience, for a no-fault scheme to be regarded as a viable «alternative» to tort, the benefits cannot be dramatically less, nor quantified on significantly different principles, than would be obtained in tort. It is also true that the more generous the no-fault benefits, the more likely the scheme will curtail tort. Otherwise the cost of buying both generous no-fault and full liability cover would make driving prohibitively expensive. Thus the real world connection between generous no-fault benefits and curtailed tort, even though contingent, is a close one. The Ontario regime under Bill 164 was as good an example of this as any.

A no-fault scheme that is not conceptualized or marketed as an alternative to tort is less constrained. It can adopt, for example, the relatively modest goal of providing mandatory no-fault cover at a basic welfare level. Or, it can attempt to provide the best no-fault cover available at pre-established rates. Ontario's new scheme reflects both these goals.

There were two keys to making the scheme viable. The first was to throw some of the cost of auto accidents onto other compensation schemes. This has resource allocation consequences, in particular because it subsidizes driving at the expense of other activities. This also has undesirable distributional consequences to the extent that these alternative sources of compensation are less available to the more vulnerable members of society. The second was the abolition of the common law collateral source rule. This is probably the single most important piece of tort reform ever effected in Ontario. It keeps virtually all relatively minor injuries out of the tort system.

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61. This problem is exacerbated when insurers target, for example, employees of large employers who offer good benefits, and solicit them with lower rates. On the one hand, this seems fair because otherwise those with employment benefits are subsidizing the auto premiums of those who do not. On the other hand, this leaves still more to be paid by those drivers who do not have the employment benefits.

62. The elderly retired drivers are permitted to file a declaration that they will not claim the earnings benefits and obtain lower rates as a result.

63. Both because tort has winners and losers and wins are achieved at a cost, and because tort arguably exists to serve other goal as much or more as it serves compensation.

Leaving tort actions to deal with excess loss pleased the lawyers. It also helped the government account politically for the shortfall in the no-fault cover.

The biggest shortcoming in the plan is in the health care area. It seems obvious that the insurers and government felt that they could not fund reasonable health care for everyone to the catastrophic limits at a satisfactory price. They did establish a solid plan for the less seriously and temporarily disabled. They did arrange to take care of the most seriously injured by defining a class of catastrophic injury eligible for relatively generous benefits. However, they also created a compensation gap into which other serious and permanently injured victims will fall. It is difficult to believe that the government's goals could not be achieved in some other manner more compatible with equitable compensation objectives.