AUTO INSURANCE REFORM 2009

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A. The Five Year Review

Under section 289.1 of the Insurance Act[1] the Superintendent of the Financial Services Commission of Ontario is required to undertake a review of auto insurance at least every 5 years. Accordingly a review commenced in 2008 pursuant to the statute. The section requires the Superintendent to make recommendations to the Minister of Finance about amendments to the Act that he believes will improve the effectiveness and administration of auto insurance. In anticipation of the 5-year review, the Superintendent invited interested stakeholders to make submissions on auto insurance reform. Dozens of submissions were received by the Superintendent, including submissions from the Ontario Bar Association, the Ontario Trial Lawyers Association, the Advocates Society, Health Care Providers and the Insurance Bureau of Canada. Submissions were received by the Superintendent in July 2008.

The Superintendent indicated that the review would focus on enhancing protection for policy holders and ensuring affordability and availability of coverage. From the consumer's point of view, submissions were invited on better access to compensation and services following an accident. FSCO also invited suggestions that would improve fairness and efficiency in the auto insurance system.

Further changes were made for accidents occurring after October 31, 1996 under Bill 59. The right to sue for economic losses was restored in part. Non-pecuniary general damages could be claimed if a new verbal

[1] Insurance Act, R.S.O 1990 c. I.8

threshold was met[2]. The deductible against non-pecuniary general damages was increased. First party benefits were changed, making them less generous.

B. The Need for Reform

Auto insurance is in need of fundamental and comprehensive reform. The current system unfairly limits access to justice with restrictions in tort rights, while burdening consumers and accident victims with an unduly expensive, complex and inefficient first party benefit system. Enhanced access to justice together with a system that more effectively delivers needed rehabilitation to accident victims is needed.

The cost of auto insurance for consumers, the rehabilitation of injured people and access to justice should be the primary focus of reform. In the last 2 decades multiple changes to auto insurance have failed dismally in delivering a stable and predictable auto insurance product. In the current round of reforms it is vital that interested parties propose reforms that provide a long term solution to what ails auto insurance today. Confidence in the auto insurance system needs to be restored with a lasting solution.

In the context of the current auto insurance system, advocates for the rights of accident victims can no longer focus solely on accessing damages and benefits for their clients within the context of the existing system. Rather, it has been necessary for those of us who were previously strangers to the economics of auto insurance to develop a level of sophistication about the business of auto insurance and the fiscal realities facing auto insurers. At the same time public concern for changes in auto insurance premiums and the political ramifications for governments are important variables in the discussion about auto insurance reform.

Responsible positions on auto insurance reform need to balance the rights of accident victims with the economic and political realities. This must also be done with the benefit of lessons learned from more than 19 years of experience with enhanced first party benefits (no-fault benefits) in Ontario.[3] The historical motivations for the introduction of restrictions on tort rights and enhanced first party benefits were the threat of precipitous increases in auto insurance premiums and the threat of an insurance

[2] The new verbal threshold is permanent serious disfigurement; or, permanent serious impairment of an important physical, mental or psychological function. See section 267.5 (5) of the Insurance Act.

[3] Enhanced first party benefits were introduced in Ontario on June 22, 1990 under the Ontario Motorist Protection Plan (OMPP).

crisis. These concerns gave rise to the Ontario Motorist Protection Plan (OMPP) in 1990 following concerns about an insurance crisis in the mid to late 1980s. Significant changes to auto insurance occurred again in 1994 with Bill 164, in 1996 with Bill 59 and in 2003 with Bill 198.

Now, in 2009, we are facing a further push for auto insurance reform following the mandatory 5-year review performed by the Financial Services Commission of Ontario (FSCO) under section 289.1 of the Insurance Act. In the March 31, 2009 FSCO report to the Minister of Finance there are 39 recommendations made for reforming auto insurance. These recommendations were made after extensive consultation with health care professionals, lawyers, insurers and other interested parties.

The FSCO recommendations have focussed primarily on first party benefits, although there are some very important recommendations about the easing of restrictions on tort rights. As well, the recommendations propose further modification to auto insurance that is intended to address the undue complexity of the first party benefit system. The report also reserves for further consideration the issue of whether there should be some change to the definition of “catastrophic” and whether there ought to be further easing of tort restrictions.

Perhaps the best place to begin when discussing the need for auto insurance reform is with premiums and politics. Common sense tells us that the public will generally tolerate increases in the cost of living consistent with inflation, tending to run at 2% per year more or less. On the other hand, the public will not tolerate the threat of auto insurance premium increases much above that level and creeping up into double digits, a scenario we currently face according to insurance industry advocates. Public pressure on governments to ensure that premiums do not increase precipitously has led to the reform we have seen over the last two decades. Unfortunately, each system developed in response to the call for lower premiums has been fundamentally flawed and has failed to deliver a long term solution for consumers or the insurance industry. Much of the reform has been influenced by the auto insurance industry with a focus on short term profits rather than long term solutions. Consequently, the periodic changes have tended to deliver increased profitability to insurers only temporarily, leading to repeated alterations to the system which, in the long term, harm consumers and accident victims.

The auto insurance industry has been very vocal in advocating for reform through the Insurance Bureau of Canada (IBC).

Fundamentally, the first party benefit system as it currently stands, with the associated transaction costs and bureaucracy needed to administer it,

is a notoriously inefficient and costly way to manage claims and determine entitlement. In contrast, the tort system is a much more efficient method for delivering compensation. Given the burdens associated with the first party benefit system, it comes as no surprise that escalating costs are threatening the entire system. Previous reforms have failed to deliver a lasting solution for Ontario consumers. A new approach to reform is called for.

In 2008 insurance premiums have started to rise again. For 2009 FSCO projected an average rate change of approximately 3% for just the first quarter of 2009. Citing skyrocketing loss costs for accident benefits claims, the insurance industry is threatening precipitous premium increases unless some rather fundamental changes are made to auto insurance in Ontario. The insurance industry claims that rising costs and relatively stable premiums have resulting in a substantial "rate inadequacy" which is bound to upset stability of the product imminently. Quite apart from the "sky is falling" approach of the insurance industry, FSCO has recognized that Ontario Consumers are facing some challenges going forward. FSCO said:

> "Consumers will likely see their premiums increase significantly in 2009 and 2010 without some structural changes to the auto insurance product to reduce and stabilize costs in the system."[4]

Indeed, fundamental change to the first party benefit system is needed, but decreased profitability of insurance companies ought not to be the motivator for reform. Rather, the fact that the first party benefit system is unduly complex, inefficient and wasteful ought to be sufficient incentive to fix what is wrong. Improving the first party benefit system by dramatic reductions in costs will also incidentally improve profitability for insurers and take upward pressure off of premiums.

There are three basic matters that need to be addressed in order to deliver the substantial cost reductions needed in the first party system. First, the current system is too complex. According to FSCO virtually every stakeholder made reference to the complexity of the accident benefits system. The complexity of the accident benefits system has been compared to the Income Tax Act and undoubtedly is a burden for consumers and contributes to substantial cost for the insurance industry. FSCO points out that only 25% of the Statutory Accident Benefits Schedule describes the benefits available to claimants, with the remainder devoted to procedure. There is ample evidence to suggest that the procedure portion is ineffective in achieving what it was created to achieve. Second, transaction costs relating to the application for and administration of claims is a huge financial burden. Training and retention

[4] See Report page 19.

of accident benefits adjusters is significant and affected by complexity. Processes for determining entitlement to benefits come at a cost out of keeping with the amounts at stake. The cost to administer benefits is often disproportionate to the amount sought and the importance of the benefit to the parties. Third, assessment costs are at unsustainable levels and are completely unjustified. The Insurance Bureau of Canada in their July 2008 submission to FSCO indicated that for every dollar paid for medical treatment in 2007, assessment costs added another 60 cents of expense, and that for claims valued at under $20,000 these costs added 70 to 80 cents for each dollar paid for treatment.

The insurance industry's push for reform should also be looked at in the context of its declining fiscal performance, clearly another downward trend as part of the historical cycles of profitability. Data shows that 2003 through 2007 were excellent years for insurer ROE. In fact profit had reached historically unprecedented highs. FSCO included the following table on income and ROE:

ALL CLASSES OF P&C INSURANCE		
YEAR	AFTER TAX NET INCOME (000,000)	ROE
2003	$2,199	11.9%
2004	$4,084	19.0%
2005	$4,043	16.5%
2006	$5,534	20.1%
2007	$4,953	16.1%
2008	$2,318	7.5%

Given the problems inherent in the first party benefit system, the unwarranted limitations on tort rights, the interests of Ontario consumers and the financial woes of the insurance industry, reform to auto insurance is needed now. In view of the problems identified and the failure of previous attempts to fix auto insurance, it is suggested that only a comprehensive package of reforms will achieve the desired goals of fairness, affordability and stability.

C. The Economics of Auto Insurance

As long as we have private auto insurance in Ontario, companies in the business of providing auto insurance must be able to earn a reasonable rate of return for the risks they underwrite. 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 of the product is regulated. Auto insurers do not engage in research and development[5] and sell to a captive market. As such, an appropriate rate of return for auto insurers may differ from what is appropriate for other industries. Arguably, the auto industry return ought to be more modest.[6]

Insurance industry profitability has historically been cyclical. In the insurance industry, which has followed an almost boom and bust pattern of return on equity (ROE)[7], there has been little attention to the boom and much consternation about the bust. When profitability declines, insurers look for ways to enhance profitability. The options available include improved efficiency, increased premiums or lower costs. Improved efficiency can be challenging and takes time and effort. Large premium increases are generally not well-received by the public and can be a public relations nightmare. Consequently the preferred approach has been to cut costs.

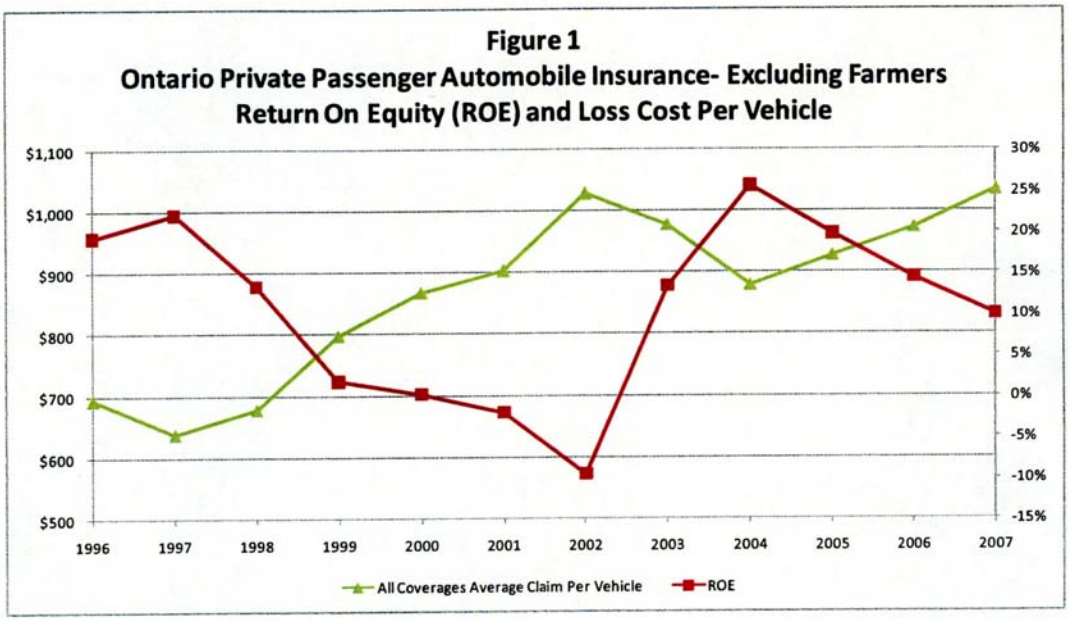
Cost cutting can take many forms. Certainly, restricting tort claims has been a preferred insurance industry approach to reducing costs. Thresholds and deductibles since 1990 have been implemented to achieve cost savings. In the process, however, it is suggested that notions of fairness and access to justice have been swept aside in the name of expediency. At the same time little attention has been paid to what in fact causes the rather wild swings in profitability for auto insurers and the extent to which tort claims are a factor. Further, stability of auto insurance is an important issue in this analysis. The ups and downs of profitability make it difficult for insurers to manage their business and tough on consumers to predict their premiums. Mitigating the ups and downs of insurer profitability and achieving more stability is an important fiscal objective. So long as profitability continues this pattern, there will be no stability for auto insurance.

[5] Unless there efforts to control access to health care can be considered research and development.

[6] See the 1996 Technical Notes for Automobile Insurance Rate and Risk Classification Filings from the Financial Services Commission.

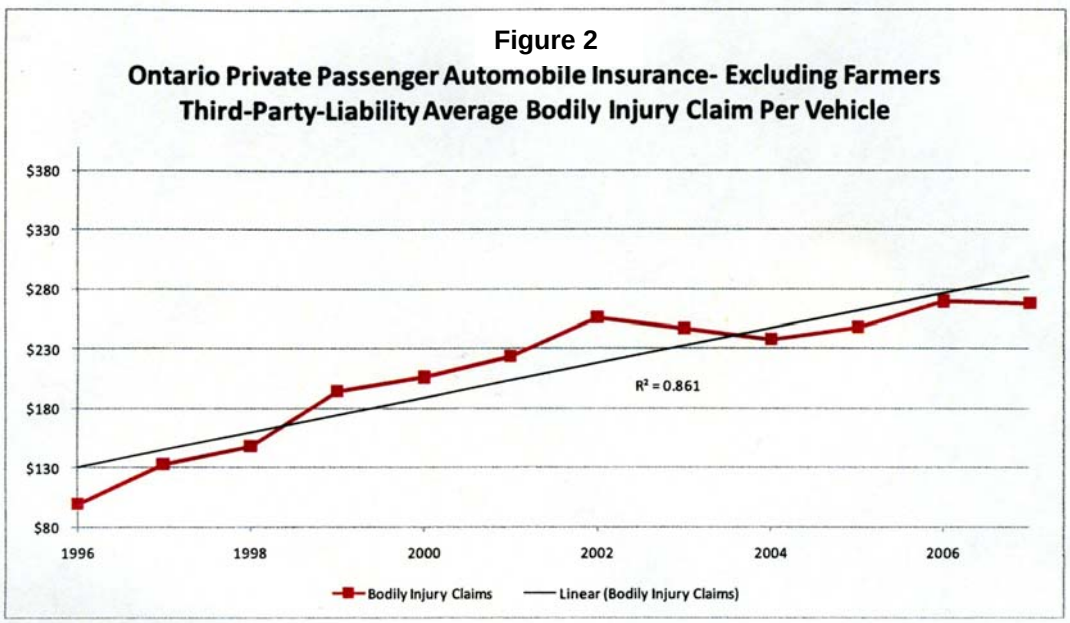
[7] Return on Equity (ROE) is the industry's after-tax profits divided by the value of investments made in the industry.

Figure 1 below shows the pattern of ROE for Ontario auto insurance from 1996 to 2007.



profitability follows a wavy pattern of peaks and valleys, third party liability claims costs (tort) does not. Similarly, accident benefits claims cost trends, while less stable than third party liability costs, do not mimic the profitability pattern. It follows, therefore, that lowering tort costs will not reduce the swings in profitability and cannot provide needed stability to auto insurance.

Third party liability costs trends have historically followed a linear pattern, trending upward. Figure 2 below shows the bodily injury cost trend for the years 1996 to 2007 in Ontario auto insurance.



Figures 1 and 2 demonstrate a distinctly different pattern. Third party liability loss costs have followed a distinctly "predictable" pattern. If this were the only variable and insurers wanted to avoid profitability swings ("instability") then all they would have to do is price the product so that the price of insurance (premiums) matched the cost trend, maintaining a steady margin for profit. While this is a dramatic oversimplification of the business of auto insurance, it nevertheless helps demonstrate why tort restrictions do not lead to stability. Year over year changes in third party liability costs do not explain why ROE is unstable. Tort restrictions imposed from time to time have not resulted in stability. Further support for this argument can been seen from developments following the reforms of 2003.

In 2003 changes were made to auto insurance in response to declining ROEs in the insurance industry. ROEs for 2000 to 2002 were below acceptable levels, although this poor fiscal performance cannot be directly attributed to third party liability claims alone. Mismanagement by some in the insurance business is another significant factor. Part of the industry response to the poor fiscal performance in these years was to seek additional tort restrictions. Those additional limits included the addition of the regulation defining the threshold and the doubling of deductibles on non-pecuniary damage awards. It must be accepted that these measures would reduce costs. These measures did not, however, deliver any stability to the auto product or mitigate the peaks and valleys of insurance industry profitability.

Two important points can be made about the 2003 changes: first, it did not and could not achieve the desired objective of product stability; second, it was an unnecessary measure that temporarily legislated the insurance industry out of a downturn. With respect to the latter point, the fiscal data demonstrates that the insurance industry would have quickly recovered from the diminished ROE without these measures. These reforms affected car accidents occurring on and after October 1, 2003. As it turned out, 2003 was on the way to becoming the most profitable year in the history of the Property and Casualty Insurance Industry in Canada. That profitability was earned on the system that existed before the 2003 round of reforms.

The crucial 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. Most accident victims are surprised to learn of the limits of their

coverage, a fact that they come to realize only after being injured in a car accident.

Other interesting observations can be made about insurance industry economics. Every automobile policy is the same. Auto insurance is a mandatory product sold to essentially a captive audience. Insurers are selling the identical product in the same marketplace. The process for administering the product is largely the same for each company. Further, fewer than a dozen insurers write about 75% of all auto insurance in Ontario. Yet, the fiscal performance of insurers varies widely.

Even in these difficult economic times, there are some auto insurers in Ontario doing rather well. Insurers are required to file financial information with the Office of the Superintendent of Financial Institutions (OSFI). The data available from OSFI[8] shows a dramatic variation in the performance of Ontario auto insurers, which is odd given the fact that they all sell the same product in the same market.

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 reserves is $60 in a year and the premiums collected $80, 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 making a profit. A loss ratio of 90% is not as good, and may represent a loss to the insurer.

To illustrate the discrepancy amongst insurers, the loss ratio for third party liability for the Co-operators General Insurance Company in 2008 was 64%, a very respectable performance. In contrast, the loss ratio for Wawanesa Mutual Insurance Company was 98%. There are more dramatic variations that this.

Insurers point out that accident benefits claims are increasing at unsustainable rates and represent significant losses for insurers. While it is true that accident benefits claims costs are out of control, the loss ratios relating to accident benefits are also anomalous. For example, 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 a loss ratio of 180%. These two figures are difficult to reconcile. With the product and 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 explain the discrepancy.

[8] See Ontario Automobile Insurance Claim Experience, 2008 Calendar Year, Federally Licenced Companies, OSFI.

In the final analysis, premiums and profitability are affected by underwriting, reserving for future claims, marketing, forecasting, returns on investments, claims experience, administrative expenses, corporate management and other factors. The cost of third party liability is but one variable, but not a variable that can explain instability of the insurance product. Restricting tort rights cannot bring stability. What is certain about tort restrictions is that they impair access to justice. Where it is sought to control costs through limits on 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 result. Experience has demonstrated time and again that this burden cannot be met.

Profitability cycles will continue until there are some more fundamental changes to the business of insurance. One suggestion for mitigating the degree of swing, particularly 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 expected when times get tough. In other words, the insurance industry ought not to be relying on government to legislate it out of every down turn. This will help enforce better pricing practices on the part of insurers and discourage overly lax underwriting practices designed to attract policy holders, at times without due regard to the potential medium term fiscal impact on the company and ultimately the industry. Insurers will be compelled to exercise more prudent discipline in pricing the product. Failure to introduce these measures would actually increase 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.

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 1 below sets out average premiums and claims costs for 1996 to 2007.

Table 4

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

Following the 2003 reforms premiums declined for Ontario drivers. According to FSCO the cumulative rate change from 2004 to 2007 was a drop of 13.75%. During that period rates had dropped at the same time as costs had risen. When rates fail to track changes in costs, the profit margin dwindles and, if timely adjustments are not made, ultimately disappears. Without exploring the reason 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 precipitous rises in premiums that the public understandably finds distasteful. This may be due in part to the rate review process and administrative and practical hurdles to efficiency. However, it is also due to corporate mismanagement and a lack of underwriting discipline when competing for market share. At times, the insurance industry is its own worst enemy.

D. THE FSCO REPORT

Tort Changes

In the introductory passages of the FSCO report there has been clear recognition of the challenges facing accident victims, consumers, courts, the regulator and the insurance industry. In particular, FSCO has acknowledged the need for both cost savings on one side and improved access to justice on the other. Acknowledging the economic realities affecting the insurance industry and the cost pressures within the system as the Report does, FSCO has made it clear that improved access to justice, cost savings and insurer profitability can all be achieved in a single package of reforms. This is a roadmap to a comprehensive approach to improving auto insurance, with improved access to justice an essential component.

One of the most significant recommendations in the Report is FSCO's urging to improve access to justice through easing tort restrictions. The Report calls for a two-stage process for addressing problems with the threshold and deductibles. First, FSCO asks the government to consider 3 important tort changes: revocation of the regulation defining the threshold; reduction of current deductibles on non-pecuniary general damages; and, the elimination of deductibles on fatality claims. Second, with respect to the suggestion that the threshold be eliminated entirely, FSCO suggests a closed claims study to allow for a more informed decision about the continued application of the threshold. Undoubtedly FSCO has been impressed by comments made by former Associate Chief

Justice Coulter Osborne and comments he made in his Civil Justice Reform Report recently delivered to Ontario's Attorney General. Justice Osborne has questioned whether the threshold has any real impact on screening out minor claims that are not already eliminated by the deductibles. This redundancy comes with considerable cost.

Reduced Medical and Rehabilitation Benefits

FSCO recommends the reduction of the current $100,000 limit for medical and rehabilitation benefits for non-catastrophic injury[9] to $25,000. Accident victims suffering from catastrophic injury will not be affected by this reform. These claimants will still have access to enhanced medical and rehabilitation benefits and attendant care benefits. Perhaps some consideration should be given to a more generous level of benefits for that small group of very seriously injured claimants with serious orthopaedic or brain injury who will not meet the catastrophic test.

This recommendation envisions expanding optional coverage, allowing consumers to buy $100,000 or even $1,000,000 of coverage should they opt to pay the additional premium. There ought to be no expectation on the part of consumers that lowering these limits and introducing more choice will bring premiums down. Rather, the likely impact on this change is to alleviate upward pressure on premiums, a desired outcome. FSCO also considered a more modest reduction of the limit (to $50,000), but is concerned that the saving from that limit may not be sufficient to result in savings to consumers.

FSCO also appropriately points out that those claimants with the right to pursue a tort claim will be allowed to claim any excess medical and rehabilitation expenses through an action against the at-fault driver. Provided tort restrictions are eased at the same time that these limits are lowered, it provides an added element of fairness to the justice process. The elimination of the threshold entirely would be the next positive step to fair access to the courts. Arguably, eliminating the threshold entirely is the only way to counterbalance this measure.

Complexity

It is refreshing to see FSCO state that "there should be a compelling reason for making a change that would add complexity to the accident benefits system".[10] The Report goes on to recommend a review of the SABs aimed at simplifying the schedule and removing ineffective

[9] See Recommendation #22.
[10] See Recommendation #1.

provisions.[11] The last two decades have witnessed a series of reforms and amendments that have succeeded in making the SABs enormously challenging for those sophisticated in auto insurance and all but impossible to navigate for all others. Virtually no consumer in Ontario is aware of the coverage (or lack of coverage) they have in their policy or, when compelled to access their coverage, how to access their coverage.

The Report points to the irony arising from the fact that stakeholders acknowledge the complexity and at the same time propose reforms that "invariably add more complexity".[12] The submission made by the Insurance Bureau of Canada is a case in point.

This recommendation is very general. Clearly FSCO contemplates considerable more work and consultation on this point. Putting the issue squarely on the table is an essential step in moving forward to simplify auto insurance for all users. The objective should be to create an accident benefits system that is sufficiently straightforward so that consumers in relatively minor cases can access entitlement with resort to lawyers and paralegals.

Catastrophic Impairment

The Report recommends further consultation on whether there is compelling evidence to alter the definition of catastrophic impairment for accident benefits purposes.[13] The insurance industry is not content with recent judicial and arbitral decisions concerning the catastrophic definition. This traces back to the decision in Desbiens v. Mordini which allowed physical impairments to be combined with psychological impairments in determining whether a claimant suffered a whole person impairment of 55% or more. This prompted the IBC to engage the Neurotrauma Foundation to convene a panel to review the medicine around predicting health outcomes arising out of brain impairment.

Further consultation regarding catastrophic impairment is indeed appropriate. One should not lose sight, however, of what has motivated the insurance industry to explore this matter further. Clearly the industry is looking at ways to further restrict access to catastrophic benefit levels by ensuring fewer accident victims qualify for the enhanced limits. FSCO does cite the important objective of ensuring "that the most seriously injured accident victims are treated fairly".[14] In this context it ought to be remembered that injured people seeking access to catastrophic benefit levels would have either exhausted the $100,000 medical and

[11] See Recommendation #2.
[12] See page 20 of the Report.
[13] See Recommendation #10.
[14] See Report page 30.

rehabilitation limit or the $72,000 attendant care limit, or both. This means that they would have already demonstrated "reasonable and necessary" need for benefits exceeding these limits. It seems fundamentally unfair to try to limit access to these people who in all probability have objectively demonstrable need.

Taken from another perspective, the catastrophic definition is intended to predict outcome and therefore need. Critics of the catastrophic definition have quite appropriately pointed out that a Glasgow Coma Scale score of 9, for example, is a poor predictor of outcome. They point out that many accident victims with a GCS score of 9 often have a complete recovery and could not reasonably be considered catastrophic. This is true. In that case, however, those with a good recovery would not access the benefits as they will not be able to demonstrate need. On the other hand, for the minority of accident victims with a GCS of 9 who have a poor outcome, they do have need and fairness demands that those needs be met. Attempting to look at matters prospectively, or predicting outcome, is one matter. Looking at the current real needs of an objectively seriously injured person is another. The former is uncertain. That latter is known.

Assessments

There are a number of recommendations in the Report with regard to assessments under both sections 24 and 42 of the SABs.[15] Assessments are overused and too expensive. Recent developments relating to the assessment process have made matters worse rather than better.

In 1993 the Designated Assessment Centre (DAC) process was introduced which was envisioned as a more objective way to determine entitlement to benefits. The concept in theory has merit, rather than have insurers conduct assessments by experts hired by the insurer itself. The relationship between the insurance company and the insured person is a first party relationship and gives rise to a duty of utmost good faith on the part of the insurer to the insured. Given the richness of benefits available to an insured, insurers are highly motivated to deny benefits when they can. This imposes an adversarial component to the relationship. As benefits become richer the more this first party relationship is likely to be impaired by financial motivations. The tort system is not subject to this challenge. At the same time, generous accident benefits have provided insurance companies with incentive to control an injured person's access to health care, at times impairing a longstanding relationship between individuals and their family physicians.

[15] See Recommendations # 11, 12, 13, 18, 19, 20, 21.

The DAC system was seen by many as not being objective and as being unduly expensive and cumbersome. Ultimately the DAC process was removed and replaced by the assessment process under sections 24 and 42. Not only did the elimination of the DAC fail to control costs, but in fact costs escalated exponentially for assessments following the elimination of the DAC.

Efficiency and simplicity requires a fundamental adjustment to the assessment process. The cost of assessments must be reduced. Finally, the availability of assessments in relation to particular claims for specified money amounts needs to be considered.

Injured people need access to skilled health care professionals. That will be true no matter what assessment process is provided under the SABs. But an inefficient and wasteful assessment process like the one that currently exists does not advance the aim of effective treatment. It diverts funds away from productive use in the rehabilitation of injured people. The focus needs to shift from assessments, which do little to advance recovery, to treatment. We also need to reform the process so that the incentive for insurers to direct access to health care is removed, a role the industry is ill-suited for.

Incurred Expenses

Considerable controversy has arisen over whether attendant care benefits can be recovered in situations where the injured person did not receive the attendant care or where the attendant care was provided by an individual who was not paid and who has not suffered an income loss. Commonly, attendant care is provided by family members and friends. As well, the prescribed rates for attendant care and the shortcomings of the Form 1 often mean that there is insufficient money to actually hire an attendant in the market place for the amounts payable by the accident benefits insurer. The insurance industry would have their insured person denied attendant care benefits when provided by a family member who had not suffered an income loss even where a court or arbitrator later found the care reasonable and necessary. This is clearly an incentive for insurance companies to arbitrarily withhold benefits. It also undermines the utmost good faith relationship between insurer and insured and punishes impecunious injured people without the means to finance attendant care up front, pending dispute resolution.

FSCO recommends that some clarification in the SABs regarding when an expense is to be paid even no obligation by the injured person has been incurred.[16] This recommendation refers to the insurers obligation to pay if

[16] See recommendation #25.

the insurer has been "unreasonable in denying" the benefit. This recommendation seems a bit vague. Currently the test is whether the benefit is reasonable and necessary. If it is, then it ought to be paid despite the fact that no direct economic loss can be demonstrated. Is the test of "reasonableness" different from the test of "unreasonably denied"? There should not be a distinction and clarification regarding this recommendation is needed.

Income Replacement Benefit

FSCO has recommended that the maximum income replacement benefit be increased from $400 to $500 weekly. It is felt that this increase would bring the benefit in line with the principles applied to the previous level. Approximately half of all full time earners are undercompensated at this level, but accident benefits are not intended as full indemnity.

Housekeeping and Home Maintenance

While housekeeping and home maintenance claims for benefits in non-catastrophic cases involved relatively small sums of money, the cost of disputing these claims makes resisting them impractical. FSCO has recommended that housekeeping and home maintenance benefits be made an optional benefit.[17] Unfortunately there has been no distinction made between non-catastrophic cases and catastrophic cases in the FSCO recommendation. The recommendation goes further and suggests that no benefit should be paid unless there is actual economic loss. This should be contrasted with the recommendation regarding attendant care discussed above.

Other Recommendations

There are a total of #39 recommendations in the Report. The fact that some have not been the subject of comment does not make them any less important. No one recommendation should be singled out as a responsible approach to auto insurance reform requires both improved access to justice and substantial cost savings.

[17] See recommendation #29.