



THE CANADIAN
BAR ASSOCIATION
Alberta Branch

March 11, 2020

Via e-mail: auto.advisorycommittee@gov.ab.ca

Alberta Automobile Insurance Advisory Committee

Attention: Chris Daniel, Chair
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Dear Members of the Alberta Automobile Insurance Advisory Committee:

RE: CBA Alberta's Submissions on Auto Insurance Regulation Review

Thank you for the invitation to provide submissions to the Alberta Automobile Insurance Advisory Committee (the "**Committee**"). Thank you also for providing an extension of time for our submissions. The Alberta Branch of the Canadian Bar Association ("**CBA Alberta**") is an organization representing over 5,300 members of the bar in Alberta. CBA Alberta has populated a volunteer working group of practicing lawyers who have come together to draft the basis of this submission. This working group is made up of lawyers from two distinct groups: those who primarily work for insurance companies and those who work primarily for Albertans injured in motor vehicle accidents.¹ This group has worked hard to reach consensus on the important issues the Committee is studying and are pleased to advise that they have in fact reached consensus on many of those issues.

Who is the CBA, What is our Bias and Why Does the CBA Matter to the Review Committee?

The Canadian Bar Association has been a leader with respect to insurance reform for decades. The CBA passed a resolution in 1974 which is still in place today as follows:

Be it resolved that the right of an individual to recover general damages from the wrongdoer in motor vehicle cases and to have such right adjudicated in the courts is one of the most vital hallmarks of the Canadian system of justice.

As such, CBA Alberta is concerned about any potential changes to the auto insurance regime in this Province and feels an obligation not only to its member lawyers but also to the public, to ensure that any such changes are thoughtful, fair and warranted.

¹ The working group is Kathy Briere, Randal Carlson, Shaun Flannigan, Sarah Makson, Jenny McMordie (co-chair), Kelly Robinson (co-chair), John Roggeveen, and Kent West.

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Why Does Process Matter?

The CBA is concerned about the transparency of the review of automobile insurance in Alberta. To date, the expedited consultation process has not appeared to be genuine. CBA Alberta reviewed the survey to which the Committee encouraged Albertans to respond. With respect, the wording of the survey seemed to telegraph responses that could only logically appear to be in favor of a no-fault automobile insurance regime in this Province.

If the Committee wants a true representation of what the Alberta public is thinking about automobile insurance, a fairly-worded survey directed towards stakeholders would be more appropriate than the current survey that will only be answered by those who have received notice of the same and have chosen to respond. CBA Alberta is concerned that the current survey does not appear to have any safeguards against individuals or perhaps even automated survey takers from submitting repeat responses.

In its current form, the survey appears manipulative and unfair to the public, and we are concerned about using statistical data accurately. Most importantly, the timeline of response to the survey, submissions to the Committee, and the Committee's report to the Government do not allow for adequate time or opportunity for consultation.

CBA Alberta has had an opportunity to review the JSCP claims and costs study report (the "**JSCP report**") but is aware of other statistical analyses (such as the report prepared for ACTLA) that come to very different conclusions. The data must be reviewed in an unbiased and measured fashion. The automobile insurance claims experience is cyclical. It is not unusual for there to be some years of an increasing claims experience, followed by years of lesser claims. The ACTLA actuarial report suggests that the claims experience is at present in one of those downswings.

Principles of the Current System and Tort Law Generally

Our justice system is built on fairness and the acceptance of responsibility for our actions. It is CBA Alberta's position that an innocent victim of an accident has a right to expect that the at-fault party take responsibility. In contrast, a no-fault insurance system would compensate both the innocent victim and the negligent driver who caused the accident.

A basic tenet of tort law is to put the victim back in the position they would have been had the tort not occurred. Tort law is not a "one-size-fits-all" system. Instead, an individual's personal situation is considered rather than treating all victims of car accidents the same. Further, individuals in consultation with their chosen health professionals should be able to make their own decisions as to their care and rehabilitation. Alberta drivers have the right to fair compensation and the right to be heard, whether that is by the auto insurer, by a court or by their chosen medical professionals. Suffering a collision and injury is a uniquely personal matter.

The role of consequence is vital. A no-fault system will shift the burden of responsibility away from bad drivers and redistribute it among all the Alberta motoring public

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regardless of driving history. CBA Alberta is concerned that a system that eliminates fault will lead to drivers who exhibit worse driving behaviours, are more distracted, and less respectful. Accountability for wrongdoing expressed by an increase in insurance premiums is appropriate. Low-risk drivers should not subsidize high-risk drivers. If in fact claim payouts are rising, that burden should rest primarily on drivers who have a history of previous claims or convictions for traffic infractions, and not on all Albertans.

Retaining legal counsel does not result in an inflation in the claim's value. It results in plaintiffs obtaining the compensation to which they are rightfully entitled. Those that argue for the absence of lawyers from the process are effectively arguing that accident victims should be denied effective representation, so they do not know or understand their full legal rights, and as a direct result, they miss out on the benefits and compensation to which they should have access.

CBA Alberta recognizes that Albertans are an independent group with an entrepreneurial spirit. The movement in Alberta to a socialist-leaning no-fault system without appropriate consultation or study is dangerous, unwarranted and unpopular. While CBA Alberta recognizes that there are some issues with the current system, those faults can likely be rectified with less drastic changes that will be addressed later in this submission. A wholesale change in the automobile insurance regime in Alberta is not supported.

Comments on the "Top Four" Injuries

The JSCP report highlights four classes of injuries that the authors believe are primarily responsible for increased claims costs. Two of those areas will be discussed in this submission. While there is little doubt that psychological injury and concussions are more prevalent now than they once were following motor vehicle accidents, that is not tantamount to saying that these types of injuries have been invented or created by the system.

With respect to psychological injury, the stigma attaching to mental illness is fortunately lessening. As a result, accident victims are much more willing to seek treatment for those types of injuries than they ever did before and further, medical practitioners are more adept at recognizing psychological injury and the need for treating the same. With respect to concussions, they too are much more readily recognized now by medical personnel than they ever were previously. Again, that is not to say that concussions did not exist historically -- it is simply the case now that medical personnel and accident victims are appropriately recognizing the symptoms of concussion and the need for treatment.

It is also of note that the Minor Injury Regulation was recently amended to expressly include some instances of concussion, psychological injuries and TMJ injuries in the definition of a minor injury. Those amendments will likely reduce claims for those sorts of injuries but as the amendments have been in place for less than two years, the effect cannot yet be measured. At the very least, more time should be given to allow for these changes to impact the claims experience in Alberta. Respectfully, the law has been

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appropriately amended to take account of these types of claims, and the results are tangible.

Comments on No-fault Insurance

Alberta currently enjoys a free market with respect to the provision of insurance products with a multitude of private insurers in the market. CBA Alberta is unaware of any like jurisdiction with private insurers where a no-fault automobile insurance regime has been contemplated, let alone put into place. It is difficult to conceive of how such a system could work for either insurers or for the motoring public.

While a no-fault system may very well reduce claims costs on an individual claim by claim basis, how can it result in a decrease in the overall claims figures for insurers in Alberta? Under the current tort-based system, it is only the innocent victim of a motor vehicle accident that obtains compensation (but for Section B). In a no-fault system, the at-fault drivers are also entitled to compensation. This is contrary to the principle of personal responsibility for one's own actions, and instead results in rewarding bad driving. Further, why should all drivers, good and bad, pay the same premium and be entitled to the same compensation? A no-fault system results in the pool of people receiving compensation to increase significantly.

One of the significant advantages of a common law tort system is that it can evolve with the times and with medical advances. There is good reason as to why nonpecuniary damages have increased for injuries for psychological damage and concussions. That is, medical advancements have brought those injuries to the fore. In contrast, a no-fault system based on a schedule of defined injuries does not have the same ability to change and evolve with the times. Reasoned decisions by the judiciary are preferable to a bureaucratic system that does not account for the individual or the modernization of the claims experience.

A no-fault system encourages an injured party to make complaints in perpetuity, to maximize their compensation. In contrast, a tort system has the advantage of bringing closure for the injured party. Injured parties feel that a weight has been lifted when their cases settle, and they no longer must justify or explain their suffering to someone. They can move on. A no-fault system with potential indefinite payments does not provide that closure.

Recommendations

CBA Alberta endorses several concepts that it believes could have the effect of reducing claims volume and cost, and which may also result in improvements to the safety of the motoring public, set out as follows:

- a) devote more resources to policing the roads including the use of photo radar;
- b) examine whether the current penalties for traffic violations are adequate and whether increasing the penalties for Provincial traffic offenses would lead to less risky behavior;

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- c) consider changes to traffic controls, speed limits and other options that could reduce collisions in high risk areas;
- d) reward drivers of vehicles with more safety features such as lane departure warnings and automatic stopping in imminent collision situations with lesser premiums;
- e) consider allowing insurers, with their insured's informed and express consent, to use geo-tracking technology to monitor a person's driving activity resulting in either increasing or decreasing premiums dependent upon the individual's driving conduct;
- f) mandatory driver education at regular intervals;
- g) to ensure that all accident victims recover from their injuries as quickly as possible, consider reviewing section B benefits and the way they are delivered to ensure that accident victims receive all medically necessary treatment in a quick and thorough and easy-to-understand manner;
- h) a cap or schedule of allowable medical and other expert report recoverable expenses for both Plaintiffs and insurers involved in litigation;
- i) a reduction in prejudgment interest on general damages to accord with current bank rates;
- j) a mandated discount rate for future damage calculations rather than requiring expert economists to opine on this issue in every individual case; and
- k) a legislated requirement for the use of winter tires as a result of the undeniable safety benefits of the same.

Conclusions

CBA Alberta favors a transparent and thoughtful approach to auto insurance reform. That approach should include detailed consultation with all stakeholders and the public. One method of obtaining those views would be a statistically robust survey of Albertans with unbiased questions.

CBA Alberta favors a system that allows injured victims in automobile accidents to obtain compensation for nonpecuniary damages. CBA Alberta is not in favor of a system where both the innocent victims and the at fault party are entitled to the same compensation.

CBA Alberta supports legal representation of the parties involved in motor vehicle accidents. This ensures that innocent victims obtain the compensation they are entitled to, and ensures that insurers are properly counselled and that the rights of their insureds are protected.

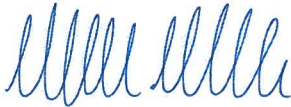
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CBA Alberta recognizes that some changes to the current tort system may be warranted. These would include reducing expert fees, reducing interest on general damages, and mandating the discount rate applicable to future claims. CBA Alberta encourages the Committee to allow the amendments to the Minor Injury Regulation which took effect in 2018 to come to fruition, as they will most likely result in an overall decrease in claims cost.

CBA Alberta welcomes the opportunity to make oral submissions to the Committee on March 24 as scheduled. Thank you for your consideration.

Yours truly,

Canadian Bar Association Alberta Branch



Ola Malik
President