Dear Mr. Attorney:

re: Minor Report: *Insurance Act*, s. 26(1) (LRC 125)

Recent judicial decisions have highlighted a problem with the operation of the *Insurance Act*. Section 26(1) allows someone who suffers loss caused by an insured person to proceed directly against the insurer. This procedure is usually unnecessary but the section provides a valuable right where the insured is unwilling or unavailable to claim on the policy. Unfortunately, the way the section is drafted means that the direct right of action is not always available.

There are two different perspectives on the function third party liability insurance performs. The first function is to protect the policy holder against the risk of loss. If the policy holder who causes loss satisfies the victim's claim, the insured is reimbursed or indemnified by the insurer (subject to the terms of the policy). Historically, this was looked upon as the sole function of third party liability insurance. In other cases, particularly those involving large claims, in the absence of the policy there simply would be no compensation to the victim. As a result, the second function served by insurance is to make sure there are adequate funds to satisfy third party liability.

Insurance is a matter of contract between the insurer and the insured and, at common law, an injured person had no direct claim against the insurer. If the insured declined to call upon the insurer, a victim who could not satisfy the judgment from the wrongdoer's property remained uncompensated. This might happen, for example, where the insured became insolvent, or left the province to avoid creditors.

B.C. Legislation

Throughout Canada, the Commonwealth and the United States, legislation was enacted in the first part of this century to deal with the problem. In British Columbia, the relevant legislation is section 26(1) of the *Insurance Act*:

> 26. (1) Where a person incurs liability for injury or damage to the person or property of another, and is insured against that liability, and fails to satisfy a judgment awarding damages against him in respect of that liability, and an execution against him in respect of it is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied.
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> 2) This section does not apply in the case of a contract of automobile insurance.

Although the section does not apply to automobile insurance, other legislation makes sure the same legal policy applies in that context. The *Insurance (Motor Vehicle) Act* provides:

> 20. Notwithstanding that he has no contractual relationship with the corporation, a person having a claim against an insured for which indemnity is provided by an owner's certificate...on recovering judgment against the insured...may...maintain an action against the corporation to have the insurance money so applied.

A Gap in the Legislation

In the past decade, a number of Canadian cases have considered the ambit of section 26 of the Insurance Act (and comparable legislation in other provinces) and have found that it does not apply to all kinds of loss for which there is insurance. The words in the legislation "Where a person incurs liability for injury or damage to the person or property of another" do not encompass claims which are separate from injury or damage to a person or a person's property such as, for example, pure economic loss. Someone who suffers pure economic loss as a result of a professional person's negligence would have no right to proceed directly against the insurer where the wrongdoer declined to claim under the insurance policy: *Starr Schein Enterprises Inc.* v. *Gestas Corporation Ltd.*, (1987) 13 B.C.L.R. (2d) 85 (B.C.C.A.); *Perry* v. *General Security Ins. Co. of Canada*, (1985) 11 D.L.R. (4th) 516 (Ont. C.A.).

A recent British Columbia case provides a dramatic example of the section's limitations. When a person is wrongfully killed by another, legislation--in British Columbia it is the *Family Compensation Act*--allows a spouse, parent or child who was financially dependent upon the deceased to recover lost support. A damage award for lost support can be substantial, but it is not "liability for injury or damage to the person or property of another," as the legislation requires. In *Scurfield* v. *Assitalia-Le Assicurazioni D'Italia S.P.A.*, [1992] B.C.J. No. 759 (B.C.S.C.), the wife of the deceased was unable to collect a judgment for $1,253,309.40 from the insurers.

Courts that have considered the limitations on the section have called for its revision. Spencer J.'s remarks in the *Scurfield* case are typical:

> The defendant's motion for judgment dismissing this claim is therefore allowed. It is a regrettable result, but one dictated by the wording of the section and the law. I draw attention to what Legg J. said in the trial decision in *Starr Schein Enterprises Inc.* when he shared the concern that the exclusion of judgments for pecuniary loss by the wording of s. 26(1) was both unfair and unfortunate for an innocent plaintiff. Apart from concerns about the level of the premium, there appears to be no justification why an insurer who would have had to pay a loss to an injured plaintiff should not be required to pay what is generally a lesser loss to that person's dependants where the injuries result in death. A change in the statutory wording would be required to effect the change.

Recommendation

The judicial call for revising the law has led us to a consider the legislation. We agree with the sentiments voiced by Mr. Justice Spencer and Mr. Justice Legg. It is our conclusion that there is no justification for insulating an insurer from responsibility to satisfy a claim covered by a valid policy of insurance. The limitation on the *Insurance Act* is an accident of legal drafting and probably reflects the fact that when the legislation was enacted claims for pure economic loss were not generally recoverable at law. But the law on that point has changed: see, e.g. *C.N.R.* v. *Norsk* (Unreported S.C.C. decision, [1992] S.C.J. No. 40). Although some judges have argued that the *Insurance Act* should be interpreted against the background of changing law, it is an approach with obvious limitations and one which has not yet proved to be successful.

The equivalent provision in the *Insurance (Motor Vehicle) Act* (set out above) covers all losses. English legislation(the *Third Parties (Rights against Insurers) Act, 1930*) in force since 1930 is equally comprehensive.

It is worth pointing out that because British Columbia legislation adopts slightly different

drafting approaches in the Insurance Act and the *Insurance (Motor Vehicle) Act*, the rights of a victim differ depending upon the identity of the insurer. A claim against a motorist insured in British Columbia for damages under the *Family Compensation Act*, for example, would be satisfied by the Insurance Company of British Columbia. But if, the death occurred in a slightly different context, another insurer could escape liability by pointing to the loophole in the *Insurance Act*.

Draft Legislation

The current formulation of section 26 is a source of injustice. It is easily corrected. Legislation along the following lines to replace subsection (1) would ensure that the policy extends to any insurable loss with respect to which there is a judgment against the insured:

> *(1) Where a judgment for money based on a claim for which the judgment debtor is insured has not been satisfied, the judgment creditor may recover from the insurer the lesser of*
>
> > *(a) the amount by which the judgment is unsatisfied, or*
> >
> > *(b) the amount which the insurer would have been obligated to pay, as an indemnity, to the judgment debtor had the judgment been satisfied by the judgment debtor.*

It is our recommendation that section 26(1) of the *Insurance Act* be revised.

Insurance legislation in Canada is a provincial responsibility but, through the Association of Superintendents of Insurance and the cooperation of the provincial legislatures, there is a high degree of uniformity among the laws of the provinces and the territories. The matters addressed by section 26(1) should be subject to a consistent national treatment. In the interests of uniformity, consequently, this matter should be brought by the Superintendent of Financial Institutions to the attention of the Association. The matter is of sufficient importance, however, that if the Association decides not to endorse this amendment, we recommend that British Columbia act unilaterally.

This letter constitutes a Minor Report (No. 125) of the Law Reform Commission. This recommendation was approved by the Commission at a meeting on June 26, 1992.

Yours sincerely,

Arthur L. Close, Q.C.
Chairman