THE PROPOSED TORT CHANGES RECOMMENDED BY THE FINANCIAL SERVICES COMMISSION OF ONTARIO (FSCO) REPORT ON THE FIVE YEAR REVIEW OF AUTOMOBILE INSURANCE

BACKGROUND:

Significant first party (no-fault) benefits were first introduced in Ontario in June 1990. At the same time, restriction on tort rights were introduced. Since then, the government has continued to struggle to find a proper balance between access to first party benefits and the injured victim's ability to claim losses from the at-fault driver (the tort claim).

Whenever automobile insurance companies found their profits too low, they maintained that Ontario was in the midst of an "insurance crisis". The crisis was often more imagined than real, however the insurer's first response was to suggest that the only way to address the so-called "insurance crisis" was to restrict people's right to sue in tort. Insurers have repeatedly argued that restricting tort rights would reduce the overall costs of the automobile insurance system and bring "stability" to the automobile insurance system.

History has shown however, that this is a fallacy. The historical data proves that reducing tort rights has not brought stability to the automobile insurance system in Ontario. The single largest area affecting the overall costs to the system, and thereby affecting the stability of the system, has been the level of available Statutory Accident Benefits and a cumbersome and expensive system for administering those benefits.

Restricting innocent accident victims' tort rights comes down to an issue of access to justice. Over the years, the government made a number of changes to the tort system which had the effect of reducing access to the Courts for less seriously injured accident victims. The introduction of a verbal threshold and monetary deductibles are examples of two such reforms. In addition, individuals were restricted from suing for their excess health care expenses unless their injuries met the definition of "catastrophic impairment".

The reforms in 2003 (Bill 198) changed the test for suing for excess health care expenses (i.e. those expenses not covered by the accident benefits coverage) from "catastrophic impairment" to the less stringent "serious and permanent impairment" (the threshold). These changes had the effect of modestly improving access to justice; however other changes restricted access to the Justice, such as increasing the deductible from $15,000.00 to $30,000.00 for non-pecuniary (general damage) awards assessed at or under $100,000.00, and $7,500.00 to $15,000.00 for Family Law Act awards under assessed at or under $50,000.00.

The last set of reforms (Ontario Regulation 461/96) provided a definition for the verbal threshold of “serious and permanent impairment”, which was intended to provide more certainty with respect to which type of injuries would exceed the verbal threshold. Some would argue that these definitions further reduced access to Justice system for innocent accident victims; while others argue that the definition did no more than codify the existing case law and manner in which the Courts applied the verbal threshold up to that point.

It has also been argued that the verbal threshold discriminates against those people who are not in the workforce (homemakers, children, the disabled and the elderly). When the verbal threshold as defined by Regulation 461/96 is applied to these groups, the threshold becomes more onerous for this group of individuals to meet than for those individuals who are employed. Consequently, lawyers who act for accident victims have argued that the verbal threshold and the defining Regulation need to be eliminated.

Innocent accident victims’ rights have been increasingly restricted based on false and unsupportable arguments about the economics of insurance. While some have argued that tort restrictions have been necessary to address out-of-control costs and instability in auto insurance rates, history has established that this is not entirely accurate. Specifically, tort claims costs have followed historically predictable patterns, and imposing tort restrictions cannot and never will bring stability to auto insurance rates.

Whenever the government seeks to reduce an individual’s access to the justice system, there should be a very high onus on the government, and those alleging that tort claims are responsible for instability within the system (i.e. the insurance industry); to demonstrate that any changes to the tort system would bring about more stability to the overall system.

Neither the insurance industry nor the government has ever been able to demonstrate that restrictions of innocent accident victims’ tort rights have brought stability to the automobile insurance system in Ontario.

Not surprisingly, previous efforts by the government to limit tort rights have not created stability within the automobile insurance system in Ontario. In fact, the current system continues to be unstable. Given the fact that tort restrictions have not brought stability to auto insurance, the solution for sustainability and stability must lie elsewhere. It follows that restrictions on tort rights should be eased at the same time as other reforms are implemented to fix what is wrong with auto insurance.

From the political perspective, an overriding consideration for the government appears to be reforms that will avoid the threat of precipitous increases in rates for Ontario consumers. The government in power is always concerned about which political party will be blamed if insurance premiums rise dramatically, and consequently, while governments are prepared to make changes which redistribute how injured accident victims are compensated between the accident

benefit and tort systems, they are loathe to make changes which would have the effect of dramatically increasing insurance premiums.

Armed with the March 31, 2009 FSCO Report, the government will have to decide which recommendations it intends to implement. As part of a comprehensive set of reforms to both the accident benefits schedule and the tort system, FSCO has recommended the following changes to the tort system:

THE VERBAL THRESHOLD:

Currently, claims for pain and suffering cannot be made unless the injured party can provide that they have sustained a permanent serious injury to an important physical, mental or psychological function ("the threshold"). For accidents occurring on or after October 1, 2003 the threshold was further defended in Ontario Regulation 381/03, amending Ontario Regulation 461/96 (the "defining regulation"). While uncertainly remains about the impact of the defining regulation, there can be little doubt but that it was promoted as a way to further restrict access to justice.

Personal injury lawyers, who represent accident victims, have continually argued that the verbal threshold is essentially redundant if a monetary deductible of $30,000.00 remains in place.

Justice Coulter Osborne, as part of the Civil Justice Reform project report also questioned the necessity of a verbal threshold in the face of a monetary deductible. Justice Osborne had difficulty envisioning what injuries would be removed by the verbal threshold, which were not already removed by the application of the $30,000.00 deductible.

While FSCO felt they did not have enough data to comment on the effect of eliminating the verbal threshold, **FSCO recommended a "closed claim study" to determine what if any changes needed to be made in regard to the verbal threshold. (i.e. changing it or eliminating it).**

FSCO is also of the view that this type of study could also address a number of other reforms recommended by the insurance industry to reduce the cost of bodily injury tort claims.

The FSCO Five Year Review also considered the application of Regulation 461/96 which defines the threshold.

FSCO has recommended that the defining regulation be revoked. FSCO is of the view that revoking the defining Regulation will have little effect upon what injured parties will pass the Threshold and be able to sue for their injuries, nor will revoking the Regulation have any significant effect on the costs to the system.

In addition, FSCO believes that elimination of the defining regulation will reduce complexity and regulatory requirements on the public.

DEDUCTIBLES:

As stated earlier, there was no justification for doubling the deductibles in 2003. Many stakeholders have advocated for the deductibles to be reduced. It must be understood that deductibles are simply another form of restriction on injured parties' access to the justice system. With respect to deductibles applied to fatal accident claims, there is no principled basis for a deductible. **FSCO has recommended the elimination of the deductible in claims involved death made under the Family Law Act.** FSCO is of the view that consumers and other stakeholders desire better access to the Courts for injured accident victims.

Taking into account the effect of inflation on the original level of deductibles which were introduced in 1996, FCSO **has recommended a reduction of the current deductible levels from $30,000.00 to $20,000.00 for non-pecuniary (general damages) and a reduction from $15,000.00 to $10,000.00 for Family Law Act (FLA) claims**. This approach, according to FSCO, is consistent with how the Courts have treated the cap on pain and suffering damages that was created by a trilogy of Supreme Court of Canada decisions some 30 years ago.

CONCLUSIONS:

The proposed government reforms to the current automobile system appear to have finally recognized that reducing injured accident victims' rights in tort is not the answer to achieving stability and cost savings in the automobile insurance system. If the government accepts the recommendations made by FSCO, the enhanced rights in tort will be a welcome change to the current system and many of its predecessors, where innocent accident victims paid the price in restricted tort rights and reduction of their claims in the name of potential cost savings to the system which never materialized. Easing tort restrictions and improved access to justice are only two important objectives of auto insurance reform. Timely and effective access to fair and reasonable benefits and affordable premiums for consumers and other equally important objectives. Achieving the latter requires a solution that ensures cost control, reduced complexity, lower transaction costs and greater discipline and accountability from the insurance industry.

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