PRESERVING ACCESS TO JUSTICE: RESISTING THE PUSH TO RESTRICT TORT RIGHTS

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Many authors have struggled with the challenge of defining the concepts of access to justice and tort law. [1] Defining these concepts, however, is less important than recognizing the historical context behind the development of these concepts and their evolution. The impact on human interaction and conduct as well as the important social policy functions of these concepts ought to be the focus. They have developed primarily to recognize important fundamental obligations that allow people to live peaceably.[2] Although access to justice and tort are separate and distinct concepts, they overlap in important ways.

Tort law regulates the conduct of all people in their interactions with others through the legal imposition of a duty of care. It creates obligations that, without tort law, would not exist, and calls for those who breach the duty of care to compensate those harmed by the breach. In this way, tort law promotes principles of responsibility and accountability for behaviour insofar as the wrongdoer and the injured party are concerned. Those principles are recognized in part when the wrongdoer is required to compensate the injured person for her loss. While compensation is a very important function of tort law, it is by no means the only function. On a broader scale, holding wrongdoers responsible for conduct that breaches tort law duties informs all people about unacceptable conduct, thereby achieving two other very important objectives of tort law: education and deterrence.

The concept of tort involves primarily the transfer of the burden of loss from an innocent injured party to a wrongdoer. Access to justice is the means by which the injured can make the wrongdoer responsible and accountable.[3] These fundamental principles of responsibility and accountability, through compensation, accord with what most people, and particularly injured parties, would consider the equitable

[1] See Linden and Feldthusen, Canadian Tort Law (8th edition).
[2] See Fridman, The Law of Torts in Canada, 2nd edition, page 9.
[3] The concept really involves a means to achieve a fair and just remedy for a wrong caused by another.

way to attribute loss. In reference to the obligations imposed by tort law, Professor Fridman stated:

> "Nowhere is this better stated than in the Institutes of Justinian, which declare the fundamental principles of the law to be: *honeste vivere, alterum non laedere, suum cuique tribuere*. To live honourably, not to hurt another, and to render unto each man that which is his: these were the underlying notions on which the specific content of Roman law was based. The law of torts, in its modern if not its ancient version, encapsulates these ideas."[4]

Modern tort law has its critics and the way in which tort law meets it objectives[5] has clearly evolved. Civil liability for tortuous conduct undoubtedly created a burden for wrongdoers, one that they often were unable to meet. The concept of insurance allowed individuals to protect their interests from obligations for tortuous conduct and permitted the spreading of risk for liability owed to injured parties. Insurance has historically allowed for protection of the interests of injured people by providing funding for their losses that otherwise might not be available, promoting the principle that those wronged ought not to bear the burden of loss caused by another. In the last couple of decades the focus on controlling costs in the insurance system has compromised the objective of shifting the burden of loss by ignoring it to varying degrees.

As society grows and becomes more complex, the demands on the tort system increase. The tort system has also been subjected to criticism for being expensive and inefficient, particularly by insurance companies called upon to pay losses under the policies they have underwritten. This resulted in initiatives to find alternate systems that might be less expensive and perhaps more efficient. The search for an alternate way of dealing with compensation, however, has unfortunately sacrificed the important purposes and objectives of the tort system and has compromised access to justice. Loss previously shifted to the wrongdoer is effectively attributed back to the injured party. Motivated, as the search was, by a single-minded focus on cost reduction without regard to other important social objectives, it has resulted in systems that do a disservice to consumers, injured people and social policy goals. Consumers receive less protection and a diluted product; innocent injured people are under-compensated and thus are called upon to bear the burden of loss caused by another; and, the importance of access to justice, as well as the functions of responsibility, accountability, education and deterrence, are diminished. The tort system, like democracy, is the worst system except all the others that have been tried.[6]

Compensation in Canada for injury is achieved at different levels. The idea of compensating all injured people is a social welfare concept, like universal health

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[4] See Fridman, page 9.

[5] Objectives are compensation, accountability, responsibility, education and deterrence.

[6] Winston Churchill said: "It has been said that democracy is the worst form of government except all the others that have been tried."

care.[7] The functions of tort law are entirely foreign to pure social welfare systems. Notions of accountability and responsibility are of no consequence. The social welfare approach provides a single level of care for all parties. Given the nature of social welfare systems, they must inherently be limited and are incapable of providing complete indemnity. An additional layer of compensation is provided by disability insurance and health coverage intended to supplement universal health care. This may be available to some through employment and to all injured in car accidents through no-fault schemes that vary widely. This, too, provides incomplete compensation. The final level is achieved through tort law, available to those injured by others, and intended to place the injured party in the position they would have been had the injury not occurred. These different levels of compensation interact in a complex way, are based on very different social policy considerations and the challenge is to find the right balance of each. Access to justice is concerned with tort rights and not social welfare schemes, but social welfare systems and no-fault insurance schemes are impacting on traditional tort rights.

Access to justice is under attack from many quarters, with advocates for restrictions on liability alleging that upward trends in compensation have and continue to burden the system. In the United States and Canada, the push for "tort reform" seeks to impose legislative restrictions on the ability to sue. Tort restrictions are nothing new in Canada, with a court-imposed cap on non-pecuniary general damages having been established in 1978.[8] Restrictions on compensation for work-related injuries in Canada have been around for the better part of a century[9]. Other jurisdictions have gone much further, with medical malpractice litigation eliminated by a government-funded system in New Zealand since 1974. In Canada some continue to advocate for no-fault medical malpractice. Some now advocate for the elimination of the concept of joint and several liability, the effect of which would deprive some injured parties of full compensation in favour of limiting the liability of a wrongdoer who had contributed to the loss[10]. In relation to automobile accidents, by 2003 every province in Canada had its own version of no-fault insurance.

It seems that the big push for implementing no-fault systems and restricting access to justice often comes on the heels of what is described as a crisis. In the United States the words "medical malpractice" are rarely uttered without the word "crisis". While there may indeed be problems with the compensation system of our neighbours to the south, no such crisis exists in Canada in the medical malpractice

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[7] See Linden and Feldthusen, Canadian Tort Law (8th edititon), page 6 for a discussion on the three-level system of compensation.

[8] See the Trilogy: Teno v. Arnold, [1978] 2 S.C.R. 287; Andrews v. Grand & Toy Alberta Ltd., [1978] 2 S.C.R. 299; and, Thornton v. Prince George School Board, [1978] 2 S.C.R. 267.

[9]See http://www.awcbc.org/en/workerscompensationtimeline.asp

[10] The rule on joint and several liability is unfortunately called the "1% rule" by some, an unfair characterization which distracts the inquiry from looking at the principles underlying the rule.

area.[11] Likewise, there should not be insurances crises of any kind in the auto insurance system.

For automobile insurance, harsh restrictions on tort rights and significantly enhanced no-fault benefits first appeared in Ontario in 1990 following the alleged insurance crisis of the mid-1980s. Nova Scotia, New Brunswick and Prince Edward Island subsequently followed suit with tort restrictions urged on an unsuspecting public by an insurance industry with one objective in mind: profit.

It is crucial to point out, and it will remain a theme of this paper throughout, that the insurance industry in Canada is entitled to earn a profit. Short of a public auto insurance system[12], it is essential that we develop an auto insurance product that creates a climate in which insurers are willing to do business. This means they must earn a reasonable rate of return on their investment. Further, those of us who advocate for auto insurance reform would do our constituents a disservice if we promoted a product that failed to ensure a healthy and viable insurance industry in the process. Having said that, when the focus is on profit to the exclusion of other important considerations, the result is an inferior product that inevitably fails to meet the needs of consumers and, as important, the needs of injured people who must access compensation under the system. Auto insurance reform must address the interests of consumers (which in turn also addresses the political issues), access to justice (involving notions of equity, fairness and accountability, among others) and the health and viability of auto insurers. Any criticism in this paper of the insurance industry's approach to auto insurance reform should not be taken as an indictment of the insurance industry, but rather an indictment of its approach to reform. The theme of this paper is merely that auto insurance can be profitable for insurers, accessible to consumers and effective for injured people if reform is approached differently.

Two other concerns will be raised at points in this paper. The first is concerned with complexity; the second with lasting solutions. On the matter of complexity, consumers cannot be expected to have any confidence in an auto insurance product that they do not understand and that places too many obstacles in the way of legitimate access to benefits. Ontario's current first party benefit scheme is a glaring example of a product that consumers cannot be comfortable with.

In Ontario, as tort restrictions were added, the first party benefit system evolved into the most convoluted, expensive and inefficient way to deliver compensation imaginable. The amounts of money at stake compelled insurers to become actively involved in the health care decisions of their insured customers, a role that they are hardly skilled to undertake, and has largely undermined the first party relationship between insurer and insured. In the process of guarding the vault to benefits,

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[11] See litigation statistics on the CMPA website, which demonstrate relatively few lawsuits are commenced in Canada each year and many are ultimately resolved in favour of the defendant physician.
[12] Like in British Columbia.

insurers have acquired rights and obligations for assessments that are largely to blame for expenses now reaching unsustainable levels.

With respect to lasting solutions, previous reforms to auto insurance have utterly failed to provide long-term solutions. Governments, insurers and other stakeholders have had to re-visit the issue of auto insurance reform repeatedly as a consequence of what has amounted to only short-term fixes. Essentially, the solutions have failed to address the problems. More will be said on this below.

This paper will examine the case for and against tort restrictions in the context of automobile insurance claims. Many of the arguments made in the context of auto insurance also apply to attempts to limit rights in other claims. Automobile insurance is instructive given the considerable experience we have to date. This paper will also suggest that there are better ways to approach auto insurance reform than those adopted in Ontario and the Atlantic Provinces. It will be argued that a broader understanding of the various interests at stake is central to designing the product that best meets consumer needs and addresses important values.

TORT RESTRICTIONS AND ECONOMICS

To fully appreciate the rationale for imposing restrictions on tort rights, it is necessary to understand the economic and political pressures that led to those restrictions. As will be discussed later, to offer responsible suggestions for future reform to automobile insurance likewise requires an understanding of economics and the resulting political pressures.

Essentially the crises that have led to restrictions have arisen out of the threat of precipitous increases in insurance premiums for the driving public. From time to time, auto insurers see their profitability diminish to unacceptably low levels. This in turn results in the need to dramatically increase premiums to offset their diminished profits. Large increases in premiums are understandably unacceptable to the pubic and consumers are not shy about expressing their disapproval during an election by voting governments out of office. Insurers, already not much admired by their customers, (but probably no less admired than lawyers) are also sensitive to the unpopularity of drastic rises in premiums. In the absence of large premium increases, the only other way to restore insurers to profitability is to reduce their costs. Governments, fearing a public backlash, have tended to capitulate to the urgings of the insurance industry in the face of these developments.

Cost reduction in the form of streamlining the administration of insurance companies or improving efficiency is hard work and takes time. It seems that some insurance companies are run more efficiently than others, as will be demonstrated below. Thus, the preferred approach, at least from the perspective of the insurance industry, is to have the government legislate cost reductions. This has come about, in part, through tort restrictions.

Periodically (that is, when profitability declines) insurers argue that claims costs are out of control, unstable and making insurance unaffordable for consumers. Escalating claims costs are repeatedly identified as the driving force for auto insurance reform that lowers costs for insurers and increases profitability, while at the same time mitigating the need for premium increases that the consumer finds intolerable. The Insurance Bureau of Canada, the lobby group representing the insurance industry, has attributed the need for major reforms to the "unfettered growth in claims costs". This is incorrect and an unfortunate distraction from actual factors that lead to a call for reform. Governments have bought into the notion that legislated claims cost reductions were required primarily due to concern for voter revolt arising from underlying threats of significant premium increases. As will be seen below, the difficulties encountered in the auto insurance system did not justify the reforms that restricted tort rights in any jurisdiction.

Profitability for the auto insurance industry, as measured by Return on Equity[13] (ROE), follows a cyclical pattern, with highs and lows. The pattern of ROE for Ontario, Nova Scotia, New Brunswick and Prince Edward Island will be illustrated below in the section on Profitability. Every jurisdiction exhibits essentially similar cycles of ROE. These cycles are the focus of the analysis.

As described below, when ROE diminishes, as illustrated by the periodic troughs in the profit cycle, there is upward pressure on premiums and urging from the insurance industry to control (read reduce) their costs. If government adopts auto insurance reform proposals in these circumstances, it essentially legislates insurers out of their periodic, and temporary, economic decline. This is an entirely unwise, unnecessary and unfortunate response to the fiscal fortunes, or misfortunes, of auto insurers. This is particularly so when the response is to limit fundamental rights to access to justice through tort restrictions. By definition, cycles have ups and downs. It makes no sense to adapt rules to the trough of any given cycle. It will be seen that the cyclicality of auto insurer profitability has more to do with insurer behaviour, pricing of insurance and the rate review process that it does with tort rights or even enhanced accident benefits.

In addressing the issues facing auto insurance claims in Atlantic Canada it is instructive to look at the experience in Ontario. Although there are important differences between Ontario auto and auto insurance in other provinces, Ontario has almost 20 years of experience with tort restrictions and enhanced no-fault benefits. Tort restrictions have been justified as a trade-off for enhanced first party (no-fault) benefits. Courts and governments have talked about the need to strike the balance between appropriate access to tort and an appropriate level of first party benefits. Thus, an understanding of the justification for tort restrictions involves, only in part, an appreciation for the motivation for providing first party benefits.

The purpose of first party benefits is the same in every province, yet each province provides a different level of first party benefits. For example, British Columbia has a

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[13] After-tax profits divided by the value of investments in the industry.

limit on medical and rehabilitation benefits of $150,000.[14] Alberta essentially has $50,000 limits for medical and rehabilitation benefits.[15] Ontario distinguishes between catastrophic and non-catastrophic injury, with medical and rehabilitation benefit limits of $1,000,000 and $100,000 respectively.[16] Medical and rehabilitation benefits in Nova Scotia and Prince Edward Island have limits of $25,000. New Brunswick medical and rehabilitation limits are set at $50,000.[17] First party benefits are designed to provide injured people with a basic level of benefits aimed at addressing injury in the early phases and to provide basic levels of benefits that will facilitate a return to work and other activities. They are a supplement to the social welfare program of universal health care. First party benefits are not intended and cannot provide unlimited care to all injured people to the full extent or for the entire duration of their injury.

First party benefits, like universal health care, are available to all injured in car accidents regardless of fault. Given the common objective of these benefits, there is no good rationale for the dramatic difference in coverage between provinces. Ontarians pay higher premiums than any one else, in part, due to the fact that the first party benefit package is substantially richer than any other province.

For tort claims, Ontario has restrictions on non-pecuniary general damages. These claims are limited in two significant ways. First, claims must meet the test of the verbal threshold. This means the injured party must demonstrate that the injury resulted in a permanent serious impairment of an important physical, mental or psychological function.[18] Once that test is met, the injured party's claim is then subject to a deductible. For the injured party the deductible is $30,000 if the claim does not assess at more than $100,000. For derivative claims under the Family Law Act (claims of relatives in the event of injury or death of another) the deductible is $15,000, unless the claim assesses in excess of $50,000.

The Nova Scotia cap on non-pecuniary general damages was introduced for accidents occurring on and after November 1, 2003. The cap of $2,500 is applied to

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[14] British Columbia has a government run insurance company called Insurance Corporation of British Columbia. In addition to moderately generous first party benefits, accident victims in British Columbia have full access to tort rights.

[15] Alberta's first party benefits are considerably less generous than British Columbia. With respect to tort rights, there is a cap on non-pecuniary general damages if considered a "minor injury".

[16] Ontario's generous first party benefits are likely to be scaled back shortly by the Ontario government following recommendations from the Financial Services Commission of Ontario after a recent 5-year review of auto insurance. Ontario has two restrictions on the right to claim non-pecuniary general damages: a deductible and a verbal threshold.

[17] Tort rights for these provinces will be discussed below.

[18] See section 267.5(3) of the Insurance Act, R.S.O. 1990, c.I.8, as amended for accidents occurring on and after October 1, 2003 a definition of the verbal threshold applies that essentially makes the test more difficult to meet. See Ont. Reg 381/03.

those suffering "minor injury".[19] It is beyond the scope of this paper to discuss the minor injury definition in the Insurance Act, R.S.N.S., c. 231, section 113B(1), yet the definition does illustrate the pitfalls of restrictions on tort rights. The definition is convoluted and complex. It creates uncertainty for litigants by virtue of the definition itself. These things conspire to make the Nova Scotia tort restrictions costly, particularly in view of the fact that the matter of whether the test is met is not determined until considerable expense is incurred by both sides and potentially at considerable expense to the administration of justice.

Pain and suffering claims in Prince Edward Island considered "minor personal injuries" are subjected to a cap of $2,500 for accidents occurring on and after April 1, 2004. New Brunswick has a cap of $2,500 on pain and suffering awards for "minor personal injury" claims occurring on and after July 1, 2003.

Verbal thresholds, deductibles and caps on minor injury damages are all designed to achieve the same objective: reduce or eliminate the cost of less serious claims. Thresholds and caps are inherently expensive and inefficient ways to achieve these goals. There are two fundamental problems: first, the definition of what constitutes a minor injury is complex and may ultimately require interpretation from an appellate court, creating uncertainty for litigants; second, the determination of whether the claims meets the test is not determined until the end of the case, after substantial costs and administration of justice resources have been exhausted.

THE ALLEGED CASE FOR TORT RESTRICTIONS

In Canada the primary proponent of restrictions on tort rights is the insurance industry, usually through its lobby group, the Insurance Bureau of Canada (IBC). The justification put forward for justifying these restrictions will be reviewed in this section. The underlying motive for tort restrictions is always to increase profit without having to invoke premium increases so significant that they raise the ire of consumers. From a political perspective, in the absence of political action, the risk is that insurers will obtain rate increases at levels the public finds intolerable which, in turn, can cost votes to the party in power.

Understandably when the proponents of restricted tort rights advocate for these changes they do not cite profits as their motive. Rather we hear allegations of abuse by users and their representatives and unpredictable claims costs escalating precipitously. While there are undoubtedly pressures in the system from abuse or merely inflation that may need addressing, in the end, it is really a matter of profit. Insurers do not tend to raise much of an issue about inefficiency, fraud or abuse when their bottom line is healthy.

Auto insurance must be considered in the context of price and profit. Put more broadly, the insurance industry must sell a product that is both priced appropriately

[19] The cap faced an unsuccessful constitutional challenge in Hartling v. Nova Scotia, 2009 NSSC 2.

and which allows a reasonable return to the industry. At the same time, given the importance of insurance, the product needs to be one that provides adequate protection to consumers. The nature and extent of the protection provided to consumers will be referred to as the quality of the product. The essential challenge involves preserving the quality of the product while maintaining a business environment that encourages insurers to compete for policy holders.

Quality of the product involves a number of important variables for consumers. In the context of auto insurance, unfortunately most consumers are unaware of these variables. This makes it difficult for advocates outside the insurance industry to promote the quality of the product because it is difficult to motivate the public to be involved in a matter about which they have little understanding.

Adequately addressing the quality of the product means ensuring that consumers receive the most comprehensive coverage available for the premium they pay. It means delivering coverage that consumers understand and compensation that is reasonably accessible. It is also concerned with ensuring that injured people are not called upon to bear the burden of loss caused by another and that these people will have access to justice in order to enforce those obligations. Where it is sought to diminish any of these principles there must be compelling reason to do so on a public policy basis.

The quality of the product is eroded when the rights of injured people are diminished in order to address concerns about profit and the price of the product. In other words, if the available coverage needs to be reduced in order to prevent increases in premiums (affordability for consumers) then the consumer is buying less with her premium dollars. In this scenario, where is it seen that costs in the system can be reduced by taking certain coverage out of the policy, then insurers can increase profit with lower or without any premium increases, easing the expense to consumers. One should not lose sight of the fact that the consumer gets less for the same premium dollar.

The challenge, therefore, is to design the auto insurance product in a way that seeks to maintain the quality of the product while at the same time pricing the product in a way that allows consumers to get value for their premium dollars and insurers to make a profit. Consumers must, however, be prepared to incur a level of expense for auto insurance that reflects their need for adequate protection. To some degree the approach to auto insurance reform must be paternalistic in order to protect the public. That is why auto insurance is mandatory; why there are minimum third party liability limits; and, why there is a prescribed minimum level of first party benefits. All of these factors are designed for the protection of the broader public interest. Therefore, the objective ought not to be the lowest price possible, but rather the lowest price for that level of protection that every person ought to have.

Having regard to the comments about pricing, profit and the quality of the product, it would be a dreadful error to make changes to the product aimed at one of these factors without due consideration for all. Further, where proposed reforms diminish coverage, particularly when those reforms involve limiting access to

justice, those advocating for those reforms ought to bear a high burden of proof to show cause why those restrictions are justified. Unfortunately, provincial governments have been too quick to limit tort rights based flawed reasoning from the IBC and others.

Undoubtedly, limiting tort rights will reduce costs to insurers. This in turn will help alleviate some of the upward pressure on premiums or allow insurers to enjoy greater profit. The fact that reducing tort costs will save money is in no way a justification for so doing. It is an entirely specious argument. This is not to say that the cost of tort claims could never be a matter of concern or a reason for reform. Rather, there are much broader considerations, including access to justice, that have been all but ignored previously. A close examination of the arguments advance by those who have proposed tort restrictions will demonstrate how they have failed to meet any reasonable burden needed to justify these measures.

In most jurisdictions long term trends in third party liability claims costs have raised concern from time to time. Certainly the underlying cause for these trends bear examination, but that tends to occur only when profits decline. Matters of accident frequency and accident severity impact on those costs. Understanding the reasons for these trends and the long term impact is necessary to develop a response, which in severe circumstances might justify curtailing the trend. Swings in ROE, however, is not a justification.

The following issues will be examined: profitability; claims, costs; and premiums.

PROFITABILITY[20]

Auto insurance is a fairly unique business in the sense that insurers sell a product defined by statute, in a market where all who drive must buy the product under circumstances where the price is regulated. Given the captive market that insurers have, arguably the profitability enjoyed by insurers ought to be more modest than in other industries, particularly those engaged in research and development and other costly endeavours.

Profitability is measured by return on equity (ROE), which is the industry's after-tax profit divided by the value of investments made in the industry. Historically, profitability for Property and Casualty Insurers[21] has followed a cyclical pattern,

[20] Note that all the graphs and tables contained in this paper are derived from statistical data available through the General Insurance Statistical Agency (GISA), and have been prepared by Economists Christopher Bruce and Jason Strauss. The graphs and tables setting out profitability of auto insurance in a particular province have been derived from statistical data after applying a methodology used by Joe S. Cheng in the Alberta case of Morrow v. Zhang.

[21] Property and Casualty Insurance protects against loss or injury as well as liability for damage to people and property. Included in this line of business is auto

with rather large swings in ROE. Figure 1 below is graph of ROE for Ontario auto from 1996 to 2007.

FIGURE 1

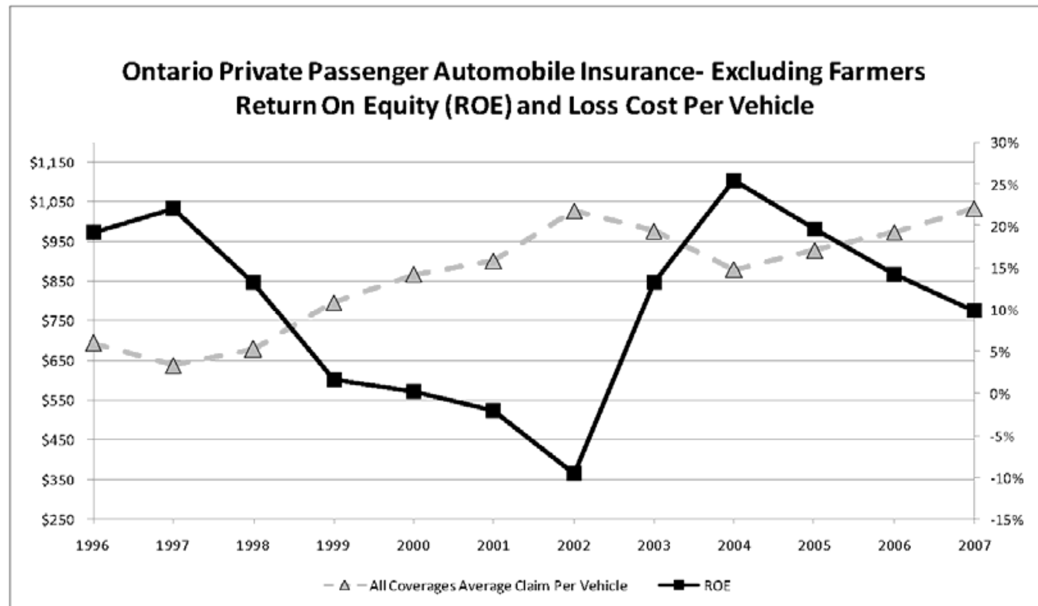

Figure 2 is a graph setting out the ROE for Nova Scotia automobile insurance from 1996 to 2006.

FIGURE 2

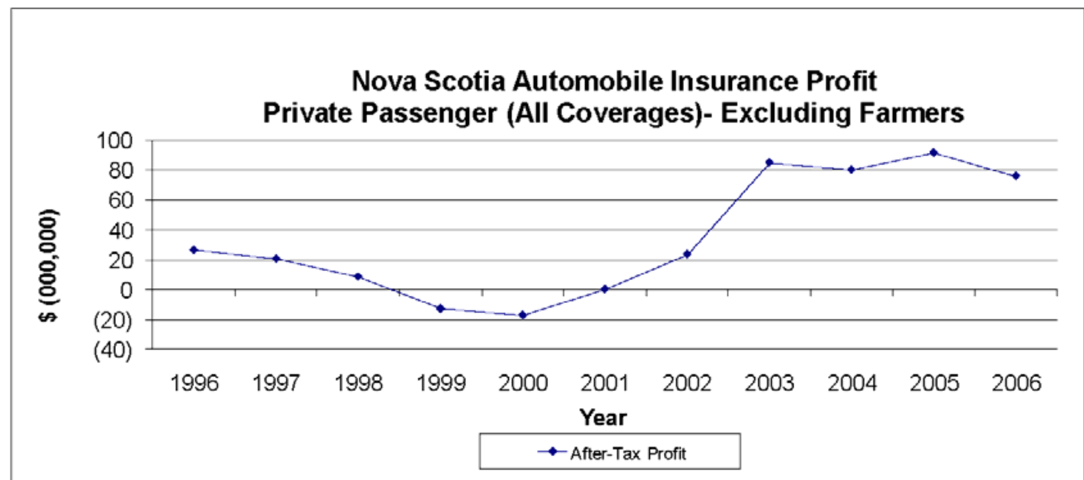

Figure 3 is a graph setting out ROE for Nova Scotia auto from 1996 to 2006 expressed as a percentage.

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insurance, homeowners insurance and commercial insurance. Auto insurance is the biggest line of business.

FIGURE 3

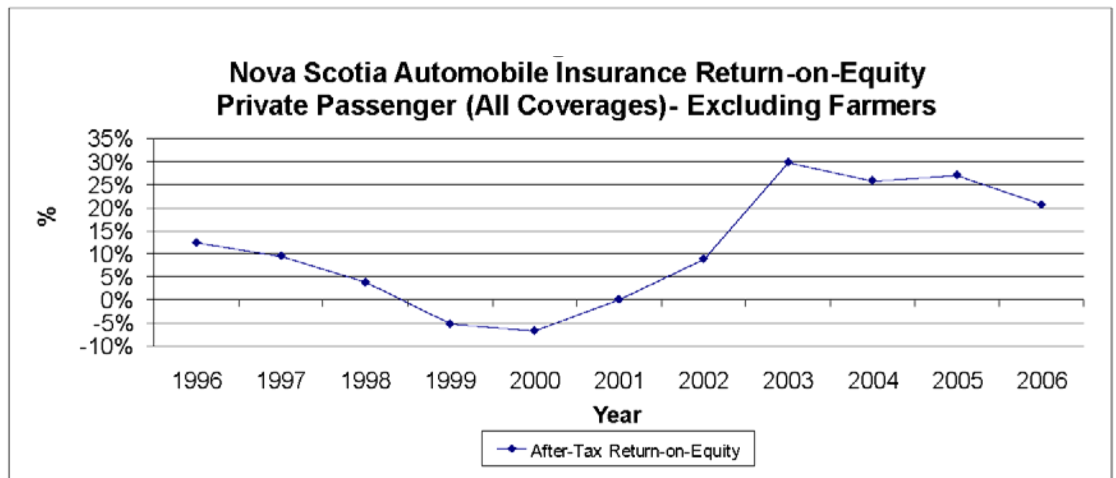

Table 1 below sets out the profitability for Nova Scotia auto insurance from 1996 to 2006. These numbers are presented graphically in figure 2 and 3.

TABLE 1

Nova Scotia Automobile Insurance Profitability Private Passenger (All Coverages) Excluding Farmers		
	Total Profit	
Year	(millions) After-Tax Profit	After-Tax Return-on-Equity
1996	26	12.4%
1997	21	9.5%
1998	9	3.7%
1999	(13)	-5.3%
2000	(17)	-6.8%
2001	0	0.1%
2002	24	8.8%
2003	85	29.9%
2004	80	25.9%
2005	92	27.0%
2006	76	20.7%

Figure 4 is a graph setting out ROE for automobile insurance in Prince Edward Island from 1996 to 2006.

FIGURE 4

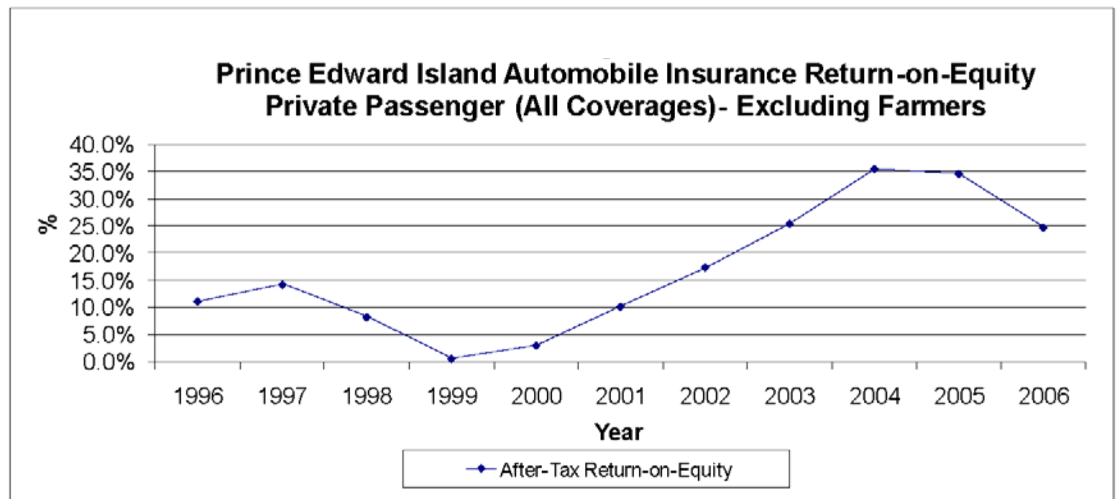

Table 2 below sets out the profits in dollars and as a percentage for PEI auto insurance from 1996 to 2006. Figure 4 is based on the data in the right-hand column.

TABLE 2

Pince Edward Island Automobile Insurance Profitability Private Passenger (All Coverages) Excluding Farmers		
	Total Profit	
Year	(millions) After-Tax Profit	After-Tax Return-on-Equity
1996	3.5	11.1%
1997	4.5	14.2%
1998	2.7	8.1%
1999	0.2	0.5%
2000	1.1	2.9%
2001	4.0	10.1%
2002	6.6	17.3%
2003	10.0	25.4%
2004	15.7	35.5%
2005	17.4	34.6%
2006	13.5	24.7%

Figure 5 is a graph showing automobile ROE for New Brunswick from 1996 to 2006.

FIGURE 5

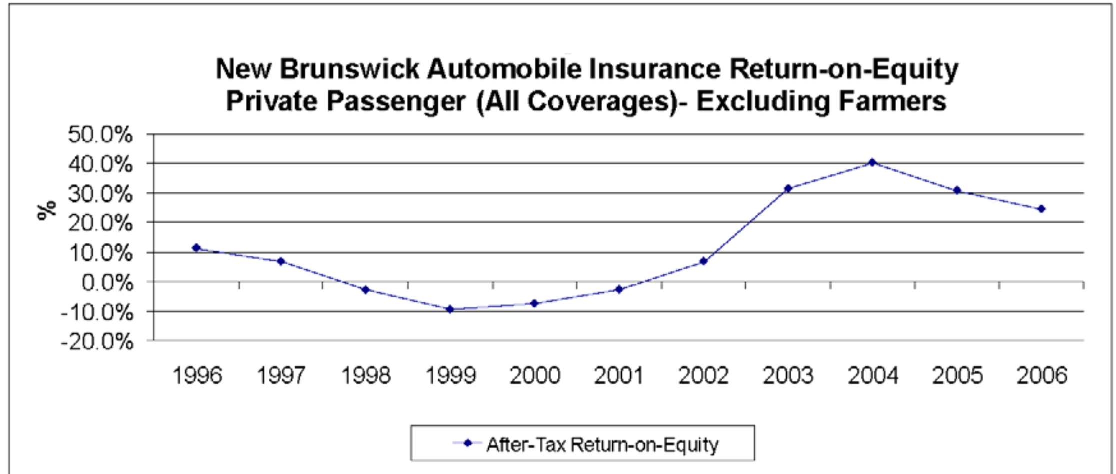

Table 3 below sets out the profitability for New Brunswick auto insurance from 1996 tot 2006. Figure 5 is based on the data from the right-hand column of Table 3.

TABLE 3

New Brunswick Automobile Insurance Profitability Private Passenger (All Coverages) Excluding Farmers		
Year	Total Profit (millions) After-Tax Profit	After-Tax Return-on-Equity
1996	25	11.3%
1997	15	6.7%
1998	(7)	-2.8%
1999	(23)	-9.4%
2000	(19)	-7.4%
2001	(7)	-2.7%
2002	18	6.8%
2003	86	31.4%
2004	124	40.3%
2005	106	30.7%
2006	87	24.5%

All the ROE graphs show similar patterns. The pattern is one of boom and bust. Those familiar with the battle over auto insurance reform know all too well that the boom attracts very little public attention, but there is much consternation about the bust. The pattern in Ontario is certainly the most dramatic.

Before discussing ROE in more detail, some other observations about the business of insurance ought to be made. There are two general issues that will be addressed: the first involves capital and competition; the second underwriting.

With regard to rates or premiums, the amounts charged to consumers depend in part on competition and capital. With respect to capital, it is generally accepted that

P & C insurers in Canada are well capitalized. With plenty of capital, insurers can engage in a battle for market share even in the face of deteriorating market conditions. This means that rates can drop while costs rise, which, as will be illustrated, is the experience in Canada. Intuitively it may not make sense to most people that the price of the product should drop or even remain level while costs are increasing. In other words, the price fails to track costs. Consequently, increasing costs in the face of level or decreasing premiums will result in vanishing profit margins for insurers. When insurers finally get around to adjusting price to actually reflect cost changes they face procedural hurdles through the rate approval process of the provincial regulator. That approval process introduces a delay for insurers to respond to market realities.

With respect to underwriting, where insurers have excess capital, the battle for market share creates what is known as a "soft market". A soft market essentially involves insurers relaxing underwriting criteria to attract more policyholders. A "hard market" is when insurers toughen underwriting standards and coverage may be more difficult to get. A prolonged soft market in the face of rates not tracking costs, followed by a delay in rate adjustments, will cause profitability to disappear. Arguably soft markets in Ontario and perhaps the Atlantic provinces, have carried on for beyond what would be fiscally prudent; contributing to the severity of the swings in ROE.

The peaks and valleys of ROE are primarily caused by this phenomenon. The problem for everyone outside the insurance industry is that we all pay a price for this occurring. That is, when insurers find themselves in difficult fiscal circumstances, with vanishing profits, they seek to have their costs lowered by reforming the product, asking essentially to be legislated out of an economic slump. Given that the business of insurance is historically cyclical, it is not unreasonable to assume that insurers would be expected to weather that economic storm rather than promote changes that impair the quality of the product. More significantly perhaps is the fact that the industry seems incapable of learning from its own well-established experience. Again, one would have reasonably thought that in managing their business insurers would adjust pricing before profit margins disappear.

There are other serious consequences of this phenomenon for consumers. When industry discipline is absent and insurers fail to act reasonably in having costs trends more closely tied into pricing trends, the result is instability in auto insurance. The insurance industry would have us believe that "instability" is most closely related to costs, either first party liability or third party liability. That is simply not the case.

Instability has a meaning for the industry and a meaning for consumers. For insurers instability refers to the difficulty in predicting costs that lead to challenges in setting rates. It also means that pricing can be susceptible to precipitous swings, particularly increases. For consumers instability refers to the ability to anticipate and budget for ones auto insurance. Consumers are generally content to see insurance premiums following the inflationary pattern of the other goods and

services they buy. The periodic outcry about premiums from the public would likely never occur if premium expenses followed typical inflationary patterns.

While more will be said about claims costs below, it is not costs that give rise to instability. Claims costs are stable and predictable. On the other hand, as is readily apparent from the graphs of ROE above, the wavy pattern of auto insurance industry ROE is anything but stable. If the peaks and valleys of ROE could be smoothed out, consumers would not face premiums increases that shock them. If consumers are not shocked by premium increases, then governments avoid the political hot potato associated with auto insurance reform. Part of the solution lies in how insurers manage their business, a matter beyond the reach of the consumer and lawyers advocating for access to justice.

In the discussion on claims costs later in this paper it can be seen that these costs have followed a linear pattern in Ontario. This is to be contrasted with the more dramatic wavy pattern of ROE.

The Office of the Superintendent of Financial Institutions (OSFI), the federal body regulating the insurance industry, produces data on the fiscal performance of insurers. In a speech given May 22, 2008, Julie Dickson, the Superintendent of OSFI said:

> The P&C industry is facing stress… while all of the stresses are not caused by the industry itself, some are, and I have had to stop and ask why players in the… P&C industry have trouble learning from the past…In the P&C industry, the cycle repeats itself over and over again and the highs can be pretty high and the lows pretty low. The last downturn about five years ago was particularly painful and there was a feeling that the pain associated with it would be a counterbalance to what were previously thought to be inevitable competitive pressures. But are we repeating the mistakes of the past with uneconomical pricing in this commercial lines sector?...the industry has enough to contend with without being its own worst enemy.[22]

The remarks from Ms. Dickson provide some important insight into why we face periodic crises in auto insurance. It is suggested that the P&C industry may well be its worst enemy and in the context of ROE cycles and pricing that is likely accurate. The pain of the last cycle, five years ago, apparently did little to persuade insurers not to succumb to market pressures to sell more policies. That is, had insurers learned their lesson from the last down cycle they would not have allowed underwriting that priced policies at levels that wiped out reasonable margins. This leads to what insurers have conveniently called "rate adequacy", which in reality simply means the price charged is too low to generate adequate profitability. If competitive pressures are going to result in inadequate profitability, which causes "pain" for the insurance industry, surely that pain should not be visited on

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[22] Remarks by Superintendent Julie Dickson, OSF, to the Langdon Hall Property & Casualty Insurance Industry Forum, May 22, 2008.

consumers in the form of precipitous premium increases or diminished coverage. Where insurers capitulate to these competitive forces they need to realize that they do so at their peril.

It is suggested that one of the reasons insurers have failed to learn their lessons is due to the fact that the IBC propaganda machine has been effective in persuading governments to legislate away the diminished profitability. If insurers believed that they would have to face the down cycle of profitability without any hope of government relief (a bail out), only then might they change their behaviour and take steps to mitigate the ROE swings. Taking this further, repeated government willingness to legislate cost reductions for insurers reinforces the kind of behaviour that makes them their own worst enemy. The problem for consumers and injured people is that they end up paying the price, not insurers.

Based on this analysis, it is difficult to imagine how tort restrictions could ever be a justifiable response to swings in ROE. There may be circumstances that have nothing to do with swings in profitability where finding cost savings in the auto insurance system is justified. Whether tort restrictions ought to be considered in an effort to lower costs must be considered in the context of the entire product as a whole and the important public policy goals. Where the objective is to save costs in order to improve profitability (or decrease upward pressure on premiums, as the insurance industry likes to say) those costs savings ought not to come at the expense of access to justice and off the back of innocent accident victims unless a very high threshold for proving the justification is met. As stated above, there has not been a direct historical connection between trends in third party liability costs and trends in ROE. Therefore, it does not follow logically that when cost savings are sought tort rights ought to be restricted. When ROE climbs there is no move by the industry to restore rights previously compromised.

Consider the following remarks made by OSFI Superintendent Julie Dickson:

> "If you sense early that rates are a problem, you need to be proactive with provincial regulators. You cannot keep rates lower than would be required to cover your risks, while continuing to write business, all while hoping that you will get a rate increase that will even things out down the road."[23]

That admonition should be taken a step further. Insurers need to be proactive in pricing and tracking costs. Insurers should not keep rates lower than would be required to produce reasonable profits, all the while hoping that government will take away tort rights (or other rights) to cover the risks that they should have anticipated when rate setting. This is precisely why there is turmoil in the auto insurance from time to time. Making these changes as a result of the failure of the insurance industry to keep rates at levels that will not result in a fiscal crisis is bad

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[23] Remarks of Superintendent Julie Dickson of OSFI, to the National Insurance Conference of Canada, Ottawa, Ontario, October 1, 2009.

policy, which would have been avoided by better management of the business of auto insurance.

The insurance industry lobby has been effective in visiting these periodic drops in profitability on everyone but themselves. Insurers criticize paralegals, lawyers, claimants and health care professionals, alleging abuse of the system and other charges. In support of those claims they rely on anecdotes of waste and abuse. While it may be true that there are and will always be abusers of the system, these anecdotes are not helpful in fixing what is wrong with auto insurance and tend to distract the debate from addressing the fundamental underlying problems.

It is unpalatable to the insurance industry to accept responsibility for any part of the problem. In the last 20 years or so the industry has been very effective in focusing the blame on any party other than insurers. In the process they have been largely responsible for creating an increasingly expensive, complex and inefficient auto insurance system that has abysmally failed to achieve any of the industry's own stated objectives and this process has given rise to a system that devours premium dollars in unprecedented amounts with compensation largely diverted away from those in need.

Another factor impacting on profitability is reserves. Reserves are an insurer's single biggest liability. Recalling that insurers collect a price today for the possibility of an unknown payout in the future, one can easily see the importance of reserves to meet those future liabilities. Reserves are the amount set aside to pay current and anticipated claims. The way in which a particular company reports reserves has an important impact on profitability. A company that tends to be conservative in reserving may have predicted liabilities at a level greater than they ultimately prove to be and thus could understate profit in a given year. Where reserves are too conservative they may be released in later years. When this happens, companies do not file new financial statements for the prior years, but will take the reserves released into income in the current year.

From 2003 to 2006 inclusive the P & C industry earned record profits. Now some of the reserves from previous years are being released. This means that those years were even more profitable than they were thought to be. By releasing reserves in more lean years, like 2008, insurers may be overstating profit. OSFI Superintendent Julie Dickson recently stated:

> "Prior years' loss reserves are developing very substantial redundancies thus distorting or overstating results from current business."[24]

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[24] Remarks by Superintendent Julie Dickson, OSFI, to the National Insurance Conference of Canada, Ottawa, Ontario October 1, 2009.

This information about reserves is important to understanding the economic influences affecting reform. It is also important to recognize that when considering the economic and political response to concerns in the insurance industry about profitability, it is inappropriate to narrowly look at the current year, or even a period of a number of years without also considering the hugely profitable years from 2003 to 2007.

When considering the connection between ROE and third party liability, a look at the timing of tort restrictions in relation to profitability changes demonstrates that adding tort restrictions was not called for. This can be established using data in Ontario, Nova Scotia, Prince Edward Island and New Brunswick.

In Prince Edward Island tort restrictions were introduced for accidents occurring on or after April 1, 2004 through the Minor Personal Injury Regulation (MPIR). A cap of $2,500 was established for pain and suffering awards that were considered "minor".

In 1999 insurers in PEI experienced a significant decline in ROE resulting in virtually no profit being earned. See Table 2, reproduced below. The year 2000 was also a very lean year. Significantly, ROE began to improve rather dramatically in 2001, though perhaps still below acceptable levels. By 2002 the auto insurance industry in PEI was doing very well indeed. ROE for PEI auto insurance reached a healthy 17.3% in 2002. Substantial profit was earned in 2003, well in excess of any measure of reasonable profitability for this industry reaching 25.4% ROE. A record profit was earned in 2003, to be exceeded by outstanding earnings in 2004 and 2005.

TABLE 2

Pince Edward Island Automobile Insurance Profitability
Private Passenger (All Coverages) Excluding Farmers

Year	Total Profit (millions) After-Tax Profit	After-Tax Return-on-Equity
1996	3.5	11.1%
1997	4.5	14.2%
1998	2.7	8.1%
1999	0.2	0.5%
2000	1.1	2.9%
2001	4.0	10.1%
2002	6.6	17.3%
2003	10.0	25.4%
2004	15.7	35.5%
2005	17.4	34.6%
2006	13.5	24.7%

Looking at the MPIR that was effective in 2004 it is obvious that the auto insurance industry in PEI was well on its way to an impressive fiscal recovery long before the

tort restrictions were brought in. Even following the introduction of the MPIR, the huge profits earned in 2004 through 2006 were for the most part based on the rules that existed before the MPIR came into effect. It takes years for tort claims to work their way through the system, resulting in profitability in the early years after implementation of the MPIR being based on the system as it existed before the MPIR. It follows, therefore, that it was not necessary to restrict tort rights in Prince Edward Island in order to restore the industry to profitability. Taking this a step further, and as discussed below in the section on claims costs, even if some cost reduction was in order, those savings should not have been achieved through restrictions on access to justice.

Insurers in PEI enjoyed enormous profits in 2003 to 2006 and have continued to do well in 2007 and 2008. There is apparently no movement afoot to undo the tort restrictions at a time of high earnings. Why? It may well be that insurers ought to be allowed to enjoy the good years in consideration of them having to weather the bad. If insurers are prepared to endure the large swings in ROE as a matter of doing business, there is no reason to resent the high profits in good years. On the other hand, if insurers continue to seek legislated cost savings in the lean years through restricting tort claims and other methods, then it is inconceivable that they should be permitted to earn profits at the levels seen subsequent to 2002 in PEI.

Insurers argue that profitability as reported to the public through the federal and provincial regulators is for all lines of P & C Insurance, which is true, and that auto insurance is not a profitable line of business, which is not true. Auto insurance is the biggest line of business under the P & C umbrella. In the last 15 years smaller insurers have been swallowed up by larger insurers, so that more than 70% of all auto insurance written[25] is concentrated in fewer than a dozen companies. Precise data isolating the profit earned in auto insurance is unavailable to the public. Given the claims by insurers regarding profitability of auto insurance, it is high time that all the data be revealed. The fact that auto insurance is a mandatory product and the fact that the insurance industry promotes additional limitations on the rights of claimants each time the ROE falls, surely the public has an absolute right to complete disclosure of all fiscal information relating to auto insurance. The public ought to also have access to all information filed by insurers on applications for review of insurance rates.

Insurers also argue that one explanation for wild swings in ROE is due to the fact that insurance is one of the few products sold in the marketplace before the final cost is known. Consequently, rates may be set based on cost predictions that ultimately turn out to be dramatically too low. When the costs are finally known the insurer cannot look back and adjust rates retroactively, with the result that they charged too little previously for the risk undertaken. While it is true that insurers do not know the risk they face with precision, there are a number of very serious flaws to this argument. They include:

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[25] At least in the Province of Ontario.

1. For reasons set out in the section on claims costs below, insurers should know within a relatively small margin of error, based on a long claims history, the costs they face for future claims.
2. Insurers are complicit in creating some degree of uncertainty because they promote changes to auto insurance, like tort restrictions, that inherently have uncertainty for all participants until these changes are interpreted by our courts.
3. As outlined above, insurers allow rate trends to move in the opposite direction of cost trends, leading to large swings in ROE.
4. A well capitalized auto insurance industry allows insurers to prolong soft markets beyond what is fiscally prudent.

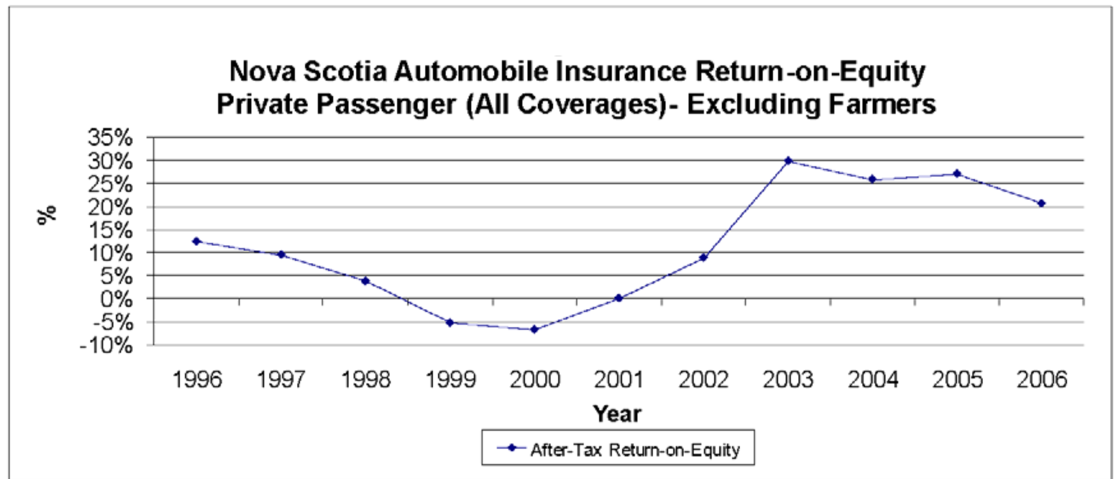
While this section is concerned with ROE, it is necessary to consider this analysis in the context of the review of both claims costs and premiums in later sections of this paper.

Nova Scotia saw tort restrictions introduced for accidents occurring on or after November 1, 2003. A cap of $2,500 on pain and suffering awards was introduced for minor personal injury claims. ROE was indeed low for auto insurers in the period 1996 to 2002, with 1998 to 2001 being particularly lean years with ROE hitting -6.8%. Importantly, in 2003 the insurance industry would enjoy record-high profits. Despite this, an ROE of 8.8% (see Table 1 reproduced below), while below reasonable levels, indicated the beginning of a recovery. It was only late in that year, at a time when the industry was already on its way to earning record profits, that the MPIR was introduced. From this fact alone, it follows that the tort restrictions introduced in 2003 in Nova Scotia were not required in order to restore the industry to profitability. It also follows that the third party liability issues could not explain why insurers had such poor fiscal performance in the years leading up to 2003.

TABLE 1

Nova Scotia Automobile Insurance Profitability
Private Passenger (All Coverages) Excluding Farmers

Year	Total Profit (millions) After-Tax Profit	After-Tax Return-on-Equity
1996	26	12.4%
1997	21	9.5%
1998	9	3.7%
1999	(13)	-5.3%
2000	(17)	-6.8%
2001	0	0.1%
2002	24	8.8%
2003	85	29.9%
2004	80	25.9%
2005	92	27.0%
2006	76	20.7%



In New Brunswick pain and suffering damages were also capped for accident occurring on and after July 1, 2003 at $2,500 for "minor personal injuries".[26] Table 3 is reproduced below. Like PEI and Nova Scotia, auto insurers in 1998 to 2001 experienced unacceptably low returns. In fact they lost money in those years. Similarly, New Brunswick insurers began to recover from poor fiscal results in 2002 and by 2003 had set a record for profits with an ROE of 31.4%. Insurers enjoyed unprecedented profits for the next 4 years, 2003 to 2006 inclusive. In 2004 return on equity for New Brunswick auto insurers was around 40%. The tort restrictions do not explain the dramatic return to profitability for auto insurers in New Brunswick. The ROE numbers do demonstrate, however, that the tort restrictions were not needed to restore reasonable earnings.

TABLE 3

New Brunswick Automobile Insurance Profitability
Private Passenger (All Coverages) Excluding Farmers

Year	Total Profit (millions) After-Tax Profit	After-Tax Return-on-Equity
1996	25	11.3%
1997	15	6.7%
1998	(7)	-2.8%
1999	(23)	-9.4%
2000	(19)	-7.4%
2001	(7)	-2.7%
2002	18	6.8%
2003	86	31.4%
2004	124	40.3%
2005	106	30.7%
2006	87	24.5%

Ontario first experienced limitations on tort rights in June of 1990 with the introduction of the Ontario Motorist Protection Plan (OMPP), following what the insurance industry had referred to as an insurance crisis in the mid-1980s. A verbal

[26] See New Brunswick Regulation 2003-20, the "Injury Regulation".

threshold[27] was introduced at the time that prevented any tort claims unless the threshold was met. In January 1994 Ontario's insurance product was changed and the threshold was amended and a monetary deductible introduced[28]. Moreover, claims in tort were limited to non-pecuniary general damages only. In 1996 the rules were changed once again for Ontario consumers. Tort claims were limited only for non-pecuniary general damages and health care expenses in some circumstances. The limitations on pain and suffering included a verbal threshold and a deductible.[29]

In 2003 the Ontario deductibles against pain and suffering were doubled and the verbal threshold defined to be tougher to meet for accidents occurring on or after October 1, 2003. In 2003 the changes were made to auto insurance in response to diminished ROEs in prior years. ROEs for 2000 to 2002 were below acceptable levels, although as stated in this paper the poor fiscal performance of the industry cannot be directly attributed to third party claims. The insurance industry was also raising the issue of "stability" of auto insurance once again.

Ontario Automobile Insurance Profits Private Passenger -Excluding Farmers All Coverages		
Year	**After-Tax Profit, $(millions)**	**After-Tax Return-on-Equity**
1996	793	19.2%
1997	907	22.0%
1998	557	13.3%
1999	74	1.7%
2000	7	0.2%
2001	(95)	-2.1%
2002	(430)	-9.6%
2003	634	13.3%
2004	1464	25.5%
2005	1324	19.6%
2006	1049	14.3%
2007	767	9.8%

[27] On June 22, 1990 Ontario had a verbal threshold that required the injured party to die or to have suffered a permanent serious impairment of an important bodily function that was physical in nature.
[28] The new threshold in 1994 was serious injury to an important physical, mental or psychological function. The deductible was set by regulation initially at $10,000 and increased with the cost of living.
[29] As of 1996 the verbal threshold was permanent serious impairment to an important physical, mental or psychological function. The deductible on pain and suffering awards was $15,000. Family Law Act awards faced a $7,500 deductible. Health care expenses could only be pursued if the injury was deemed catastrophic. Other economic losses could be pursued in tort.

In response to insurance industry urging, the government of the day, on the eve of the provincial election, and having seen an election almost lost a short time earlier in New Brunswick over auto insurance issues, introduced the increased deductibles and defining regulation: two further limits on tort rights. What the government of the day did not know when it agreed to further trample access to justice is that the P & C Insurance industry was on the cusp of making the largest profit in the entire history of the industry.

The economic evidence establishes that Ontario, like the Atlantic provinces, would have recovered from the poor profitability of the auto insurance industry without impairing tort rights further. The evidence further proves that the instability alleged by the insurance industry was not in any way caused by third party liability claims. The record profits earned in 2003 and subsequent years were earned on the rules that existed before the October 1, 2003 changes.

The important point to make here is that legislation limiting tort rights can lower premiums, but will never lead to premium stability. Swings in profitability and pressure for precipitous premium increases will not be eliminated through restricting access to justice. Restricting access to justice, on the other hand, will always impair the rights of innocent accident victims and consequently the quality of the product consumers purchase.

There are some other interesting observations that can be made about profitability of insurers in Ontario and the Atlantic Provinces. In considering these additional observations one should be mindful of the following: auto insurance is mandatory; the product is developed and defined by statute and regulation, making at least basic coverage the same on every single policy; the identical product is then sold in the same marketplace by every insurer; the process of administering the product is essentially the same for every insurer; and, every insurer is subject to the same regulatory fees, taxes and rate review process. Having noting these considerations, one might reasonably conclude that most insurers would achieve more or less similar financial results subject to some minor variations. It is surprising to see how wrong this assumption is in fact.

Data from OSFI[30] demonstrates a dramatic variation in the performance of insurers in Canada. One measure of insurer performance is what is referred to as a "loss ratio". The loss ratio is a fraction where the numerator is the claims paid plus loss reserves and the denominator is the premiums collected. For example, if the claims paid plus loss reserve is $60 in a year and the premiums collected $80, then the loss ratio is 60/80, or 75%. The lower the loss ratio, the better the fiscal performance of the insurer. A loss ratio of 75% likely means an insurer is profitable. A loss ratio of 90% is not as good, and may indicate the insurer is suffering a loss. Attached as Schedule "A" is a copy of loss ratio for 2007 and 2008.

To illustrate the discrepancy in performance amongst insurers, the third party liability loss ratio for the Co-Operators General Insurance Company in 2008 was

[30] Source: OSFI database accessed Via Beyond 20/220 Website.

64%, a very respectable performance. In contrast, the third party liability loss ratio for Wawanesa Mutual Insurance Company was 98%. Given the similarities that must exist between the companies (primarily the product and the administration), it would be helpful to know what Co-Operators is doing differently from Wawanesa. Generally speaking, the consumer ought not to be terribly concerned about this mysterious discrepancy. But the companies with poor loss ratios are the ones that reduce the average ROE for the industry and are the ones most likely to be allowed large rate increases by provincial regulators. Given the fact that those matters are what generally drives the push for reform, the public has a vested interest in explaining these phenomena. There are even more dramatic illustrations of fiscal performance differences.

In Ontario in particular, insurers quite properly point out that accident benefits claims costs are increasing at unsustainable rates and represent significant losses for auto insurers. Though accident benefit costs are indeed out of control in Ontario, there are still loss ratios relating to those benefits that are anomalous. For example, the Co-Operators General Insurance Company had an accident benefits loss ratio in 2008 of 72%, hardly an indication of out of control costs. At the same time, Pilot Insurance Company reports an accident benefits loss ratio of 180%, an economic disaster. These two figures are impossible to reconcile from the data available. With the product identical, the market the same, one might wonder about an anomalous loss experience or perhaps about dramatically different corporate management. Either one or both of these seems unlikely to adequately explain the discrepancy.

CLAIMS COSTS

If changes in the pattern of claims costs account for precipitous changes in premiums, one would expect to find the same wavy pattern to historical claims costs that one sees on historical ROE. It turns out that claims costs do not follow a wavy pattern and are in fact linear.

Assessing the role of claims costs on auto insurance reform requires consideration of the perspective of the insurance industry. In support of the argument that claims costs are difficult to predict, the industry points out that: pricing auto insurance is prospective; the data used to price auto insurance is 2 or 3 years behind the current pricing; and, it is difficult to predict cost trends. Given the many years of experience with claims costs, these arguments ought not to impact materially on estimating future costs. Repeated reforms of auto insurance would in and of themselves contribute to the difficulty in predicting future costs. This is a compelling argument for a solution that is more enduring than what has been employed in the past.

In Ontario the third party liability claims costs for 1996 to 2006 are illustrated in figure 6 below.

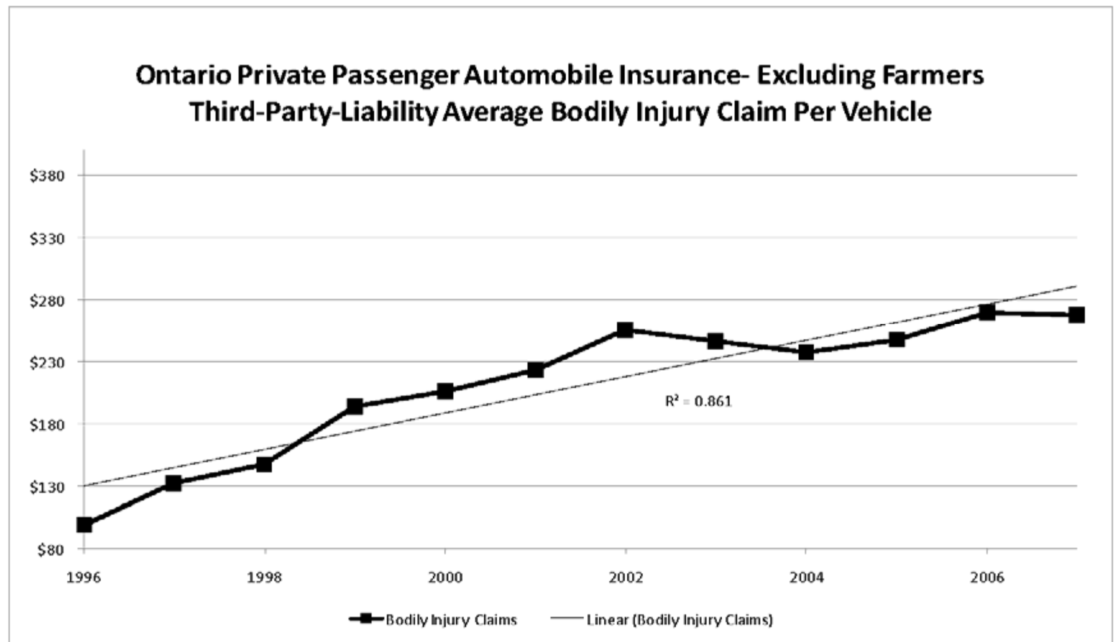
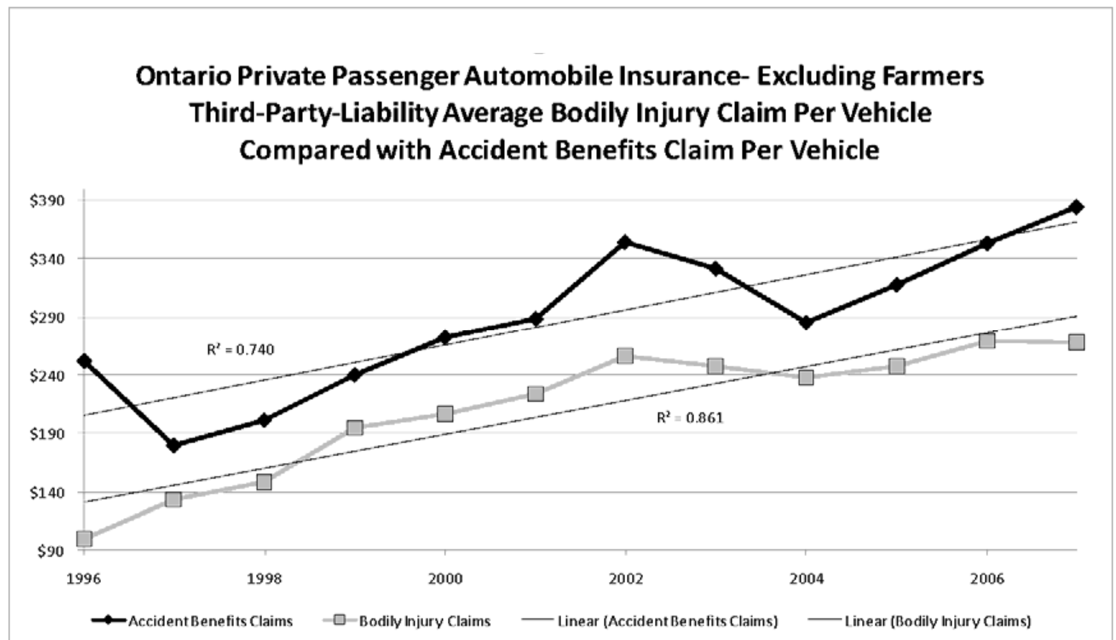


Figure 7 below sets out Ontario third party liability and accident benefits claims costs for 1996 to 2006.



PEI has demonstrated a slightly different pattern of claims costs, as suggested in Table 4 below. Premiums have followed a consistent upward trend while claims costs have varied. This data relates to all coverages. What is interesting is the fact that claims costs as a percentage of premiums has declined rather significantly. This is an important observation in the context of the 2004 introduction of the MPIR. With less being paid for claims relative to premiums collected, there was even less

justification for the introduction of the MPIR. In the year the MPIR was introduced claims costs relative to premiums had dropped to 46% from 80% in 2001.

TABLE 4

Prince Edward Island Automobile Insurance Private Passenger-Excluding Farmers All Coverages			
Year	Average Premium	Average Claim per Vehicle	Claim Costs Relative to Premiums
1996	$ 580	$ 490	85%
1997	$ 580	$ 467	80%
1998	$ 582	$ 494	85%
1999	$ 593	$ 561	95%
2000	$ 601	$ 574	95%
2001	$ 648	$ 520	80%
2002	$ 732	$ 477	65%
2003	$ 832	$ 509	61%
2004	$ 847	$ 392	46%
2005	$ 825	$ 375	45%
2006	$ 787	$ 438	56%
Source: GISA/IBC AU90-P.1987-2006			

Table 5 below sets out third party liability claims costs and accident benefits claims costs for PEI from 1996 to 2006. It can be seen that the pattern of bodily injury claims costs rises and falls, but the cost of bodily injury claims in 2003, despite a 14% increase, is not materially different than it had been in each of the previous 7 years. It follows that bodily injury claims costs experience did not demonstrate any concerns and most certainly could not explain the dramatic changes to insurer ROE. Again, there is nothing in the bodily injury claims costs data that could be used as a justification for limits to tort rights in 2004.

TABLE 5

Prince Edward Island Private Passenger (Excluding Farmers) Automobile Insurance Average Claims Per Vehicle (per Coverage Type) & Percentage Change								
Year	Third-Party-Liability Claims				Accident Benefits	% Change	Other Coverages	% Change
	Bodily-Injury	% Change	Property-Damage	% Change				
1996	$ 247		$ 65		$ 18		$ 194	
1997	$ 228	-8%	$ 72	11%	$ 18	0%	$ 187	-4%
1998	$ 240	6%	$ 76	5%	$ 21	15%	$ 192	3%
1999	$ 274	14%	$ 73	-3%	$ 31	48%	$ 209	9%
2000	$ 289	6%	$ 77	5%	$ 28	-8%	$ 229	9%
2001	$ 228	-21%	$ 76	-1%	$ 29	1%	$ 210	-8%
2002	$ 228	0%	$ 71	-7%	$ 27	-5%	$ 196	-7%
2003	$ 259	14%	$ 66	-8%	$ 22	-19%	$ 186	-5%
2004	$ 160	-38%	$ 68	4%	$ 22	-1%	$ 185	-1%
2005	$ 162	2%	$ 63	-8%	$ 18	-18%	$ 175	-5%
2006	$ 208	28%	$ 63	0%	$ 23	26%	$ 170	-3%
Source: GISA/IBC AU90-P.1987-2006. Includes allocated-loss-adjustment-expenses and unallocated-loss-adjustment-expenses. "Other Coverages" in this table account for collision and comprehensive "Optional" coverages; these two coverages make up approximately eighty-five-percent of the entire "Optional" coverages; more is noted in Table 6.								

Table 6 below demonstrates that there has been a significant decline (improvement) in claims costs relative to premiums since 2001.

TABLE 6

Prince Edward Island Automobile Insurance Private Passenger-Excluding Farmers All Coverages			
Year	**Average Premium**	**Average Claim per Vehicle**	**Claim Costs Relative to Premiums**
1996	$ 580	$ 490	85%
1997	$ 580	$ 467	80%
1998	$ 582	$ 494	85%
1999	$ 593	$ 561	95%
2000	$ 601	$ 574	95%
2001	$ 648	$ 520	80%
2002	$ 732	$ 477	65%
2003	$ 832	$ 509	61%
2004	$ 847	$ 392	46%
2005	$ 825	$ 375	45%
2006	$ 787	$ 438	56%
Source: GISA/IBC AU90-P.1987-2006			

For Nova Scotia the claims cost experience from 1996 to 2006 is set out in Table 7 below. Like PEI, it can be seen that claims costs as a percentage of premiums declined from 2000 and up to and beyond the introduction of the 2003 tort restrictions. It supports once again the fact that tort changes were not necessary to address ROE problems in the insurance industry.

TABLE 7

Nova Scotia Automobile Insurance Private Passenger-Excluding Farmers All Coverages			
Year	**Average Premium**	**Average Claim per Vehicle**	**Claim Costs Relative to Premiums**
1996	$ 591	$ 482	82%
1997	$ 599	$ 521	87%
1998	$ 602	$ 549	91%
1999	$ 604	$ 627	104%
2000	$ 613	$ 681	111%
2001	$ 675	$ 640	95%
2002	$ 800	$ 604	76%
2003	$ 950	$ 530	56%
2004	$ 883	$ 491	56%
2005	$ 871	$ 478	55%
2006	$ 829	$ 504	61%
Source: GISA/IBC AU90-S.1987-2006			

Further support for the notion that insurers in Nova Scotia did not require tort restrictions in 2003 can be found in Table 8 below which sets out third party liability and accident benefits claims costs between 1996 and 2006. Table 8 demonstrates that third party liability claims costs were down after 2000 and remained well below previous levels. This establishes that there were no problems with third party liability claims costs that needed to be addressed by tort restrictions. It also establishes that poor ROEs for insurers in prior years could not be attributed to any problems with third party claims. Going one step further, this is also proof that the ups and downs of ROE, and therefore instability, is unrelated to third party claims costs. Finally, this supports the conclusion that swings in ROE and instability must be due to other factors.

Put another way, precipitous increases in premiums must be attributed to influences in the business of insurance other than third party claims costs. As illustrated above in the section of profitability, how the business of insurance is managed is likely the main factor. Other factors that can contribute to increasing premiums include claims costs, administrative costs, overhead, returns on investments and taxes, along with a built in mark-up for insurer profit. Without getting into a detailed analysis of these other factors, it is suggested that each of these is relatively stable. Undoubtedly insurers have seen a steady decline on their return on investments, but those declines have followed a linear pattern as well.

TABLE 8

Nova Scotia Private Passenger (Excluding Farmers) Automobile Insurance
Average Claims Per Vehicle (per Coverage Type) & Percentage Change

Year	Third-Party-Liability Claims				Accident Benefits	% Change	Other Coverages	% Change
	Bodily-Injury	% Change	Property-Damage	% Change				
1996	$ 241		$ 65		$ 35		$ 203	
1997	$ 262	9%	$ 63	-4%	$ 38	8%	$ 222	9%
1998	$ 285	9%	$ 64	2%	$ 44	16%	$ 213	-4%
1999	$ 329	16%	$ 69	8%	$ 59	33%	$ 233	9%
2000	$ 366	11%	$ 69	0%	$ 62	6%	$ 246	5%
2001	$ 334	-9%	$ 71	3%	$ 59	-6%	$ 232	-5%
2002	$ 317	-5%	$ 68	-4%	$ 55	-6%	$ 217	-6%
2003	$ 269	-15%	$ 65	-5%	$ 42	-24%	$ 201	-7%
2004	$ 213	-21%	$ 70	7%	$ 53	26%	$ 209	4%
2005	$ 211	-1%	$ 70	1%	$ 42	-19%	$ 207	-1%
2006	$ 214	1%	$ 73	4%	$ 47	11%	$ 227	9%

Source: GISA/IBC AU90-S.1987-2006. Includes allocated-loss-adjustment-expenses and unallocated-loss-adjustment-expenses. "Other Coverages" in this table account for collision and comprehensive "Optional" coverages; these two coverages make up approximately eighty-percent of the entire "Optional" coverages; more is noted in Table 6.

Claims costs experience for New Brunswick was much like that experienced in PEI and Nova Scotia. Table 9 below sets out average premiums and claims cost for New Brunswick from 1996 to 2006. This table demonstrates a similar pattern to other provinces, showing that claims as a percentage of premiums was decreasing.

TABLE 9

New Brunswick Automobile Insurance Private Passenger-Excluding Farmers All Coverages			
Year	**Average Premium**	**Average Claim per Vehicle**	**Claim Costs Relative to Premiums**
1996	$ 737	$ 614	83%
1997	$ 741	$ 677	91%
1998	$ 735	$ 751	102%
1999	$ 737	$ 821	111%
2000	$ 746	$ 841	113%
2001	$ 808	$ 804	99%
2002	$ 943	$ 739	78%
2003	$ 1,095	$ 606	55%
2004	$ 1,120	$ 477	43%
2005	$ 1,044	$ 535	51%
2006	$ 951	$ 534	56%
Source: GISA/IBC AU90-B.1987-2006			

Table 10 below shows bodily injury and accident benefits claims costs in New Brunswick for the period 1996 to 2006. Once again, the table demonstrates that bodily injury claims costs were not a problem in New Brunswick and that tort restrictions were not necessary to address diminished profitability for insurers in earlier years.

TABLE 10

New Brunswick Private Passenger (Excluding Farmers) Automobile Average Claims Per Vehicle (per Coverage Type) & Percentage Change								
Year	Third-Party-Liability Claims				Accident Benefits	% Change	Other Coverages	% Change
	Bodily-Injury	% Change	Property-Damage	% Change				
1996	$ 333		$ 69		$ 61		$ 211	
1997	$ 352	6%	$ 73	6%	$ 89	46%	$ 215	2%
1998	$ 403	14%	$ 70	-4%	$ 102	14%	$ 221	3%
1999	$ 444	10%	$ 76	8%	$ 127	25%	$ 225	2%
2000	$ 436	-2%	$ 76	0%	$ 134	5%	$ 242	7%
2001	$ 424	-3%	$ 72	-5%	$ 132	-1%	$ 228	-6%
2002	$ 382	-10%	$ 67	-7%	$ 121	-8%	$ 209	-8%
2003	$ 280	-27%	$ 64	-4%	$ 110	-9%	$ 188	-10%
2004	$ 189	-32%	$ 61	-4%	$ 87	-21%	$ 178	-6%
2005	$ 224	18%	$ 63	2%	$ 100	15%	$ 187	5%
2006	$ 212	-5%	$ 72	15%	$ 89	-11%	$ 190	2%
Source: GISA/IBC AU90-B.1987-2006. Includes allocated-loss-adjustment-expenses and unallocated-loss-adjustment-expenses. "Other Coverages" in this table account for collision and comprehensive "Optional" coverages; these two coverages make up approximately eighty-percent of the entire "Optional" coverages; more is noted in Table 6.								

Coming back to the insurance industry's oft-cited concern about "stability", it is obvious from this analysis that there was no instability on account of third party liability claims. Advocating for restrictions in tort rights, therefore, makes absolutely no sense when third party liability claims were not presenting a problem for the industry or the system.

Perhaps the most important point to drive home on the matter of stability is the undeniable fact that limits on tort rights can not and will never provide stability to auto insurance. Third party claims do not contribute to instability in any meaningful way. Moreover, the fact that instability has continued in the face of tort restrictions, tracing back as far as June 1990 in Ontario, demonstrates unequivocally that stability can not be achieved with tort restrictions.

While claims costs do not rise and fall dramatically, the impact of changes in claims costs over time is a factor to be considered. In Ontario the recent experience with first party benefits demonstrates a rate of change of costs well in excess of inflation. It is necessary to develop an understanding as to why that occurs and whether there are any steps that can be taken to tame these costs. These changes in the cost of first party benefits in Ontario have created a system that is currently unsustainable as it stands. There are many reasons why expenses for first party benefits are out of control, but the three main reasons are undue complexity, excessive assessment costs and enormous transaction costs.

The IBC argues that reforms that have limited claims have resulted in only a couple of years of improved financial results which are then undermined by stakeholders who "find and exploit weaknesses". While claims costs are a factor affecting profitability, the transient nature of the improved fiscal performance is due in large part to the failure of the insurance industry to develop a solution that responds to the problem directly and a failure to acknowledge the fundamental cause for the problem. The fact that results improve temporarily prove that the solution is wrong. As to the notion of "finding and exploiting weakness", the solutions proposed by the IBC, at least in Ontario, have introduced and expanded a level of complexity that inevitably leads to uncertainty, ambiguity, inefficiency and the development of an expensive bureaucracy, driving up costs for all participants, including the administration of justice.

PREMIUMS

At the heart of any debate about auto insurance is the matter of premiums. Understandably, the public does not welcome precipitous increases in their expenses, particularly when they are unanticipated. There is fallout from sudden premium increases for insurers and politicians.

For the insurance industry, already suffering from a poor public image, sudden premium increases impair their relationship with their customers. From a public relations point of view, insurers are well advised to do what they can to avoid sudden premium increases. It is understandable why insurers prefer to have

legislated costs reductions than large premium increases. It appears, however, that insurers are unable to regulate their own behaviour to avoid the need for large price increases.

Public intolerance of large premium increases inevitably becomes a political issue. Consumers look to government to control rising premiums. The cost of auto insurance is a matter that directly impacts on the majority of voters. Premiums represent a significant amount of the household budget for many consumers. Elections can be won and lost on the issue of auto insurance. Unfortunately in the controversy that erupts over sudden premium increases it is not unusual to lose sight of the equally important issue of quality of the product. In the result, governments have tended to make quick fixes that provide relief for costs, relieving upward pressure on premiums, without due consideration for the actual need for the changes or whether the reforms fit with what is ailing auto insurance at the time.

Part of the problem with smoothing out the highs and lows of profitability for insurers may be due to the fact that changes in loss costs and pricing of insurance have tended not to correspond. Table 11 below sets out the average premiums and claims experience for Ontario for the years 1996 to 2006. Table 7 sets out the average premiums and average claim per vehicle for Nova Scotia.

Using Ontario as an example, it can be seen that claims costs and pricing (premiums) often move in opposite directions. Recall that the years 2000-2002 were very lean for ROE. Immediately prior to the reforms of 2003 premiums increased from $1,039.00 to $1,248.00 on average (2002 to 2003), while the average claims dropped from $1,028.00 to $977.00. The claims to premium ratio fell from 99% to 78%. The average premium increase again in 2004 while the average claim dropped, leading to a further improvement in the claim to premium ratio of 63%. In 2006 we saw the reverse pattern. After the reforms of 2003 in Ontario, the government promised to bring premiums down, which they did by around 14% from 2004 to 2007. Yet at the same time the table shows that costs increased from 2004 to 2007. Incredibly with decreasing premiums and increasing costs, the insurance industry enjoyed the best years in history between 2004 and 2007 with respect profitability. The industry would have the public and the government believe that the reductions in premiums after 2003 could be attributed to the reforms made in 2003. A look at the data, however, proves that claim to be untrue. The reforms brought forward in 2003 had virtually nothing to do with the record years of profit in 2004 to 2007. From 2003 to 2007 costs are rising and premiums are falling, while profit skyrockets. The claims that any of this is due to the reforms of 2003 is irresponsible and misleading. The fact that increased profit and decreased claims costs followed the Ontario reforms in 2003 has allowed the IBC to spin that data that way. That feeds the arguments convenient to their political agenda. The truth is that profitability was restored quite independently of the 2003 reforms.

TABLE 11

Ontario Private Passenger Automobile Insurance- Excluding Farmers					
All CoveragesAverage Premium and Claim Cost (Loss Cost) per Vehicle					
Year	Average Premium	Average Claim	Claim to Premium Ratio	Annual Change in Average Premium	Annual Change in Average Claim (per Vehicle)
1996	$962	$693	72%		
1997	$939	$638	68%	-$23	-$54
1998	$887	$678	76%	-$51	$40
1999	$861	$797	93%	-$26	$119
2000	$868	$868	100%	$6	$71
2001	$914	$902	99%	$46	$34
2002	$1,039	$1,028	99%	$125	$126
2003	$1,248	$977	78%	$209	-$51
2004	$1,396	$879	63%	$147	-$98
2005	$1,349	$928	69%	-$47	$48
2006	$1,307	$973	75%	-$42	$46
2007	$1,290	$1,034	80%	-$16	$61
Data Sources: Publication AU10-N, years 2008-1996, valued at last publication date					

The experience in Nova Scotia is similar to Ontario. The Nova Scotia reforms limiting tort came into effect in November 2003. Recall that ROE was very poor in the years leading up to the reforms. In 2001 premiums were rising while claims costs were coming down. That pattern continued in 2002 when the claims to premiums ratio dropped to 76%. By 2003 that ratio was a very healthy 56%; a clear sign that the restrictions were not needed. Ontario data provides the best illustration of these arguments due to the fact that the ROE cycles in Ontario tend to be more dramatic than other provinces.

When rates fail to track changes in costs, the profit margin dwindles and, if timely adjustments are not made, ultimately disappears. Without exploring why some companies see their profit margins disappear more quickly or dramatically than others, the lag in adjusting pricing can result in a later attempt to catch up with pricing, giving rise to the precipitous rises in premiums that the public understandably abhors. Criticism for the delay in catching up with pricing can not be laid entirely on the insurance industry. Difficulties undoubtedly arise in part as a result of the rate review process and the administrative and practical hurdles to efficient and timely price adjustment.

OTHER THREATS TO ACCESS TO JUSTICE

The lengths to which the IBC is prepared to go to allow profit to trump any other rights or interests is evident in Ontario. In Ontario, the Insurance Act requires the Superintendent of Insurance to review auto insurance every five years. That review took place in 2008 with submissions made by many stakeholders including the IBC. In its July 2008 submission to the Superintendent, the IBC expressed dissatisfaction with the "adverse trend that arose out of court and arbitration decisions on auto insurance issues". They described judicial findings adverse to the insurer as "unexpected interpretations to the product".

The IBC claims that these unexpected interpretations can have a "significant destabilizing effect". Having been party to introducing some of the most complex provisions to auto insurance in any jurisdiction, and adding to the complexity with each new reform they propose, the industry now complains about the uncertainty surrounding the interpretation of these convoluted provisions. Paradoxically, while complaining about interpretation of the product and recognizing the undue complexity of the product, in its submissions to the Superintendent the industry offered proposals that would only exacerbate these problems.

But the real threat to access to justice is the IBC recommendation that the government be able to "negate the precedent-setting effect of court/arbitration decisions".[31] The IBC recommends that arbitration decisions not be considered precedent setting.[32] It is incredible that the IBC would seek to undermine one of the most fundamental principles of the justice system: the importance of precedent. This outrageous position is motivated by the fact that the IBC is unhappy with how the insurance product has been interpreted in Ontario. In developing its ideas about reform, it appears the IBC has lost sight of the relationship insurers are to have with their insureds, one of utmost good faith.

Another important fundamental threat to access to justice is concerned with recent proposals to do away with the law of joint and several liability. This is most certainly the next frontier. The IBC has promoted the abolition of joint and several liability in auto cases.[33] Recent ads taken out by the group representing Chartered Accountants have also promoted the abolition of joint and several liability.

Accountants, auditors, corporate directors and others are urging changes to the notion of joint and several liability. Some seek to impose proportionate liability and/or caps on damages in certain cases.

Where there are multiple wrongdoers, joint and several liability makes each defendant liable for the full extent of the plaintiff's loss. A paying defendant is then at liberty to seek contribution and indemnity from any other defendant. This accords with the primary objective of tort law which is to attribute loss away from the plaintiff to those who have caused the harm. It is based on a notion of fairness that as between an innocent party and a wrongdoer, the wrongdoer ought to bear the burden of the loss. This also means that defendants assume any burden associated with a co-defendant's inability to pay. That co-defendant may be uninsured, inadequately insured or have insufficient assets to satisfy a judgment.

In scenarios where one defendant is unable to satisfy a judgment, the principle of joint and several liability is the only means by which a plaintiff may be made whole. It is the policy of making the plaintiff whole, which is the fundamental purpose of tort law, that is the basis for joint and several liability.

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[31] See recommendation 22 of the July 2008 IBC submission to the FSCO.
[32] See IBC recommendation 23.
[33] See IBC recommendation 14 in the July 2008 submission to the FSCO.

Those advocating for a move to proportionate liability or some modified version of that concept would visit all or part of loss unpaid by the delinquent defendant on the plaintiff. It amounts to a shifting of loss away from a defendant who is found culpable for the loss. Many of the policy considerations outlined in this paper in relation to auto insurance reform apply to joint and several liability. Compensation, deterrence and fairness are among the policy consideration. On the other side of the debate are professionals, advisors and insurance companies seeking to lower their exposure to loss. It would result in cost savings for liable defendants at the expense of an innocent plaintiff in some scenarios. On a public policy basis, different considerations may apply when different interests are at stake. There may be reason to distinguish between personal injury, economic loss and property losses. The debate on joint and several is about to heat up.

CONCLUSIONS

In the final analysis, premiums and profitability are affected by underwriting, reserving for existing and future claims, marketing, forecasting, returns on investments, claims experience, administrative expenses, corporate management, profit and other factors. The cost of third party liability is but one of the variables affecting cost, but not a variable affecting stability or predictability. Restricting tort rights cannot bring about stability and cannot provide a lasting solution to the periodic drops in insurer ROE. Arguing for restricted access to justice in the face of diminished profits is a non sequitur. What is certain about tort restrictions is that they impair access to justice. Where it is sought to control costs through limiting access to justice it seems only reasonable to impose a high burden on those promoting these limits to show cause why they are justified and why other methods cannot be utilized to achieve the desired results. Experience has shown time and time again, based on the data, that this burden cannot be met.

Consequently, experience has shown that the responsibility for finding solutions to what ails auto insurance cannot be entrusted to the insurance lobby. Admittedly there are insurance companies prepared to take a more responsible approach to finding a solution to auto insurance problems that are lasting and truly in the interests of consumers and those unfortunate enough to have to access the protection they buy. When profit is not the only motivation, a solution can be found.

In Ontario, despite severe restrictions on tort rights, made even more severe in the 2003 round of reforms, we find ourselves in the same predicament in 2009. Limiting access to justice did not bring stability to auto insurance for either insurance companies or consumers. First party benefit costs are out of control. Ontario’s benefit scheme is beyond the understanding of most consumers. The cost to administer this unduly complex system devours huge sums of premium dollars paid by consumers. Transaction costs and assessment costs are out of control. The expense associated with recovering a benefit is, in many cases, disproportionate to the amount at stake and the importance of the benefit. A solution needs to be found that does not require significant reform every few years.

Profitability cycles will continue until there are some more fundamental changes to the business of auto insurance. One suggestion for mitigating the degree of swing of ROE, particularly through the trough, would be to forewarn the insurance industry that government intervention in the form of legislative changes aimed solely at cost reduction cannot be relied upon to legislate the industry out of a downturn. This will help enforce better pricing practices on the part of insurers and discourage overly lax underwriting designed to attract policy holders when those practices may fail to have due regard to the potential medium term fiscal impact on the company and, ultimately, the industry. Insurers should be compelled to exercise more prudent discipline in pricing the product, no matter what capital is on hand. In fact, the failure to introduce these measures actually contributes to instability by tacitly encouraging a boom and bust mentality with "bail outs" in the form of cost cutting changes to the product during the bust.

Richard Halpern
November 13, 2009

SCHEDULE A

Ontario Automobile Insurance Claim Experience
2007 and 2008 Calendar Year
Federally Licenced Companies

Company Name	Year	Liability		Accident Benefits		Other		Total	
		Premiums	Ratio	Premiums	Ratio	Premiums	Ratio	Premiums	Ratio
Canadian Total	2007	3,500,200	71%	2,197,647	98%	2,013,230	63%	7,711,077	77%
Total Foreign Licenced in Canada	2007	578,620	73%	356,956	160%	320,537	69%	1,256,113	94%
Total Federal Licenced	2007	4,078,820	71%	2,554,603	105%	2,333,767	64%	8,967,190	79%
Ontario Personal Auto 2007 Green Book		3,518,305	75%	2,415,622	100%	2,207,975	66%	8,141,902	80%
Canadian Total	2008	3,576,920	68%	2,238,962	118%	2,020,843	65%	7,836,716	81%
Total Foreign Licenced in Canada	2008	605,670	78%	378,986	166%	329,597	70%	1,314,233	102%
Total Federal Licenced	2008	4,182,590	69%	2,617,918	125%	2,350,440	65%	9,150,949	84%
State Farm Mutual Automobile Insurance Company	2007	428,882	64%	312,280	158%	253,847	70%	995,009	95%
	2008	477,955	75%	339,276	169%	271,527	65%	1,088,758	102%
ING Insurance Company of Canada	2007	349,414	84%	227,958	90%	202,127	61%	779,499	80%
	2008	365,676	76%	228,721	85%	204,030	67%	798,427	78%
Economical Mutual Insurance Company	2007	267,680	70%	157,352	105%	159,914	65%	584,946	78%
	2008	292,421	83%	167,749	130%	167,664	65%	627,834	91%
Dominion of Canada General Insurance Company (The)	2007	214,300	77%	121,096	93%	127,891	62%	463,287	77%
	2008	221,330	73%	122,086	101%	134,487	59%	477,903	77%
Security National Insurance Company	2007	207,640	59%	144,374	87%	114,146	69%	466,160	70%
	2008	202,559	60%	138,463	136%	118,944	66%	459,966	84%
Pilot Insurance Company	2007	210,088	55%	141,846	136%	140,168	61%	492,102	80%
	2008	194,376	30%	126,209	180%	129,387	60%	449,972	80%

Company Name	Year	Liability		Accident Benefits		Other		Total	
		Premiums	Ratio	Premiums	Ratio	Premiums	Ratio	Premiums	Ratio
Co-operators General Insurance Company	2007	193,481	54%	127,109	51%	95,813	77%	416,403	58%
	2008	194,420	64%	132,662	72%	100,151	72%	427,233	69%
Wawanesa Mutual Insurance Company (The)	2007	127,685	102%	95,044	93%	99,712	54%	322,441	84%
	2008	134,908	98%	97,619	99%	102,299	53%	334,826	85%
Unifund Assurance Company	2007	111,951	91%	59,325	86%	81,444	60%	252,720	80%
	2008	129,975	99%	67,714	96%	89,692	71%	287,381	90%
Personal Insurance Company (The)	2007	121,630	62%	71,346	174%	72,246	59%	265,222	91%
	2008	121,654	63%	89,993	115%	55,981	80%	267,628	84%
Traders General Insurance Company	2007	132,172	53%	67,922	146%	67,035	70%	267,129	81%
	2008	132,149	25%	66,314	169%	68,277	72%	266,740	73%
Allstate Insurance Company of Canada	2007	121,741	38%	69,492	98%	52,804	66%	244,037	61%
	2008	125,853	63%	73,472	101%	50,441	83%	249,766	73%
AXA Insurance (Canada)	2007	85,160	43%	54,928	104%	43,676	63%	183,664	66%
	2008	96,471	50%	62,169	135%	51,768	65%	210,408	79%
Nordic Insurance Company of Canada (The)	2007	71,318	103%	58,013	61%	37,561	87%	166,892	85%
	2008	88,158	79%	66,455	86%	45,555	73%	200,168	80%
RBC General Insurance Company	2007	95,927	80%	70,425	65%	55,690	67%	222,042	72%
	2008	85,981	56%	63,898	109%	48,544	56%	198,423	73%
Aviva Insurance Company of Canada	2007	92,689	72%	35,610	118%	41,255	53%	169,554	77%
	2008	95,448	1%	36,290	162%	42,322	63%	174,060	50%
TD General Insurance Company	2007	62,489	72%	66,302	128%	33,101	49%	161,892	90%
	2008	66,445	62%	66,464	180%	35,950	56%	168,859	107%
Lombard General Insurance Company of Canada	2007	93,769	101%	30,313	84%	31,725	72%	155,807	92%
	2008	96,256	105%	34,882	124%	30,392	79%	161,530	104%
Royal & Sun Alliance Insurance Company of Canada	2007	73,286	91%	39,671	122%	44,131	59%	157,088	90%
	2008	74,446	38%	42,295	65%	44,238	48%	160,979	46%
Primmum Insurance Company	2007	54,334	50%	56,106	84%	40,329	45%	150,769	61%
	2008	52,716	32%	55,842	112%	36,732	49%	145,290	67%
TD Home and Auto Insurance Company	2007	64,570	74%	54,585	104%	39,313	56%	158,468	80%
	2008	60,563	86%	48,740	122%	35,440	59%	144,743	92%
Coseco Insurance Company	2007	57,653	76%	33,779	81%	27,603	74%	119,035	77%
	2008	65,728	94%	35,354	166%	29,357	64%	130,439	107%
Scottish & York Insurance Co. Limited	2007	58,710	86%	41,902	137%	31,280	70%	131,892	98%
	2008	57,031	44%	39,873	198%	30,879	73%	127,783	99%
Markel Insurance Company of Canada	2007	85,237	57%	4,076	230%	44,747	70%	134,060	67%
	2008	71,731	84%	5,049	259%	35,887	91%	112,667	94%
Zürich Versicherung-Gesellschaft	2007	87,525	101%	15,959	143%	31,476	53%	134,960	95%
	2008	69,663	92%	12,970	229%	24,895	65%	107,528	102%

Company Name	Year	Liability		Accident Benefits		Other		Total	
		Premiums	Ratio	Premiums	Ratio	Premiums	Ratio	Premiums	Ratio
Perth Insurance Company	2007	47,329	50%	35,005	99%	22,184	56%	104,518	68%
	2008	46,808	70%	34,564	135%	22,296	57%	103,668	89%
Gore Mutual Insurance Company	2007	37,643	81%	30,570	60%	24,117	71%	92,330	72%
	2008	41,959	84%	31,969	86%	26,310	66%	100,238	80%
Echelon General Insurance Company	2007	33,336	66%	35,390	80%	16,028	48%	84,754	69%
	2008	37,709	76%	35,369	73%	17,696	41%	90,774	68%
Trafalgar Insurance Company of Canada	2007	39,339	81%	22,994	97%	20,783	61%	83,116	80%
	2008	43,392	73%	24,467	90%	22,241	68%	90,100	76%
Lombard Insurance Company	2007	35,279	87%	29,350	64%	22,734	61%	87,363	73%
	2008	36,350	92%	28,960	77%	23,208	60%	88,518	78%
Certas Direct Insurance Company	2007	35,390	72%	29,121	106%	19,292	58%	83,803	80%
	2008	38,838	68%	31,661	93%	15,474	70%	85,973	76%
Guarantee Company of North America (The)	2007	36,141	46%	23,130	103%	24,756	58%	84,028	65%
	2008	34,175	88%	21,716	114%	23,698	44%	79,590	82%
Western Assurance Company	2007	24,968	86%	15,588	122%	19,963	44%	60,517	81%
	2008	26,392	221%	17,028	209%	20,988	45%	64,408	161%
Pembridge Insurance Company	2007	20,856	65%	15,435	79%	12,272	57%	48,563	67%
	2008	24,343	77%	18,644	92%	13,896	65%	56,883	79%
Waterloo Insurance Company	2007	18,655	60%	11,577	91%	13,462	60%	43,894	68%
	2008	21,889	76%	13,354	131%	15,485	54%	50,728	84%
Motors Insurance Corporation	2007	20,201	26%	14,632	84%	15,867	87%	50,690	62%
	2008	20,139	51%	15,181	117%	14,891	103%	50,211	86%
Chubb Insurance Company of Canada	2007	22,721	68%	6,512	38%	21,199	70%	50,432	65%
	2008	22,887	74%	6,493	57%	20,737	58%	50,117	65%
S&Y Insurance Company	2007	21,354	72%	15,012	108%	11,658	67%	48,024	82%
	2008	22,349	38%	15,144	148%	12,464	70%	49,957	79%
ING Novex Insurance Company of Canada	2007	19,740	79%	14,396	50%	12,241	69%	46,377	67%
	2008	19,996	66%	14,143	85%	12,266	71%	46,405	73%
Elite Insurance Company	2007	9,831	90%	6,020	194%	18,221	44%	34,172	84%
	2008	12,153	41%	8,541	183%	20,480	57%	41,174	78%
Pafco Insurance Company	2007	34,829	63%	27,381	63%	10,898	76%	73,108	65%
	2008	19,425	7%	13,153	117%	5,937	95%	38,515	68%
Zenith Insurance Company	2007	9,746	140%	11,390	39%	8,713	56%	29,849	77%
	2008	10,468	126%	11,862	60%	9,276	57%	31,606	81%

Company Name	Year	Liability		Accident Benefits		Other		Total	
		Premiums	Ratio	Premiums	Ratio	Premiums	Ratio	Premiums	Ratio
ACE INA Insurance	2007	23,520	55%	187	116%	8,024	71%	31,731	59%
	2008	21,473	106%	169	66%	8,015	78%	29,657	97%
Jevco Insurance Company	2007	3,408	50%	8,854	57%	2,495	35%	14,755	52%
	2008	8,519	47%	15,421	84%	4,777	41%	28,717	66%
Old Republic Insurance Company of Canada	2007	18,138	83%	2,414	113%	6,325	50%	26,877	78%
	2008	15,937	89%	2,320	101%	5,586	86%	23,843	90%
Federated Insurance Company of Canada	2007	13,218	77%	3,957	6%	7,167	63%	24,342	61%
	2008	12,035	74%	3,919	186%	6,416	70%	22,370	92%
CUMIS General Insurance Company	2007	7,692	48%	5,232	127%	4,359	63%	17,283	76%
	2008	9,175	42%	6,267	134%	5,322	72%	20,764	77%
St. Paul Fire and Marine Insurance Company	2007	13,501	103%	2,692	34%	4,081	69%	20,274	87%
	2008	13,379	107%	1,949	168%	4,267	168%	19,595	126%

			MKT %		MKT %		MKT %		MKT %
Total of Selected Companies	2007	4,016,464	98%	2,523,650	99%	2,295,763	98%	8,835,878	99%
Total of Selected Companies	2008	4,133,703	99%	2,592,853	99%	2,316,665	99%	9,043,122	99%