

CHOICE . . . OR IS IT?

by Colin D. Clackson

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New amendments to the *Automobile Accident Insurance Act* have resurrected the right to sue for injuries sustained in an auto accident, but don't be fooled. The new "tort coverage" looks nothing like the system that was in place before the current "no-fault" scheme was imposed upon the motoring public.

Until January 1, 1995, Saskatchewan residents recovered compensation for injuries sustained in an auto accident by suing the person that caused it. After January 1, 1995 the ability to sue for compensation was taken away and replaced by a system of income replacement benefits administered by Saskatchewan Government Insurance adjusters. While the right to sue for "economic loss" remained, the definition of economic loss ensured that such lawsuits would be few and far between. Under no-fault, the only economic loss for which an innocent victim can sue is the difference between her net income (after deducting CPP, EI and income taxes) minus \$57,700. Obviously, few but the very wealthy (who, coincidentally, usually carry disability insurance) would suffer an economic loss worthy of the time and expense inherent in a lawsuit.

Since its inception, the no-fault system was under constant criticism. As time passed, anecdotal evidence of problems with claims handling and benefits mounted.

The constant calls for a fairer system and a return to the "good old days" of tort must have had an impact because on January 1, 2003 Saskatchewan once again became a "tort jurisdiction" well, sort of.

On January 1, 2003 every man, woman and child (yes, child), irrespective of whether she owns or operates a motor vehicle, may make a written election to receive limited income replacement, medical and rehabilitation benefits in exchange for the right to sue for compensation for the pain and suffering arising from injuries sustained in a motor vehicle accident. Each Saskatchewan resident will continue to be a no-fault insured until he makes an election (in the proper form) to be governed by the tort system. The election operates only from the time it is received by SGI and then only with respect to accidents that occur after the date of receipt of notice. Residents may move between tort and no-fault coverage as often as they please provided they complete the prescribed form and pay the prescribed fee.

Interestingly, a parent can make the election for her child. Perhaps this is a program designed to create work for all of those lawyers whose practices dried up when no-fault was introduced. Which parent with joint custody of a child has the right to make the election? What if that parent gets it wrong? We are living in interesting times.

After January 1, 2003, if the at-fault driver is a no-fault insured and the victim is a tort insured the victim may sue SGI (not the no-fault insured) for pain and suffering. SGI's liability is limited to \$200,000 for any one accident, regardless of the number of claims arising from the accident.

The tort insured victim may sue the no-fault insured directly for property damage or economic loss in excess of the weekly benefits allotted to the tort insured but cases where it would be worthwhile to do so have proven to be extremely rare. Whether under no-fault or tort coverage, economic loss is defined as net income (gross income less CPP, EI and income taxes) minus any benefits paid by any government, public or private insurance scheme. If the accident victim possesses disability insurance it is quite likely that no economic loss will exist. Disability

insurance typically pays 67% of gross earnings while net income is usually about 67% percent of gross income less CPP, EI and income taxes. Coincidence?

Non-residents involved in accidents in Saskatchewan will continue to be governed by the existing no-fault compensation scheme. They could not make an election even if they wanted to.

When no-fault was implemented it had an unexpected effect. The prohibition against lawsuits for injuries was interpreted by our courts to mean all actions for injuries arising from a moving motor vehicle. As a result, car manufacturers, sellers, repair shops and commercial liquor establishments could not be sued for any part they played in creating the accident. Effective July 1, 2002, the ability to sue these persons was returned to no-fault insureds, but only for compensation for pain and suffering, and “economic loss” of course.

Whether the dual system of insurance will actually work is unknown. While Saskatchewan residents are understandably confused about which will be best for them, it is virtually impossible to predict in advance which system will provide the highest benefits. Factors such as income (both of the victim and the wrongdoer), age, occupation and even gender can affect the result. Therefore, it is unlikely that anyone outside of SGI will provide definitive advice on which to choose.

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