

SIPP Briefing Note

The Saskatchewan Institute of Public Policy

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Choice in Automobile Insurance: Tort vs. No Fault Coverage*

Commencing December 16, 2002, residents of Saskatchewan may opt for either no-fault or tort automobile insurance coverage, with the latter effective January 1, 2003. In addition to introducing the alternative of tort coverage for those who wish to retain the right to sue at-fault drivers — for economic or such non-economic losses as pain and suffering — Saskatchewan Government Insurance (SGI) is implementing a number of improvements to the Personal Injury Protection Plan (otherwise known as “no-fault” automobile insurance). While SGI refers to the new system as “Choice in Auto Insurance”, the fact of choice will also affect those who do not have a car or drive: such persons too may elect the tort option as their means of redress in the event they are involved in an accident. Parents also may make the election on behalf of their dependant children.

The implications of these changes for Saskatchewan residents will vary, depending upon individual circumstances. For some, the new tort coverage will undoubtedly be the better option; for others — probably a majority — the no-fault option is likely to better meet their needs. It is hoped that, by providing a discussion of the nature and implications of the changes, this briefing note will contribute to an informed consideration of the insurance options available to Saskatchewan residents.

Tort and no-fault coverage are two different systems for compensating persons injured in automobile accidents. (See boxes, next page.) Tort places financial responsibility on drivers who are at fault, while no-fault provides benefits to those injured, physically or materially, regardless of fault. While the compensation that is potentially obtainable by an injured party is greater under tort, access to rehabilitation and benefits is almost certainly speedier and easier under no-fault.

The no-fault system in effect in Saskatchewan prior to August 1, 2002 provided a range of defined benefits for the injured regardless of the circumstances of the accident, and, in the case of economic losses, permitted tort action to recover losses in excess of those benefits. Injured parties, however, were precluded from legal action to seek compensation for non-economic losses such as pain and suffering.

This system was introduced in January 1995 after a heated debate and strong opposition from the legal community. It replaced the previously existing tort system. SGI was the driving force behind the recommendation to the provincial government and legislature to implement the Personal Injury Protection Plan (PIPP), as the no-fault system was called.

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What is Tort in Automobile Insurance?

Under tort, innocent victims are able to take legal action against the at-fault party to recover economic and non-economic losses. Fault in this case is assigned according to the accident circumstances and is incorporated in the calculation of future compensation. Seeking redress through the courts, however, is time-consuming, risky and any eventual judgement is subject to being reduced by legal fees and, in some jurisdictions, required deductibles.

There is a variety of existing tort systems. Pure tort assigns the responsibility for determining any compensation to the courts. Modified tort can include the provision of no-fault benefits, or a threshold (e.g., a minimum dollar amount or specified types of injuries that permit tort action), or a deductible (a dollar amount to be subtracted from any court award), or a combination of the above.

What is No-Fault in Automobile Insurance?

While fault is typically determined and assigned under no-fault insurance — e.g., to adjust the future premiums of the at-fault driver — every person injured in an automobile accident is entitled, under no-fault, to benefits irrespective of fault. Benefits are to cover income loss, medical expenses, permanent impairment or death. Such benefits are provided by the insurer according to the extent of injuries suffered and during rehabilitation until the injured party is able to return to his/her pre-accident activities. Unless specifically provided, no-fault insurance eliminates the right to sue at-fault parties for losses. There are, however, a number of different no-fault systems: pure no-fault prohibits any legal action against an at-fault driver and provides only defined benefits; modified no-fault insurance includes limited provisions for tort liability.

SIG's main argument for the change was that spiralling injury claim costs were going to contribute to higher future insurance premiums. SIG also blamed the tort system for not adequately rehabilitating accident victims and suggested there could be an improvement in that area by adopting a pure no-fault plan. The proposed system would give injured people much quicker access to benefits than tort, under which they had to wait for court awards before receiving financial relief. Moreover, since the benefits available to injured parties were increased substantially, and only losses in excess of these would be recoverable under tort, the number of those who might be better off under a tort option was reduced appreciably.

Review of the Personal Injury Protection Plan (PIPP)

The 1995 legislation adopting no-fault insurance provided that the plan be reviewed every five years by an independent committee, to ensure its continuing suitability for the residents of Saskatchewan. In anticipation of the Committee review in 2000, the Coalition Against No Fault — comprised of victim groups and organisations representing the legal community in Saskatchewan — increased its efforts to marshal evidence supporting a return to the pre-1995 system of tort-based insurance. Although invited to participate in the review process, the Coalition, the Law Society of Saskatchewan, and the Canadian Bar Association, Saskatchewan Branch, all withdrew at an early stage, accusing the Review Committee and the government of being biased in favour of the no-fault system.

In December 2000, the PIPP Review Committee released its report outlining a number of recommendations for the operation of the no-fault insurance system. The Committee concluded that the Personal Injury Protection Plan is functioning well and meeting the needs of Saskatchewan motorists at large; it proposed, therefore, that it be kept in place for the future. The report also recommended, however,

that provision be made for tort action, although only in limited circumstances. Given the recommendations of the Review Committee and the continuing pressure from the Coalition Against No Fault, the Government of Saskatchewan has decided to implement a limited tort option alongside the improved no-fault coverage. This has been viewed by some

as an unfortunate compromise, and defended by others as “providing the best of both worlds.” Still others see it as insufficient to provide an insurance system that would best meet the needs of Saskatchewan residents. However it is viewed, it is indisputable that Saskatchewan is the first jurisdiction in North America to have tort and no-fault systems co-existing.

How did we get here?

In 1993, SGI released an official report, prepared by Sobeco, Ernst and Young, an actuarial company hired by SGI, which proposed the implementation of a pure no-fault insurance system in Saskatchewan. The report stated that in the late 1980's and early 1990's liability-claim costs had soared relative to other costs, mostly because of settlement procedures that, frequently, were protracted and resulted in high payoffs. Claim costs for minor injuries had also increased substantially. Another important consideration was that the Auto Fund (SGI's subsidiary that administers the compulsory driver insurance program) did not provide quick and adequate rehabilitation benefits to accident victims, therefore impeding their ability to return to pre-accident activities as soon as possible. Last, but not least, were the rapidly growing demands on the Auto Fund by third parties (mostly passengers) for accident-related costs.

The evidence of sharply increasing claim costs was disputed by the Joint No-Fault Committee of the Law Society of Saskatchewan and the Canadian Bar Association, Saskatchewan Branch. In a 1997 report, which was part of their continuing campaign against no-fault insurance in Saskatchewan, the Committee stated that the increases in claim costs could have been contained by periodic small increases in insurance premiums and “minor adjustments to the existing system”. Unlike SGI, the Committee did not anticipate a continuous upward trend in claim costs at a rate higher than inflation. There was thus, they argued, no need to replace the tort plan.

A subsequent study of the automobile insurance system in Saskatchewan was conducted for the legal community in the province and published in August 2000 by the independent consulting firm Kroll Lindquist Avey (The Kroll Report). Supported by scholarly evidence and industry surveys, it arrived at conclusions and recommendations similar to those provided earlier by the Joint Committee. It criticised SGI for failing to disclose, prior to implementing no-fault insurance, information important to concerned parties in the debate. It identified alleged deficiencies in the economic analysis that had been undertaken and asserted that there had been a failure to adequately inform the public of the issues involved. Finally, the Kroll Report identified alternatives of which SGI had been aware, but which were seemingly not adequately considered.

After a process of consultation between SGI and selected interested parties, during which the legal community strongly opposed the proposed changes, Bill 56, to amend the Automobile Accident Insurance Act and establish no-fault insurance, was introduced in the provincial legislature in April 1994, and passed a month later.

Some Important Facts About the New Tort and No-Fault Insurance Options Offered by SGI

If a driver covered under PIPP (the no-fault scheme) injures a person who has opted for tort coverage, the latter may sue the former for economic losses to the extent that these exceed the defined benefits provided under the tort option. Subject to a \$5,000 deductible, he/she may also sue for non-economic damages (pain and suffering). In this latter case, however, the action would be defended by SGI, rather than the no-fault driver who had caused the injury. Substituting for the driver who was at fault, a Crown corporation with massive legal and other resources at its disposal, may adversely affect the probability of success in the tort action.

If a driver with tort coverage injures a person with PIPP coverage, the latter may sue only for economic losses in excess of the defined benefits provided under the no-fault option. With respect to non-economic damages, unless the tort driver was impaired, or caused the crash intentionally, or the accident occurred because of a specific third party's negligence, the driver with PIPP coverage may not take legal action.

In the case of an accident involving two parties each of whom has opted for tort coverage, the party found not to be at fault (or to the extent that the party is found not to be at fault) may recover both economic and non-economic losses from the other driver's insurance coverage. Any award for pain and suffering, however, will be reduced by a \$5,000 deductible, which means that the net compensation received by the plaintiff will be equal to the gross court award less \$5,000 and, to the extent that they are not covered by a court award, less the plaintiff's legal fees. In consequence, unless there is a significant probability of a relatively large settlement, suing for non-economic damages may be fairly risky.

What has changed?

Under the new scheme, Saskatchewan residents aged 18 or older will be able to choose between tort and no-fault insurance coverage; the parents of younger persons may make the election on their behalf. Currently, everybody is covered under the no-fault plan, but they may elect tort coverage at any time after December 15, 2002. The default system in the province will continue to be no-fault; therefore, unless motorists and other residents inform SGI officially (by filling out a one-page declaration form) of their intention to have tort coverage, they will continue to be insured under the no-fault option.

Several improvements to the no-fault system were implemented on August 1, 2002, including increases in defined benefits and expanded provision for tort action. Proponents of no-fault insurance point out that tort action has been allowed, under SGI coverage, where economic losses exceeded the no-fault benefits provided by that coverage. In practice, relatively few people have been eligible to sue for loss of income since the inception of PIPP, and their cases have typically been settled quickly by SGI before going to court. The increase in defined benefits under the no-fault system will further limit the scope for personal liability. That, however, will be offset to some degree by the introduction of provisions for legal action to recover non-economic losses.

Rehabilitation, permanent impairment, income replacement and death benefits have all been increased in accordance with the recommendations of the Review Committee to allow for more adequate compensation. People should bear in mind that, if they were unemployed at the time of the accident, they may be denied an income benefit for up to 180 days. Where they can establish that, but for their injuries, they would have been employed, an income

benefit will be paid. The income benefit would also be paid if the injuries result in the loss of Employment Insurance or National Training Act benefits.

The Personal Injury Protection Plan is also improved in the area of legal rights and obligations. It now includes the limited ability to sue for pain and suffering when an at-fault driver has been convicted of impaired driving or been found guilty of using a vehicle to deliberately cause injury; and where negligence by a specific institutional third party (e.g., a car manufacturer) has contributed to the accident.

What will the adopted tort coverage offer drivers in Saskatchewan? First, with the exception of limited circumstances discussed below, it will offer the ability to sue at-fault parties for both economic and non-economic damages. Second, it will guarantee some defined benefits irrespective of the accident circumstances. Third, it will reduce the degree of SGI's direct intervention in the rehabilitation process of the injured by not forcing them to be "responsible" for their recovery (even though evidence of that may be required in court to strengthen a claimant's case), on which the receipt of benefits may later be contingent.

Fourth, the tort coverage will likely provide more personalised outcomes in assessing injuries and subsequent losses than does the no-fault option, which utilises broad injury categories.

The tort system, however, will preclude seeking damages in respect of single-vehicle collisions, accidents with wildlife, and those where there is no

at-fault party from whom to recover losses. Also, it must be recognised that tort litigation may be expensive, time-consuming, and without any guarantee of success. Moreover, failure may result in the award of court costs against the plaintiff. Even if a plaintiff is successful in winning a court award, lawyer fees and benefits from other insurance plans will reduce any compensation that they receive.

Final Remarks

The debate on tort versus no-fault insurance is ongoing and unlikely to be ended soon. Critics of tort argue that a system of personal liability is slower than no-fault to compensate accident victims and tends to push up insurance premiums. It also tends to provide an inefficient allocation of resources by over-compensating small losses and under-compensating large ones. On the other hand, critics of no-fault argue that it undermines individual responsibility for

accidents and thereby contributes to their higher incidence. In other words, it ignores the notion that economic incentives do indeed influence human behaviour. Reconciling these divergent views will be difficult, but the advent in Saskatchewan of a hybrid system, in which the two approaches to insurance will exist side by side, may provide the opportunity to establish more firmly the comparative merits of the two systems. No other jurisdiction in North America provides a comparable opportunity. But choice brings its own unique difficulties.

"The default system in the province will continue to be no-fault; therefore, unless motorists and other residents inform SGI officially (by filling out a one-page declaration form) of their intention to have tort coverage, they will continue to be insured under the no-fault option."

The considerations that may influence the choice between the no-fault and tort options are both too numerous and complex to be fully captured here. Moreover, their relative importance in the decision process will depend upon the unique circumstances of each insurance purchaser. The foregoing discussion, therefore, simply serves to identify some of the more important considerations that should be kept in mind when deliberating on the relative merits of the two options. It will be interesting, however, to observe how in fact residents of the province will exercise their new-found right to choice.

Even though both the no-fault and tort coverage will be initially available at the same premium, SGI

expects that over time, the premiums for the tort option will increase more rapidly than those for no-fault coverage. This is likely to occur because the risks associated with the available tort option will tend to deter all but those who may reasonably expect substantial awards under a tort system. The premiums necessary to finance such awards will have to be commensurately high which, over time, will help direct the majority of drivers to the no-fault option. The fact that there will be a limited provision under the no-fault option for innocent victims to sue in respect of economic losses will further strengthen this tendency. A steady and self-reinforcing divergence between the premiums for the two options is therefore very probable.

SIPP Briefing Note

The **SIPP Briefing Note** series is a new initiative for the Saskatchewan Institute of Public Policy. This series allows the Institute to review and comment on public-policy issues that affect the people of our community. A **SIPP Briefing Note** will be released several times a year and can be used as an instrument for further discussion and debate.

The next issue of the **SIPP Briefing Note** will explore the challenges surrounding Collective Bargaining in Essential Services within the province.

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Defined Benefits Under the New Tort and No-Fault Options

Tort

1. Income Replacement Benefits

People who were employed (or homemakers) at the time of the accident and whose injuries arose within 20 days of the accident, receive \$300 per week (totally disabled) or \$150 per week (partially disabled) for up to 104 weeks. People who are confined to a hospital, bed, or wheelchair as a result of an accident will receive \$150 per week for up to 52 weeks.

2. Medical and Rehabilitation Benefits

These benefits are payable only to the extent to which the sustained injuries are not covered by another health insurance plan (for example, Saskatchewan Health Services Plan). The maximum amount available is \$20,000. If, however, a person sustains “catastrophic” injuries, (e.g., brain injury, blindness, amputation), they are entitled to benefits to a maximum of \$150,000.

3. Death Benefits

The spouse’s weekly death benefit is 45% of the deceased’s net income. A dependent child, where there is also a spouse, receives a weekly death benefit of 5% of the deceased parent’s net income. A dependent child, where there is no spouse, is entitled to the same amount of benefits that a surviving spouse would have received, until they reach 21 years of age.

4. Permanent Impairment Benefits

The maximum amount payable is \$10,000. However, if the individual has sustained “catastrophic” injuries, they are entitled to a permanent impairment benefit of up to \$130,000.

Additional information on Tort and No-Fault is available on the SGI website: www.sgi.sk.ca

No-Fault

1. Income Replacement Benefits

Injured persons who were employed at the time of the accident receive 90% of their net income to a maximum of \$57,788 per year in benefits. If a person was self-employed at the time of the accident, he/she may choose between income replacement (90% of net income) or a substitute worker benefit. Caregivers receive an income replacement benefit and students are entitled to a loss-of-studies benefit, the latter of which varies in value depending upon the level of education among elementary, secondary, and post-secondary students.

2. Medical and Rehabilitation Benefits

The maximum amount payable is \$5,000,000, which includes a maximum of \$950 per week for personal and home care expenses. These benefits will be retroactive to January 1, 1995.

3. Death Benefits

A spouse of a deceased is entitled to a death benefit equal to 45% of the deceased’s net income. The spouse may also receive an additional 5% of the deceased’s income replacement benefit for each dependent child until they reach 21 years of age. Where there are no dependants, each non-dependent parent or child will receive a death benefit of no less than \$11,462. There are also death benefits available for a spouse’s education and for vocational and grief counselling.

4. Permanent Impairment Benefits

Except in the case of catastrophic injuries, the maximum amount payable is \$143,282. Persons, who have sustained catastrophic injuries, are entitled to benefits of up to \$175,000.

5. Other Benefits

There is a group of expenses that are rebated under no-fault. It includes a meal allowance, private accommodation, travel and clothing expenses, and financial counselling.

The Saskatchewan Institute of Public Policy

www.uregina.ca/sipp

The Saskatchewan Institute of Public Policy (SIPP) was created in 1998 as a partnership between the University of Regina, the University of Saskatchewan and the Government of Saskatchewan. It is, however, constituted as an institute at the University of Regina. It is committed to expanding knowledge and understanding of the public-policy concerns in Canada with a particular focus on Saskatchewan and Western Canada generally. It is a non-profit, independent, and non-partisan Institute devoted to stimulating public-policy debate and providing expertise, experience, research and analysis on social, economic, fiscal, environmental, educational, and administrative issues related to public policy.

The Institute will assist governments and private business by supporting and encouraging the exchange of ideas and the creation of practical solutions to contemporary policy challenges. The Founding Partners intended the Institute to have considerable flexibility in its programming, research, contracting and administration so as to maximize opportunities for collaboration among scholars in universities and interested parties in the public and private sectors.

The Institute is overseen by a Board of Directors drawn from leading members of the public, private and academic community. The Board is a source of guidance and support for SIPP's goals in addition to serving a managerial and advisory role. It assists SIPP with fostering partnerships with non-governmental organizations, the private sector and the expanding third sector.

Saskatchewan enjoys a long and successful tradition of building its own solutions to the challenges faced by the province's citizens. In keeping with this tradition, the Saskatchewan Institute of Public Policy will, in concert with scholars and practitioners of public policy, bring the best of the new ideas to the people of Saskatchewan.

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