UNLV | William S. Boyd School of Law

(North) American Exceptionalism: The Auto Liability Version

Jeffrey W. Stempel - Lee Professor of Law
Boyd School of Law-UNLV
Erik S. Knutsen
Queen's University Faculty of Law (Canada)

ATILA – Transatlantic Lectures in Insurance Law – No. 5

Automobile Insurance Problems and Policies: A Transnational Comparison

March 10, 2022

The Omnipresence of American (U.S.) Exceptionalism (Cut Canada Slack)

- Government (two parties; electoral college; chamber of legislature (Senate) that violates its own Constitution (Equal Protection Clause)(but Canada has the Ford Brothers)
- Football means guys in helmets and on a field rather than a pitch (Canada only 2/3 guilty)
- Allergies to public transit
- Attraction to sprawl

And we mean insurance and related topics, too

- Medical services and Health Insurance (a contrast between the two neighbors: average annual spending per capita roughly $5,700 in Canada (11% GNP) vs $12,000 (20% GNP) in U.S.)
- “True” national health insurance/single payer in Canada
- “Obamacare” in U.S. – still mostly employer provided group medical insurance (the legacy of shipbuilder Henry Kaiser, who avoided WWII wage controls by “paying” employees with medical insurance)
- Auto is similarly different with the U.S. And rather disparate from the industrial world; Canada less so

The American Overview

- USA – 50 states; District of Columbia and still some territories (notably Puerto Rico): all have substantial political autonomy (Canada's provinces less so) and significant economic/financial autonomy in spite of the U.S. Constitution's "Commerce Clause" and more unitary government in Canada
- The USA States have "police power" over public health, safety .. and roads and motor vehicles (e.g., you get a personal ***state*** driver's license and ***state*** license plates for your car).
- As part of police power, auto liability insurance is mandatory for licensing a vehicle (required on an annual basis in U.S. States but a trip to the dreaded "DMV" (state Department of Motor Vehicles) is required only every few years.
- Canada – each province requires mandatory auto insurance by law

Auto Insurance: North American History

- Autos sufficiently present to produce first collision litigation tort suits by early 1890s
- But auto insurance comes a bit later – 1897 for liability alone; 1902-1912 sees development of broader coverage
- 1927: Massachusetts requires auto insurance as condition of licensing a vehicle – other states do not follow until 1950s – but the trend spreads rapidly.
- Initially, some auto insurance that did not cover policyholder drivers at fault – but by the 1930s the unwisdom of that construct was apparent
- Rise of more comprehensive auto insurance parallels (and perhaps precedes a bit) rise of comprehensive general liability (CGL) insurance during 1940s.

(Later) Auto Insurance History: The No-Fault Movement

- Spurred by concerns about amount of socio-economic resources invested in auto accident litigation, law professors Keeton and O'Connell found traction in proposing "No-Fault" auto insurance. *See* ROBERT E. KEETON & JEFFREY O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965).
- The goal was to have claims for both property damage and bodily injury resolved based on injury without regard to relative fault of the drivers
- Enacted – in part – in most states (debated over extent of adoption and retreat). But de-fanged to a large degree in that litigation was still permitted if claimant (a) incurred more than a minimum amount of medical expenses ("monetary threshold") or (b) suffered sufficiently serious injury ("verbal threshold")
- Monetary threshold too easily evaded by attorneys sending claimants for more treatment – move to verbal threshold but this hardly stemmed the tide of litigation.

No-Fault: Aspiration and Reality

- Academic consensus that "true" or "pure" no-fault is a good idea but practical barriers to implementation. Insurer views mixed. Lawyers dislike. And there is some policy pushback arguing that fault-based liability fosters useful deterrence against bad driving. *See* JAMES A. ANDERSON, ET AL., THE U.S. EXPERIENCE WITH NO-FAULT AUTO INSURANCE: A RETROSPECTIVE (2010).
- Abundant problems of under-enforced criminal penalties for intoxicated driving, reckless driving. Also poor coordination of the states re licensing, enforcement. Poor enforcement of even minimum policy limits (e.g., the driver that drops liability insurance after renewing license plates almost never gets caught until there has been a collision, by which time it is too late for the victim).
- Lots of rational ways to improve the situation but many barriers to improvement: decentralization; political factionalism; interest group influence; difficulty enacting comprehensive reforms; lack of commitment to devote resources to the problem (Republicans and Democrats tend to both be reluctant to raise taxes or expand government unless there are direct tangible benefits voters will appreciate); optimism bias prompting most people to undervalue risk of being collision victims); resistance to things like better public transit, universal medical care that would tamp down some of the litigation pressure

Auto Insurance in Canada

- Canadian provinces legislate text of available auto policy
- for coverage disputes, legislative model of interpretation used (not contractual)
- Two models of provision:

1. **government-as-insurer:**
   - BC, Manitoba, Saskatchewan, Quebec

2. **market co-opt:**
   - the rest (i.e. Ontario, Alberta, the Maritimes)

- both models have heavy input from insurance industry.

Tort vs. No-Fault in Canada

- Tort with limited no-fault:
  - BC (moving to no-fault), AB, NS, NB, PEI, NLD, YK, NU, NWT
- Pure no-fault:
  - Quebec (gov't injury, private property), MB
- Choice:
  - SK: tort or no-fault (no non-pec, economic $52k/yr)
- Hybrid tort/no-fault:
  - ON: no-fault unless injury over threshold, then back to tort

No-Fault Experience in Canada

- aim was to be faster, cheaper, lower auto rates, less reliance on lawyers
- has resulted in:
  - a cottage industry boom of specialty lawyers and firms;
  - a cottage industry boom of assessment industry;
  - even worse delays;
  - even higher legal expenses;
  - near ‘de facto’ necessity of lawyers to deal with ever-changing regulatory complexities (where can policyholders turn to for help against their own insurer? Answer: lawyers);
  - every “government of the day” takes a political kick at tweaking some of it, adding complexity and change,and fuelling more litigation;
  - an additional administrative law judicial review apparatus taking up the courts;
  - far greater uncertainty (lay tribunals solving complex legal disputes);
  - far, far less compensation to auto victims;
  - skyrocketing auto rates;
  - psychological ‘harm’ of constant ‘tweaking/removing/adding’ of benefits by the ‘system’ for accident victims over time (case never ends).

Auto Safety & Regulation a Mixed Bag in the U.S. and Canada

- National government sets some safety standards (authority based on role of auto in interstate commerce): e.g., crashworthiness, seat belts, air bags. Also regulates emissions and fleet fuel economy. Interstate Commerce Commission regulates aspects of trucking.
- But states/provincies regulate responsibility of use of vehicles causing injury (e.g.: tort liability; compensatory damages; punitive damages) – and required liability insurance. Also regulate things like carriage of agricultural products, whether use of seat belts mandatory, inspection requirements.
- Property damage insurance (for collisions, weather, vandalism, thefts) not required

U.S. & Canada Use a Liability Rule

- Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).
- Provides an overview of how societies and governments protect rights. Assigning a property right strongest but as liability rules dominate, perhaps inevitable as a practical matter. We cannot "exclude" other drivers from hitting us but we can make them pay – and require them to have sufficient insurance to do so (and avoid "judgment proof" tortfeasor defendants.

But a flawed liability rule (at least in the USA)

- Required amount of auto liability insurance is astonishingly low: $25,000 per person injured and $50,000 for all persons injured in a particular crash ("25/50" policy limits). A few states are as low as 15/30; Nevada changed to 25/50 only in 2018.
- USA Insurance agents recommend 100/300 for middle class drivers (Stempel has 250/500 and $2 million personal umbrella)(more on that later)
- in Canada, provincial minimums of $200,000 CAD (but $1 or $2 million CAD most common)

Ragingly Insufficient in US . . . But Better than Nothing

- A large but unknown percentage of USA drivers are on the road with minimum limits (this data is not well kept) – which are clearly insufficient for tort liability of any magnitude
- And these same drivers most likely lack significant personal assets. Realistically, a victim of tortfeasor driving has recourse only against tortfeasor auto insurance and modest judgment collection. After that, victim may see public assistance.
- Worse yet, 13% percent of drivers are uninsured in spite of "financial responsibility" laws (many deadbeat drivers drop their insurance after obtaining license plates). Against the law, but under-enforced
- Percent uninsured varies by state from high of 29% (Mississippi) to low of 3% (New Jersey). In addition to possible understatement, the uninsured rate is typically higher in urban areas (some estimate 40% or more in Los Angeles).
- Result is millions of uninsured drivers on the road – and millions of underinsured drivers on the road

Impact of the Duty to Defend

- Auto Liability Insurance with a Duty to Defend lawsuits is, like the CGL policy, “litigation insurance” that offloads disputing costs (and control) to the insurer
- Insurer controls response to suit, selection of defense counsel from “panel” of attorneys approved by insurer
- Unless there is a conflict of interest, in which policyholder may be entitled to select counsel

Who is the "Client"? And how many are there?

- USA states divide in auto (and other) insurance matters.
- Rules of lawyer ethics make the defendant policyholder the "client" to which loyalty is owed
- But majority of states also view insurer as "client" (which we think is addled; the insurer is a third-party payer, albeit one with important contract rights)
- Distinction without difference? The two-client states uniformly say that if interests conflict, defense counsel should favor interests of defendant policyholder over the interests of insurer.
- But is that honored in the breach due to lawyer dependence on insurers for continued retention, fees?
- Hard to write a monthly report to the insurer that is paying fees and dance around information that might defeat the defendant policyholder's coverage.

The Sometimes Precarious Position of Defense Counsel

- Defense lawyer wants to be a hero to the insurer: defeat the claim (if PH less at fault) or suppress the size of the verdict/judgment -- a desire that in one famous USA case (*Campbell v. State Farm*) let to large excess verdict and subsequent huge punitive damages award
- USA reliance on juries a big difference from other countries as well – arguably impedes predictability of outcomes, range of results
- in Canada, some auto cases tried with juries
- But in meritorious cases, duty to PH requires that counsel urge settlement within policy limits to protect defendant PH from potentially larger award
- Fear of an "excess" verdict – by both PH and Insurer

The "Bad Faith"/Unfair Claims Handling Regime

- USA/Canada law: all contracts implicitly contain a "covenant" of good faith and fair dealing
- Something of a paper tiger with most contracts; Defined as "honesty in fact and observance of reasonable commercial standards" but second part gets short shrift
- But for insurance, BF has teeth: insurer must in defending a claim against PH make "reasonable settlement decisions" – e.g., refusing to offer $50,000 policy limits to settle a viable $500,000 claim violates covenant – obligates errant insurer to pay the resulting $500,000 judgment and other provable damages to PH

The "Bad Faith"/Unfair Claims Handling Regime

- Also American State Unfair Claims Practices Acts patterned after National Association of Insurance Commissioners (NAIC) Model Act
- A long list of prohibited practices – but mostly applied by government regulators in response to PH complaints; Minority of States (e.g. Nevada) give PHs a private right of action for damages in cases of violation, which travels with BF suits and both duplicates and expands PH remedies

The "Bad Faith"/Unfair Claims Handling Regime

- And PH rights can generally be assigned to claimant as part of settlement, after which claimant counsel pursues the insurer
- So even though claimants may not pursue a "direct action" against the insurer (a handful of exceptions), the functional equivalent often results through assignment
- And in most States and Provinces, BF conduct is a tort that if proven can subject the insurer to punitive damages if the insurer conduct was "conscious" or "reckless" or "intentional" disregard of PH rights
- Depending on State law, a mishandled settlement opportunity can subject the insurer to responsibility for entire judgment in excess of policy limits w/out BF

The Role of Low Policy Limits and Uninsured Drivers (in the USA)

- In addition to other factors spurring auto liability litigation (e.g., lack of medical insurance and other safety net programs)(relative to other industrialized nations), USA lawsuits spurred by the insurance regime
- During the 1950s, regulators recognized the problem. In addition to requiring insurance, many wanted higher minimum limits – insurers fought – a move that seems puzzling to us, particularly in light of the reaction of the legal regime to low limits (the Bad Faith litigation sub-industry)
- The counter-proposal of regulators focused upon uninsured motorist (UM) coverage and underinsured motorist (UIM) coverage

UM/UIM Coverage

- UM/UIM is coverage that supplements or replaces the missing or inadequate coverage held by the underinsured/uninsured tortfeasor driver.
- Insurers offered it during mid-century but did not make it part of the standard policy or even emphasize it.
- American Regulatory response was to require that it be offered for purchase and that declination be documented. Not a mandated purchase or mandated inclusion in the standard policy.
- In Canada, UM purchase is mandatory but UIM is not only optional, but privately controlled (i.e. “not” legislation, so contractual model of interpretation applies to coverage disputes)

UM/UIM Coverage: Only Partial Market Penetration and Success

- The objective was to have policyholders protect themselves from underinsured and uninsured drivers by purchasing their own UM/UIM coverage
- Only partially successful.
- Despite relatively low cost in additional premium, many/most American policyholders do not purchase the coverage.
- In Canada, most brokers ‘by default’, “add” UIM or strongly urge – and most (but not all) purchase it.

The Way It's Suppose to Work

- Tortfeasor with $25,000 policy limits smashes into PH lawfully stopped at red light, causing substantial injury ($75,000 medical bills; six months missed work; severe pain that subsides over time but remains at lower level).
- Tortfeasor insurer recognizes claim value exceeds policy limits, pays the $25,000 limits.
- PH then calls upon its UIM coverage of 100/300 and obtains $100,000.
- No sweat but not always the norm

The UM/UIM Identity Crisis

- Expanded upon in Stempel & Knutsen, *Protecting Auto Accident Victims form the UM/UIM Insurer Identity Crisis*, 26 CONN. INS. L.J. 1 (2019).
- Many/most insurers approach a UM/UIM claim by PH as if it were a pure first-party medical cost reimbursement claim: e.g., question whether $75,000 is inflated medical bill; does not sufficiently consider lost income, pain, suffering (both short-term and perhaps permanent)
- But UM/UIM is hybrid: only first-party in that it is purchased by PH to whom Insurer owes good faith duties; third-party in that it takes the place of missing tortfeasor insurance
- To get UM/UIM benefits, PH must show it was "legally entitled to recover," and is less at fault than the tortfeasor; UIM insurer can play the role of defense counsel and deny claim if PH the tortfeasor, or avoid payment if tortfeasor is immune (e.g., government actor) or limit payment under applicable law (e.g., caps on amount of damages).
- Insurers embrace third-party, substitute liability insurance model when to their benefit – but improperly reject it when it makes non-payment or "low ball" offers more obvious.

What to Do? (Going Forward)

- Within the existing system:
- Recognize the apt role of the UM/UIM insurer
- Insurer should react to claim as if it was liability insurer for tortfeasor and assess the risk of an excess verdict, make reasonable settlement decision appreciating that claim has value not just because of medical costs but also because of other remedies available in a tort suit – particularly pain and suffering
- Insurer should recognize that "pre-existing" conditions are no defense/not much of a defense (e.g., PH may have had back problems in the past but if fine on day of crash, the pain and treatment occasioned by the crash is a proper element of damages)(the "thin skull" doctrine of USA/Canada tort law applied to insurance).
- Adopt more realistic and cost-effective response to claims (mostly for insurers but also PH counsel). Some "shoot the moon" lack of realism by PH plaintiffs but in our view most fault with insurers that are too unrealistically frugal responding to claims (e.g., our earlier example but with a UM/UIM insurer that offers nothing or something like $7,500 of its $100,000 policy)(Stempel sees it all the time in Nevada). Insurers should appreciate that even if they think a six-figure policy limit demand is high, low-balling the policyholder is bad faith and encourages litigation that might well have been avoided with a decent, non-insulting counter-offer.

What to Do? (Going Forward)

- ***In changing the system*** (a range of options, but perhaps none are realistic)
- Go to a pure no-fault regime (but Knutsen argues it's a "nightmare" worse option in operation);
- Mandate or Provide High(er) Policy Limits:
  - higher level coverage actually cheaper
  - less settlement 'limits' issues
  - gets closer to true 'compensation'
- Mandate UM/UIM insurance as part of standard policy and allow insurers to charge fair comprehensive premium
- Expand medical and disability insurance or social program coverage in both countries (so that auto suits are not unduly prompted by efforts to fill those gaps)

Or, for something really radical . . .

- Create a national auto insurance compensation program funded from gasoline tax or other general revenue sources.
- Claims are made and processed by the Agency in charge, with rights of administrative appeals and (perhaps limited?) right to sue in court.
- Compensation is net with set-offs for medical insurance or other coverage
- At-fault drivers are charged a “tax” or fee. Repeat or egregious at-fault driving results in license suspension (both for owned vehicle and driver’s license)

Or, if Status Quo Bias Wins Out . . .

- “Suffer” or “endure” higher rates for faster, more “generous” (“adequate” if one is plaintiff counsel) coverage and payouts
- Perhaps combine with higher fees, limits on driving for habitual crashers
- Encourage cultural shift to seeking earlier settlements that save total social costs at some risk of higher immediate expenditures by the insurer receiving the claim
- Knutsen/Stempel assert the irrefutable (because it will never be attempted) proposition: more insurer “generosity”/”reasonableness” at the front end would in the long run be good for the bottom line (mild apologies for the cliches)

And if that's not enough auto exceptionalism . . .

- USA differs in that its dual court system (separate state and national (a/k/a "federal" in USA-speak) courts but possibility of "removing"/transferring from state to federal or dismissing national cases due to lack of federal "diversity" jurisdiction (litigants from different states; high enough stakes of case) creates all sorts of procedural issues and opportunities
- USA also has possibility of venue transfer within both systems, particularly federal courts
- Contract issues may play a role: e.g., insurance policies providing that actions must be brought in time period shorter than prevailing law on limitation of actions

And more exceptionalism still . . .

- Lawyer regulation plays a role: defense counsel must be members of the bar in locale of litigation or be admitted “pro hac vice”

- USA litigation generally state centered not only because of traditional division of authority but also due to the congressional McCarran-Ferguson Act (passed in 1950) largely removing federal regulation of insurance. Creates presumption against national regulation.

- Contract and Tort are common law subjects in USA; State and federal civil procedure have extensive written rules but much common law – However, insurance often has more statutory and administrative code regulation than most USA state law topics. Often questions about whether general regulations provide rules of decision for private litigation about insurance rights.

Good Grief, More Exceptionalism

- Throughout insurance, contract, tort, and procedure matters is the issue of the USA and Canadian use of a layperson **jury** in civil cases. Even though most cases are resolved by settlement or judicial ruling on motion, the availability of the jury shapes disputing process (e.g., more stringent rules of evidence admissibility than in many countries) and strategy/tactics of negotiation, litigation, settlement.

Special Thanks

- To David McClure and Justine Iverson, Wiener-Rogers Law Library, Boyd School of Law, University of Nevada Las Vegas, UNLV Boyd School of Law, Queen's University (Canada)
- ATILA organizers and co-panelists

Questions