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# Automobile Insurance - Canadian Style

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## Automobile Insurance—Canadian Style

A. M. Linden\*

Perhaps the most important function of tort law in Canada today is the adjustment of disputes arising out of automobile accident injuries. Much dissatisfaction has been expressed about the way in which tort law handles these losses. Dozens of books<sup>1</sup> and articles<sup>2</sup> have attacked the present system while some have defended it.<sup>3</sup> The debate seems endless.

Recently there has been something of a breakthrough in Canada.<sup>4</sup> There has also been movement elsewhere,<sup>5</sup> but the voices calling for reform have not yet been stilled.<sup>6</sup> This area of the law is of immense practical significance. Lawyers must be informed of developments not only to serve their clients effectively, but also to participate intelligently in the discussions over the coming years. Moreover, automobile insurance reform is important because we are considering more than just the best way of administering car crash losses—we are evaluat-

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1. P. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW (1970); A. CONARD, AUTOMOBILE ACCIDENT COSTS AND PAYMENTS (1964) [hereinafter cited as ACCIDENT COSTS]; T. ISON, THE FORENSIC LOTTERY (1967); R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965) [hereinafter cited as BASIC PROTECTION]; A. LINDEN, REPORT OF THE OSGOOD HALL STUDY ON COMPENSATION FOR VICTIMS OF AUTOMOBILE ACCIDENTS (1965) [hereinafter cited as OSGOOD HALL STUDY].

2. Atkey, *Perspectives for Non-Fault Automobile Accident Compensation in Ontario*, 5 WESTERN L. REV. 1 (1966); Gibson, *Non-Fault Automobile Insurance*, 11 CAN. B. J., 172 (1968); Ison, *Highway Accidents and the Demise of Tort Liability*, 47 CAN. B. REV. 304 (1969); Linden, *Peaceful Coexistence and Automobile Accident Compensation*, 9 CAN. B. J. 5 (1966); McRuer, *The Motor Car and the Law*, 4 OSGOOD HALL L. J. 54 (1966).

3. Griffiths, *Don't Abolish Tort Law in Auto Accident Compensation*, 12 CAN. B.J. 187 (1969); Somerville, *The Motorists' Compensation Board*, 5 CAN. B.J. 357 (1962).

4. Linden, *Automobile Insurance Breakthrough in Canada*, 1 TRANSPORTATION L. REV. 171 (1969).

5. Bombaugh, *The Department of Transportation's Auto Insurance Study and Auto Accident Compensation Reform*, 71 COLUM. L. REV. 207 (1971); Keeton & O'Connell, *Alternative Paths Toward Nonfault Automobile Insurance*, 71 COLUM. L. REV. 241 (1971).

6. Green, *A Fish Out of Water—Classical Fault on the Highway*, 35 SASK. L. REV. 2 (1970); Palmer, *Abolishing The Personal Injury Tort System: The New Zealand Experience*, 9 ALTA. L. REV. 169 (1971).

ing the future role of tort law in the modern state.

The problem is much larger than merely that of providing financial reimbursement for the victims of automobile collisions. It involves a consideration of programs aimed at reducing accidents on the highways that is the best way to combat the problem of compensation for traffic victims.<sup>7</sup> Canadian governments have begun to move in this direction in the last few years. Steps have been taken to try to remove the drinking driver from the highway.<sup>8</sup> Measures have been enacted to require automobile manufacturers to include safety features such as seat belts, head rests, collapsible steering wheels, and other injury reducing devices on all their vehicles.<sup>9</sup> Much remains to be done, but at least some action has been taken. Nonetheless, 5,318 Canadians die on our roads each year, some 173,901 are injured, and property damage of \$271,517,000 is incurred as a result of 484,436 recorded accidents.<sup>10</sup> Until something better comes along to replace it, tort law retains a vital role in minimizing the economic dislocation that results from these crashes.

#### *Tort Liability for Automobile Accidents*

Although at one time the automobile was considered a wild beast that generated strict liability,<sup>11</sup> today negligence law is employed to deal with these problems.<sup>12</sup> A motorist must operate his vehicle with reasonable care, and if he drives too fast or if he does not keep a proper lookout, he will be ordered to make good any losses caused to his victims.<sup>13</sup> The rules of the road, as articulated in the various highway traffic acts are important factors to be considered by a civil court in assessing fault.<sup>14</sup> Proof that such a provision has been violated, will normally be considered as prima facie evidence of negligence,<sup>15</sup> although in certain circumstances it might amount to negligence per se or perhaps only some evidence of negligence.

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7. See generally Linden, *The Prevention of Traffic Accidents*, 15 CHITTY'S L. J. 80 (1967).

8. CAN. REV. STAT. c. C-34, §§ 234-38 (1970).

9. Motor Vehicle Safety Act, CAN. REV. STAT. c. 30 (1970) and Regulation P.C. S.O.R. 70/487 (Nov. 6, 1970) (1st Supp. 1970).

10. CANADA YEAR BOOK 916 (1970-71).

11. *Hutching v. Maunder*, 37 T.L.R. 72 (1920); *Walton & Co. v. Vanguard Motor Bus Co.*, 25 T.L.R. 13 (1908).

12. See generally D. HORSLEY, *MANUAL OF MOTOR VEHICLE LAW* (1963) [hereinafter cited as HORSLEY]; R. PHELAN, *HIGHWAY TRAFFIC LAW* (3d ed., 1960); L. SHANNON, *MOTOR VEHICLE OFFENCES* (1964).

13. See generally L. GREEN, *TRAFFIC VICTIMS—TORT LAW AND INSURANCE* 66-68 (1958).

14. See generally W. PROSSER, *THE LAW OF TORTS* 191-203 (3d ed. 1964).

15. *Queensway Tank Lines Ltd. v. Moise*, [1970] 1 Ont. 535 (1969); *Sterling Trusts Corp. v. Postma*, [1965] 48 D.L.R. 2d 423 (1964).

Not only is a negligent operator responsible to pay damages, but legislation has made the owner of a motor vehicle liable for

loss or damage sustained by any person by reason of negligence in the operation of the motor vehicle on a highway, unless the motor vehicle was without the owner's consent in the possession of some person other than the owner or his chauffeur.<sup>16</sup>

This provision, a type of statutory vicarious liability, was first enacted in Ontario in 1930 to provide an additional fund out of which potential auto crash victims could be reimbursed. It was thought that the owner of an automobile would be more likely to carry insurance and, in any event, the vehicle itself would be available for the satisfaction of any judgment awarded. Furthermore, owners would be encouraged to exercise more care in selecting people of responsibility to drive their vehicles. There are a number of decisions interpreting this section which are well-considered elsewhere.<sup>17</sup>

Normally the onus of proof rests upon the plaintiff in a negligence case, but this onus has been shifted by statute in some of these automobile cases.

When loss or damage is sustained by any person by reason of a motor vehicle on a highway, the onus of proof that the loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle is upon the owner or driver.<sup>18</sup>

The provision does not apply "in case of a collision between motor vehicles . . . nor to an action brought by a passenger in a motor vehicle in respect of injuries sustained by him while a passenger."<sup>19</sup> The purpose of the legislation, like that of the doctrine of *res ipsa loquitur*, is to overcome the evidentiary problems encountered by pedestrians and bicyclists,<sup>20</sup> who are struck by automobiles. Often they are not apprised of the facts, whereas the defendant may be. Moreover, the policy of loss distribution is served by such a rule. Consequently, once the plaintiff proves that he was struck by a motor vehicle on a highway, "the onus again shifts and rests on the defendants to satisfy the court that such loss or damage did not arise through the negligence or improper conduct of the

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16. REV. STAT. ONT. c. 202, 132 (1) (1970).

17. See HORSLEY, *supra* note 12, at 275; MacIntyre, *Liability Incident to the Ownership of a Motor Car*, 4 ALTA. L.Q. 3 (1940).

18. ONT. REV. STAT. c. 202, § 133 (1970). See generally HORSLEY, *supra* note 12, at 307; Phelan, *Onus Under the Highway Traffic Act*, in SPECIAL LECTURES OF THE LAW SOCIETY OF UPPER CANADA 215 (1955).

19. ONT. REV. STAT. c. 202, § 133 (1970).

20. *Hutcheon v. Storey*, [1935] 4 D.L.R. 684 (bicyclist).

owner or driver."<sup>21</sup> A similar result occurs when a vehicle crashes into real or personal property.<sup>22</sup> There are a fair number of cases dealing with this section and the specialized works should be consulted.<sup>23</sup>

Liability insurance is almost universal in Canada. Some jurisdictions require it, but others, like Ontario, have achieved 98 percent coverage by less drastic methods.<sup>24</sup> Uninsured drivers must pay an "uninsured motor vehicle fee" of \$25.00 into the fund when they secure their license. Certain financial responsibility provisions are also utilized. To assure that all motorists will be able to buy insurance, the industry has established "The Facility", which is an arrangement that spreads the burden equitably. Most provinces require a minimum coverage of \$50,000. Those drivers who are not insured are backstopped to the same extent by the Motor Vehicles Accident Claims Fund, which acts in the same way as an insurance company in relation to third parties, although it does nothing for the uninsured driver, since it can claim reimbursement from him for any amounts paid on his account.

#### *Defects in the Present System*

In operation the Canadian tort system was riddled with inadequacies. Too many victims of car crashes were unable to win tort compensation. In Ontario, for example, only 43 percent of those injured were compensated whereas 57 percent failed to recover anything via the tort route alone.<sup>25</sup> The situation was even worse in the more serious cases than in the minor ones. In British Columbia some 63 percent of serious claims were paid,<sup>26</sup> but this was largely because the guest passenger law there did not prohibit recovery altogether as it did in Ontario. This poor recovery pattern was reflected in the United States where approximately 63 percent of those injured in Michigan were denied tort recovery.<sup>27</sup> Only a small portion of the total costs incurred by car crash victims are recompensed. The Osgoode Hall Study found that 37 percent of all Ontario economic losses were reimbursed<sup>28</sup> while 33 percent were reimbursed in British Columbia.

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21. *De Jussel v. Jahzer*, [1948] Ont. W. N. 468, 470 (1948); *Temple v. Ottawa Drug Co.*, [1946] Ont. W. N. 295 (1946).

22. *Pollock & Pizel v. Link Mfg. Co.*, [1955] Ont. W. N. 463 (1955) (overhanging sign); *Bell Tel. Co. v. Kan Yan Gan Co.*, [1940] Ont. R. 510 (1940) (telephone pole).

23. See generally HORSLEY, *supra* note 12; R. PHELAN, *HIGHWAY TRAFFIC LAW* (3d ed. 1960).

24. See Lofchik, *The Ontario Motor Vehicles Accident Claims Act*, 28 U. TORONTO FACULTY L. J. 94 (1970).

25. OSGOODE HALL STUDY, *supra* note 1.

26. Linden, *The Processing of Automobile Claims*, 34 INS. COUNSEL J. 50 (1967). These figures were taken from insurance claims files, but not all injured people make a claim.

27. ACCIDENT COSTS, *supra* note 1, at 149 (1964).

28. OSGOODE HALL STUDY, *supra* note 1, ch. II at 1.

This absence of tort recovery, however, is not as serious as it once was. Today social welfare schemes and private insurance programs are available to assist individuals injured in automobile accidents. State-run hospital insurance<sup>30</sup> covers nearly every citizen of Canada and medical care insurance is virtually universal.<sup>31</sup> Other government programs such as workmen's compensation,<sup>32</sup> disability and survivorship benefits,<sup>33</sup> and general welfare assistance<sup>34</sup> are additional sources of reparation. The Osgoode Hall Study disclosed that 40 percent of all the money actually received by those injured in car crashes in Ontario came from these programs.<sup>35</sup> Eighty-six percent of the victims received something from a non-tort source and the losses of 18 percent of the victims were completely reimbursed by these schemes. After combining the amounts of money received from both tort and non-tort sources, 54 percent of those suffering economic losses were fully reimbursed and only seven percent suffered out-of-pocket losses in excess of \$500. There is little doubt that these new programs have filled the most glaring compensation gaps left by tort law. Nevertheless, if the sole purpose of negligence law is to assure full reparation for all auto accident victims, then the system has fallen short of this goal.

Another shortcoming of the tort system is the problem of delay. Even when a victim of an auto crash has a meritorious tort claim, he must wait too long for payment. It takes over two years from the date of the accident for most automobile cases to get to trial in Toronto.<sup>36</sup> The pace of litigation is somewhat brisker in British Columbia; an average of 12 months is required from the date of the writ to disposition on the merits.<sup>37</sup> The picture is much bleaker in the United States where the delay can be as long as five or six years.<sup>38</sup> The addition of more judges and more courtrooms will not solve this problem completely, although it should help. Even if the sluggish pace of litigation is attacked by a series of measures,<sup>39</sup> it will still take time to process tort claims. The very nature of a lump sum award for personal injury impedes speedy resolution. Quite often

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29. REPORT OF THE BRITISH COLUMBIA ROYAL COMMISSION ON AUTOMOBILE INSURANCE 404 (1968). See Ison, *Highway Accidents and the Demise of Tort Liability*, 47 CAN. B. REV. 304, 305 (1969).

30. *E.g.*, The Hospital Services Commission Act, ONT. REV. STAT. c. 176 (1960).

31. *E.g.*, The Health Services Insurance Act, ONT. REV. STAT. c. 200 (1970).

32. Workmen's Compensation Act, ONT. REV. STAT. c. 506 (1970).

33. Canada Pension Plan, CAN. REV. STAT. c. 50 (1970).

34. *E.g.*, The Family Benefits Act, ONT. REV. STAT. c. 157 (1970).

35. OSOODE HALL STUDY, *supra* note 1, ch. VI (1965).

36. *Id.* ch. V at 20.

37. Linden, *Automobile Cases in the British Columbia Courts* 3 U.B.C. L. REV. 194, 197 (1967).

38. See BASIC PROTECTION, *supra* note 1, at 13.

39. See Linden, *The Law's Delay*, 5 L. SOCIETY OF UPPER CAN. GAZETTE 96; H. ZEISEL, H. KALVEN & B. BUCHHOLZ, *DELAY IN COURT* (1959).

accurate medical prognosis of an injury is unavailable until several months have elapsed. In such circumstances it is not advisable for a plaintiff to rush into trial, especially if he is receiving adequate medical attention and some income support. It may also be that a few lawyers are "dilatory, disorganized and inefficient in moving their clients' auto claims forward to final disposition."<sup>40</sup> Happily, most auto claims are not resolved in trial; the Osgoode Hall Study showed that only 13 percent of the injured people commenced action and only 1.2 percent reached a trial on the merits.<sup>41</sup> Settlements are concluded more expeditiously than trials. A majority of the minor claims were concluded in less than six months, but the serious cases took longer.<sup>42</sup> One study done in British Columbia found that 73 percent of *all* insurance claims were settled within 60 days of notice to the company.<sup>43</sup> In the bodily injury claims the pace was slower, but even here 55 percent were concluded in 90 days and 73 percent within six months.<sup>44</sup> Another British Columbia research project disclosed that the median period from accident to compensation in serious and fatal cases was nine months.<sup>45</sup> This figure climbed to two years in the serious injury cases where the losses exceeded \$5,000. Because of the potential hardship and anxiety of the claimant, a delay of even a few months, although understandable, is unacceptable. Nevertheless, this shortcoming alone need not lead to the abolition of the tort claim.

The cost of administering the present system is inordinately high. It has been demonstrated that approximately \$1.60 in premiums are needed to yield \$1.00 in compensation to a victim.<sup>46</sup> Although this is a better ratio than the American one,<sup>47</sup> this is still considerably higher than the approximately 10 percent administrative costs for workmen's compensation, nine percent for victims of crime schemes, and 11.3 percent to 16.3 percent incurred under the Saskatchewan Automobile Insurance Act.<sup>48</sup> Obviously, an investigation of fault and the determination of tort damages is much more costly than finding out whether an injury occurred. There are many who believe that this extra cost is not warranted whatever dubious benefits the tort system offers.

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40. Griffiths, *Don't Abolish Tort Law in Auto Accident Compensation*, 12 CAN. B. REV. 187, 193 (1969).

41. OSGOODE HALL STUDY, *supra* note 1, ch. II.

42. *Id.* ch. V.

43. Linden, *The Processing of Automobile Claims*, *supra* note 2, at 55.

44. *Id.*

45. THE REPORT OF THE BRITISH COLUMBIA ROYAL COMMISSION ON AUTOMOBILE INSURANCE 73 (1968).

46. *Id.* at 119.

47. BASIC PROTECTION, *supra* note 1 (1965).

48. Ison, *Highway Accidents and the Demise of Tort Liability*, 47 CAN. B. REV. 304, 306 (1969); P. ATIYAH, ACCIDENTS, COMPENSATION AND THE LAW, ch. 21 (1970).

Some critics contend that the fault system is difficult to administer. A perceptive jurist has described the process as being "based largely on conjecture," because of the inability of witnesses to remember what happened months and years before.<sup>49</sup> These comments apply with equal force to cases tried by a judge without a jury. The task of assessing damages is equally complex and replete with speculation. It is not easy to decide the value of an eye or a life. It is impossible to know whether a young widow will marry again or whether a disabled person will be unable to find work in the future. Some commentators fear that the dignity of the judicial system is tarnished when the "well known methods used in the Middle East in the retail trade-bargaining" are used to settle law suits.<sup>50</sup> Another problem is the temptation to claimants and their lawyers to exaggerate their evidence in order to inflate damage awards. The spectacle of widespread "ambulance-chasing", although not prevalent in Canada, can corrode respect for the law. An "injury industry" in which crash victims and their lawyers search for a pot of gold at the end of an automobile accident rainbow could be an unwelcome development. It has been stated, rather pithily, that the present auto claims system provides "too little, too late, unfairly allocated, at wasteful cost, and through means that promote dishonesty and disrespect for law."<sup>51</sup>

#### *The Canadian Breakthrough*

These deficiencies have generated a good number of proposals for reform. Great American scholars, such as Albert Ehrenzweig<sup>52</sup> and Leon Green,<sup>53</sup> led the way. Several statistical studies added fuel to the flames.<sup>54</sup> The most radical reformers suggested that law suits for *all* personal injuries be abolished to be replaced by government-operated accident and sickness benefits.<sup>55</sup> Some urged that automobile accident claims should be handled in the same way as workmen's compensation.<sup>56</sup> Unfortunately anyone who disliked socialism, distrusted adminis-

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49. McRuer, *The Motor Car and the Law*, 4 OSGOODE HALL L. J. 54, 69 (1966).

50. *Id.* at 72.

51. BASIC PROTECTION, *supra* note 1, at 3.

52. Ehrenzweig, "Full Aid" Insurance for the Traffic Victim, 43 CALIF. L. REV. 1 (1955).

53. L. GREEN, TRAFFIC VICTIMS—TORT LAW AND INSURANCE (1958).

54. See ACCIDENT COSTS, *supra* note 1; Morris and Paul, *The Financial Impact of Automobile Accidents*, 110 U. PA. L. REV. 913 (1962); OSGOODE HALL STUDY, *supra* note 1 (1965); THE REPORT OF THE BRITISH COLUMBIA ROYAL COMMISSION ON AUTOMOBILE INSURANCE (1968).

55. THE REPORT OF THE ROYAL COMMISSION ON COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND (1967); ISON, THE FORENSIC LOTTERY (1967). The New Democratic Party of Ontario adopted this suggestion in its platform in the 1971 election.

56. McRuer, *The Motor Car and the Law*, *supra* note 2, at 54 (1966); Dean C. A. Wright is often credited with this view but he did not express it in writing anywhere, except by implication. See, e.g., Comment, *The Adequacy of Tort Law* in STUDIES IN CANADIAN TORT LAW (1965).



trative tribunals or supported trial by jury was driven to defend the status quo, despite its admitted deficiencies. Another approach was to recommend that auto liability insurance be supplanted with loss insurance so that all victims would recover from their own insurers on a no-fault basis rather than from the other driver's insurer on a negligence theory.<sup>57</sup> This too met with the stout opposition of anyone who felt that tort law had *some* present value. Various compromise schemes, incorporating both tort and non-tort features, sought to break the logjam.<sup>58</sup> Added impetus was generated by the release of the multi-volume United States Department of Transportation Automobile Insurance and Compensation Study.

Canada has been at the forefront of the no-fault controversy. Even though the Canadian defects were less serious than in the United States, Canadian legislatures responded more quickly. The peaceful coexistence plan that has been devised in Canada is now being adopted in several American jurisdictions<sup>59</sup> and elsewhere.<sup>60</sup> The Canadian scheme is marketable because it gives us the best of both worlds—tort and non-tort—while at the same time it avoids the shortcomings of both. Everyone is compensated to a degree without regard to fault, but this is not accomplished at the expense of those with meritorious tort claims. All of this has been accomplished without abolishing tort suits, without discarding jury trial, and without creating any new boards. It can also be done through private insurance, if that is deemed desirable, or through public insurance if that is preferred. Let us now look more closely at four of the provincial plans.

### *Saskatchewan*

The earliest and most dramatic development occurred in Saskatchewan in 1946.<sup>61</sup> It is easy to understand why the Co-operative Commonwealth Federation (Canada's Labour Party) felt the need to reform the automobile accident reparations system when it assumed office. In post-war Saskatchewan only 12

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57. REPORT OF THE BRITISH COLUMBIA ROYAL COMMISSION, *supra* note 54; NEW YORK DEP'T OF INSURANCE, AUTOMOBILE INSURANCE . . . FOR WHOSE BENEFIT? (1970); AMERICAN INSURANCE ASSOCIATION, REPORT OF SPECIAL COMMITTEE TO STUDY AND EVALUATE THE KEETON-O'CONNELL BASIC PROTECTION PLAN AND AUTOMOBILE ACCIDENT REPARATIONS (1968).

58. BASIC PROTECTION, *supra* note 1 (1965); FINAL REPORT OF THE ONTARIO SELECT COMMITTEE ON AUTOMOBILE INSURANCE (1963).

59. Oregon and Delaware.

60. The Canadian developments are being studied by various governments in Australia, the United Kingdom and Latin America.

61. Lang, *The Nature and Potential of the Saskatchewan Insurance Experiment*, 14 FLA. L. REV. 352 (1962); Schumiatcher, *State Compulsory Insurance Act—An Appraisal*, 39 CAN. B. REV. 107 (1961).

percent of the automobiles were insured against public liability. The population of 800,000 was largely rural and far from affluent. The compensation gap, therefore, was a wide one. A special committee set up to study the problem in 1945 noted that more people were killed or injured on Canada's highways during World War II than were killed or injured in military action overseas.<sup>62</sup> Its recommendations formed the basis of the Automobile Accident Insurance Act,<sup>63</sup> which established the Saskatchewan Government Insurance Office (S.G.I.O.), a publicly-owned corporation, to operate the new scheme.

Under Part II of the Saskatchewan Plan (the no-fault section) everyone is insured against loss resulting from bodily injuries sustained by him directly . . . through accidental means . . . as a result of driving, riding in, or on, or operating a moving motor vehicle, or collision with or being struck, run down, or run over by a moving motor vehicle.<sup>64</sup>

People domiciled in Saskatchewan are insured if they are injured outside the province. The protection of the plan is lost only if the injured person is under the influence of alcohol, driving without a license, or riding outside the vehicle.<sup>65</sup>

The benefits of the no-fault portion of the plan are modest. If the insured is killed, \$5,000 will be paid to the primary dependent and \$1,000 will be paid to each secondary dependent (to a maximum of \$5,000). In the event of the death of a child, the amounts vary from \$100.00, in the case of a one year old or under, up to \$1,000 for a fifteen to eighteen year old.<sup>66</sup>

A weekly indemnity is payable to those unable to work as a result of an injury obtained in a car crash. The amount of this payment is \$25 per week to a maximum of 104 weeks. A housewife is entitled to receive the same amount, if totally and continuously disabled, but only for 12 weeks. If the disability is only partial, the weekly indemnity is reduced to half the above sums.<sup>67</sup>

In addition to these death benefits and weekly indemnities, supplementary allowances up to \$2,000 are paid for extra medical, hospital, or funeral expenses.<sup>68</sup>

There are also lump sum payments for impairment of bodily function.<sup>69</sup> The

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62. REPORT ON THE STUDY OF COMPENSATION FOR VICTIMS OF AUTOMOBILE ACCIDENTS, SASKATCHEWAN 8 (1947).

63. Automobile Accident Insurance Act, REV. STAT. SASK. c. 409 (1965).

64. *Id.* § 20.

65. *Id.* § 32.

66. *Id.* § 24.

67. *Id.* § 22.

68. *Id.* § 23.

69. *Id.* § 21, as amended Stat. Sask. 1970, c. 5 and regulations passed thereunder.

maximum allowed under this heading is \$4,000—payable for the loss of both hands, both feet, or sight in both eyes. The figure is reduced to varying percentages of this sum, according to an elaborate schedule which stipulates amounts to be paid for the loss of function of limbs or the spine, for scars and other such injuries. This payment is akin to a pain and suffering allowance, but reduces the amount of individual evaluation as much as possible.

Liability insurance is also provided under the Saskatchewan Plan to motorists within the province.<sup>70</sup> This coverage is compulsory to \$35,000. Any amounts recovered under Part II are deducted from sums paid under the liability policy. Since 1957 these benefits have also been available where a hit-and-run driver is responsible for the injury of the claimant.

In addition to no-fault coverage and liability insurance, there is also provided comprehensive coverage for loss or damage to the insured vehicle as a result of fire, theft, collision, etc., subject to a \$200 deductible feature.<sup>71</sup>

The premiums for the basic S.G.I.O. coverage are collected in two ways. First, everyone who buys an operator's license must pay an insurance premium. Secondly, every vehicle owner on purchase of the owner's license must pay a premium according to a complex schedule. Those with traffic offense records must pay somewhat more than those without records.

According to the figures published by S.G.I.O. the expenses in the extension insurance area were 35 percent. This is almost identical to those of the private insurance companies in Canada. With regard to Part II, loss insurance coverage, the expenses are in the neighborhood of 17 percent. That is so because there is no need to determine fault or to have elaborate damage assessments. It has, however, been suggested that these statistics should be viewed skeptically since figures are "difficult to ascertain with any degree of reliability because of the arbitrary allocation necessary in their determination."<sup>72</sup>

The Saskatchewan Plan appears to be a viable solution to the problem of automobile accident compensation. It incorporates the idea of "peaceful coexistence" or "live and let live," whereby tort law operates beside an automobile compensation plan. Basic compensation is available to all, and full reparation is permitted to the deserving. The only aspect of the Saskatchewan Plan that remains controversial is the socialistic nature of the operation, a factor that is a question of political values for each jurisdiction.

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70. *Id.* Part IV.

71. *Id.* Part III.

72. Lang, *supra* note 61.

*Ontario*

For nearly 25 years no other Canadian province followed the Saskatchewan example despite constant criticism of the existing system of auto accident compensation. However, on April 5, 1960 the Legislative Assembly of Ontario appointed a Select Committee to "examine and investigate, inquire into, study and report on all matters relating to persons who suffer financial loss or injury as a result of a motor vehicle accident."<sup>73</sup> The Select Committee received influential briefs from a Special Committee of the Law Society of Upper Canada and from the All Canada Insurance Federation, a trade association representing the bulk of insurance companies in Canada. The Law Society Committee's brief contained a defense of tort law, but also recognized its obvious shortcomings. Several reforms were recommended, the most important being a suggestion that a no-fault plan be established to supplement the tort system. The solution resembled the Saskatchewan Plan, except that it would be run by private insurance companies rather than by the state. The insurance industry sought permission to include in its automobile policies "limited accident benefits," something that had not been permitted at that time, but it hesitated to urge that this coverage be made mandatory. In its Final Report, the Select Committee urged that limited accident benefits coverage be included in all standard automobile policies.<sup>74</sup> It also suggested that the Motor Vehicles Accident Claims Fund should provide similar coverage for uninsured drivers and hit-and-run victims. The right to sue in tort should survive intact, except that any amounts recovered under the no-fault plan should be set off against tort recoveries.

The government was slow to move. But on May 31, 1966 the Minister of Transport announced that he would amend the legislation to permit this limited accident benefits insurance to be written on a voluntary basis.<sup>75</sup> The Minister was not prepared at that time to make it mandatory. Beginning on January 1, 1969 when the scheme went into effect, all but 20 to 30 percent of automobiles in Ontario were covered by this voluntary no-fault insurance, for an annual premium of \$7.00 per vehicle. This did not stop the Ontario New Democratic Party and others from urging the complete nationalization of the insurance industry, nor did it quell the calls for reform from the newspapers and the Canadian Bar Association.<sup>76</sup> In the summer of 1971, with an election in the

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73. For a more detailed description see Linden, *Automobile Insurance Breakthrough in Canada*, 1 TRANSPORTATION L. REV. 171 (1969).

74. FINAL REPORT OF THE ONTARIO SELECT COMMITTEE ON AUTOMOBILE INSURANCE (1963).

75. See [1966] *Legislature of Ontario Debates* 4058 (1966); Insurance Amendment Act, Stat. Ont. c. 71, § 11 (1966).

76. On Sept. 3, 1969, at its annual convention in Ottawa, the Canadian Bar Association

offing and a new Minister, another legislative reform was introduced which makes this limited accident benefits coverage mandatory as of January 1, 1972.<sup>77</sup>

The new no-fault provisions contained in Schedule E cover each "insured person . . . who sustains bodily injury or death, directly and independently of all other causes, by an accident arising out of the use or operation of an automobile."<sup>78</sup> An "insured person" includes any occupant of the insured vehicle, any person who is struck in Canada by the insured automobile, and the insured and members of his family injured while occupants of another vehicle or while they are pedestrians.<sup>79</sup>

The benefits are substantial. All reasonable expenses incurred within four years from the date of the accident for necessary medical, surgical, dental, hospital, professional nursing, ambulance service, and rehabilitation care to a limit of \$5,000 per person will be paid. The insurer, however, is not liable for any portion of these expenses that are "payable or recoverable under any medical, surgical, dental, or hospitalization plan or law." In addition, funeral expenses up to the amount of \$500 per person will be reimbursed.<sup>80</sup> Death benefits are payable in the amount of \$5,000 for a breadwinner, \$2,500 for a spouse in a two-parent household, \$500 for a child under five and \$1,000 for a child under 21.<sup>81</sup> If the head of a household dies, leaving two or more survivors, an additional \$1,000 is payable for each survivor other than the first.

Weekly disability benefits are forthcoming during the time when a person is "wholly and continuously" disabled. To qualify, the person must have been employed at the date of the accident and he must be unable to perform "any and every duty pertaining to his occupation or employment." These payments will stop after 104 weeks, however, unless the injury "permanently and totally disabled such person from engaging in any occupation or employment for which he is reasonably suited by education, training or experience."<sup>82</sup> The amount of these weekly benefits will be reduced by the amount of payments under government pension plans. The amount of the benefit is 80 percent of the gross weekly earnings, subject to a maximum of \$70 per week. For a housewife who is

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adopted the following resolution offered by the Ontario Subsection: "Be it resolved that the accident insurance benefits presently available in the standard automobile policy be made mandatory in all such policies and in all provinces."

77. The Insurance Amendment Act, 1971, Stat. Ont. 1971, §§ 14, 15.

78. *Id.*

79. *Id.* § 3(1).

80. *Id.* § 1.

81. *Id.*

82. *Id.* § 2.

unable to perform any of her duties, by reason of incapacity, the payment is \$35 per week to a maximum of 12 weeks.

The cost of this new insurance coverage will be nine dollars per vehicle per year and it will be provided by the private auto insurance companies in the province. Similar protection will be afforded by the Motor Vehicle Accident Claims Fund to victims of uninsured and hit-and-run drivers.

This plan is unquestionably a major achievement for Ontario. The scope of its operation is broad and the benefits are quite generous. There was almost no bitterness generated during the period of its introduction, because no one's livelihood was threatened by the scheme and yet the injured people are being well-served. In the years ahead one can expect both the benefits and the premiums to be increased. The tort rights that survive will become less and less important, except in the serious injury cases.

### *British Columbia*

On January 1, 1970, British Columbia also instituted a peaceful coexistence plan operated by private insurance companies.<sup>83</sup> This plan was the culmination of an investigation begun by a Royal Commission on Automobile Insurance that was formed in January of 1966. Hearings were held and reported on July 30, 1968.<sup>84</sup> The Royal Commission advocated the abolition of the tort claim in auto accident cases and the establishment of a complete no-fault program in its place. A special legislative committee was set up to study these recommendations. On March 18, 1969, the committee released its report<sup>85</sup> which also urged that no-fault coverage be supplied to all motor accident victims, but that the right to sue for personal injuries be retained. The committee report also advocated that guest passengers be permitted compensation on the same basis as anyone else. These suggestions were incorporated into the new scheme along with several other ones.

The Government of British Columbia enacted a new contract of insurance that is compulsory for all motorists, their families, their passengers, and people struck by them. Everyone who buys insurance fills out the prescribed applica-

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83. See Insurance Act, Stat. B. C. 1969, §§ 325, 326 and Regulation 267/69 1969 pursuant thereto.

84. REPORT OF THE BRITISH COLUMBIA ROYAL COMMISSION, *supra* note 54. See, for reviews, Ison, *Highway Accidents and the Demise of Tort Liability*, 47 CAN. B. REV. 304 (1969); Atiyah, *British Columbia Royal Commission on Automobile Insurance*, 32 MODERN L. REV. 547 (1969).

85. THE REPORT OF THE SPECIAL COMMITTEE TO STUDY THE REPORT OF THE ROYAL COMMISSION ON AUTOMOBILE INSURANCE (1969).

tion form and is given a certificate. If the insured wants, he may secure a copy of the policy without cost to himself by requesting one.

In Section A of the policy the usual third-party liability provisions are set out. The insurer agrees to indemnify the insured (and any other person driving the car with his consent) against liability imposed by law upon the insured (or other person) for loss or damage arising from the ownership, use, or operation of the automobile up to \$50,000 minimum limits.<sup>86</sup>

Section B, dealing with accident benefits, is the significant reform. The insurer agrees to compensate, regardless of fault, anyone who "sustains bodily injury or death directly and independently of all other causes by an accident arising out of the use or operation of an automobile." Funeral service costs up to \$500 and all reasonable medical and rehabilitation expenses will be paid, subject to a maximum figure to be stipulated in the policy.<sup>87</sup>

In case of death, various amounts will be paid. For the head of a household under 64 years old \$5,000 will be allowed. This amount is reduced by varying sums for married women, dependent children, and old people. Where a head of a household dies leaving two or more survivors, in addition to the principal sum, \$1,000 is payable for each dependent other than the first. Also, where there are one or more survivors, \$50 per week, plus \$10 per dependent other than the first, will be payable for 104 weeks.<sup>88</sup>

For those who are totally disabled, a maximum weekly benefit of \$50 is payable. The calculations are based on 80 percent of gross weekly earnings, if they exceed \$50 per week, and if they do not exceed \$50 per week, the payment is \$40 per week. A disabled wife is also entitled to \$50 per week for 26 weeks.<sup>89</sup> No payments will be forthcoming to persons who commit suicide (or try to), who are covered by Workmen's Compensation, who are engaged in an automobile race, or who occupy a vehicle engaged in illicit trade. Nor will the insurer be liable under the policy to pay disability benefits to those sustaining injury by reasons of driving while under the influence of alcohol or drugs, while under age or while unauthorized or unqualified to drive the automobile.<sup>90</sup>

In adopting these reforms British Columbia has placed itself in the forefront of automobile insurance reform, by ensuring that virtually all the victims of car crashes will receive some basic reparation. It has refused to tamper with tort

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86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. Automobile Insurance Act, Stat. Man. 1970. The Act was passed with a majority of 1 vote.

law, leaving it available for those with special losses caused by negligent drivers. It has, however, provided for a reduction of the amount of recovery by these benefits to avoid double recovery. It has made insurance compulsory, yet it has left it to private enterprise to administer.

### *Manitoba*

After a fierce legislative struggle, the New Democratic Government of Manitoba enacted legislation which created a Manitoba Public Insurance Corporation (MPIC).<sup>90</sup> The function of this government-run corporation is to provide compulsory insurance for all motor vehicles in Manitoba. Regulations have been passed which will provide no-fault coverage for all victims of car crashes,<sup>91</sup> public liability up to \$50,000,<sup>92</sup> and comprehensive or "all perils"<sup>93</sup> coverage with a deductible of \$200. The Manitoba scheme, which is almost a carbon copy of the Saskatchewan plan, does not tamper with the injured persons' common law rights. It is called "Autopac".

The no-fault benefits are payable as of November 1, 1971 to

every person for loss resulting from bodily injuries or death, suffered or sustained by him directly, and independent of all other causes through accident which occurs in Manitoba . . . as a result of (a) driving or riding in or on, or operating a moving motor vehicle . . . (b) collision with or being struck down or run over by a moving vehicle . . . (c) entering, getting on to or alighting from a motor vehicle.<sup>94</sup>

Compensation is, however, denied to unlicensed drivers, persons engaged in a race or speed test and drivers impaired by alcohol or drugs,<sup>95</sup> although death benefits will be paid to their families.<sup>96</sup>

The benefits under the Manitoba scheme include medical and rehabilitation expenses up to \$2,000,<sup>97</sup> above the amounts paid by any other scheme, and funeral expenses to a maximum of \$500.<sup>98</sup> The amount of death benefits is \$5,000 plus \$1,000 for each "secondary dependent" to a limit of an additional

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91. *Id.* Part II.

92. *Id.* Part IV.

93. *Id.* Part III.

94. *Id.* § 39(1).

95. *Id.* § 39(3).

96. *Id.* § 56. *See also* § 53.

97. *Id.* § 40.

98. *Id.* § 41.



\$5,000.<sup>99</sup> There is a weekly benefit payable to an employed person who is "totally disabled" in the amount of \$50 per week for the "duration of the period during which the injured remains totally disabled."<sup>100</sup> In the event of partial disability, an indemnity of \$25 per week is payable up to a maximum of 104 weeks.<sup>101</sup> Similar amounts are payable to housewives who are "rendered totally incapable of performing any and all household duties."<sup>102</sup>

In addition to these sums, impairment benefits are provided,<sup>103</sup> similar to those in Saskatchewan. In the event of total disability, \$6,000 is paid. For partial impairment a schedule has been prepared which sets out a certain percentage of this \$6,000 figure which is payable for each of the listed disabilities. For example, if an arm is amputated between the shoulder and elbow, 50 percent of \$6,000 is payable, whereas if a hand is lost, only 40 percent of \$6,000 is provided for. There are various percentages for the inability to move certain muscles and joints running all the way from 1 to 40 percent. Scars and disfigurement of the face yield certain awards, as for example, the loss of a nose or an ear provides 20 percent. The total cannot exceed \$6,000. One provision that is bound to cause trouble is the one that provides payment for disability of the brain; a slight disability yields five percent, a mild one 10 percent, very moderate 20 percent, moderate 30 percent, mildly severe 40 percent, moderately severe 50 percent, very severe 60 percent, extremely severe 70 percent, profoundly severe 90 percent, and total 100 percent. These adjectives will undoubtedly engage the psychiatrists in some tantalizing word games in the years ahead.

Finally, extension coverage is permitted for anyone who wants more coverage than the minimums provided.<sup>104</sup> Extra liability coverage can be obtained up to amounts of \$100,000, \$200,000 or \$300,000 and deductibles can be reduced to \$100 or to \$50.

A complex premium structure has been devised by the MPIC. First, all drivers must purchase driver's certificates, the basic price of which varies according to age and sex.<sup>105</sup> Additional premiums must be paid according to the number of demerit points a person has accumulated. This assessment, which is a type of "tort fine", ranges from \$50 to \$300. Surcharges may also be exacted for drivers who are "disproportionately hazardous." Second, each owner of a

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99. *Id.* § 42.

100. *Id.* § 43(1).

101. *Id.* § 43(2).

102. *Id.* § 43(3), (4).

103. *Id.* § 44.

104. *Id.* Part V.

105. Manitoba Regulation 48/71, § 3 (1971).

vehicle must buy an owner's certificate. These rates vary in accordance with the type of vehicle and the territory of its use.<sup>106</sup> The extension coverage is available, in addition, for those who choose to acquire it. Certain surcharges may be required. It has been claimed that savings ranging from five to 35 percent over the current private rates have been won for various motorists. The private insurance companies will be allowed to compete with the government in the area of supplemental coverage, but not in any of the other areas.

#### *Conclusion*

Canada now has a variety of automobile accident compensation programs. Two provinces have publicly-run schemes while the rest are privately operated. Four provinces have mandatory accident insurance coverage, whereas it is still voluntary in the others. The amounts of the benefits provided vary to some degree, but all provinces have retained the right to sue in tort. One might conclude that Canada has been a pioneer in automobile insurance reform and would be worth studying by any jurisdiction contemplating new legislation in this area.

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106. Manitoba Regulation 105/71, § 20 (1971).