

Nova Law Review

Volume 3, Issue 1

1979

Article 10

Legislative Overview: Florida Automobile Reparations Act, 1972-1978: A Review of the Modifications in the Tort Threshold

Honorable Terence T. O'Malley*

*

Copyright ©1979 by the authors. *Nova Law Review* is produced by The Berkeley Electronic Press (bepress). <https://nsuworks.nova.edu/nlr>

Legislative Overview: Florida Automobile Reparations Act, 1972-1978: A Review of the Modifications in the Tort Threshold

Honorable Terence T. O'Malley

Abstract

The "Automobile Reparations Reform Act" became law on January 1, 1972.

KEYWORDS: automobile, tort, threshold

Legislative Overview: Florida Automobile Reparations Act, 1972-1978: A Review of the Modifications in the Tort Threshold

THE HONORABLE TERENCE T. O'MALLEY*

The "Automobile Reparations Reform Act"¹ became law on January 1, 1972. Florida became the second state² to adopt a pure no-fault³ automobile insurance law. The adoption of no-fault in Florida was a response by the Legislature to rising public pressure and outcry reflecting frustration with Florida's existing automobile insurance rates. The 1970 campaign for Insurance Commissioner pitted a no-fault proponent, Thomas D. O'Malley, against the incumbent Insurance Commissioner, Broward Williams, a supporter of the existing system of auto insurance in Florida.⁴

The potential for insurance rate relief promised by no-fault advocates, including Commissioner-Elect O'Malley,⁵ resulted in the 1972 Act. To assure at least an initial rate reduction, the Legislature included

* Elected to Florida House of Representatives November, 1976; Member of House Commerce Committee; Chairman of Ad Hoc Subcommittee on Auto Insurance Rates of House Commerce Committee; Member of Subcommittee on Insurance of House Commerce Committee; Member of Subcommittee on Hospitalization Insurance of House Commerce Committee; Member of Firestone Commission on Auto Insurance Rates, 1977 (Chairman of Joint Underwriting Association Committee of Firestone Commission); Member of Joint Legislative Committee on Workmen's Compensation Insurance.

1. FLA. STAT. §§627.730-.741 (1971).
2. Massachusetts adopted a no-fault law in 1970. A. WIDISS, J. LITTLE, R. CLARK, T. JONES, *NO-FAULT AUTOMOBILE INSURANCE IN ACTION* at 8 (1977).
3. A pure no-fault system contains these essential elements:
 - (1) no-fault coverage is compulsory by statute,
 - (2) or alteration and partial elimination of tort liability,
 - (3) a system of first party insurance was substituted for the eliminated portion of the tort liability.
4. Until the adoption of no-fault in Florida, insurance was not compulsory. Florida operated under a financial responsibility law which required insurance or other proof of financial responsibility *after* any accident.
5. See O'Malley, *Is No-Fault Insurance Best for Florida*, 45 FLA. B. J. 187 (1971).

in the 1972 Act a mandatory 15% reduction in liability rates, reflecting its expectation of a reduction in third-party lawsuits. This discussion will examine the original intent of the Legislature, the expectations of the Legislature in adopting no-fault and the modifications of the 1972 Act reflecting the legislative and public frustration with the failure of the original statute to provide all that was promised at the time it was first proposed. This article will not include any discussion of the attempt by the Legislature to apply the no-fault concept to the property damage insurance coverage. Although the 1972 Act included such a provision, the Legislature never attempted to correct the deficiencies cited by the Florida Supreme Court in its decision in *Kluger v. White*,⁶ in which the no-fault property section was stricken.

In *Lasky v. State Farm Mutual Insurance Company*,⁷ the court addressed for the first time the constitutionality of partially eliminating tort actions in Florida. The concept of no-fault is the limitation of the right to recover in tort for certain damages *offset* by the benefit of recovery for certain damages from one's own first party insurer without the requirement of establishing fault. In its decision, the court considered the threshold⁸ and found a portion of that threshold deficient.⁹

6. 281 So.2d 1 (Fla. 1973).

7. 296 So.2d 9 (Fla. 1974).

8. The threshold is the barrier as to the type of injury or amount of medical expenses before an action in tort is allowed.

In any action of tort brought against the owner, registrant, operator or occupant of a motor vehicle with respect to which security has been provided as required . . . or against any person or organization legally responsible for his acts or omissions, a plaintiff may recover damages in tort for pain, suffering, mental anguish, and inconvenience because of bodily injury, sickness, or disease arising out of the ownership, maintenance, operation or use of such motor vehicle only in the event that the benefits which are payable for such injury . . . or which would be payable but for any exclusion deductible . . . exceeded one thousand dollars or the injury or disease consists in whole or in part of permanent disfigurement, a fracture to a weight-bearing bone, a compound comminuted, displaced or compressed fracture, loss of a body member, permanent injury within reasonable medical probability, permanent loss of a bodily function, or death. Any person who is entitled to receive free medical and surgical benefits shall be deemed in compliance with the requirements of this section upon a showing that the medical treatment received has an equivalent value of at least one thousand dollars. Any person receiving ordinary and necessary services normally performed by a nurse from a relative or a member of his household shall be entitled to include the reasonable value of such services in meeting the requirements of this subsection.

FLA. STAT. ANN. §627.737(2) (1974).

9. In *Lasky v. State Farm Ins. Co.*, 296 So.2d 9 (Fla. 1974), the Florida Supreme

Appellants had asserted that the tort threshold in the new no-fault law had violated appellants' right of access to the courts and to trial by jury, denying them due process and equal protection of the law. In considering this question, the court found:

[I]nsurance coverage as to the personal injury benefits provided by the no-fault insurance law is compulsory . . . [A]ll right of recovery is not denied, but only recovery for particular intangible elements of damage in a few situations; there is no immunity from tort liability for tangible damages resulting from injury except where the benefits provided in F.S. §627.736 are payable to the injured party by his insurer or would be so payable but for an authorized deduction or exclusion. Thus the injured party will receive such benefits as payment of his medical expenses and compensation for any loss of income and loss of earning capacity under the insurance policy he is required by law to maintain, up to applicable policy limits, and may bring suit to recover such of these damages as are in excess of his applicable policy limits.¹⁰

The court did, however, uphold the severability of the stricken portion and found the remainder of the statute complete in itself and capable of being executed in accordance with the original legislative intent.

Following *Lasky*, the Florida Automobile Reparations Reform Act remained intact until the 1976 Legislature. In the four years that had passed since its original adoption, automobile insurance rates had started to climb despite the initial reduction mandated by the 1972 law and a further 1973 reduction ordered by the Insurance Commissioner after a review of company experience under the law. During the first year of no-fault, because of the \$1,000 threshold, a substantial reduction in the number of third-party lawsuits filed had occurred.¹¹ Gradually, the number of lawsuits stabilized and then began to climb once again, reflecting both the inflation of medical costs causing the \$1,000 threshold to be pierced, and the practice of "building" of claims for the sole purpose of piercing the \$1,000 threshold so a tort action could be filed.

In 1976, in response to the apparent targeting of the \$1,000 amount,

Court invalidated all thresholds except \$1,000 medical expenses, death, and permanent injury, finding the other injury thresholds arbitrary and unreasonable, and thus denying equal protection.

10. *Id.* at 14.

11. For a detailed study of litigation trends after the adoption of no-fault in Florida, see Little, *No-Fault Auto Reparation in Florida*, 9 U. MICH. J. LAW REFORM 1 (1975) reprinted in A. WIDISS, J. LITTLE, R. CLARK, T. JONES, NO-FAULT AUTOMOBILE INSURANCE IN ACTION (1977).

the Legislature replaced the monetary threshold with a verbal threshold which allowed recovery in tort only if the injury or disease consisted in whole or in part in:

- (a) Loss of a body member.
- (b) Permanent loss of a bodily function.
- (c) Permanent injury within a reasonable degree of medical probability other than scarring or disfigurement.
- (d) Significant permanent scarring or disfigurement.
- (e) A serious non-permanent injury which has a material degree of bearing on the injured person's ability to resume his normal activity and life-style during all or substantially all of the ninety day period after the occurrence of the injury, and the effects of which are medically or scientifically demonstrated at the end of such period.
- (f) Death.¹²

Almost immediately the 1976 Act came under fire. The public was frustrated by the continuing escalation of auto insurance rates. Even though it might have been reasonable to assume that there would be a time lag between a legislative modification of the law and an actual reduction in rates, the public outcry was for immediate relief. As a result, the 1977 Legislative Session was inundated with a myriad of proposals for auto insurance reform. The most far-reaching proposal was that of Insurance Commissioner Bill Gunter.¹³ Commissioner Gunter's proposal was rejected by the 1977 Legislature, but it served as the catalyst for the changes made in the tort threshold in the 1978 Session. The Commissioner proposed the complete abolition of the right to recover in tort for "speculative"¹⁴ or non-economic damages. His proposal included a plan for insurance companies to offer an *optional* first party coverage to those who wished to have the ability to recover for non-economic losses.

The 1977 Legislative Session adjourned without acting on the Gunter Proposal. Hence, the Commissioner sought to pursue his plan via the initiative process and wrote a proposed constitutional amendment

12. FLA. STAT. §627.737(2) (1977).

13. FLORIDA DEP'T. OF INSURANCE, A SOLUTION TO THE AUTOMOBILE INSURANCE CRISIS (1977).

14. "Speculative" damages were defined by Gunter as those which have no dollar value. The damages to be eliminated were identical to those included as elements in personal injury and property damages in Florida Standard Jury Instructions 6.2: injury, pain, disability, disfigurement, and loss of capacity for the enjoyment of life.

to be placed upon the ballot in November of 1978. The Floridians for Auto Insurance Relief Amendment was to be an addition to Article X of the Florida Constitution and provided:

Limitation of damages—motor vehicle accidents—

(a) Damages recoverable by any person in a civil suit against the owner or operator of a motor vehicle for injuries resulting from a motor vehicle accident shall be limited to the following:

- (1) Medical expenses, past and future;
- (2) Lost earnings and lost earning capacity;
- (3) Funeral, burial or cremation expenses;
- (4) Property damage;
- (5) Out of pocket expenses; and
- (6) Punitive damages where the owner or operator of a motor vehicle is found to have caused injury to another by willful or wanton misconduct or a reckless indifference to the rights of others.

While the controversy raged over the proposed constitutional amendment, some 300,000 Floridians signed the petitions to place this item on the 1978 General Election Ballot. The Legislature, led by Senator Dempsey Barron, readdressed the tort threshold issue and attempted to provide a compromise reform bill that would be sufficiently acceptable to Commissioner Gunter to cause him to abandon his efforts to enact the Floridians for Auto Insurance Relief Amendment by the initiative process. The result, Senate Bill 1308, represented the latest modification of the tort threshold and became effective on January 1, 1979.

The newly revised tort exemption in Section 627.727(2) permits recovery in tort only in the event that the injury consists in whole or in part of:

- (a) ~~(b)~~ Significant and permanent loss of an important bodily function.
- (b) ~~(c)~~ Permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement.
- (c) ~~(d)~~ Significant and permanent scarring or disfigurement.
- ~~(e)~~ (Struck in entirety)
- (d) ~~(f)~~ Death.

The revised law eliminates the right to recover for nonpermanent injuries by striking the language added in 1976, and offsets the elimination of that right with an increase from \$5,000 to \$10,000 in the required mandatory personal injury protection. The 1978 changes leave Florida with one of the strongest tort restrictions in the nation. Even before the effective date of the law, constitutional attacks loomed on the horizon.

CONCLUSION

From 1972 to 1978 the tort restrictions evolved from a dollar threshold with the ability to recover for nonpermanent injury upon exceeding that \$1,000 threshold to a total abolition of the right to recover in tort for any nonpermanent injury.

What may we expect from future Legislatures in relation to the tort threshold? If the constitutional challenges are withstood, it is unlikely that the tort threshold will be modified or altered at any time in the near future. The Legislature has modified that threshold three times in six years and evidences a reluctance to further restrict the right to a tort action. Further, it has been the position of a substantial number of Legislators, as well as the Insurance Commissioner, that Florida's automobile insurance climate is improving, that much of that improvement is a reflection of the changes that have occurred, and that further changes of a substantial nature should be postponed until there is clear statistical data from the insurance companies on which to base any additional changes.

A review of the legislative debate¹⁵ surrounding the initial adoption of the no-fault concept in Florida confirms that the intent¹⁶ in adopting no-fault revolved around a desire to:

- (1) Reduce insurance premiums;
- (2) Reduce litigation (and its attendant costs to the insurance system);
- (3) Reduce the delay in providing relief to injured parties;¹⁷
- (4) Elimination of overcompensation of minor injuries and undercompensation of serious injuries.¹⁸

15. See, e.g., Fla. H.R. Jour. 599-605 (May 19, 1971).

16. Little, *supra* note 11.

17. *Id.*

MEDIAN ELAPSED TIME IN DAYS BETWEEN THE DATE AN ACCIDENT CLAIM WAS FILED AND THE DATE FIRST PAYMENT WAS MADE—FLORIDA

Type of Claim	1971	1972	1973
First Party	37.3	25.3	29.1
Third Party	83.5	102.5	136.5

18. Reporting on a six year study conducted by the Department of Transportation, Brock Adams, Secretary of Transportation, stated:

The existing system unfairly overcompensated the small accident victim and inadequately compensated or did not compensate at all the major accident victim.

Where out-of-pocket victim losses were under \$500, victims recovered an average

These concerns continue to be foremost in the minds of Legislators. If, however, the Legislature is reluctant to further alter the tort threshold and the insurance rate climate does not stabilize or decline, it is my opinion that the legislative direction will next occur in the following areas:

(1) Changes in the classification system which would eliminate age, sex, and marital status as a basis for determining insurance premiums and replace them with some sort of merit-rating proposal based upon use of car, driving experience, and/or driving record.

(2) Elimination or modification of territorial ratings.

(3) Restructuring of surcharge system for accidents and moving violations.

(4) Statewide charge for company expenses replacing percentage of premium currently employed for such charges.

Many of these alternatives are currently being evaluated both in Legislative Committees and by the Department of Insurance. The allocation of company expenses referred to in (4) above has been mandated by a recent order of the Insurance Commissioner.¹⁹ All four alternatives have the potential of reducing rates for some drivers by shifting the premium burden to other drivers. The real dilemma and challenge facing future Legislatures will be to ascertain which premium burdens may be shifted from one sector or group to another without causing an inequitable result.

of four and a half times their economic losses. Where losses were \$25,000 or more, even successful tort claimants averaged a net recovery of only about one-third of their out-of-pocket loss.

Standards for No-Fault Motor Vehicle Accident Benefits Act: Hearings on S.1381 Before the Committee on Commerce, Science and Transportation, 95th Cong., 2d Sess. (July 15, 1977).

19. Florida Dep't of Insurance Rule No. 4-43.02, FLORIDA ADMINISTRATIVE CODE.