NOTES FOR REMARKS

BY

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TO THE

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It is a great honour to have been included in your very impressive program. I congratulate you on grappling with this very thorny problem which faces professionals, as well as those of us able to shape society's response through advice on legislation or through court decisions.

My perspective will be one of synthesis of the proceedings, and of the issues as they have evolved over recent history. I was pleased to accept the Chief Justice's invitation to comment from the point of view of a careful observer of the legal and insurance systems. My observations are coloured by experience as Deputy Minister of Consumer and Corporate Affairs over the past five years, and as chairman of a committee which advised our British Columbia Cabinet in 1983 on a range of insurance issues including the possible implementation of a no-fault insurance scheme for bodily injury claims. I conclude that society needs a rebalancing of the rights and obligations of professionals and their clients and of the way in which insurance supports that relationship. It is encouraging to find the kind of general consensus which seems to have developed here.

During the last two days, we have examined professional liability of lawyers, doctors and accountants. In this respect, we have reviewed the present state of the law as well as trends in the insurance industry.

Let me begin by summarizing what have been described as the causes of the current situation.

One school of thought contends its origin lies in the underwriting practices of insurance companies during the period of very high interest rates of a few years ago.

Insurance companies, able to general sufficient profit on their investments, were discarding historic underwriting rules and competing with each other to gain more business. This competition, some say, resulted in imprudently low premiums.

Another school of thought concludes that the size and frequency of recent court awards for liability, both in areas where compensation was traditionally provided - and in areas where it was not - are responsible.

The dynamics of these two sets of circumstances converged in the second half of 1985 when the interest rate picture changed. As the rates lowered, insurers found their investment profits declining, so much so that they could not compensate actuarial losses. A factor compounding the severity of the situation was inability or unwillingness of the reinsurance industry to assume all the risk being presented. Large settlements and potentially huge future awards caused international reinsurers to dramatically increase premiums to cover losses and to build up substantial reserves for future losses.

Consumers of this type of insurance found themselves in the position of either struggling to pay increased premiums or not being able to afford coverage at all.

Media attention quickly began to focus on the hardships of private and public sector organizations and companies. In our province, the experiences of local governments seemed to receive most attention followed by other public bodies such as hospitals, schools and colleges, and professional groups.

Let me now touch on professional liability insurance, the area you are concentrating on at this seminar.

The "Errors and Omissions" market has never been tighter. Higher premiums, up anywhere from 50 to 500 per cent, is one of the problems.

Another is that the capacity of the market has shrunk so that many professionals cannot even obtain insurance, at any price.

As regulators and as a government, we understand the alarm. Professionals have long regarded liability insurance as a necessary business expense. While personal services rendered by professionals cannot be equated with the purchase of other more tangible goods, insurance gives professionals what incorporation gives businessmen - a limit on personal liability.

The final report of the Ontario Task Force on Insurance, released in May of this year, shed some light on the subject.

"The Slater Report" keys in on Ontario's experience with the liability insurance crisis. Since the insurance market is international in scope, I think the report's content has relevance here and in other Canadian provinces as well.

In an appendix on the question of liability insurance for professionals, the report states that at current premium levels, over $100 million is required to insure all professionals across Canada.

The impact of that figure is greater when you consider that few of the major insurers write this kind of business. Willingness of firms to expand in this area is jeopardized by the fact that reinsurance is almost unattainable.

Most reinsurance is written by Lloyd's of London. It tends to regard Ontario and other Canadian provinces in the same light as the United States. Our domestic firms are, rightly or wrongly, feeling the repercussions of the American experience where it has recently been estimated that one in twelve citizens will launch a civil action. A greater number of cases and corresponding higher awards is now the norm.

I have been following with interest the Ontario government initiative to encourage the development of an insurance exchange. A related report this week notes that some $25 million has been invested to support excess liability coverage. Further, a proposal to increase capacity for excess directors' and officers' insurance will go ahead. But, unfortunately, and in confirmation of the seriousness of the problem of capacity for liability insurance for professionals, the proposal in that regard has been dropped.

One of the important messages which must be conveyed, in every way possible, to the international insurance community, is the differences between Canada and the United States -- particularly those critical differences in our legal systems, in our patterns of settlement and the slightly less litigious attitude of the Canadian public.

Discussing the Canadian liability market, Lloyd's of London chairman Peter Miller said care must be taken not to confuse the Canadian legal system with that of the United States.

There are fundamental differences, he said. "You are far more likely to get unpredictability in the United States where you get mad jury awards than you are here."

"All in all, if Lloyd's was to withdraw from U.S. casualty coverages, I do not see why that would be so in Canada. I cannot conceive that Lloyd's, with its reputation for finding an answer, will in fact withdraw from the casualty scene in the United States. We shall try to find the underwriting answers."

I was encouraged here at Mr. Belton's confirmation of the conclusion regarding availability of insurance, and the probable decline in cost increases.

That conclusion is one that has tentatively been drawn by a committee of British Columbia government officials. It is lent more weight when considered in the context of the history of the general insurance business in our country. This sector of the financial institutions marketplace is cyclical. Indeed, the past cycle has been particularly dramatic, as insurers came to depend upon interest earnings on their investment portfolios, rather than on traditional underwriting earnings. That is, rather than gradually increasing rates over the early 80's to cover the costs of claims, insurers insulated their customers from rate increases by living off interest profits. There is no doubt that the general insurance industry mirrors the degree of risk that goes with living and doing business in our society.

It is a business which is susceptible to the ebb and flow of market forces and social attitudes.

The economic forces I described earlier must be considered against popular culture. As a society we have, in recent years, affirmed the notion that people can sue for compensation for any harm or inconvenience.

No one can dispute the fact that the number and size of court awards has increased. In this sense, the courts may themselves be reflecting the community belief that compensation, at any cost, should be provided. But, we are not convinced the court awards alone have justified the increases in liability premiums.

In fact, the so-called "Trilogy" decisions which established effective limits on awards for pain and suffering are an example of your courts acting responsibly to balance the needs of the individual injured person against the needs of society. Your moderating effect is also evident in the appeal decision on the Brampton case, where the lower court decision was so widely cited as evidence of awards being out of hand. It raises an interesting questions, however, of the role of the judiciary set against the responsibility of legislators.

Further, I would like to suggest to you today that solutions to the "crisis" will not be found only by being concerned with the problems of insurance affordability and availability. All those concerned -- customers, insurance companies, courts and governments -- must assess the price we are collectively prepared to pay for a risk-free society.

Let me turn to the specific development of the law as it affects the liability of professionals.

Dean Burns reviewed the explosion in negligence law, from pure contractual agreement in 1939, with action available only to the client of a professional, through to tempering of that principle by concern for third parties affected by either acts or omissions of the professional. This was based on a concept of a high duty of care, including foresight as to the consequences of action or inaction, as the snail's progress illustration last evening, in such a delightful retrospective. He described the growing concern for some limitation on liability, and a greater degree of predictability. The moderation of court awards reflects this current counterforce.

Dean Burns described the insurance crisis, as it affects professionals, particularly in view of judgements based on ability to pay. Professionals, of course, backed by insurance, have been seen as having a limitless checkbook.

His conclusion was one of concern at the consequences of imposing such a high duty of care. He invited restraint, consistency and predictability in interpretation.

Maître Beaudoin, en traitant la vulnerabilite des médecins, a surveillé la multiplication des recours, due au consumerisme des services professionnels, au mutation profonde de la relation patient - médecin, et le passage de la "médecine-art" a la "médecine-science." Il a observé que la jurisprudence canadienne est devenue plus éxigeante pour le professionnel et trouve plus facilement une faute. Il nous a fait remarquer de l'extension du lien de casualite, de l'importance croissante du consentement éclairé, et de l'inflation des octrois de dommages, grâce a la trilogie de la Cour Suprême du Canada.

With regard to the lawyer's liability for negligence, Mr. Hamilton reviewed the evolution of judicial trends. The variety of circumstances in which a lawyer is found liable, and the range of persons to whom he or she owes a duty, has been greatly expanded in recent years by the courts. The definition of negligence has been changed by the courts; the "ordinary, prudent solicitor" test has been superceded by a test, based on public policy considerations, of avoiding foreseeable risk.

He reinforced the theme of concern at the court's assumption that insured professionals have limitless ability to pay. That assumption, of course, has been challenged by the past two years' experience with the so-called insurance crisis.

Many of our speakers traced the evolution of common law, with the implied obligation derived from accepting a fee for whatever professional service, of the exercise of due care, skill and judgement. For doctors, lawyers and accountants, this duty has been expanded dramatically, and with it, the exposure to personal financial ruin as a result of a judgement against the professional.

Mr. Giles outlined the particular application of the law to the liability of professional accountants, including the three possible tests for finding of a duty of care in Judge Dixon's decision.

"(i) foreseeability of the use of the financial statement and the auditor's report thereon by the plaintiff and reliance thereon;
(ii) actual knowledge of the limited class that will use and rely on the statement;
(iii) actual knowledge of the specific plaintiff who will use and rely on the statement."

It is clear that society exacts a high standard of professionals. Various judicial and legislative actions have expanded the range of consequences of professional conduct which are compensable. The professions we have examined here have been given the right to self-regulation - that is, to establish and police their own standard of conduct. Legislators and the courts appear to have helped define that standard to a level which could threaten the willingness of professionals to serve the public who

need them. It is incumbent upon us all, including the self-regulatory bodies, to seek solutions which will satisfy the public.

So - what of solutions? Members of this assembly have explored a number of avenues. We are left with an exhortation to society to come to grips with the issues.

There are four areas which deserve examination:
- those related to insurance;
- limitations on liability;
- reform of the tort system;
- alternative dispute resolution mechanisms.

First, insurance itself. Many jurisdictions are turning to the concept of self-insurance, pooling the risk among particularly vulnerable groups. While attractive in the short term, actuarial concepts still apply - someone must pay.

Certainly, efforts to expand the reinsurance capacity, and to protect Canadians' access to the international reinsurance market are important. We have reviewed evidence that Canadian awards are not yet as extreme as those elsewhere. We must ensure that those who underwrite our insurance premiums understand this pattern.

Second, the establishment of limits on liability. There may be value in limiting the dollar value of settlements, or, as suggested by a number of speakers, increasing the use of structured settlements. Civil remedies could be limited to damages, rather than awards which reflect an attempt to punish. The use of verbal thresholds as legislative guidance to the courts would be a form of limiting consequences which are subject to compensation to those effects which are of major importance. Limitations could be established regarding parties able to seek compensation, with a renewed emphasis on recourse of clients rather than third parties. We could insulate certain parties from action, towards the goal of focussing on those professionals whose actions have led directly to the damage.

Third, a reevaluation of the tort system. Some observers think the Slater report's proposal for a no-fault system for automobile insurance - that could later be extended to liability coverage - is a step in the right direction.

The Ontario Task Force recommended co-ordinated federal-provincial action to reform tort laws in conjunction with a new accident and disability compensation and arbitration plan. The Ontario Law Reform Commission has begun to work on the project.

Down the road, the Slater Report leaves room for the government to work with the private insurance industry to expand several social programs into a universal accident plan that would involve compensation for all accidental injuries similar to the plan now operating in New Zealand.

British Columbia is an active participant in federal provincial matters and I do not think our province would refuse to discuss tort system reform in light of the Slater Report.

The Chairman, in arriving at this conclusion, describes the problem as confusion between tort as a method of deterrence versus that of a method of compensation. He claims that in personal injury areas, the modern tort system does not separate these functions.

David Slater writes: "The fundamental solution lies in recognizing that compensation and deterrence must be separated and that the compensation job must be done through a more efficient and equitable first-party no-tort accident insurance system. The modern day problem of injury compensation should be dealt with more efficiently and expeditiously - not through tort but through insurance."

British Columbia has had some first-hand experience in looking at the relative merits of moving towards no-fault.

In 1983, a distinguished committee presented a report to the Insurance Corporation of British Columbia on automobile accident compensation. They concluded as follows:

> The majority of this committee believe that the only way to provide automobile accident victims with truly compassionate, just, prompt, and secure compensation is through a first-party-no-fault system for economic losses.
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> To quote again from Mr. Justice Dickson in one of the Supreme Court of Canada's Trilogy decisions:
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> "The subject of damages for personal injury is an area of the law which cries out for legislative reform. The expenditure of time and money in the determination of fault and of damage is prodigal. The disparity resulting from lack of provision for victims who cannot establish fault must be disturbing. [Andrews v. Grand and Toy Alberta Ltd. [(1978), 83 1].L.R.(3d)458(S.C.C.)at page 458]"
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> To meet new needs, the insurance system has been changed before. It is time to do it again.

At that time, I was asked by Cabinet to chair a committee to review these recommendations, along with a number of other issues regarding the operation of the ICBC.

Both committees reviewed this province's present insurance scheme and reviewed several alternate systems based on the no-fault concept, such as exist in Quebec, Michigan and New Zealand.

Under overall autoplan coverage, certain accident benefits are provided on a no-fault basis in British Columbia.

The British Columbia government decided then not to extend the concept or to apply it to other types of liability insurance. We do, however, have experience and some careful analysis to draw on in weighing pros and cons, as our experience evolves.

These pros and cons have received much debate since the Ontario Task Force reported in May.

Although David Slater himself acknowledges the difficulty of applying the no-fault concept to the assessment of damages other than personal injury, the attempt is certainly worthwhile.

Jean Robitaille, Chairman of the Insurance Bureau of Canada, says he believes a no-fault system could be more effective, less costly and serve the majority of people faster.

The advantages lie in predictability of awards. No-fault could increase fairness with awards appropriate to the degree of damage. Costs would be reduced by the cost of the settlement process, and by the cost of capital, in the case of structured settlements. The public would more easily understand, as the purchase of insurance would be a direct protection of the person subject to harm or damage, at least in the case of bodily injury. Under current third party liability insurance, the purchaser of insurance is protecting his income and assets from attack in the event of being found at fault.

Lastly, we must explore means of easing the pressure on your courts. Maître Beaudoin, entre autres, nous a proposé la reduction de la pratique des honoraires conditionnels et des poursuites frivoles. Others have proposed limiting the use of juries in civil proceedings. However, the public need to be educated. It is not right to assume that only harm comes from contingency fees and jury awards.

Not being one of you, I have some trepidation at suggesting alternatives to your courts. However, let me cite the views of one of your colleagues, Mr. Justice Allan Wachowich, Court of Queen's Bench of Alberta and Member of the Supreme Court of the Yukon Territories: -

"If there is an excess of laws, not only does justice become expensive. Inescapably, this proliferation also weakens the rule of law. Citizens become frustrated and mistrust the expensive system which seems to serve the lawyers rather than the law. Too much law -- too little justice -- too many rules -- too few results. This all leads to a lack of certainty in the law and when that occurs, there is no justice."

"The answer, to some degree, is to deregulate and to simplify."

"If court backlogs continue to grow at the present rate, our children may not be able to bring a lawsuit to conclusion within their own lifetimes. Lawsuits will have to be passed on from generation to generation just like family feuds. There is a time and expense involved in righting wrongs which can unto themselves become inequities."

"When it is necessary to wait up to 5 years to have a case heard, then justice is obstructed, and 5 years is not uncommon in certain jurisdictions."

"But many disputes could be avoided altogether and others could be resolved without recourse to a courtroom. There are processes such as arbitration, negotiation, and binding agreements which could be used. I am of the view that the report by the Automobile Accident and Compensation Committee in British Columbia has opened the door for adjusters to play a part in possibly solving problems which would otherwise burden the courts."

The increased use of mediation and arbitration proceedings is an alternative which must be explored. British Columbia's newly created International Commercial Arbitration Centre is evidence of our Attorney General's conviction that arbitration is an important element of our legal framework.

Above all, ladies and gentlemen, those of us who can influence public policy have a duty of care to come to grips with the obligations of professionals and the rights of those they serve. I commend you for engaging your intellects with the issue over the past several days, and in such a lively fashion. Thank you for the honour of including me in your examination.

May I conclude by a frivolous observation drawn from an involvement earlier this week with Canadian, American and British authorities who regulate the commodity futures markets.

Those of you from the prairies will be familiar with how grain traders have for years hedged their risk by buying futures on grain prices. Perhaps there is a market among professionals to hedge their risk by using futures contracts based on predictions as to the value of future liability awards.

I look forward to hearing the verdict of the jury.