costs by providing quick payment for injuries (with a view to promoting speedy recovery) in the public transit environment. It simply does not work. In the case of large urban centres and large transit systems, it is completely inappropriate and has resulted in drastically increased expense for patrons of the system and taxpayers in general.

Not a New Proposal

From the beginning of this decade to the present, the TTC and other public transit authorities have raised with representatives of the Government of Ontario the prospect of exempting public transit from the application of the no-fault benefit regime. As far back as 2002 and 2003, the City of Mississauga wrote letters to the Honourable Minister of Finance setting out the issues which were becoming increasingly problematic for transit systems since the passage of Bill 59. One such letter from the City of Mississauga dated January 4, 2002 stated: "Similar to the Toronto Transit Commission as well as other public transit systems, the City has been a target for claims involving elements of fraud and/or exaggerated injuries and damages. Typical of many urban municipal public transit systems, the City is self-insured for virtually all Accident Benefits claims and bodily injury tort claims which are paid directly from municipal operating budgets ... It is our position that public transit should be exempt from the accident benefit legislation due to the heavy and unfair financial burden to the City."

Unfortunately, various changes (most especially, the provisions of Bill 198) have been made to the SABS regime since 2002, which, overall, have had the effect of increasing dubious expenses for the users of public transit. In a report dated January 2008, the City of Brampton stated that 59% of the 2006 transit claims related directly to Ontario's no-fault insurance legislation, and that these accounted for 82% of the claims funds expended. The City of Brampton stated that "the impact of the mandatory accident benefits on the City transit insurance premiums and claims experience has been astronomical". The City of Brampton adopted a motion requesting that the Province review the impact on public transit of its no-fault and accident benefit legislation with consideration that all public transit be exempted from accident benefit legislation or alternatively, the creation of a modified no-fault / accident benefit regime for public transit.

Other large urban centres in Ontario have experienced similar problems. In addition to the City of Mississauga and City of Brampton, Hamilton and York Region[3] have advised of serious concerns and have expressed a strong desire to be exempted from the no-fault regime. They are not alone. Even public transit systems in northern Ontario (and in eastern Ontario) have begun to experience "pay now (in settlement) or pay later (in assessments)" claims from local paralegals and lawyers acting on behalf of SABS claimants. OPTA (the Ontario Public Transit Association) and the Ontario Regional Committee of CUTA (the Canadian Urban Transit Association), which have observed these effects over time, also support the proposal.

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[3] For example, York Region, before the accident benefits regime, and at its inception, had a deductible from their insurers of $5,000 per claim. As the SABS scheme took hold, it became necessary to raise that deductible to $10,000. As of this submission, it is at $100,000.00. That is a **1900 PERCENT** increase - and absent some change, it is likely to continue to rise.

Below is a chart indicating the claims payments for no-fault benefits, tort liability and general liability (subway and other property) for the years 2004 through to 2007 inclusive. These are amounts which include all claims for benefits, damages, interest, medical costs and disbursements, and legal costs, related to the claims in these areas (in millions).

TTC Claim Payments
(000,000)

	2004	2005	2006	2007
Accident Benefits	$6.4	$8.5	$8.3	$10.4
Motor Vehicle Tort Liability	$4.8	$3.8	$3.4	$5.1
General Liability	$1.9	$1.4	$2.6	$1.8

One of the areas of concern, as discussed below, relates to the costs for medical assessments and medical reports. It should be noted that of the no-fault benefits paid by TTCICL, over 1/3 of the costs relate to medical assessments and report costs, not including any amounts for direct medical benefits, attendant care benefits, and rehabilitation expenses. The experiences of the Toronto Transit Commission are not unique: experience across the Greater Toronto and Hamilton area has been similar. The following are the amounts expended by TTC for these assessment and report costs for the years 2004 through to 2007 (in millions):

TTC Assessment and Report Costs
(000,000)

	2004	2005	2006	2007
Assessment & Report Costs	$2.3	$2.7	$3.5	$4.3

The costs for medical assessments and medical reports almost doubled from 2004 to 2007 and are expected to continue to rise when the statistics for 2008 are available.

WHY NO-FAULT IS INCREASINGLY INAPPROPRIATE FOR PUBLIC TRANSIT

It is important to examine some basic concepts with respect to the no-fault benefit regime in the context of public transit in order to understand the potential for abuse and why public transit needs to be exempt. The occurrence of an "accident" potentially triggers a claim for various benefits as against the transit insurer. "Accident" is defined, in part, as an incident in which the use or operation of an automobile directly causes an impairment. Public transit vehicles (buses, and, in Toronto, also streetcars) are captured in the present legislation by the definition of "automobile".

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An individual claiming to be injured in an accident involving a public transit surface vehicle (regardless of whether the transit authority is at fault or even aware of an incident having occurred) can pursue a no-fault claim against the transit authority if he or she does not own an insured automobile, is not named as a driver on another automobile policy, and is not the spouse or dependent of someone who owns an insured automobile. In some cities -- and in Toronto in particular -- there are a large number of individuals who do not have access to their own insurance and thus are in a position to make a claim for accident benefits against the transit insurer in the event they claim they were injured as a result of an "accident". In addition, transit authorities are reporting increasing looseness in the interpretation of who is covered under a policy such that the cost is forced back onto the transit system. (For instance, an "added driver" on a policy of insurance is now not required to look to the policy in the event of a no-fault claim.)

Given this, some major distinctions can be seen between the situation involving private insurance companies and their insureds, and the situation involving public transit. In the private insurance industry, there is a first party. This is a named insured who is party to a contract. He or she has entered into a contract, in writing, for a policy of insurance. Both parties entering into that agreement have power: the first party can review a number of options and choose among them, while an insurer can decide whom it insures, the amount of the premium, and can discuss various aspects of the policy or options with its insureds. Insurance premiums are adjusted to address cost and risk issues to the benefit of both parties to the contract. It is anomalous to define members of an ambiguous and unknown, constantly changing group numbering into the millions of persons as "first parties". The term "first party" in the insurance context suggests the "first party" is a known entity who, having weighed risks and benefits, has entered into a contract. That is not true with public transit riders.

No Contractual Relationship

The truly contractual nature of private insurance has led to economic benefits to private insurers. There is a recognized reluctance on the part of their true "first parties" to pursue claims – some frivolous, some not – for fear that their contract of insurance will be subject to revision upon renewal, or will be cancelled altogether.

It is not uncommon for a person who attempts to advance a claim against a transit authority, upon being advised that he or she must make a no-fault claim to his or her own insurer, to recover promptly from his or her complaints such that no claim is made. It is also not uncommon for persons to mislead transit authorities by claiming to be divorced from policy holders to whom they are still married, or claiming not to have any form of available insurance when they do. Transit authority adjusters are caused to expend considerable time and expense to review the insurance status (as far as it can be determined) for claimants. These are not situations faced by those insuring private drivers, aware of the inherent risks of making frivolous or bogus claims. In addition, private insurers face no issue in determining whether or not a person is a first party to their contract while for public transit, it is a constant struggle.

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The transit business is unique – complete strangers are deemed to be parties to a contract and thus insured from the moment they begin the process of boarding a transit vehicle.

Transit authorities operate vehicles of mass transit in which there is a complete arms-length relationship to customers, each of whom by virtue of the no-fault system is a potential "insured" claimant. In an ideal world, transit authorities could trust each and every rider advancing a claim but experience has shown this not to be the case.

No Deterrent to Claiming

The public transit authority is unable to increase premiums (other than by fare increases which impose the burden – unfairly – across all riders and/or taxpayers). There are no premium consequences for individuals who may make repeated claims, questionable or not. These claims can be made repeatedly without proof of negligence of any type on the part of the transit authority, all arising from the payment of a passenger fare.

Given the definitions of "accident" and other terms under the no-fault benefit legislation, transit companies are particularly vulnerable to fabricated and exaggerated claims and abuse of process by claimants. Claims often include alleged injury caused by minor falls or bumps, by twists or turns at various locations on vehicles, including in the aisles while holding onto stanchions, or entering or exiting vehicles, or even being jostled in their seats, all of which are claims arising from the "use" of the vehicle. Even a person who walks into the side of a bus is deemed to have been affected by the "use or operation" of the bus. Each of these "accidents" is a potential opportunity to advance a claim, regardless of whether or not there is any negligence on the part of the public transit authority. Many of these no-fault "accidents" are largely beyond the purview of risk control efforts instituted by the public transit authority.

There is often a lack of substantial, corroborating evidence of a "real" accident, other than of course, the insureds' description. There is no strict duty to report an incident to the public transit authority or police at the time of the incident occurring. Reports may be received days later, many times without a driver having any knowledge of the incident. Nonetheless, the transit authority has an obligation of good faith and there are very short time constraints with respect to response from the insurer. In this situation it may not be difficult for a claimant to "get into the system" with a dubious claim. Once inside the system, the cycle of costs for the insurer of the transit authority begins.

It is not uncommon to have multiple claims from the same individuals, or their relatives. Also common are situations where one family member -- after his or her claim is settled -- becomes the "paid attendant" or "housekeeper" under the SABS for another family member who later advances a fresh claim. In order to advance a claim that one was injured on a vehicle, often one need have very little more information than the location of an accident involving a public transit vehicle or a vehicle number, both of which are plainly available through word of mouth, through the media, through observation of passing vehicles, all creating opportunities for those who would seek out the opportunity to make frivolous claims. In fact, none of this is required. A person can simply assert that he or she fell or was injured on a public transit vehicle with no information other than the route in order to

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cause the investigation of a claim and the rise of the strict timelines (imposed rigorously on insurers -- at the same time that the timelines imposed on insureds are all subject to relaxation).

Difficult Risk to Underwrite

It is obvious then that public transit authorities and their insurers are particularly vulnerable to fabricated and exaggerated soft tissue and psychological claims as well as staged accidents. They are frequently drawn into the unwieldy and exorbitantly costly no-fault regime, in very questionable circumstances. There is an extremely expensive and elaborate system of medical fees and assessment costs for what appear to be minor soft tissue injuries. These assessments often involve a multi-disciplinary team of experts (psychiatrists, orthopaedic surgeons, neurologists and other medical experts). Many of those defending these claims have difficulty accepting that the typical alleged injury arising from the situations mentioned above should routinely require the full gamut of medical consultations, assessments and treatments, including typically physiotherapy, massage, chiropractic, orthopaedic, neurological and psychological expertise.

There are instances where the medical costs associated with a minor soft-tissue injury from an alleged bump against a pole, or jostling in a vehicle, have cost tens of thousands of dollars – and this is simply on the medical side where a sizeable and questionable array of clinics operate with a vested interest in assessing claimants as in need of treatment.[4] We are concerned that there may be "arrangements" made with these "clinics" for "fee sharing" with the allegedly injured party, or his or her legal agent or any party who made the referral. And, of course, medical incapacity then supports claims for a variety of other benefits such as income replacement, non-earner benefits, housekeeping, attendant care, and the like. In order to deny these claims, the insurer has to incur massive costs of assessing the claimants not only for the insurer's purpose, but also has to fund the assessments the claimants obtain to counter the insurer's examination (this latter situation came into law with the passage of Bill 198).

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[4] Perhaps there is no better instance of this than a situation which occurred on the TTC's Dawes Road bus in 2003. A tip to the Toronto Police Service in the form of a videotaped statement advised them one day *in advance* of an accident which was to occur on a Sunday evening when a U-Haul truck would make a minor impact with the rear of a TTC vehicle. The incident did occur. The bus, which normally carried about 40 persons, on this day carried 80. After the accident, approximately 40 persons simply took the next bus and were not heard from again. However, the other 40 claimed injury requiring ambulances and hospital examinations. Virtually all were from the same area of the city which was nowhere near Dawes Road and their explanations of why they were on the bus were conflicting and illogical. Despite this – *and this is the critical fact* – by the Tuesday morning after that accident, thirty-five alleged "medical professionals" had found these persons disabled and in need of treatment – treatment to be provided at the transit company's expense by the same professionals who completed the forms. Not one of these claims was accepted, and not one of the allegedly injured parties pursued their claim once the story of the fraud broke in the media. No one can say how many of these cases exist because only due to the conscience of an informer involved in the scheme was this one uncovered.

Since that time, the "industry" of medical care providers who benefit from a finding that a claimant needs treatment has grown geometrically. Indeed, it is commonly the case that a claimant will be referred to "therapy" not by his or her doctor, but by a legal agent or by a special "accident doctor".

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These types of alleged soft tissue injuries and the infrastructure surrounding them in the no-fault regime are generating enormous and often unwarranted medical and legal costs. A similar bump, trip or jostle which occurs outside the universe of the no-fault insurance regime, such as incidents in one's own backyard or home or even on a subway, certainly do not seem to generate the same degree of medical attention and costs – if they generate any at all. Studies involving soft tissue injuries arising in countries which do not have rich and extensive compensation systems, suggest that human beings are reasonably hardy and resilient, and can actually recover extremely quickly from these types of injuries. Two separate studies in Lithuania concluded that, without insurance, involvement of the therapeutic community, litigation, and pre-conceived notions about whiplash, the symptoms of acute whiplash are self-limiting and brief. Further, chronic whiplash either did not exist or was rare. Public transit authorities operate large, extremely safe vehicles capable of withstanding major impacts at times without persons on the bus or streetcar even knowing there has been an impact until after it is over. Given that Ontario's health care system has difficulty promptly treating everyone who has a genuine, serious illness or injury, it is worth reassessing the social costs, benefits and impact of the no-fault legislation in the context of transit. At the end of the day, the taxpayers fund our healthcare system, and in the case of public transit, also fund the inflated costs of the private clinic system which has proliferated since the passage of no-fault legislation and never more so than since the passage of Bill 198.

Separate Claims Handling Requirements

Another costly effect of this system is that in all of the no-fault cases, separate files and file handling must be established for the SABS and tort files. The staff and administrative costs in handling these claims separately from one another further impacts transit operating budgets.

The Folly of Hoping for One Result while Rewarding Another

Underlying this submission is the indisputable fact that the dramatic increase in costs experienced by public transit systems is funded by public dollars. Public transit authorities who purchase insurance from private insurers have seen deductibles increase to the point that most of the cost of the SABS is carried by the public transit system – which means by its riders and all taxpayers.

The Province has mandated growth of public transit in order to improve the environment and the quality of life in Ontario. Provincial funding from such sources as the gasoline tax cannot be utilized for "capital development" if the system has become, to some extent, a revenue generator for claimants and the various industries that support them. Should the economic downturn in Ontario continue, it is only reasonable to expect that there will be increased interest in the "easy money" available by making claims against a public transit authority. At the same time, as gas prices increase, public transit ridership, which has already been growing steadily, is expected to grow even more. Capital expansion and service improvements will be necessary to meet increased demand – but it likely also will lead to an increasing number of claims from abusers of the SABS. The cost of fraudulent claims may well outstrip the revenue increase associated with increased ridership, particularly given that

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some sizeable portion of the increase has been attracted by effective fare reductions, such as revised rules on the use of passes, and in some cases, free public transit. One might wonder if there will be funds available for the sorts of service improvements the Province wholeheartedly supports if the current SABS system continues to drain resources from public transit.

The no-fault system hinders public transit authorities and the provincial government from meeting the goal of offering an economical, reasonable and efficient transit system. Unfortunately, the no-fault system creates an impediment to the expressed goals of all parties in Ontario with regard to public transit.

Referring back to the rationales for no-fault, they have not been borne out. Claims' costs, and, in particular, medical assessments, reports and other related costs have soared. Likewise, liability has not been eliminated or reduced as an issue. The verbal threshold has been dramatically weakened over the years as a result of court interpretation. The threshold applies strictly to general damages, and other claims such as economic loss claims may proceed in tort regardless of the extent of the threshold and the extent of the injury as a result of Bill 198. There is thus a true benefit in building a massive SABS claim in order to move the excess over into a tort claim. Thus liability is a live issue in virtually every personal injury claim.

Other Issues with the No-Fault System in Ontario

Quite apart from the need to exempt public transit, there are a number of ongoing difficulties with the no-fault regime in Ontario. Some of the major problems include the following:

- Medical fees and assessment costs are no longer capped by FSCO;
- The medical report and assessment system, involving initial medical assessment, rebuttal assessment/report, reply to rebuttal assessment/report is now all at the insurers' expense, and is of questionable value;
- Claimants are able to isolate separate benefit claims and proceed with repeated and separate mediations and arbitrations -- all at the insurers' expense;
- The criteria for catastrophic assessments have been substantially weakened as a result of Court and FSCO arbitration decisions. Catastrophic determinations result in substantially enhanced benefits for a claimant;
- Claimants are able to isolate separate benefit claims for purposes of obtaining medical reports (funded by insurer) and the purpose of arbitrating each one at the insurers' expense, thus increasing the insurers' overall ongoing costs, with a view to pressuring a settlement of the case;
- Even minor injury claims can now result in a requisition to the insurer for a catastrophic assessment. These assessments often can cost between $20,000 to

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$30,000, involving a multi-disciplinary team of professional experts (psychiatrists, orthopaedic surgeons, neurologists, and other medical experts);

- Public transit authorities or their insurers are unable to settle any SABS claim within the first year of accident;

- Public transit authorities or their insurers must have a medical report to deny benefits (surveillance, investigative evidence alone is not sufficient);

- The verbal threshold in tort has been dramatically weakened by Court interpretation;

- The threshold in tort applies only to general damages - various other claims, such as economic loss still proceeds in tort without regard to any threshold; and

- A claimant can arbitrate each treatment plan (for example, claimants can come back for 10 years post-accident with new treatment plans each of which can cost thousands of dollars to assess).

OTHER JURISDICTIONS

Different types of no-fault regimes exist in different provinces and states, with different levels of benefits, timeframes, and conditions, and thus it is difficult to compare directly. It should be noted, however, that until recently Newfoundland & Labrador had a no-fault system which applied to public transit vehicles. The no-fault system was then discarded, and no-fault was provided as an option under a policy, thus rendering it inapplicable to public transit. Transit systems in Newfoundland & Labrador are now in a strict tort regime, and this change has resulted in a substantial drop in the overall claims payments. The Province of Alberta has a pure tort regime in the transit environment.

In the United States, in the few states which still have no-fault systems, in most cases public transit is exempt. In a very few areas where there is some no-fault coverage available (and it must be remembered that in the USA, there is no universal healthcare, which has been a rationale for retaining some form of no-fault where it exists), there are very strict financial limits and those limits are strictly enforced.

There is no suggestion in the United States that there is fundamental unfairness in treating transit riders who do not have insurance differently from those who carry their own. The distinction between public transit and automobiles is based on the public nature of the burden for transit authorities and not on the flawed logic that all conveyances which move on wheels must be treated exactly alike. The latter reasoning, which presently prevails in Ontario, suggests that persons travelling on a bus on public roads have greater rights than persons paying exactly the same fare but travelling on rails in a tunnel. Each year in Ontario, hundreds of persons are injured in bicycle accidents, either between two bicycles, or between a pedestrian and a bicycle. There are no accident benefits available to them. The determining factor of whether or not a person can be covered by a policy of insurance as a first party should be, as it generally is other than in a public transit no-fault situation, the

decision of that person to become a party to a contract of insurance and pay the price for so doing, or adopt the risks of not doing so and allowing the tort system to operate to make them whole, should injury occur.

In short, the no-fault system is not working, and in particular is not working for public transit. A recent article should be noted with respect to the situation in New York State (and particularly New York City), which exemplifies the potential seriousness of these issues:

> *In at least one state, New York, the no-fault plan suddenly and unexpectedly led to an enormous flood of litigation beginning around 1995 and continuing unabated to date (2007). As documented by the New York State Insurance Department and by New York Court of Appeals, a billion dollar a year "no-fault fraud industry" has emerged, in which large numbers of people ... are recruited by "criminal rings". They are "then involved in deliberate or "staged" accidents. The "victims" are then referred to compliant "medical clinics" which supply unnecessary, questionable or redundant treatment and/or medical supplies. Medical bills are sent* en masse *to no-fault insurers and when payment is denied a suit is commenced by a number of law firms which apparently specialize in just this kind of claim ... no-fault litigation is reported to constitute 25% of all lawsuits filed in New York City Civil Court.*

CONCLUSION

To summarize, the no-fault system is not working for public transit. All the foregoing is submitted in support of a proposal to:

1) exempt public transit (as presently defined in Ontario) from the SABS regime;

2) return bodily injury claims arising from the use or operation of surface vehicles owned by public transit authorities to a pure tort regime;

3) eliminate the verbal threshold as a bar to making a claim in tort involving public transit now subject to it;

4) eliminate the monetary threshold (the $30,000 deductible) as a bar to making a claim in tort against public transit now subject to it.

Thank you again for allowing public transit authorities this opportunity to present our views as you consider the existing legislation and proposed changes thereto. We would be pleased to meet with you to provide additional comments or respond to any questions you might have.

Brian M. Leck
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