

THE Litigator



WINTER, 2006

Journal of the Ontario Trial Lawyers Association

WINTER SPORTS

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No-Fault = No Justice

by Russ Howe

Ontario's no-fault auto insurance system is broken beyond repair. Over a span of more than fifteen years, no-fault has failed to meet the needs of accident victims, premium payers, medical professionals, and the provincial government. The time for tinkering is over. We have only one rational option—scrap no-fault and return to traditional tort law.

No-fault has failed the innocent accident victim in many ways. Good drivers who are involved in accidents have gotten less and less coverage and compensation, yet their premiums have gone up. The maximum for weekly income benefits in the basic package has been hammered down from a high of one thousand dollars, to six hundred dollars, finally plummeting to a meager four hundred dollars. Medical and rehabilitation benefits for non-catastrophic cases have been reduced to 10% of their previous levels and a no-man's land of administrative obstacles has been placed between the injured and the care they need. Deductibles have tripled since their introduction and the verbal threshold has become more draconian in each new iteration. Insurance Bureau of Canada spokesman Mark Yakabuski has referred to Ontario's current no-fault benefits as "generous." I challenge him to live for three months in southern Ontario on four hundred "generous" dollars a week.

Over the time period, our benefits and compensation system has been gutted, and premiums have been going steadily upwards. The insurance industry is crowing over reducing premiums in the range of 12% since late 2003, but this reduction occurred



because the Liberal government mandated a cut in rates. In the no-fault years before the Liberal's firm hand on rates, premiums had moved steadily upwards despite three no-fault systems, each more repressive and bloated than the previous. Only a government-imposed rollback stopped the rising rates. Despite these premium cuts, insurer profits continue to skyrocket to record levels. So what has no-fault done for Ontarians? Less benefits, less tort rights, more bureaucracy, higher premiums, and record insurance profits. Is that what the system was supposed to deliver?

The most tragic fallacy is the myth that no-fault auto insurance helps control premiums. Our neighbours to the south have learned this lesson the hard way. No-fault is not an Ontario invention. It has been utilized in various forms in the United States since the early seventies. The American experience offers us hard facts that should guide our decisions in Ontario. No-fault has also been a failure in the United States:

◆ *The five states with the highest*

premiums are all no-fault states.

- ◆ *Liability premiums in no-fault states are 21% higher than traditional law states.*
- ◆ *Overall premiums in no-fault states are 16.3% higher than traditional law states.*
- ◆ *When Georgia repealed no-fault, their premiums underwent a 6% decrease when the rest of the nation underwent a 7% increase, a 13 % positive swing.*
- ◆ *When Connecticut repealed no-fault, their premiums went down 7% when the rest of the country's rose 2%, a 9% positive swing.*

Recently, both the New Jersey and Colorado no-fault systems reached a crisis point with premiums. New Jersey tried to modify the system, making it harder to get benefits and tightening the regulations. New Jersey premiums skyrocketed. They now pay the highest premiums in the United States. Colorado repealed no-fault and returned to traditional tort law. Premiums in Colorado dropped an average of 25%. Which system should we emulate?

While many plaintiff lawyers refuse to talk about it, no-fault insurance encourages fraud. Robert Doone, CEO of Netmap Analytics, a company that writes software for insurers to fight fraud, says that no-fault insurance makes fraud more likely. Robert Hartwig, chief economist for the Insurance Information Institute, said that no-fault

has created a "perfect environment" for criminals, and this environment has evolved over time. The answer is not more expensive and discriminatory anti-fraud measures (that works about as well as the gun registry does in preventing gun crime) but rather to eliminate the environment that breeds the crime. If you have a stream that runs through your back yard and you dam it up to make it easier to get drinking water, you may well end up with unpotable water that breeds mosquitoes. The solution is not to build a bigger dam and pour DDT into your drinking water, but to break the dam and let the water flow free again.

The "father" of no-fault is University of Virginia Law Professor Jeffrey O'Connell. Even he has been forced to admit the experiment has been a failure. His comments are insightful:

On Monetary Thresholds (akin to our deductibles): "No-fault thresholds arguably encourage victims to inflate their lawsuits to exceed the threshold." and "The total payout under no-fault in greater than under traditional systems."

On Verbal Thresholds: "Verbal thresholds do not adequately stabilize automobile insurance costs."

On No-Fault in General: "The cost of no-fault insurance in some states has been unexpectedly high."

No-fault in Ontario has also created more litigation than ever before. Under the traditional tort system, we would typically see one action between the at-fault driver and the victim. In the new system, we often see three actions for each collision. One between the victim and the tortfeasor, one between the victim and his insurer, and one between the at-fault driver and his own insurer. This is progress?

So let's review. Under no-fault we see:

- ◆ *higher premiums for good drivers.*
- ◆ *less care for good drivers.*
- ◆ *less compensation for good drivers.*
- ◆ *more litigation.*
- ◆ *more wasteful bureaucracy.*
- ◆ *more fraud and abuse of entitlements.*
- ◆ *insurers laughing all the way to the bank.*

If we are to have a workable auto insurance system in Ontario, it is time to face facts. No-fault is a failed legislative experiment that needs to be repealed in its entirety. Colorado did it, Georgia did it, Connecticut did it. We too must do it if we really want to deliver a fair auto insurance system to the next generation. ⚖️

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