No-fault North America

Roy Nickerson, Canada

The insurance industry is making a concerted push to introduce no fault automotive compensation schemes in several Australian jurisdictions. New proposals seem likely to be based on Canadian or US models, so Roy Nickerson has provided APLA with this timely summary of the cross-pacific experience:

This discussion will be confined to Canada and United States, notwithstanding the North American nomenclature. Although Mexico's driving population is not insignificant, the demographics of its population and the lack of a traditional tort system, makes a study of their system of little value or interest to a jurisdiction considering a departure from the traditional fault-based system enforced by a respected judiciary.

The subject of no-fault covers the broad field of the diminution of the ability to sue a tort-feasor for compensation. It is more than a simple loss of an injured party's right to sue, in that it attempts to offset this loss with a different kind of universal benefit. Whatever form it takes, its *raison d'ëtre* remains the same - cost control.

No-fault insurance is a radical departure from the traditional tort system. As it was provoked by escalating insurance costs, its advancement was promoted by the insurance industry, with a view to improving profit margins. Where it has been adopted, this radical departure from the traditional tort system received the blessing of the voting populace because of promises of lower insurance premiums and faster medical care for all motor vehicle accident victims, regardless of who caused the accident.

No-fault was, appropriately enough, first introduced in North America in the State of Michigan, the location of the City of Detroit, the birth place of the North American automotive industry.

What was introduced to Michigan in 1972 was a "threshold" no-fault system. This system limits the right to sue to those victims who are killed or suffer certain defined injuries. In Michigan the threshold requires an injury to cause a serious impairment of bodily function, or permanent serious disfigurement before a victim can sue. In return for the loss of the right to sue for full compensation, any person injured as a result of a motor vehicle accident is entitled to apply forthwith to his or her own insurer for partial (85%) income loss benefits and medical and rehabilitation benefits.

Experience has shown that the verbal threshold plans have eliminated over 90 percent of tort claims.

Other forms of thresholds are more closely linked to economic factors, i.e.:

a) a prohibition against suing unless paid medical expenses reach a certain level
b) a prohibition against recovery of general damages less than a certain level.

Many jurisdictions have adopted a hybrid system consisting of the retention of the tort system, but requiring the victim's insurers to provide a minimum level of immediate benefits, such as wage replacement and medical benefits. This may be of significant benefit to a victim in the U.S.A., which does not have a universal health care system.

No-fault in various forms and guises has been adopted in approximately half of the States in America. Presently the opposing forces appear to be deadlocked with neither the insurance industry making significant inroads in non-no-fault states, nor the American Trial Layers Association being able to rollback no-fault in States which have significantly altered the tort system.

Understanding the American system requires an appreciation of the aforesaid reference to the lack of universal health care in that country. Most States that do have a no-fault system have a mixed system, ie. they provide for no-fault medical and disability benefits without taking away a victim's right to recover for pain and suffering. Because health care in America is very expensive, the insurers in these jurisdictions are still striving to obtain a prohibition against tort litigation. Several years ago the State of Pennsylvania repealed their mixed no-fault system at the instigation of the insurance industry, because of the prohibitive cost of medical treatment. More recently the State of Hawaii up-graded their mixed no-fault system to a threshold system, but the legislation was vetoed by the Governor. This dispute between the various levels of government will inevitably be resolved by the voters.

The main weapon of proponents of no-fault is the threat of rising insurance rates. Interestingly enough, heavily populated threshold states like New York and Michigan, have similar insurance rates to the most significant tort state, California. Insurance rates in the remaining states fall above or below the rates in these states, with no apparent pattern which can be attributed to whether or not the state has no-fault. This may be because added to the equation, is the range of personal injury coverage required. To say the least, the discrepancy is vast. The range is attributable to whether the population of a state embraces the concept of having insurance to protect most victims or having insurance to protect one's own fortune. As a result, some states require no insurance and some states require significant amounts of insurance.

Historically Canada eventually embraces most developments arising in the United States and no-fault was no exception. Canada lagged behind the adoption of extreme systems such as threshold no-fault, probably because of free health care and the lack of obscenely high civil jury awards. (Awards for pain and suffering and loss of enjoyment of life are capped by Canadian Courts at about $170,000 US). There are 10 provincial

jurisdictions in Canada and almost any form of no-fault can be found in any one of them.

Quebec is the only one of the states or provinces that does not have a common law tradition and, interestingly enough, it was the first jurisdiction on the continent to adopt a "pure" no-fault system. All victims have lost the right to sue in return for a form of income replacement benefit, medical and funeral expenses and even a modest entitlement to an award for pain and suffering, depending on the extent of the injury. The maximum award for pain and suffering is less than $95,000 US and is determined in a manner similar to Workers' Compensation schemes, where the body is divided up into a "meat chart" with certain values attributed to various parts of the anatomy.

Quite recently two other provinces have passed no-fault laws similar to Quebec. Coincidentally, these two provinces, Manitoba and Saskatchewan, like Quebec before them, have insurance schemes which are funded and administered wholly by their provincial governments. One other Canadian province, British Columbia, has a provincial government automobile insurance scheme. There are no American States with government run insurance plans.

Other than Quebec, the remaining provinces were slow to consider no-fault schemes that prohibited lawsuits by victims of motor vehicle accidents. At the same time, all of the provinces were quick to pass mixed no-fault schemes to provide immediate, if modest, income replacement benefits and extra health care coverage without the elimination of tortious remedies. Although these benefits existed since the early 1970s, Ontario was the first of the common law provinces to adopt a no-fault scheme prohibiting litigation. The scheme they adopted in 1990 was a threshold no-fault similar to that initiated in the States of Michigan. The verbal threshold in Ontario for victims not killed in accidents requires "permanent serious disfigurement or permanent serious impairment of an important bodily function caused by a continuing injury that is physical in nature".

Ontario is an interesting study because politics played such a large part in the adoption of their no-fault system. It was initiated by a newly elected Liberal party, which wrested power from the previous long-governing Conservative party. In the next election the labouresque (New Democratic Party) formed the next government. It had promised to effect changes to the fledgling no-fault system. After four turbulent years in power, it was replaced by a rejuvenated Conservative government, which has promised further changes to the system. It is unknown how big a part no-fault insurance played in the three elections in this short period of time, as it was only one of the many social and economic issues percolating in the Province of Ontario at the relevant time.

The far western provinces of Alberta and British Columbia and the Atlantic provinces of Newfoundland, Prince Edward Island, New Brunswick and Nova Scotia remain tort jurisdictions. As indicated earlier, only one of the remaining provinces, British Columbia, has a provincially run insurance scheme. Historically provinces with government run automobile insurance schemes are able to move the fastest in eliminating the tort system, presumably because the governments are insurers and have a vested interest in insurance rates.

Canada is moving away from universal free health care coverage as the various levels of government attempt to balance their budgets. Because funding health care to all victims is a big part of no-fault, it is unknown how this development will effect the impetus to adopt radical no-fault schemes. On the one hand it is inclined to make the general population receptive to no-fault, as it will promise to replace health care benefits being rolled back, particularly physiotherapy, and on the other hand the increased costs make the insurers themselves wary.

Traditionally the introduction of no-fault of the type that prohibits or limits litigation, is preceded by sparring between interest groups: notably lawyers who act for victims and insurance companies. It is not a battle between the forces of light and darkness. It is part of the continuing evolution of the tort system which evolved out of its predecessor. Notwithstanding the force applied, which is motivated by self-interest of any group, what will evolve eventually is a system which benefits the most participants. ■

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