INVERSE LIABILITY AUTOMOBILE ACCIDENT INSURANCE

JAMES B. M. MURRAY

> "Only a fool will build in defiance of the past. What is new and significant must always be grafted to old roots, the truly vital roots that are chosen with great care from the ones that merely survive"
>
> —Bartok

The spotlight of adverse criticism has in recent years turned full beam on the current system of third party automobile insurance and the methods of compensating those who are injured, and the dependents of those killed on North American roads, methods which have held sway on this continent for over fifty years. That this is a social problem of major magnitude can be easily comprehended from the fact that over 1100 persons were killed every week in automobile accidents during 1966 in the United States and Canada.

The Osgoode Hall Study on Compensation for Victims of Automobile Accidents conducted in Ontario in 1964 found that only 42.9 percent of those hurt or killed received any tort reparation, and only 28.8 percent recovered all of their economic loss.[1] These figures are not surprising when it is realized that a person injured in an automobile accident will only be fully reimbursed for his loss if:

(a) his injury was caused by the negligence of the owner of an automobile; and

(b) he can prove such negligence; and

(c) that owner carries insurance sufficient to cover the whole loss, or alternatively, has sufficient assets to cover the claim;

and even then the unfortunate victim may have to wait months or years until he can successfully pursue a legal action through the courts.

It will be seen therefore that, under the present system, many of those injured and killed have no recourse to recovery because:

(a) the accident was caused by their own negligence; or

---

[1] Allen M. Linden, "Peaceful Coexistence and Automobile Accident Compensation." *Canadian Bar Journal,* February 1966.

(b) the accident was inevitable, that is, it was caused by no one's negligence; or

(c) the accident was caused by a negligent motorist but the injured person cannot prove it; or

(d) the negligent motorist carried no insurance and had no assets (In many jurisdictions uninsured motorist coverage or Motor Vehicle Indemnity Funds will be available to take care of such loss up to the statutory minimum limits.); or

(e) the injured person was a passenger in an automobile driven by a negligent motorist in those jurisdictions where passengers have no redress in such circumstances.

In these cases the injured person will have to rely on whatever accident insurance he may have purchased for his own benefit, such as medical payments insurance, accidental death and dismemberment, disability income, and so on, but usually such insurances only cover a woefully small proportion of the loss, and in the vast majority of cases little or no accident insurance is carried. There is in fact no form of accident insurance available at the present time which will provide a full measure of reimbursement of loss to the insured. The dependents of those killed will in many cases be beneficiaries of the life assurance policies which prudent husbands and fathers may have purchased, and this alleviates the hardship to that extent.

The nub of the problem is not in the area where the loss can be measured in hundreds of dollars. Most people can soon recover from such a loss. It is the serious injury cases where years of total disability lie ahead, it is the widows with young families to feed and educate, where the need is greatest. All of the alternative methods proposed for the solution of the automobile victim problem aim their benefits to loss up to $5,000 or $10,000 and leave those who suffer greater loss with all the deficiencies of the present system.

Compensation without Fault.

Compensation without fault is one method which has been considered as an alternative. This system is now in operation in the Canadian province of Saskatchewan. All persons injured or killed in automobile accidents automatically receive compensation, up to the limit of $5,000 any one person, from this government-operated plan, irrespective of who was

legally liable for the accident, and their legal rights have been taken away from them up to this amount. If the loss exceeds the $5,000 compensation then they must prove negligence and pursue their claim in the usual way. This plan does not therefore solve the major problem of the serious injury cases involving total disability. Further, the death benefit limit of $5,000 may be much more than an indemnity for a young, single person with no dependents, but would be totally inadequate for a married man with a young family. It should be remembered that the plan was introduced in an endeavor to keep down insurance costs, rather than to provide the best system possible for the victims. It is doubtful whether it has gained its number one objective, since the true costs are partially hidden in the expense of administering the vehicle licensing department, no agency commission is payable, and the premiums are not subject to taxes. It is only fair to say, however, that most residents of the province seem to be reasonably happy with the plan, although this may be partially due to the fact that Saskatchewan is basically a farming community with no large metropolitan centres. The Saskatchewan Plan has been in operation for twenty years but has not been adopted in any other jurisdiction.

Accident Benefits

At the present time there is a proposal in the province of Ontario to include in the standard automobile policy accident benefits providing medical payments, death, dismemberment, and total disability weekly benefit. The death benefit would cover death within 90 days of the accident and the amount would be graded according to the age, sex, and marital status of the deceased—varying from 100% of the Principal Sum for married males up to age 60 (plus 20% of the Principal Sum for each dependent child), down to 5% of the Principal Sum for unmarried children. The percentage of the Principal Sum in the event of dismemberment varies in the usual way. Total disability is provided up to 104 weeks with a waiting period of 7 days. If the injury causes total and permanent disability the weekly benefit continues for a further 104 weeks.

The original proposal by the Select Committee of the Ontario Legislature called for the adoption of these accident benefits, as a mandatory section of the standard third party automobile policy, applicable to any person while an occupant of the insured automobile and any person, not the occupant of an automobile, who is struck in Canada by the insured automobile. The injured person would be deprived of his right to sue the driver or owner of the automobile in which he was riding as a passenger, or by

which he was struck, except for any amount in excess of the accident benefits.

The cost of these benefits for a Principal Sum of $5,000 has been estimated at 12.6% of the third party premium for limits of $35,000 inclusive for bodily injury and property damage, assuming benefits are offset against third party liability.[2]

The Ontario plan has been opposed on the ground that the motorist should not be legally obligated to pay the premiums on a policy which provides accident benefits to persons other than occupants of the insured vehicle. If, as now appears, the coverage is to be voluntary, consumer resistance may be expected to the inclusion of third party pedestrians, etc. The Ontario plan is also opposed on the grounds that it requires legislative changes to the common law and that it does not adequately provide for the very serious cases.

Basic Protection Plan

The Basic Protection Plan by Robert E. Keeton and Jeffery O'Connell[3] is the latest proposal for the solution of this urgent social problem. It provides a form of compulsory insurance which compensates victims without regard to fault for economic losses up to $10,000 per person and $100,000 per accident. Legislation is required to exempt the insured from his common law liability to the extent of the compensation. Reimbursement of losses is provided as they accrue so that the victim does not require to await the assessment of his total loss before receiving any payment. In arriving at the amount of net loss, benefits from other sources must be subtracted in order to avoid duplication, and there is a compulsory deductible of $100 or 10% of work loss, whichever is greater. It is perhaps too early to estimate the acceptance of this comprehensive plan. Undoubtedly it would be an improvement on existing methods if the plight of the injured victim is considered. However, as in all compensation plans, there is the necessity to change the common law, and the disadvantage that benefits are limited to small and medium sized losses.

It may be that society is not yet willing to accept the regimentation of fixed and limited benefits in place of unlimited common law rights. The prospective plaintiff would rather take his chance of recovering his full

[2] H. E. Wittick, "Estimating the Cost of Accident Insurance as a part of Automobile Liability Insurance," *PCAS* Vol. LI, 1964.

[3] Keeton & O'Connell, *Basic Protection for the Traffic Victim*, Little, Brown & Co., 1965.

loss at common law rather than be assured of partial compensation. There certainly seems to be a very great reluctance on all sides to endorse any solution which requires, as an essential ingredient, the abrogation of the common law rights of the individual. Perhaps this is not too surprising in a nation where freedom is the individual's birthright defended by the highest courts in the land.

It becomes of interest therefore to seek, if possible, a solution which:

(a) does not subtract from the injured party his right to go to court if he so wishes in order to recover his loss; and

(b) gives the injured party a full indemnity for all economic loss, limited only by the sum insured; and

(c) is payable irrespective of fault; and

(d) provides advance payment of out-of-pocket expenses.

These requirements would be met by a form of accident insurance which would provide an indemnity to the insured and which he can elect to collect from his own insurance in lieu of an action against a wrongdoer, but with provision that the insurer would then be subrogated to the insured's rights, if any, against that wrongdoer.

Inverse Liability

Inverse Liability automobile accident insurance has therefore been designed with these requirements in mind. Simply stated, such a policy would pay to the insured, or in the event of death, to his legal representative, all economic loss suffered as the result of bodily injury in an automobile accident, that is, for the amounts of economic loss which he would have been entitled to collect at law if he had claimed against a responsible third party. Benefits would apply to the insured, and to dependent relatives residing with him, for bodily injury arising out of any automobile accident, whether as drivers, passengers, or pedestrians. Economic loss would include medical, surgical, hospital, and nursing expenses, and loss of income as well as the expense of rehabilitation, excluding any amounts received by the insured under workmen's compensation, Social Security, governmental hospitalization schemes, and so on. In the event of death, the financial loss suffered by the insured's estate because of the accident would be payable for the same amount as would have been recognized as a legitimate claim from the dependents of a deceased third party claimant. Fault does not enter into the question, so that in all cases the insured would be assured of a complete indemnity. Thus where the Inverse Liability

insured is himself responsible for the accident, or where no other car is involved, such as in the car-tree type of collision, he would still receive full indemnity under the Inverse Liability policy.

Since the policy is one of indemnity the insurer would be entitled at common law to take over the insured's rights, if any, against any other party responsible in whole or in part for the insured's loss. Thus the Inverse Liability insurer, having agreed to indemnify the insured, would pursue recovery in his name against the wrongdoer's automobile liability insurer.

Where the insured is 100% responsible for the accident the Inverse Liability policy pays the loss but of course has no rights of recovery.

If the insured prefers to pursue an action or make settlement with any other person responsible for the accident, he may of course do so, since that is his legal right, but in that event he would forfeit all benefit under the Inverse Liability policy in exactly the same way as is provided under Uninsured Motorist coverage. In fact Inverse Liability is an extension of the principle of uninsured motorist coverage but of course is not limited to accidents caused by uninsured persons (See the proposed policy wording in the Appendix).

Inverse Liability, being an accident policy, would not be liable to partnerships or corporations — the insured would require to be an individual, but as stated above the benefits would extend to cover relative dependent members of the named insured's household. Like any other accident insurance Inverse Liability could be sold on a group basis for employees on a named schedule.

Payment on Account

Medical, surgical, hospital, and nursing expenses and other out-of-pocket expenses would be paid under Inverse Liability upon production of evidence of payment, subject to a receipt being taken from the insured or his legal representative for the purpose of bringing this into account at the time of final settlement. This is a valuable advantage to the insured and it is an effective answer to the existing problem where victims of accidents who are unable to pay their way are often forced to settle for less than their legal entitlement.

Policy Limits

The insured would select his own limits, the suggested minimum being $100,000 with increased amounts up to $500,000 available at an increased

premium. It is important that adequate amounts are available, since small sums insured would suffer from the same defects as limited compensation plans. The availability of alternative amounts enables applicants to purchase coverage in keeping with their dependency obligations and their standing in the community.

Pedestrians

Where the Inverse Liability insured is a pedestrian at the time of an automobile accident he is entitled to the full benefits provided by his Inverse Liability policy, and the insurer would then recover if it can from the automobile owner or driver or his automobile liability insurer. Similarly, where the insured at the time of the accident is a fare-paying passenger in a taxi or omnibus, his loss in the first instance would be paid by his Inverse Liability insurer who would then subrogate against the owner of the taxi or omnibus.

Where the responsible party is insufficiently insured the Inverse Liability insurer would have a net loss of the difference between the full indemnity paid to the insured and the amount recovered from the responsible party's insurer.

Where a greater amount is recovered from the responsible party or his insurer than has been paid by the Inverse Liability insurer to its insured, the excess would belong to the insured on the theory that that is the amount he would have recovered if he had pursued his legal rights against the wrongdoer, instead of claiming under his Inverse Liability policy. In practice this is not likely to arise since in cases involving a responsible third party a final settlement under the Inverse Liability policy is likely to be postponed until the recovery amount has been determined by negotiation with, or by court action against, the responsible third party or his insurer.

Uninsured Motorist Insurance

It will have been appreciated from what has been said that Inverse Liability insurance would include uninsured motorist coverage in the event that the accident is caused by an uninsured motorist or by a hit and run driver, but it is not limited to the statutory minimum limits. The principle is the same—that of the first party insurer acting in the place of the third party insurer for the purpose of determining the amount of the insured's loss. Inverse Liability is also analogous to the Sister Ship Clause of marine insurance whereby if two ships belonging to the same owner are in collision, the liability between them is settled as if the ships belonged to

different owners. The principle of Inverse Liability is not therefore new — it is merely an extension to an existing method.

Determination of the Amount Payable

The amount payable under the Inverse Liability policy would be determined by agreement between the insured or his legal personal representative and the company, or failing agreement, by arbitration as defined in the policy. This is also the method adopted by uninsured motorist coverage. No suit by the insured against the company would be valid unless all terms of the policy, including the arbitration condition, are complied with.

Claims under the Inverse Liability policy will fall into one of two main categories—those where some other party was responsible or partly responsible for the accident, and those where the insured was the author of his own misfortune. In the former case the Inverse Liability insurer will be pursuing recovery of its payments to the insured, and final settlement with the insured will not be arrived at until this has been agreed with the third party or his insurer by negotiation or by court judgment. In the latter case the insured would have no means of recovering his loss except by his claim under the Inverse Liability policy, and for this reason he is not likely to be too unreasonable in negotiating a settlement.

However, since the amounts claimable under Inverse Liability relate to economic losses which can be established with reasonable accuracy in most cases, and since the insurer can obtain medical examinations as often as considered necessary, and since the insured must cooperate with the insurer in producing evidence of loss, there should be an amicable settlement reached in the vast majority of cases. There will be controversy in some cases in the same way as these are encountered in all forms of insurance, with the possible exception of total losses under fire and property policies and losses under life policies, where the amount payable is fixed. The amount of loss under Inverse Liability is no less determinate than the amount payable under a Business Interruption policy. Whatever defects can be attributed to Inverse Liability because of the possibility of difficult settlements in some cases should be outweighed by its many advantages, not the least of which is the fact that rehabilitation of injured automobile victims becomes an immediate possibility without all the problems which presently attend the injured third party victim who does not, and can not, share a community of interest with the insurer, because of the fear of prejudicing his legal position. By promoting rehabilitation the Inverse

Liability insurance can make a major contribution to a social problem of national importance.

Voluntary or Mandatory?

There is certainly a very powerful argument for making Inverse Liability a compulsory form of insurance for automobile owners. The state is well within its constitutional rights in requiring the owner of an automobile to produce a guarantee that no person who uses the automobile or who is struck by it, will, by reason of injury following an automobile accident, require the financial aid of the state. This could be accomplished by a combination of an Inverse Liability policy and an automobile liability policy. (Both coverages could be provided in one policy by adding Inverse Liability coverage to the standard automobile policy.)

The usual opposition that such a mandatory requirement calls for one section of the community to pay insurance premiums for benefits which another section of the community receives is scarcely valid, since the insured purchases Inverse Liability for his own protection, and for the protection of the members of his family.

Pedestrians do not usually go without compensation following an automobile accident since in the vast majority of cases the automobile is at fault. (In some jurisdictions the automobile owner is deemed liable unless he can disprove it.) However, pedestrians may in some cases also be automobile owners who have purchased Inverse Liability, and in any event, those who do not own automobiles could still purchase Inverse Liability for their own protection at lower premiums than automobile owners.

It should be noted that if Inverse Liability were made compulsory, there would be no necessity to change the tort liability law, since duplicate reimbursement is avoided by the indemnity-cum-subrogation feature of Inverse Liability.

The disadvantage of a voluntary form of Inverse Liability is of course that it only provides an effective solution to the current problem to the extent that it would be purchased by the motoring public. However, provided the cost can be kept within reasonable bounds, Inverse Liability would likely reach a large section of the community.

The Cost of Inverse Liability

The rating factors to be used for Inverse Liability bear great similarity to those adopted for automobile third party bodily injury insurance, since

both premiums are a direct function of the frequency of automobile accidents and the average size of a bodily injury claim. Thus the location, the use of the automobile, the age, sex, and marital status of the drivers, and the accident and conviction record of the insured would all be relevant factors in the rating of Inverse Liability insurance.

Thus it should be possible to relate the cost of Inverse Liaiblity to the cost of the corresponding third party bodily injury liability insurance. In this way maximum use would be made of existing statistics. Superimposed on this base would be a composite factor dependent on the following variables:

(i) the amount of coverage,
(ii) the age of the insured (probably in quinquennial age groups),
(iii) marital status,
(iv) number and ages of dependents,
(v) number of automobiles owned in the household.

It would be necessary in the first instance to set up differentials for these variable factors largely on a judgment basis although reference could be made, for example, to the relativity by age group for disability income insurance, and to the cost of annuities for widows and child dependents. It is recognized that several of these factors may be difficult or impossible to assess accurately in the initial stages since there are many imponderable quantities involved. For example, the married man with a young family would have a larger claim for dependency than an older man whose family were grown up, but on the other hand the young person is not likely to have reached his maximum earning capacity. Again, the older man with long service may not suffer the loss of income to such an extent as the young man, but the young man may make a speedier recovery from his injuries. Notwithstanding the complexity it should be possible to set up a rating structure in each territory based upon the accident statistics which are usually available in considerable detail showing the number of persons injured and killed by age groups. In conjunction with the frequency of accident it will be necessary to arrive at an estimated cost of claim which should bear some reasonable relation to the average cost of a third party bodily injury claim, information on which is available in most, if not all, jurisdictions. In estimating the cost of claim, recognition should be given to the fact that, in a percentage of the cases, some recovery will be made from a responsible third party or his insurer.

As a matter of interest the premium developed along these lines for $100,000 coverage in the province of Ontario, ignoring recovery pos-

sibilities, was of the order of $60, and this compares to an average third party bodily injury and property damage premium of $69 (bodily injury is not recorded separately), and a collision premium of $46. This seems to indicate that the cost of Inverse Liability would be within reasonable limits, although of course, much research would be necessary in order to develop a more detailed rating program. Based on this estimate many people who could not afford both collision and Inverse Liability might choose the latter as being better protection against a financial loss of crippling proportions.

Damages for Pain and Suffering

It will have been observed that the proposed form of Inverse Liability coverage indemnifies the insured for his economic loss, and the question arises as to whether the coverage should be extended to provide an allowance for pain and suffering, loss of future enjoyment of life, mental anguish, and such indefinite items of general damages. These are amounts which a successful plaintiff can include in his claim against a wrongdoer, and the question arises as to whether the Inverse Liability policy which did not pay these amounts is in fact indemnifying the insured, and I think it would have to be conceded that as a purely academic question it provides something less than a full and perfect indemnity. However, from a practical viewpoint, the knowledge that he will be fully reimbursed for all his economic loss including loss of future earning power, plus payments on account, and the absence of worry that these assurances bring, should outweigh to some extent the indefinite amounts recovered in the courts for pain and suffering. In any event, where pain and suffering form a major portion of the insured's claim he can always elect to pursue his claim against the responsible motorist (if there is one) and forego the claim under his Inverse Liability policy. Further, if the Inverse Liability insurer subrogates against a responsible third party and is successful in recovering an amount under the heading of pain and suffering, this would of course be paid to the insured.

There is no reason, in theory at any rate, why pain and suffering could not be provided by Inverse Liability, in the same way as it is offered as an additional coverage under Keeton and O'Connell's Basic Protection Plan, but it does add to the technical problems which might arise.

Unsatisfied Judgment Funds

In several jurisdictions there are government operated funds (financed by the insurance companies in some cases) available for the benefit of

persons injured in automobile accidents caused by uninsured motorists or unknown motorists. Usually the regulations prohibit any insurance company benefiting from the funds. The intention here is basically directed to collision insurers but the wording as it stands would also apply to Inverse Liability insurers, who would presumably be unable to subrogate against the fund even if the recovery is pursued in the name of the insured. Actually the Inverse Liability insured has no need of such funds except in the rare event that he had violated the conditions of his Inverse Liability policy, and if Inverse Liability were compulsory, there would be no need for Unsatisfied Judgment Funds.

There are indeed many facets of Inverse Liability which require research for the purpose of relating this new form of coverage to the various jurisdictions.

Deductibles under Inverse Liability

Because of the fact that many persons carry some form of accident insurance which pays some benefits in the event of an automobile accident, such as medical payments, hospitalization, death and dismemberment, disability income, and so on, it becomes of interest to explore the possibility of issuing an Inverse Liability policy subject to a deductible such as $500, $1,000, or more.

From the point of view of reducing the cost to the insured and the avoidance of duplicate insurance, this would seem to be an advisable proposition, but it immediately leads to the question whether the deductible reduces the benefits under Inverse Liability to something less than an indemnity, and thus whether the insurer is entitled to subrogation. As a matter of equity it is entirely reasonable that an insured should not be in the position of recovering a portion of his loss twice over, but it is a fact, unfortunate perhaps, but nevertheless true, that the automobile victim at the present time can claim under any accident policies he possesses and still include these amounts in his claim against a responsible third party.

Undoubtedly the best method is to include a subrogation condition in the policy, and not to rely on common law rights for subrogation. In some jurisdictions it may be necessary to pass enabling legislation to accomplish this.

The Economic Cost of Inverse Liability

It is to be expected that opposition to Inverse Liability will appear in some quarters on the grounds that it increases the cost of insurance to

the general public. A deeper consideration of this question, however, will show that the cost is already being borne by the community, either by individuals who have been financially ruined by the effects of serious automobile accidents, or by social or government institutions who are maintaining those who, because of automobile accidents, are unable to meet their own financial obligations. Inverse Liability spreads the existing cost over a large number of insured persons so that no one insured suffers undue economic loss.

Inverse Liability indeed satisfies all the required concepts of an insurable risk as specified by David B. Houston,[4] namely, (1) loss is objective and accidental, (2) exposure units are homogeneous, (3) loss occurring to one exposure unit does not alter the loss expectation of any other exposure unit, and (4) there are a large number of eligible exposure units. In addition Inverse Liability is the low frequency-high possible loss type of insurance which is recognized as one of the most suitable insurable risks. Finally, the occurrence of an accident is easily defined and thus the prospect of fraudulent loss is minimal.

Some Further Objections to Inverse Liability

It might be contended that under Inverse Liability coverage the insured may endeavour to claim for injuries or conditions which were not actually received in the accident. This is undoubtedly true since this is "tried on" by claimants under the third party section of the automobile policy and under general liability policies. I believe, however, that the incidence of such fraudulent claims is lessened under Inverse Liability because of the company's right to examine the insured as often as it is deemed necessary. In addition, the application would contain declarations as to the insured's physical health. Despite the best of safeguards some exaggerated claims will be successful no doubt, in the same way as there are fraudulent or exaggerated fire claims; however, the rate has to be established to include this cost factor.

There may be a tendency for the insured to be uncooperative in proceedings for subrogated recovery from a responsible third party. The insurer, however, should be able to effectively counteract this because of the policy conditions, and also because of the fact that the insured's claim under the Inverse Liability coverage would not be finally settled until the

[4] David B. Houston, "Risk, Insurance and Sampling," *Journal of Risk and Insurance*, Vol. 31, No. 4, 1964.

recovery process is completed. The company, therefore, has a lever to be used where any lack of cooperation is evident.

Another objection may be advanced in the difficulty which may arise in arriving at a settlement figure especially where the insured has himself been responsible for the accident, and therefore no recovery proceedings are possible. Arbitration is admittedly fraught with some difficulties, but it still represents the best method known to us at the present time. The insured of course will undoubtedly take his own lawyer's advice on this subject, and the company also will have the benefit of its own counsel's opinion, so that many cases should be settled by negotiation between the legal advisers of each party without the necessity to refer to an umpire. In actual fact there is probably no existing form of first party insurance where there is not occasionally a conflict between insurer and insured over the amount of settlement. All partial losses under fire and burglary policies involve the necessity to reach an agreement on an indefinite amount of loss, to say nothing of the complexity of loss adjustments under Marine and Business Interruption insurance.

Inverse Liability, if a voluntary form of insurance, will, of course, only solve the problem of the uncompensated victim to the extent that it is bought by the public. There are actually some fairly strong arguments in favour of compulsory Inverse Liability since the state is entitled to be assured that, if it permits a subject to use a potentially dangerous vehicle on the public highways, there will be no uncompensated victims who may become charges on the community dependent upon the financial assistance of the state. The principle here has been established in those states with compulsory uninsured motorist coverage. The combination of third party insurance for injured pedestrians and Inverse Liability for the occupants of the insured automobile effectively ensures that all injured persons would be insured up to the minimum amounts established in each jurisdiction. If Inverse Liability were not mandatory it would have to be admitted that there would continue to be uninsured victims. However, if Inverse Liability can be supplied at reasonable premiums, the uninsured victim is in no different position than the widow of the man who did not buy life assurance.

Conclusion

The automobile insurance industry, rightly or wrongly, is saddled with the task of finding a solution to the uncompensated automobile accident victim, and every effort is being made to find an answer which will at the same time retain the best of the traditional negligence system.

Inverse Liability is one method which, if found to be acceptable, would keep the court and jury system intact as the final arbitrator for the extent of liability and the quantum of damages. It is a modern approach to accident insurance with subrogation which would indemnify the insured automobile victim for economic loss irrespective of fault. It provides cash for current expenses. It provides the insured with complete freedom from financial worry. It enables the insurer to provide the most modern aids to rehabilitation and thus to make a useful contribution to a major social problem in North America today.

APPENDIX

INVERSE LIABILITY AUTOMOBILE ACCIDENT POLICY PROPOSED POLICY WORDING

WHEREAS an application in writing has been made by the Applicant therein mentioned (and hereinafter called the Insured) to the Company for a contract of Inverse Liability Accident Insurance and the application forms part of this contract of insurance.

NOW THEREFORE, in consideration of the payment of the premium and of the statements contained in the application and subject to the limits, terms and conditions herein stated

THE COMPANY AGREES to pay the Insured or his legal representative the amount of economic loss because of bodily injury, sickness or disease, including death resulting therefrom, hereinafter called bodily injury, sustained by the insured caused by accident during the policy period and arising out of the maintenance, use or operation of an automobile or whilst in, on, or struck by an automobile; provided the amount of such loss shall be determined by agreement between the insured or his legal representative and the Company or, if they fail to agree, by arbitration as defined in this policy.

DEFINITIONS

"Insured" means the named insured and any dependent of the named insured, related to him and resident in the same household. The insurance afforded applies separately to each insured, but the inclusion herein of more than one insured shall not operate to increase the limit of the Company's liability.

"Automobile" includes all self-propelled vehicles, their trailers, accessories and equipment, but not railway rolling stock, watercraft or aircraft of any kind.

EXCLUSIONS

This policy does not apply:

(a) to bodily injury to an insured, or care or loss of services, recoverable by an insured, with respect to which the insured, his legal representative or any person entitled to payment under this policy shall, without written consent of the Company, make any settlement with or prosecute to judgment any action against any person or organization who may be legally liable therefor.

(b) so as to inure directly or indirectly to the benefit of any person or organization other than the insured or his legal representative.

(c) to accidents occurring outside Canada or the continental United States of America.

LIMITS OF LIABILITY

(a) The limit of liability stated herein is the total limit of the Company's liability because of bodily injury as the result of any one accident.

(b) Any loss payable under this policy to or for any person shall be reduced by the amount paid and the present value of amounts payable under any workmen's compensation law, governmental hospitalization or social security.

OTHER INSURANCE

(a) If the Insured has other accident, medical payments or medical or surgical insurance available to him against a loss covered by this policy then this insurance shall be considered as excess insurance over such other insurance.

(b) If the Insured has other similar Inverse Liability Accident insurance available to him against a loss covered by this policy, the Company shall not be liable for a greater proportion of such loss than the applicable limit of liability hereunder bears to the total applicable limits of liability of all valid and collectible Inverse Liability Accident insurance.

ARBITRATION

If any person making claim hereunder and the Company do not agree as to the amount recoverable hereunder then, upon written demand of either, the matter shall be referred to the arbitration of some person to be chosen by both parties, or if they cannot agree on one person, then to two persons, one to be chosen by the Insured and the other by the Company, and a third to be appointed by the persons so chosen, or on their failing to agree, then by a Judge of the County or District Court of the county or district in which the insured resides; and such reference shall be subject to the provisions of The Arbitration Act; and the award shall be conclusive as to the amount payable hereunder; and the question of costs shall be in the discretion of the arbitrators.

TRUST AGREEMENT

In the event of payment to any person under this policy:

(a) the Company shall be entitled to the extent of such payment to the proceeds of any settlement or judgment that may result from the exercise of any rights of recovery of such person against any other person or organization legally responsible for the bodily injury because of which such payment is made;

(b) such person shall hold in trust for the benefit of the Company all rights of recovery which he shall have against such other person or organization because of the damages which are the subject of claims made under this policy;

(c) such person shall do whatever is proper to secure such rights and shall do nothing after loss to prejudice such rights;

(d) if requested in writing by the Company, such person shall take, through any representative designated by the Company, such action as may be necessary or appropriate to recover such payment, as damages from such other person or organization, such action to be taken in the name of such person; in the event of a recovery, the Company shall be reimbursed out of such recovery for expenses, costs and legal fees incurred by it in connection therewith;

(e) such person shall execute and deliver to the Company such instruments and papers as may be appropriate to secure the rights and obligations of such person and the Company established by this provisions.

GENERAL CONDITIONS

1. *Notice.*

Written notice of claims to the Company shall contain particulars sufficient to identify the insured and also reasonably obtainable informtion with respect to the time, place and circumstances of the accident and the names and addresses of the injured and of available witnesses.

If, before the Company makes payment of loss hereunder, the insured or his legal representative shall institute any legal action for bodily injury against any person or organization legally responsible, a copy of the writ, summons, complaint or other process served in connection with such legal action shall be forwarded immediately to the Company by the insured or his legal representative.

2. *Payment of Loss.*

Any amount due is payable (a) to the named insured, or (b) if the insured be a minor to his parent or guardian, or (c) if the insured be deceased to his surviving spouse otherwise (d) to a person authorized by law to receive such payment or to a person legally entitled to recover the damages which the payment represents.

3. *Prohibited Use by Insured.*

The insured shall not drive or operate an automobile:

(a) While under the influence of intoxicating liquor or drugs to such an extent as to be for the time being incapable of the proper control of the automobile; or

(b) unless he is for the time being either authorized by law or qualified to drive or operate the automobile, or while he is under the age of sixteen years or under such other age as is prescribed by the law of the province where he resides at the time the policy is issued; or

(c) for any illicit or prohibited trade or transportation; or

(d) in any race or speed test.

4. *Prohibited Use by Others.*

The insured shall not permit, suffer, allow or connive at the use of an automobile:

(a) by any person under the influence of intoxicating liquor or drugs to such an extent as to be for the time being incapable of the proper control of the automobile; or

(b) by any person, unless such person is for the time being either authorized by law or qualified to drive or operate the automobile, or while such person is under the age of sixteen years or under such other age as is prescribed by law; or

(c) for any illicit or prohibited trade or transportation; or

(d) in any race or speed test.

5. *War Risks.*

The Company shall not be liable for loss or damage that is caused directly or indirectly by bombardment, invasion, civil war, insurrection, rebellion, revolution, military or usurped power, or by operations of armed forces while engaged in hostilities, whether war be declared or not, or by civil commotion arising from any of the foregoing.

STATUTORY CONDITIONS

NOTE: — In those Provinces or Territories lacking Statutory Conditions for Accident Insurance the following shall constitute the Standard Terms and Provisions of the Policy.

1. The Contract — This policy including the endorsements, insertions or riders if any, and the application for the contract if attached to the policy, constitutes the entire contract and no agent has authority to change the contract or waive any of its provisions.

2. Waiver — The insurer shall be deemed not to have waived any condition of this contract, either in whole or in part unless the waiver is clearly expressed in writing signed by the insurer.

3. Material Facts — No statement made by the insured or his application for this contract may be used in defence of a claim under; or to avoid, this contract unless it is contained in the written application for the contract and unless a copy of the application or such part thereof as is material to the contract, is endorsed upon, inserted in or attached to the policy when issued.

4. Termination by Insured — The insured may terminate the contract at any time by giving written notice of termination to the insurer by

registered mail to its head office or chief agency in the province or by delivery thereof to an authorized agent of the insurer in the province and the insurer shall, upon surrender of this policy, refund the amount of premium paid in excess of the short rate premium for the expired time according to the table in use by the insurer at the time of termination.

5. Termination by Insurer.
   (1) The insurer may terminate the contract at any time by giving written notice of termination to the insured and by refunding concurrently with the giving of notice the amount of premium paid in excess of the pro rata premium for the expired time.
   (2) The notice of termination may be delivered to the insured, or it may be sent by registered mail to the latest address of the insured on the records of the insurer.
   (3) Where the notice of termination is delivered to the insured, five days notice of termination shill be given; where it is mailed to the insured, ten days notice of termination shall be given and the ten days shall begin on the day following the arrival of the notice at the post office to which it is addressed.
6. Notice and Proof of Claim — The insured or his agent, or a beneficiary entitled to make a claim or his agent, shall:
   (a) give written notice of claim to the insurer;
      (i) by delivery thereof, or by sending it by registered mail to the head office or chief agency of the insurer in the province or
      (ii) by delivery thereof to an authorized agent of the insurer in the province, not later than thirty days from the date of the accident or the beginning of the disability due to sickness;
   (b) within ninety days from the date of the accident or the beginning of the disability due to sickness for which the claim is made, furnish to the insurer such proof of claim as is reasonably possible in the circumstances of the happening of the accident or sickness and the loss occasioned thereby; and
   (c) if so required by the insurer, furnish a certificate as to the cause and nature of the accident or sickness for which the claim is made and as to the duration of the disability caused thereby, from a medical practioner legally qualified to practice in the province.

7. Failure to Give Notice of Proof — Failure to give notice of claim or furnish proof of claim within the time prescribed in this statutory condition will not invalidate the claim if the notice or proof is given or furnished as soon as reasonably possible and in no event later than one year from the date of the accident or the beginning of the disability due to sickness and if it is shown that it was not reasonably possible to give notice or furnish proof within the time so prescribed.
8. Insurer to Furnish Forms for Proof of Claim — The insurer shall furnish forms for proof of claim within fifteen days after receiving notice of claim but where the claimant has not received the forms within that time he may submit his proof of claim in the form of a written statement of the happening and character of the accident or sickness giving rise to the claim and of the extent of the loss.
9. Right of Examination — The insurer has the right, and the claimant shall afford to the insurer an opportunity, to examine the person of the person insured when and as often as it may reasonably require while the claim hereunder is pending, and also, in the case of the death of the person insured to make an autopsy subject to any law of the province relating to autopsies.
10. Limitation of Actions — An action or proceeding against the insurer for the recovery of a claim under this contract shall not be begun after one year from the date on which the cause of action arose.

DISCUSSION BY J. A. HILLHOUSE

The paper on Inverse Liability Automobile Accident Insurance presented at the May, 1967 meeting of our Society by Mr. J. B. M. Murray is an extremely welcome and a very timely contribution to our *Proceedings*. Seldom can one pick up a newspaper or trade journal today without observing some article leveling adverse criticism towards the current tort liability system. In his presentation as part of a panel discussion on Automobile Compensation Plans at the May, 1966 CAS meeting, Professor Keeton summarized the shortcomings of the present automobile claims system by saying, "It provides too little, too late, unfairly allocated, at wasteful cost, and through means that promote dishonesty and disrespect for law." The degree of consent or opposition toward this statement from various segments of the industry varies quite drastically, although it is generally agreed that some refinement is necessary in the present system of settling third party liability claims.