

Don't move the goal post, improve the game

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The Attorney General recently proposed a No Fault Liability System to assist victims of accident cases to have faster access to compensation. He then referred to New Zealand and Australia as two countries with this system.

It is almost impossible for any lawyer to comment that the No Fault Liability System won't work, without being accused of merely protecting our 'rice bowl'.

Whilst there is little doubt that many lawyers are involved in this Personal Injury Claims involving motor vehicle, it is also virtually certain that the No Fault Liability System will see the end of lawyers' involvement in those cases.

Despite these foreseeable accusations against me, I will still endeavour to try persuading the AG that the No Fault System will likely not work in Malaysia.

What is wrong with the current system?

Ironically recently the Chief Judge of Sabah and Sarawak led a team of Judges who dialogued with the Bar about establishing a proposed 'Pre-action protocol' for Personal Injury Cases. The Learned Chief Judge's team was keen to speed things up for such claims. This led to Forum held by Kuala Lumpur Bar Committee on the 10th April 2007.

At that Forum, 2 major issues were raised by lawyers who attended the Forum:-

1. long wait for the issuance of the Medical reports from Government Hospitals, sometimes taking as long as a year;
2. equally long wait for documents from the Police.

There were also some comments about Insurance Companies not replying quick enough and also low offers from the same.

The Forum alluded KL Bar Committee members to some of the problems which causes delay to Personal Injury Claims, the very same delay that the AG believes can be solved by merely changing the system to a No Fault Liability System.

Of course, needless to say, there are some instances where lawyers may have caused delays too. Lawyers are not so thick-skinned to deny that the legal fraternity is absolutely above the cause of delay. But what is crucial is we have clear evidence from the very lawyers that are conducting Personal Injury Claims on a daily basis of the some of the causes of the delay in claims. This evidence, to a very large extent can be substantiated.

For the moment the said Pre-Action Protocol is not likely to take off, but is being reviewed. Perhaps a specialist court make take off, handling accident claims.

In addition to the findings at that Forum, I wish to add a personal opinion. I am of the view that the Insurance companies are also culprits in the delay. These companies in the disguise of trying to evade fraudulent claims more often than not, delays the claims as long as they can. It is my view that even with the No-Fault Liability Claim, the compensation will still NOT be paid any quicker, so long as the Insurance Company are not coerced to do so.

It is also my contention that the purging of lawyers in Personal Injury Claims cases would mean the victims would be at the mercy of the Insurance Company, and this time, the victim has no representation and no one to shield, protect and defend him/her.

At this juncture, this write up looks more like a fault finding write up. And the fact is, IT IS! I am seeking to see where the fault and cause of the current delay which made AG want to propose the alternative No Fault System. It is my hope that since we can identify the causes for delay, AG only needs now to try tackle these issues and try resolving it.

Clearly it is a problem which can be solved, so why change the current system?

Would the No-Fault Liability System work?
I venture to quote from the Australian Journal 'The Agenda',
Vol 9 No 2, 2002, page 135. [please see :

<http://epress.anu.edu.au/agenda/009/02/9-2-A-4.pdf>]

In that article, the authors Bronwyn Howell, Judy Kavanagh and Lisa Marriott said this at pages 137 to 138:-

"No-fault systems have been proposed as a means of reforming the tort-based system. No-fault systems remove the need to prove cause from the compensation equation and thereby reduce the transaction costs of the process (Danzon, 1990:4). Compensation is generally paid according to a prescribed schedule if the loss-sufferer satisfies the scheme administrators that loss has been incurred, regardless of any fault by the alleged loss-causer. Such schemes are typically funded out of levies on potential loss-causers or from general taxation and are accompanied by some limitations on the loss-sufferer's rights to seek redress from the loss-causer through tort actions.

The principal weakness of no-fault schemes is the difficulty of ensuring that the socially optimal amount of care is taken by potential loss-causers, as the links between their potential to cause loss and the costs of their actions are severed. Consequently, most no-fault schemes are accompanied by additional administrative systems, not present in typical tort systems, to monitor the behaviour of potential loss-causers in order to preserve their incentives for appropriate loss-avoidance (Kessler, 1999:13). The efficiency-improvement

criterion is met if the transaction costs saved from the tort process are greater than the additional monitoring costs incurred in the no-fault system for the same level of compensation paid to individuals for the same number of adverse events.

No-fault insurance schemes are common where the probability of a loss occurring is very uncertain. These include 'acts of God' (a sudden and unavoidable occurrence caused by natural forces, such as a flood or earthquake), where there is no party obviously at fault from whom partial cost recovery can be sought. The low probability of these events occurring, the unpredictability of the size of the loss and the exposure to large number of claims arising from a single event, mean that there is often a failure of private insurance companies to indemnify such losses. Further, as no individual has the ability to 'cause' the event, there is no need for incentives to prevent the loss-causing event and monitoring costs are low."

These authors are academicians in Australia and New Zealand and their views can be used as a guide to what we are facing here.

As can be seen above, the purpose of introducing the No Fault Liability System in New Zealand [NZ] was to control spiralling costs. It is also meant to deal with mostly Medical Negligence cases, where the NZ government faced huge claims for medical negligence at its National Health Services [NHS] Hospitals. With a No Fault Liability System, the costs of maintaining the Hospitals can be fixed as the government need not make huge provisions for medical negligence suits.

Another factor that the our AG ought to take into account is that in some states in United States of America where this No Fault Liability System is practised, the premium for the Insurance is extremely high. Why is this so? The Insurance Company in this kind of scheme would have no choice but to compensate a victim once the victim can prove his/her claim. There is little chance of defending the claim. So the Insurance Company would logically increase the premium to hedge their losses.

Also, the AG must realise that even with the adoption with this system ALL the above mentioned delays [medical and police reports] still exist – which would only mean that accident victims now have to deal with the Hospitals and Police on their own to extract all relevant documents, for their claim. All the best to the victims!

Conclusion

I have said in my earlier postings at the Bar Website that I am concerned that such major change may in fact not solve the problem. And of course as a lawyer I will concede that the change of system will mean many of our friends all over Malaysia, will lose out in their income.

I take a position that the current system needs some intervention by authorities to speed things up.

If the AG truly wants to quicken the claims process of the victims, as he so assert in the press release, then I urge him to look at solving the current system and not changing it.