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The Time Has Come to Examine Objectively the No-Fault Concept in North Carolina

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nate the present situation of uneven treatment accorded defendants in different parts of the state. Whether or not the author's suggested statute is accepted, this study indicates a need for positive action to determine what the objectives of this law are to be and to clarify these objectives to the courts and to the commercial community.

MIKE CRUMP

The Time Has Come to Examine Objectively the No-Fault Concept In North Carolina

INTRODUCTION

Although the no-fault principle is not new,[1] widespread interest in this controversial subject has erupted only within the last seven years.[2] In 1970 Massachusetts became the first state to adopt a no-fault plan.[3] In 1972 Florida,[4] Illinois,[5] Delaware,[6] and Oregon[7] adopted varying degrees of no-fault plans, and one-half of the state legislatures[8] including

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[1]For a history of compensation without fault, see Markhoff, *Compensation Without Fault and the Keeton-O'Connell Plan: A Critique*, 43 ST. JOHN'S L. REV. 175, 181-187 (1968).

[2]The spark igniting the controversy was *R. Keeton & J. O'Connell, Basic Protection for the Traffic Victim* (1965) [hereinafter cited as *Basic Protection*].

[3]MASS. ANN. LAWS ch. 90, §§ 34A, 34D, 34M, 34N; ch. 175, §§ 22 E to H, 113 B to C; ch. 231, § 6D (Supp. 1971) (the complete act appears as Act of August 13, 1970, ch. 670) [hereinafter cited as *Mass. Act*]. Puerto Rico has enacted a similar law in 1968. P.R. LAWS ANN., tit. 9 §§ 2051-2065 (Supp. 1970). For a detailed treatment of the Massachusetts plan, see Kenny & McCarthy, *No-Fault in Massachusetts, chapter 670, Acts of 1970, A Synopsis and Analysis*, 55 MASS. L.Q. 23 (1971); Ryan, *Massachusetts Tries No-Fault*, 57 A.B.A.J. 431 (1971).

[4]For a detailed discussion of the Florida Automobile Reparation Reform Act, see Gillespie & McKay, *Florida's No-Fault Insurance Law*, 45 FLA. B.J. 400 (1971). Also see *Is No-Fault Best for Florida?* 45 FLA. B.J. 186 (1971).

[5]ILL. ANN. STAT. ch. 73, §§ 1065.150-.163 (Smith-Hurd Supp. 1971). The Illinois No-Fault Automobile Insurance Act has been held unconstitutional because of its discriminatory character. Victims with the same injuries receive different amounts depending on where the injury occurred, which hospital was utilized, and the wealth or poverty of the victim. Grace v. Howlett, 40 U.S.L.W. 2437 (Ill. Cook County Cir. Ct., Dec. 29, 1971). The *Mass. Act* has been held to be constitutional. Pinnick v. Cleary, ___ Mass. ___, 271 N.E.2d 592 (1971). For a critical appraisal of the Illinois plan, including its constitutionality, see Hofeld, *Toward Understanding, Analyzing and Improving "No-Fault" in Illinois*, 1971 INS. L.J. 403.

[6]Porter, *5 States Now Have Own Plans*, The Charlotte Observer, Dec. 6, 1971, at 13A, col. 3.

[7]Ch. 523, 1971 Oreg. L. 912.

[8]*Is "No-Fault" Insurance the Answer?* U.S. NEWS & WORLD REP., Jan. 3, 1972, at 27, col. 1.

North Carolina's will consider no-fault this year. The 1971 North Carolina General Assembly, as a continuance[9] of the study of insurance, created the Governor's Study Commission on Automobile Insurance[10] with a specific mandate to study the no-fault concept. In addition there has been a vertiable flood of material in the various legal publications.[11] Yet with all this fantastic growth of an exposure to the no-fault concept, how many members of the bar actually are suffieiently familiar with no-fault insurance to form a rational opinion as to its value?

Any change in the present tort system is of great interest to the bar if for no other reason than the potentially significant effect such change will have on the income of the bar. Attorneys' fees for bodily-injury liability proceedings alone amounted to approximately one billion dollars in 1968.[12] It is hardly surprising, therefore, that no-fault engenders

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[9]In 1969 the General Assembly created the Governor's Study Commission on Automobile Liability Insurance and Rates. Res. 65, [1969] N.C. Sess. L. 1576. The Commission's report dealt extensively with the automobile insurance system in North Carolina, the cost of automobile insurance, and the needs of the Insurance Department. No-fault insurance, however, was not studied in depth. GOVERNOR'S STUDY COMMISSION ON AUTOMOBILE LIABILITY INSURANCE AND RATES, REPORT TO THE GOVERNOR OF NORTH CAROLINA, at 93-8 (1971).

[10]Res. 122, [1971] N.C. Sess. L. ____. For a synopsis of the areas to be covered by the Commission and its composition, see Meeker, *Study Commissions,* POPULAR GOV'T 16, 17 (Sept., 1971).

[11]*See, e.g.*, Brainard, *Is Equity of Insurance Being Sacrificed?* 3 TRIAL, No. 6, at 38 (1967); Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967); Kuhn, *The Keeton-O'Connell Basic Protection Plan for Automobile Insurance: A Practicing Lawyer's View*, 22 ALA. L. REV. 1 (1969); Sargent, *Disaster Walks in the Guise of Social Reform*, 3 TRIAL, No. 6, at 24 (1967); Comment, *The Gathering Storm In Automobile Injury Compensation: A Workable Solution*, 22 U. MIAMI L. REV. 151 (1967).

[12]1 U.S. DEP'T OF TRANS., AUTOMOBILE PERSONAL INJURY CLAIMS at 80 (1970) [hereinafter cited as DOT PERSONAL INJURY STUDY]. This study is one component of the U.S. Department of Transportation Automobile Insurance and Compensation Study.

> In May of 1968, Congress authorized "the Secretary of Transportation to conduct a comprehensive study and investigation of the existing compensation system for motor vehicle accident losses." After referring to the growing evidence that the present tort liability system is in many ways inadequate, the resolution directed the Secretary to investigate a broad range of subjects related to the existing insurance system. Armed with this impressive list of objectives and with ample funds, the Department of Transportation (DOT) organized a small professional staff to oversee the study. Almost all the research, however, was conducted by independent contractors and consultants because the two-year time limit for the project and the relatively long lead time required for survey research militated against any attempt to perform the basic research with in-house staff. Most of the studies undertaken for the Deparment have recently been made public, though without policy recommendations and usually without comment by the DOT.

Bombaugh, *The Department of Transportation's Auto Insurance Study and Auto Accident Compensation Reform*, 71 COLUM. L. REV. 207 (1971) [hereinafter cited as Bombaugh].

strong opinions. Yet, while a plethora of articles have been written, few reach the practicing attorney other than by way of newspaper or bar publication. The former, written for broad public consumption, generally depict no-fault in very complimentary terms but contain few details of the mechanics.[13] The latter are generally strongly opposed. While some bar publications strive to present both sides of the issue,[14] the typical article leaves the impression not of an attempt objectively to examine the merits of the no-fault concept but of a search for weaknesses in order to hinder its growth.[15]

This dearth of objective, detailed information is regrettable because an informed bar is essential to responsible action by the bar, something that some writers believe has been lacking in this area.[16] An active role by the bar is essential because a thorough examination of the very complex no-fault plans may require legal expertise and experience. Unfortunately, however, the role of the bar in the present automobile accident compensation scheme leaves much to be desired.[17] One study

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Other selected parts of the landmark U.S. Dep't of Trans. Automobile Insurance and Compensation Study include: D. REINMUTH & G. STONE, A STUDY OF ASSIGNED RISK PLANS (1970); U.S. DEP'T OF TRANS., AUTOMOBILE ACCIDENT LITIGATION (1970) [hereinafter cited as DOT AUTO ACCIDENT LITIGATION STUDY]; 2 U.S. DEP'T OF TRANS., AUTOMOBILE PERSONAL INJURY CLAIMS (1970); U.S. DEP'T OF TRANS., CONSTITUTIONAL PROBLEMS IN AUTOMOBILE ACCIDENT COMPENSATION REFORM (1970); U.S. DEP'T OF TRANS., DRIVER BEHAVIOR AND ACCIDENT INVOLVEMENT: IMPLICATIONS FOR TORT LIABILITY (1970); U.S. DEP'T OF TRANS., ECONOMIC CONSEQUENCES OF AUTOMOBILE ACCIDENT INJURIES, Vol. I [hereinafter cited as DOT ECONOMIC CONSEQUENCES OF AUTO ACCIDENTS STUDY] & II; U.S. DEP'T OF TRANS., ECONOMIC CONSEQUENCES OF AUTOMOBILE ACCIDENT INJURIES: PUBLIC ATTITUDES SUPPLEMENT (1970); J. VOLPE, MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE U.S. (1970) [hereinafter cited as DOT MOTOR VEHICLE CRASH LOSSES STUDY]; A REPORT OF THE SURVEY RESEARCH CENTER, INSTITUTE FOR SOCIAL RESEARCH, UNIVERSITY OF MICHIGAN, PUBLIC ATTITUDES TOWARD AUTOMOBILE INSURNACE (1970); J. HENLE, REHABILITATION OF AUTO ACCIDENT VICTIMS (1970); REPORT OF THE DIVISION OF INDUSTRIAL ANALYSIS, BUREAU OF ECONOMICS STRUCTURAL TRENDS AND CONDITIONS IN THE AUTOMOBILE INSURANCE INDUSTRY (1970); THE ORIGIN AND DEVELOPMENT OF THE NEGLIGENCE ACTION (1970).

This entire study is of monumental importance since it provides heretofore unavailable data on the cost of the present system. Due to the difficulty of accumulating vast amounts of data, particularly in the insurance field, some of the statistics quoted will reflect a compilation of stale data. It is regrettable that more current data is not available, but even this lag does not diminish the importance of this study.

[13]*See, e.g.*, Shaw, *'No-fault' Insurance Saves Massachusetts Big Money*, The Charlotte Observer, Sept. 29, 1971, at 2A, col. 1.

[14]6 TRIAL, No. 6, at 68-69 (1970).

[15]*See, e.g.*, Jones, *A Criticism of the Keeton-O'Connell Plan*, 29 ALA. LAW. 294, 301 (1968).

[16]For an example of the hostility of the bar toward proponents of no-fault insurance, see O'Connell, *Industry and the Academic Researcher*, 53 IOWA L. REV. 1269, 1273-1276 (1968).

[17]AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT AND RECOMMENDATIONS OF THE SPECIAL

has shown that people who have actually observed a trial have a less favorable attitude toward the administration of justice than those persons whose knowledge comes from outside sources.[18] This mistrust is attributed mostly to automobile accident litigation.[19] Because of the nature of the proceeding, justice and the attorney in particular are placed in a most inauspicious stature.

It is important, therefore, to call for objectivity by the bar and all others involved in examining this subject.[20] This article will deal with the shortcomings of the present system; the operational mechanics of various no-fault plans, and how they propose to remedy the flaws in the present system; criticism of the no-fault concept and alternatives to shifting to no-fault; and recommendations for North Carolina. In response to the need for an objective treatment of this subject, a conscious effort has been made to refrain from advocation of the adoption or rejection of no-fault in North Carolina.

CRITICISM OF THE PRESENT SYSTEM

The amount of interest in the no-fault concept is hardly surprising in view of the widespread dissatisfaction with the present system, which is being attacked stringently by varied interest groups—consumers, academicians, political organizations, and lately the insurance industry itself. These proponents of change list a multitude of reasons for their position.

COMMITTEE ON AUTOMOBILE ACCIDENT REPARATIONS 11 (1971) [hereinafter cited as TRIAL LAWYERS' REPORT].

> We are convinced that the bar, and especially the trial bar, has a key role to play in public consideration of the policy issues posed by auto plans. Its judgment is seasoned by daily experience with the working of the existing tort system in auto cases; the trial bar is a highly relevant expert. Its stance toward proposals for basic change is important. We urge that it is the duty of the bar to the public and to itself to keep an open mind on the possibilities for reform of the auto tort system, to welcome new proposals, and to hold itself out to give them serious consideration. . . . The issue is such that all persons who have taken and urged positions on it may have strong economic or personal motivations.

Id.

[18]MISSOURI BAR, PRENTICE-HALL SURVEY, A MOTIVATIONAL STUDY OF PUBLIC ATTITUDES AND LAW OFFICE MANAGEMENT 173 (1963), reported in Selinger, *Automobile Accident Litigation and the Bar*, 56 A.B.A.J. 631 (1970).

[19]Selinger, *Automobile Accident Litigation and the Bar*, 56 A.B.A.J. 631, 632-34 (1970).

[20]*See* TRIAL LAWYERS' REPORT 2.

A. Fault

Much of the dissatisfaction is directly attributable to the core of the present tort system: fault.[21] To recover under the tort system, it is necessary to show that the claimant was injured, that the defendant (or someone for whose conduct he is responsible) was at fault, and that the claimant's injury was proximately caused by the defendant's faulty conduct.[22]

Application of this principle is a difficult undertaking because of the unique nature of automobile accidents. Professor William L. Prosser, a noted authority on torts, observed that:

> [t]he process by which the question of legal fault, and hence of liability, is determined in our courts is an . . . almost ridiculously inaccurate one. The evidence given in personal injury cases usually consists of highly contradictory statements from two sides, estimating such factors as time, speed, distance, and visibility, offered months after the event by witnesses who were never sure just what happened when they saw it, and whose faulty memories are undermined by lapse of time, by bias, by conversations with others, and by subtle influence of counsel. . . . [T]he extent to which it has damaged the courts and the legal profession by bringing the law and its administration into public dispute can only be guessed.[23]

The injustices of the fault system are further aggravated by the existence of such defenses as contributory negligence, governmental and charitable immunity, and automobile guest statutes.[24] These defenses deny recovery even in the presence of faulty conduct. Contributory negligence, the most prevalent spectre of the four, is mitigated to some extent by jury conduct. Instead of denying recovery when contributory negligence is present, but relatively slight, the jury may reduce the verdict as a compromise measure. Yet the threat of contributory negligence is present. Many cases are settled out of court for inadequate amounts because of the apprehension of being completely denied recovery. In any case, the wisdom of retaining a doctrine which encourages disregard for the law is questionable.[25]

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[21]*See* BASIC PROTECTION 15-24.

[22]*See generally* W. PROSSER, THE LAW OF TORTS 146 (3d ed. 1964).

[23]*Consumer Union Supports a Plan for Automobile Insurance Reform*, CONSUMER REPORTS 9-15 (Jan., 1968).

[24]BASIC PROTECTION 24-28.

[25]*Id.* at 25.

The fault concept is not sacred to our system. Nor does it have roots stretching back into legal antiquity, as some defenders of the present system would suggest.[26] Instead, the fault concept is a compromise dictated by the industrial revolution. The increasing number of injuries caused by the hazards of industry precipitated a shift away from strict liability. Yet something short of total avoidance of responsibility for harm visited on others was desired.[27] The compromise was the concept of fault. But just as strict liability was displaced because of the exigencies of that period, so must fault be because of the revolutionary increases in the number of highway victims and in the cost of health care.

B. Deterrence

The supporters of the present system strongly emphasize that the removal of responsibility for damage caused by careless behavior would have a deleterious effect on deterrence of that behavior.[28] First, the burden of this responsibility has been shifted from the individual by the widespread use of insurance.[29] Secondly, some drivers can be deterred from careless behavior only by removal from the highways.[30] Thirdly, the deterrent effect of increased insurance premiums and possible loss of driving privileges is far greater than the remote possibility of a large liability.[31] Under the new no-fault systems proposed, these two deterrents would still be present. Fourthly, there is no evidence of any significant deterrent effect for the present automobile liability system. "[M]ost accidents are caused by environmental or personal factors which are external to the individual's conscious control and . . . punishment on its threat, therefore, is ineffective as a deterrent to deviant driving behavior."[32] According to one study, only fourteen percent of the motoring public felt that liability for damages caused by automobile

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[26]Knepper, *The Automobile Compensation Controversy*, 26 WASH. & LEE L. REV. 17, 18 (1969).

[27]James, *Analysis of the Origin and Development of the Negligence Actions*, in U.S. DEP'T OF TRANS., AUTOMOBILE INSURANCE AND COMPENSATION STUDY: THE ORIGIN AND DEVELOPMENT OF THE NEGLIGENCE ACTION, at 36 (1970).

[28]Jones, *A Criticism of the Keeton-O'Connell Plan*, 29 ALA. LAW 293, 299 (1968).

[29]For data concerning the impact of liability insurance on fault and deterrence see BASIC PROTECTION 252-56.

[30]DOT MOTOR VEHICLE CRASH LOSSES STUDY 54.

[31]BASIC PROTECTION 249.

[32]DOT MOTOR VEHICLE CRASH LOSSES STUDY 54.

accidents does cause careful driving.[33]

Therefore, the assumptions upon which a deterrence justification is based are not valid. Human error is inherent in the complex operation of an automobile. The automobile driver must make two hundred observations and twenty decisions each mile he drives. As a result, the average driver makes one error for each two miles driven.[34] There exists, therefore, the possibility that even the most careful driver can cause an accident. The blameworthiness usually associated with fault and making it a useful doctrine is singularly lacking in many automobile accidents.[35]

> Driver error is only one of several factors that contribute to motor vehicle crashes. The individuals and groups who plan the vehicle and the highway environment also share responsibility for crashes and crash losses. No generally accepted criteria seem to exist by which causal factors may be ranked in importance.[36]

C. *Cost of Administration*

The cost of administration of the present system is staggering. In 1968 auto-insurers incurred liability for third-party bodily-injury losses in the amount of 2,908,100,000 dollars and property damage losses of 1,453,411,000 dollars.[37] Add to this property damage benefits, and the total net benefits accruing to third-party claimants amounted to 3,152,000,000 dollars, while the cost of administering the system was 3,768,000,000 dollars.[38] Therefore, under the present automobile liability system, 2.07 dollars must be paid into the system for every dollar in benefits paid out. Another source shows that fifty-eight cents of every dollar goes to administration costs as compared with three cents for Social Security, seven cents for Blue Cross/Blue Shield, and seventeen cents for health and accident insurance.[39]

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[33]*Id.* at 56.

[34]117 CONG. REC. S1828 (daily ed. Feb. 24, 1971).

[35]D. KLIEN & J. WALLER, CAUSATION, CULPABILITY AND DETERRENCE IN HIGHWAY CRASHES 122 (1970).

[36]U.S. DEP'T OF TRANS., DRIVER BEHAVIOR AND ACCIDENT INVOLVEMENT: IMPLICATIONS FOR TORT LIABILITY 189 (1970).

[37]For an excellent synopsis of the Department of Transportation Study's statistical findings, see Bombaugh 229-31.

[38]DOT MOTOR VEHICLE CRASH LOSSES STUDY 48-49.

[39]117 CONG. REC. S1834 (daily ed. Feb. 24, 1971).

D. *Inadequacy of Compensation*

Of even greater significance than the cost of administration is the inadequacy of benefits received. It has been estimated that in 1967 compensable[40] losses in the amount of 5,127,000,000 dollars were suffered by deceased and seriously injured victims of auto accidents.[41] The fact that 3,116,000,000 dollars of this total compensable economic loss was not compensated speaks badly for the performance of the present system. Even when a serious injury was not involved, of the 5,422,000,000 dollars in compensable economic loss, only 3,937,000,000 dollars were paid in reparations.[42] Therefore, out of a total compensable loss of 10,549,000,000 almost half was not compensated by the present automobile reparation system.

Even when compensation is awarded, it is often done unjustly. If the accident victim suffers an economic loss of less than five hundred dollars he recovers an average of four and one-half times the amount of his economic loss.[43] This is largely due to the desire of the insurance company to avoid the high administrative costs involved in processing a disputed claim. At the other end of the spectrum, of those fifty-five percent of seriously injured victims who are fortunate enough to receive compensation at all from the present liability system, most receive inadequate benefits. For example, those claimants with economic loss in excess of 25,000 dollars recover only thirty percent of their loss, and if a total permanent disability is sustained, the claimant receives only sixteen percent of his total economic loss.[44] The fact that minor injuries are over-compensated while serious injuries are not adequately compensated is significantly inequitable. Losses suffered by those less seriously injured are not as severe, nor is the impact of these losses as distressing.[45]

E. *Slowness of Payment*

The method of payment has also been roughly criticized. Under the present system the liability insurer's obligation terminates upon the

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[40]Compensable losses as the term is used here includes both large and small economic losses. Whether any reparations system should attempt to fully compensate both is subject to debate.

[41]DOT MOTOR VEHICLE CRASH LOSSES STUDY 10.

[42]*Id.* at 11.

[43]*Id.* at 36.

[44]DOT ECONOMIC CONSEQUENCES OF AUTO ACCIDENTS STUDY 26.

[45]DOT MOTOR VEHICLE CRASH LOSSES STUDY 11.

payment of a single lump sum. Since it is very difficult to ascertain the future consequences of an injury, the claimant is best advised to wait as long as possible to settle so that the risk of the unforeseeable is diminished.[46] The Department of Transportation study shows that half of all claims settled were settled within six months, but half of the loss dollars involved were not settled for over one year.[47] This reluctance by the claimant to settle quickly coupled with an increased willingness on the part of the insurer to litigate large claims explains why large claims take longer to settle. Yet, particularly where a serious injury is involved, the claimant is incurring high expenses that must be paid. Lack of funds generally prohibit the utilization of rehabilitation facilities until after settlement. Rehabilitation at that point, if undertaken at all, is less effective and more expensive than if it had been commenced soon after the injury.[48] These factors exert pressure on the claimant to settle for less than full compensation in order to pay his bills.[49]

In addition, many people lack the ability to handle a large amount of money like that awarded in a lump sum payment. The money is often squandered, and the victim, perhaps permanently dishabilitated, becomes a burden on the rest of society.

F. The Effect on the Court System

The choking effect the present compensation system has upon the court is another reason for criticism. Motor vehicle accident cases consumed seventeen percent of both civil and criminal resources in 1968.[50] The cost to the taxpayer of dealing with these cases in the courts amounted to 133,700,000 dollars.[51] In addition to the cost, the large

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[46]*See* R. KEETON & J. O'CONNELL, AFTER CARS CRASH . . . THE NEED FOR LEGAL AND INSURANCE REFORM 13 (1967) [hereinafter cited as AFTER CARS CRASH]. This book traces the experience of an accident victim through the present system and how that experience would differ under a no-fault system. Because of the admirable simplicty with which the book treats the difficult issues involved, it would serve very well as a primer on the problems in the present system and the basic no-fault plan for even those without legal expertise.

[47]DOT AUTO ACCIDENT LITIGATION STUDY 184.

[48]DOT MOTOR VEHICLE CRASH LOSSES STUDY 58-60.

[49]BASIC PROTECTION 37.

[50]*Id.* at 72. This percentage can be much higher depending on the area. It was estimated in 1966 that automobile liability cases constituted 80% of the litigation in the courts of New York. Keeton & O'Connell, *Basic Protection and the Costs of Traffic Accidents*, 38 N.Y.S.B.J. 255 (1966).

[51]DOT MOTOR VEHICLE CRASH LOSSES STUDY 72.

number of cases aggravates the congestion in the courts and causes unreasonably long delays in many urban centers.[52]

G. *Cost to and Dissatisfaction of the Consumer*

Perhaps the greatest source of public dissatisfaction with the present system is the rapidly climbing cost to the consumer.[53] No doubt much of this increase is due in part to the inflationary trend in general and the large increase in the cost of medical care in particular. Nevertheless, "[a]ny solution to the present insurance problem that does not result in a reduction of cost is doomed."[54]

The dissatisfaction with the present system is further aggravated by the unavailability of insurance for some groups in various areas of the country.[55] Even where insurance is available, the allied problems of increased cancellations and refusals to renew further fan the flames of discontent.[56]

NO-FAULT INSURANCE PLANS

A. *The Basic Protection Plan*

One of the most significant factors in evaluating no-fault insurance is the absence of a single no-fault plan. There are at least twenty proposed plans in addition to the comprehensive plans already adopted in the United States.[57] While some plans completely abolish the tort system for automobile accident compensation,[58] others are designed merely to complement it.[59] Before the decision to support or oppose no-fault can be made it is necessary to determine exactly which plan is being discussed.

Because of the complexity and abundance of plans, there is an

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[52]*Id.* at 70-73.

[53]*The Workshop Sessions: Summary Report*, in CRISIS IN CAR INSURANCE 260-61 (1968). It should be noted that cost, frequency of cancellation, and availiability of insurance are all direct functions of the state systems. National figures in these areas are of little value because of the divergence of experiences among the states.

[54]*Id.* at 261.

[55]*Id.* at 262.

[56]AFTER CARS CRASH 85.

[57]For an excellent discussion of the various plans, see W. ROKES, NO-FAULT INSURANCE 51-96 (1971) [hereinafter cited as ROKES].

[58]See, for example, the proposed New York Plan: State of New York Insurance Department, *A Proposal for a Better System*, 71 COLUM. L. REV. 194, 194-95 (1971).

[59]ROKES 87.

infinite capacity for variation, with each variation having a significant impact on the resulting system. Because of space limitation, it will be impossible to discuss every plan. Instead, this comment will briefly outline the more important provisions of the Basic Protection Plan devised by Robert Keeton and Jeffrey O'Connell[60] and how it proposed to remedy the alleged deficiencies of the present system. This plan is the source of the current controversy over no-fault insurance and epitomizes the comprehensive no-fault plan designed to replace the present tort system within certain limits. The Massachusetts Plan,[61] in recognition of its historic significance, will then be summarily compared with the Basic Protection Plan.

(1) *Coverage of the Basic Protection Plan.* Any person (including the pedestrian) who suffers injury arising out of ownership, maintenance, or use of a motor vehicle is entitled to Basic Protection benefits, though one who intentionally suffers injury is not.[62]

(2) *Partial Replacement of Tort Liability.* Under the Basic Protection Plan, fault need no longer be established in order to recover within the limits of the compulsory coverage of fifteen thousand dollars net economic loss.[63] The sole criterion for recovery is involvement in an automobile accident. This obviates the expensive and time-consuming process of the present system's method of determining fault. Even more significantly, there is a certainty of recovery under the Basic Protection Plan not found in the present system. Everyone except the individual who intentionally inflicts injury upon himself[64] and perhaps the drunken driver[65] are guaranteed recovery for net economic loss up to the limits of the policy.

Actually, the payment of benefits on a basis other than fault is not a novel concept in the automobile insurance field. The proposed system of first party compensation is closely analogous to the medical payments provision present in many current automobile insurance policies.[66] As in the case of medical payments coverage, the insured deals with his own insurance company. The insurance protects the insured

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[60]BASIC PROTECTION, *supra* note 2.

[61]MASS ACT, *supra* note 3.

[62]BASIC PROTECTION §§ 1.3-.8.

[63]*Id.* at § 2.1.

[64]*Id.* at § 1.6.

[65]*See* note 165 and accompanying text *infra.*

[66]Keeton & O'Connell, *Basic Protection Automobile Insurance* in CRISIS IN CAR INSURANCE 49 (1968) [hereinafter cited as Keeton & O'Connell, CRISIS IN CAR INSURANCE].

with a first-person coverage rather than those to whom he may become liable on a third-person basis.[67] This removes the adversary nature of the relationship between the insurance company and the victim as it exists under the present system. Since the company insuring against automobile loss is likely to be also supplying the other insurance needs of the insured, the company is much more amenable to fair treatment of the insured.[68]

(3) *Exemption From Tort Liability.* For those who secure the compulsory first-person insurance under the Basic Protection Plan, a complete exemption from tort liability up to the limits of the policy exists as a necessary corollary.[69] This immunizes the insured from fault liability within the policy coverage. When the damages caused exceed the tort exemption, however, the right of the victim to pursue recovery in a tort action is preserved.[70] The incentive to bring suit after the first-party benefits have been received has been removed except in cases involving substantial claims. If the injured party is awarded a judgment based on fault against the other party, the amount received in first-party benefits is credited against the judgment so that only the amount in excess of first-party coverage is actually awarded to the injured party, and thus double recovery is avoided.[71] The likelihood of recovery of an amount in excess of first-party benefits would have to be fairly substantial to justify the expense and aggravation of bringing suit. Thus the number of suits brought even when serious injury is involved is minimized.[72]

The reason for retention of the tort system in the serious injury case while not in the minor injury case necessitates an explanation. First, the argument for placing the responsibility on the wrongdoer for his actions is more compelling in the serious injury case. Secondly, the amounts involved are more likely to justify the cost of determining fault and the value of the injury. Thirdly, the Basic Protection Plan is a compromise. If it has any hope of universal acceptance, it can not attempt to unseat the deeply ingrained fault concept in the presence of serious injury.

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[67]*Id.* at 49-50.

[68]AFTER CARS CRASH 37.

[69]BASIC PROTECTION § 4.2, at 323.

[70]*Id.* § 4.3, at 324.

[71]*Id.*

[72]Keeton & O'Connell, *Basic Protection—A Proposal For Improving Automobile Claims Systems*, 78 HARV. L. REV. 329, 361 (1964) [hereinafter cited as Keeton & O'Connell, *Proposal for Improvement*].

Fourthly, the fifteen-thousand-dollar first-party benefits are received when the damage is suffered, thus preventing the common occurence under the present system of non-compensatory settlements necessitated by the desparate need for funds. And finally, the fifteen-thousand-dollar tort liability exemption will remove the great majority of the automobile cases from the court docket, thus allowing these large claims to be settled more quickly than under the present system.[73]

(4) *Recovery Limited to Net Economic Loss.* The losses recoverable under the first-person insurance of the Basic Protection Plan are limited mainly to reasonable medical expenses, expenses reasonably incurred for services in lieu of those the injured person would have performed absent the injury, burial expenses, and wage loss.[74] This total is reduced by certain factors to arrive at net economic loss.[75] Losses for which compensation is received from such other sources as Blue Cross/Blue Shield, accident insurance, and sick leave are excluded, thus avoiding double recovery.[76] In addition, the amount receivable for compensating wage loss is reduced by fifteen percent in recognition of the tax savings to the injured person.[77]

Perhaps the most controversial portion of the Basic Protection Plan and most other no-fault plans is the exclusion of pain and suffering as a compensable loss. If pain and suffering caused by an auto injury is not so severe as to cause loss of work or is determined to be less than five thousand dollars, the victim receives no compensation for it under the compulsory Basic Protection Plan.[78] Even if a successful tort action is brought and the jury awards pain and suffering in excess of five thousand dollars, only that excess is paid to the claimant in order to avoid "jack-pot neurosis" suits.[79] If the total amount of pain and suffering including the first five thousand dollars were to be awarded, the incentive for bringing a suit in hopes of exceeding the pain and suffering threshold would be great.[81] The policy of the Basic Protection Plan is

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[73]AFTER CARS CRASH 71-76.

[74]BASIC PROTECTION § 1.9. Burial Expenses are limited to $500. *Id.* at § 1.9(a).

[75]*Id.* at § 1.10.

[76]For a discussion of the reason for avoiding double recovery, see note 150 and accompanying text *infra*.

[77]BASIC PROTECTION § 1.10(d). The insured can have the 15% figure reduced by presenting to the insurer reasonable proof of a lower tax advantage.

[78]*Id.* § 1.9(c).

[79]For an example of how the pain and suffering threshold works in an illustrative case, see AFTER CARS CRASH 61-67.

[80]*Id.* at 64.

not to encourage litigation in this manner. The rationale for omitting pain and suffering will be deferred to a later discussion of the criticism of the no-fault plans.[81] It should be noted, however, that optional coverage for pain and suffering can be secured under the Basic Protection Plan for an additional premium.[82]

(5) *Property Damage.* Originally the Basic Protection Plan compensated only bodily injury claims on a no-fault basis and excluded damage to personal property.[83] The Basic Protection Plan has now been amended to make Vehicle Protection Insurance mandatory.[84] Vehicle Protection Insurance serves as a compulsory substitute for the traditional tort action, allowing the insured to elect one of three options. Listed in decreasing order of expense, the insured can (a) recover from his own insurer damages to the insured car on a no-fault basis; (b) recover damages to the insured car from his own insurer only if the insured had or would have had but for the exemption under the Vehicle Protection provision a valid claim against another identifiable person; or (c) elect a full-deductible option which gives up all claims against others insured under Vehicle Protection and which provides no recovery for the insured, thus making the individual a self-insurer.[85] The role of liability insurance coverage is thus limited to damage to the few cars not covered by the Vehicle Protection provision and damages to property other than cars. This amendment is of great significance since a high percentage of the benefits paid out by auto insurance companies goes to compensate damage to automobiles.[86] Although payment on a first party basis may not lower this percentage, elimination of the necessity of litigating a liability claim in this area should have a significant beneficial effect on administrative expense and the court docket.

(6) *Periodic Reimbursement.* The Basic Protection Plan effectively eliminated the lump-sum payment to which many of the difficulties of the present system have been attributed.[87] In its place, a periodic payment system is established, with payments being made as losses

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[81]See notes 153-156 and accompanying text *infra.*

[82]See note 156 and accompanying text *infra.*

[83]BASIC PROTECTION §§ 1.4, 2.2, 2.3(c).

[84]Keeton & O'Connell, *Alternative Paths Toward Nonfault Automobile Insurance*, 71 COLUM. L. REV. 241, 260-262 (1971) [hereinafter cited as Keeton & O'Connell, *Alternative Paths to No-Fault*].

[85]*Id.* at 261-62.

[86]DOT MOTOR VEHICLE CRASH LOSSES STUDY 4.

[87]See text beginning at note 44 *supra.*

accrue.[88] The injured person need only report his losses to the insurance company, which is then required to pay them within thirty days.[89] As an incentive for prompt payment, the insurance company must pay the costs, attorney's fee, and interest from the due date if the claimant is forced to go to court to recover payments unreasonably withheld.[90]

(7) *Basic Protection is Compulsory.* As a condition to registering a motor vehicle for operation within the state, Basic Protection Insurance must be obtained.[91] Of course, compulsory insurance is hardly a new concept for North Carolina, which was one of the pioneers in adopting such a plan.[92] Encouraged by the cost data from the plans already enacted, the creators of the Basic Protection Plan have suggested that first-party insurance be offered as an alternative to the present insurance rather than that its adoption be compulsory.[93] Allowing the consumer to decide which he prefers is more politically palatable than a complete abrogation of the established system.[94] Upon the assumption that the consumer would choose no-fault, the widespread adoption of no-fault insurance would be expedited.

As protection against the motorists who do not obtain insurance as required, an assigned-claims pool is established.[95] Claims involving uninsured motorist are assigned to the various insurance companies on some predetermined basis as a condition to writing insurance in the state.[96] The cost of this pool is limited by allowing the insurance company to recoup against the uninsured driver at fault, since an operation without Basic Protection Insurance does not have the tort exemption that accompanies it.[97] This effectively and economically closes the gap of protection for injured motorists that exists under the present system in many states.[98]

(8) *Deductible Losses.* Under the Basic Protection Plan, the in-

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[88]BASIC PROTECTION §§ 1.9(d), 3.1, 3.3.

[89]*Id.* at § 3.1(b).

[90]AFTER CARS CRASH 59.

[91]BASIC PROTECTION §§ 5.1-.4.

[92]Prior to the adoption of the no-fault plans in the various states, North Carolina, New York, and Massachusetts were the only states with compulsory auto insurance. CRISIS IN CAR INSURANCE 44.

[93]Keeton & O'Connell, *Alternative Paths to No-Fault* 254-58.

[94]*Id.* at 256.

[95]BASIC PROTECTION §§ 9.1-.8.

[96]*Id.*at § 9.3.

[97]Keeton & O'Connell, *Proposal for Improvement* 377.

[98]*Id.* at 376.

sured bears the first one hundred dollars of his *net loss* of all types or ten percent of *wage loss*, whichever is greater.[99] In cases involving serious injury, the ten-percent wage loss is likely to be greater. This results in complete compensation of medical expenses since they are direct out-of-pocket expenses.[100] The ten-percent wage loss deduction combined with the fifteen-percent tax savings deduction normally results in compensation of seventy-five percent of wage loss.[101] These deductible wage loss provisions are designed to reduce the cost of insurance as well as to prevent malingering and to encourage the injured person to return to work as soon as he is able.[102]

(9) *Optional Modifications.* "The optional deductibles give the vehicle owner an opportunity to choose coverage somewhat more limited in scope than standard coverage, at appropriately reduced premium rates."[103] The insured party can secure three hundred dollars deductible coverage in place of the regular one hundred dollars deductible. This deductible provision applies only to the insured and members of his household, while other passengers and pedestrians who may be involved will receive normal compensation under the Basic Protection Plan.[104] In addition, the insured can choose a thirty-percent deductible wage loss coverage.[105] It should be emphasized, however, that the insured is given the opportunity to decide the extent of the benefits he or someone for whom he is economically responsible will receive.

(10) *Optional Added Protection.* The Basic Protection Plan requires the insurance companies to offer an optional full first-party protection provision for all economic loss at an additional premium.[106] This option is a complete substitution for all tort claims against other Basic Protection insureds.[107] The accident victim can be certain of coverage regardless of the severity of the injury or the extent of the economic

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[99]BASIC PROTECTION § 2.3.

[100]Keeton & O'Connell, *Proposal for Improvement* 368.

[101]For an actual application of these deductible features, see AFTER CARS CRASH 50-51.

[102]Keeton & O'Connell, *Proposal for Improvement* 368.

[103]Keeton & O'Connell, CRISIS IN CAR INSURANCE 59.

[104]BASIC PROTECTION § 2.4(a).

[105]*Id.* at § 2.4(b).

[106]Keeton & O'Connell, *Alternative Paths to No-Fault* 265.

[107]There is a compelling reason for granting tort immunity as a correlative to paying benefits on a first-party basis when the amount involved is within the limits of the compulsory first-party coverage. See notes 69-72 and accompanying text *supra*. This reason is, however, less compelling if optional coverage in excess of the basic first-party benefits is possible. Such difficult questions as the possibility of subrogation and final loss allocation must be closely examined before completely substituting optional benefits for recovery on the basis of tort liability.

losses.[108] The all too frequent occurrence under the present system of the seriously injured receiving only a fraction of his out-of-pocket expenses can be avoided.

Optional pain-and-suffering compensation provisions are also offered under the Basic Protection Plan.[109] The individual is, therefore, able to choose to buy insurance to compensate pain and suffering or to be a self-insurer. If he chooses to buy coverage, he can recover for pain and suffering and be certain of recovery for net economic losses as well.[110] This certainty of recovery is missing under the present system.

(11) *Injuries Involving Non-Residents.* If the auto accident occurs within a state which offers the Basic Protection Plan and a nonresident who has been in the state for a short time is involved, he recovers first-party, no-fault benefits from the assigned-claims pool.[111] On the other hand, if the accident occurs outside the state, those covered under the Basic Protection Plan still receive first-party benefits, but first-party benefits are not extended to others involved.[112] Obviously, the tort exemption of the insured is not applicable against those not insured on a first party basis to whom the insured might become liable for accidents occuring outside the state. The standard liability coverage is still, therefore, a necessary part of the Basic Protection Plan package to protect against this type of occurrence.

(12) *Litigation Procedure.* For claims involving more than the fifteen thousand dollars in first-party benefits, the litigation procedure of the present tort system will be retained. For claims involving disputes within the Basic Protection Plan coverage, jury trial is permitted only if the claim amounts to five thousand dollars or more in order to expedite the trial process.[113] To assure that the benefits get to the injured party, the insurance company pays one-half of the claimant's attorney's fee in all cases involving reasonableness of claims.[114] In order to discoverage frivolous and unfounded claims, the Basic Protection Plan also provides for payment by the claimant of his own litigation and attorney's expenses as well as those of the insurance company if the claim is found to be frivolous.[115]

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[108]Keeton & O'Connell, *Alternative Paths to No-Fault* 265.
[109]BASIC PROTECTION § 2.5.
[110]AFTER CARS CRASH 43-45.
[111]BASIC PROTECTION § 9.4.
[112]*Id.* at § 2.10.
[113]BASIC PROTECTION § 3.10.
[114]*Id.* at § 3.8(c).
[115]*Id.* at §§ 3.8-.9.

(13) *Effect On Automobile Safety.* As previously mentioned, an improvement in the safety of automobiles is essential to decreasing the cost of automobile insurance.[116] There is little incentive for encouraging product safety improvement under the present system, however.[117] Rates are currently structured on the basis of the frequency of accident occurence.[118] Since benefits are paid to third persons, the safety of the insured's automobile in most cases reduces only the benefits to be paid by some other insurer.[119] The likelihood of reducing payments by the competition is hardly a basis for giving the insured who drives a safer car a reduction in insurance premiums.[120] Under the Basic Protection Plan, on the other hand, the insurer knows exactly to whom payment will be made—the insured. The likelihood of serious injury and high recoveries which is directly influenced by the safety of the car in which the insured is riding, can now be considered along with frequency of accident occurrence in rating an insured.[121] The insurer will thus be able to give a reduction in premium for safety features and should encourage the insurance industry to take a more active role in calling for automobile safety as a means of reducing their payout costs.[122] Improved auto safety could also reduce the cost of insurance to the consumer, a subject in which insurance companies are vitally interested. This interest is not entirely altruistic because high premiums are the source of much of the discontent with automobile insurance. The insurance companies fear that this discontent if not assuaged may well lead to nationalization of the auto industry, a concept which is a complete anathema to the industry.[123]

(14) *Attorney's Fees.* Obviously the role of the attorney in claims exceeding the Basic Protection coverage will remain the same. Compen-

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[116]See text accompanying note 36 *supra.*

[117]AFTER CARS CRASH 94.

[118]*Id.* at 86.

[119]The no-fault proponents' claim that safety devices reduce only the payout of the other insurance company is not entirely true. Insofar as safety devices reduce accident occurrence, they reduce the likelihood that the insurer will ever have to pay. Safety devices that prevent or reduce injury of the car occupants also reduce the payout by insurance companies because these occupants recover from the insurance company if the driver negligently causes an accident.

[120]AFTER CARS CRASH 94.

[121]*Id.* at 88.

[122]*Id.* at 94-96. This argument is difficult to follow. If the insurance companies exert pressure for safer automobiles now, the result would be an industry-wide savings in which they all would share.

[123]O'Connell, *The Automobile Insurance Industry and Federal Takeover*, 36 U. CHI. L. REV. 734 (1969).

sation for services rendered will continue to be based on reasonableness. The attorney will also be entitled to a reasonable fee for advising and representing a claimant on claims brought to recover benefits under the first-party coverage.[124] Services required should be less extensive, however, since the necessity of litigating fault and pain and suffering has been removed.[125] Even if no court action for compensation under the coverage proves necessary or is contemplated, the insured may feel more comfortable with an attorney processing the claim if for no other reason than to avoid omission of some compensable item.[126] The role of the attorney will, therefore, be more limited under the Basic Protection Plan than in the negligence system.

B. The Massachusetts Plan

Being the first no-fault plan adopted by any state, the Massachusetts plan must be considered revolutionary.[127] The plan is not, however, recommended as a model for other states, because it is heavily laden with constrictive amendments forced by opponents of its adoption.[128] For example, one of the amendments reduced insurance rates for property damage liability, collision, comprehensive, fire, and theft coverages.[129] None of the above coverages were changed by the bill, and reduced rates for property liability coverage as required by the bill were subsequently declared unconstitutional by the Supreme Judicial Court of Massachusetts.[130]

(1) *Compulsory Automobile Bodily Injury Liability Insurance.* As a prerequisite for car registration, the Massachusetts Act requires each owner to purchase bodily injury liability insurance providing coverage of five thousand dollars per person and ten thousand dollars per accident.[131]

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[124]BASIC PROTECTION 3.8(a).

[125]*Id.* at 438.

[126]AFTER CARS CRASH 57-58.

[127]See note 3 *supra.*

[128]Keeton & O'Connell, *Alternative Paths to No-Fault* 253.

[129]*Id.* at 251.

[130]Aetna Cas. & Sur. Co. v. Commissioner of Ins., ___ Mass. ___, 263 N.E.2d 698 (1970). Statutory rate reductions for the other coverages mentioned in the text were also declared unconstitutional by a single Justice of the Supreme Judicial Court of Massachusetts, and the attorney for the state indicated that the state would not appeal to the full court. Keeton & O'Connell, *Alternative Paths to No-Fault* 251 n.45.

[131]This particular provision was not changed by the MASS. ACT; see MASS. ANN. LAWS ch. 90, § 34A (1967).

(2) *Compulsory No-fault Coverage.* Subject to certain deductible features,[132] personal injury protection insurance paying up to two thousand dollars in first-party benefits is included in every compulsory automobile liability policy.[133] Personal injury protection insurance covers reasonable expenses incurred within two years of the accident for necessary hospital and medical services (unreduced by compensation from other sources). The cost of substitute-service payments is covered as is net loss of wages for the employed or loss of earning power for the unemployed. Compensation for the loss of wages is, however, diminished by benefits from wage continuation plans and is limited to no more than seventy-five percent of the weekly salary of the insured.[134]

(3) *Partial Tort Exemption.* The no-fault personal injury benefits under the Massachusetts Act partially replace any damages that would otherwise be recoverable in tort.[135] Pain and suffering is recoverable only if reasonable and necessary medical and hospital expenses exceed five hundred dollars or if one of several specifically enumerated serious injuries is involved.[136]

(4) *Optional Deduction.* The insured can purchase, at a reduced premium, a deductible provision under which he forgoes first-party benefits for himself and his family to the extent of the amount selected. In addition, this selection precludes the insured from maintaining a tort action for the deductible amount as though he were receiving first party benefits,[137] which in effect makes the insured a self-insurer.

(5) *Other Provisions.* The Massachusetts Act also provides for a merit rating system under which those drivers involved in accidents and violations pay higher rates while those not so involved get a reduction.[138]

Property damage originally was not covered under this Act[139] as in many other acts.

Since the Massachusetts plan was severely compromised in order to make its enactment possible, several provisions are of questionable utility. The tort exemption, for instance, is much too low for Massachu-

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[132]MASS. ANN. LAWS ch. 90, § 34M (Supp. 1971).
[133]*Id.* § 34A.
[134]*Id.*
[135]*Id.* § 34M.
[136]*Id.* ch. 231, § 6D.
[137]*Id.* ch. 90, § 34M.
[138]*Id.* ch. 175, § 113B.
[139]Keeton & O'Connell, *Alternative Paths to No-Fault* 253.

setts to preclude a very large amount of litigation. In addition, allowing pain-and-suffering actions when a five-hundred-dollar threshold is met is an open invitation for padded medical expenses. Nevertheless, the Massachusetts Act is viewed by the proponents of no-fault as a significant step toward widespread adoption of no-fault.[140]

CRITICISM OF THE NO-FAULT CONCEPT

Not everyone views the no-fault concept as a panacea for the problems with the present system. Professor David J. Sargent, who recently made an address to the annual meeting of the North Carolina State Bar,[141] is a typical critic of the no-fault concept. He and other critics denounce what they feel to be numerous fallacies in the various plans. The following is a synopsis of the arguments against the no-fault concept and short rebuttal where appropriate.

A. Morality and Deterrence

The immorality of paying without fault and the adverse effect on deterrence and on the judicial system as a whole is a failing of the first magnitude.[142]

B. Cost

Cost savings, the principle attraction to the no-fault plans, are illusory.[143] Under the old tort liability system, persons who were at fault or who were injured in accidents not involving faulty conduct of third parties were not allowed to recover.[144] These people would be able to recover under a no-fault system, which would increase the number of people entitled to benefits. The result will be either fewer benefits or

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[140]Keeton & O'Connell, *Alternative Paths to No-Fault* 253-54.

[141]Mr. Sargent, a Professor of Law at Suffolk University Law School, has also traveled around the country with the public relations director of the American Trial Lawyers advocating that group's opposition to no-fault insurance. *Resolved, the Keeton-O'Connell Basic Insurance Plan Should Be Enacted By the Arkansas General Assembly*, 22 ARK. L. REV. 574, 600 (1968) (Jeffrey O'Connell and David Sargent debate no-fault) [hereinafter cited as *O'Connell-Sargent Debate*].

[142]See notes 35, 36 and accompanying text *supra*.

[143]Address by David J. Sargent, North Carolina State Bar Thirty-Eighth Annual Meeting, Oct. 22, 1971, at 8 (page cites to the reprint of this speech published by the North Carolina State Bar) [hereinafter cited as Sargent].

[144]The admission by the supporters of the present system that a great number of people are not covered would seem to be strong testimony that the present compensatory system is inadequate.

higher premiums to recompense the insurance companies for what will necessarily be a larger payout.

The proponents of the no-fault concept contend, however, that the cost of insurance need not be raised nor the amount of benefits decreased. The additional funds necessary to provide coverage for people not covered under the old system will come from the large amounts of administrative expenses saved by not paying on a fault basis.[145]

The critics of no-fault foresee higher premium costs under no-fault for an additional reason. As previously noted, tort liability is precluded only when the other driver is also insured under a no-fault policy. Liability insurance, therefore, will also be a necessary supplement to basic no-fault coverage. Several plans do not compensate for property damage to automobiles on a no-fault basis, so collision insurance must also be procurred at an additional premium.[146] Pain and suffering will not be covered, so an additional premium is needed to cover this. The cost of this total package of insurance coverage will surpass the cost of insurance under the present system rather than reduce it.[147]

C. *Extent of Coverage*

Deducting payments from collateral sources such as health and hospitalization insurance and wage continuation plans from the amount of benefits due from first-party accident insurance is inequitable.[148] If someone pays two insurance premiums, he should be able to receive two benefits.

The proponents of no-fault effectively counter this argument by pointing out that having overlapping coverage is not financially wise. Insurance companies have to meet high administrative expenses even without any consideration of profit. The expense of insurance is worthwhile when the driver is being protected from a potentially disastrous out-of-pocket loss but not otherwise. Taking a chance on double payment is "just like gambling in a casino where the house is taking a big cut. Now and then some gambler will strike it lucky and get ahead. But

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[145]AFTER CARS CRASH 83-84; notes 35-37 and accompanying text *supra*.

[146]Property damage was originally excluded from the Basic Protection Plan. In response to the claim that this exclusion is unsupportable in view of the large amount of property damage involved, Keeton and O'Connell have since amended their plan to cover property damage to automobiles on a no-fault basis. See notes 83-86 and accompanying text *supra*.

[147]Sargent 15.

[148]Sargent 8.

if you keep at it for long . . . you're almost sure to be a loser in the long run."[149]

By subtracting collateral source benefits, the cost of auto insurance can thus be reduced. The contention that reducing the cost of auto insurance in this manner discriminates against the responsible individual who protects himself and his family and discriminates against the laborer who has taken part of his pay in the form of collateral coverage[150] is not well founded. Even though the driver who does not have collateral benefits will recover the same amount within the no-fault auto insurance policy limits, those insured who have collateral coverage pay less for their auto insurance. First, they will get a reduced premium when they buy auto insurance if the amount of collateral coverage is significant.[151] In addition, if the injury is sufficiently severe to necessitate expenses in excess of the collateral policy limits, the insured is entitled to the full amount of his collateral benefits plus whatever amount up to the limits of the auto insurance benefits is needed.[152]

D. Pain and Suffering

Since no-fault can reduce premium expense only by deleting some of the coverage provided by the present tort liability system, benefits for pain and suffering caused by auto accidents are limited or completely abrogated.[153] Not to allow a person to recover for a lifetime disfigurement, for example, is heartless and is an unacceptable means of cutting insurance costs.[154]

The proponents of the no-fault concept recognize that there is a limit to what people are willing to pay for insurance. It is, therefore, better to guarantee out-of-pocket expenses incurred in an auto accident, particularly in serious injury cases.[155] If the insured desires pain-and-suffering insurance, it can be purchased at an additional premium.[156] This provides certainty of recovery for out-of-pocket expenses which is absent under the present system and a choice as to pain-and-suffering coverage.

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[149]AFTER CARS CRASH 52.

[150]Sargent 7.

[151]AFTER CARS CRASH 53.

[152]CRISIS IN AUTO INSURANCE 55.

[153]See notes 78-82 and accompanying text *supra*.

[154]Markhoff, *Compensation Without Fault and the Keeton-O'Connell Plan: A Critique*, 43 ST. JOHN'S L. REV. 175, 194 (1968) [hereinafter cited as Markhoff].

[155]AFTER CARS CRASH 44.

[156]*Id.* at 45.

E. *Deductible Provisions*

The numerous deductible provisions[157] of no-fault plans further cut the cost of insurance and negate recovery in all modest claims.[158] In effect, a premium paid for no-fault buys only cheap justice. The same result could be obtained by incorporating these deductibles into liability insurance.[159]

The proponents of no-fault readily agree that deductible provisions are necessary cost concessions, but they emphasize the certainty of recovery in the serious accident cases, in which the economic effect can be devastating.[160]

F. *Driving Record*

No-fault insurance discriminates against the safe driver who has a family and a substantial income and favors the "hot-rodder."[161] The family man is likely to suffer a larger compensable loss because his income and, therefore, his total recovery will be higher. He will, therefore, have to pay more for his insurance under a no-fault system, since no-fault covers on a first-party basis. The "hot-rodder," on the other hand, is less likely to suffer a large loss other than medical expenses. He will, therefore, pay less.

The proponents of the no-fault plan are quick to point out that there is no discrimination at all. First, the cost savings are due to the reduction in administration and legal expenses under a no-fault system.[162] The family man's premium would go down rather than up. In addition, he would be getting a far superior coverage. Under the present system, if the family man and the "hot-rodder" collide, the "hot-rodder" is likely to have little or no insurance. Unless the family man has covered himself, the financial blow could be devastating. Under no-fault the family man would be sure of recovery.

The family man is also, in all probability, the safer driver, so he will be entitled to a merit rate reduction, which would further reduce his insurance premium.[163] The "hot-rodder", on the other hand, is

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[157]See notes 99-102 and accompanying text *supra*.

[158]Markhoff 195.

[159]*O'Connell-Sargent Debate* 589.

[160]See notes 40-45 and accompanying text *supra*.

[161]Sargent on No-Fault 7.

[162]See note 145 *supra*.

[163]See notes 117-121 and accompanying text *supra*.

likely to have a poor driving record. Even though the amount of his loss if involved in an accident is likely to be lower than that of the family man, the likelihood of accident involvement and serious injury is much higher. He will, therefore, be required to pay a higher premium.[164]

G. *Drunk Drivers*

If benefits are paid on a no-fault basis, the wrongdoer will be rewarded because he too can recover. This is particularly true in the case of drunken drivers, who are a major cause of serious accidents in the United States.[165] In fact, paying benefits to these people will encourage drunken driving, a most undesirable result.[166] In addition, compensation for drunken drivers would come from the safe-driving public, since drunken drivers as a class can not be charged a premium sufficiently high to compensate for the injuries they cause.[167]

The proponents of no-fault cite the findings of the Department of Transportation's Study on the lack of effect that potential tort liability has on irresponsible driving behavior.[168] In addition, the drunken driver can be excluded from coverage under the basic plan. The insured can protect himself from injury caused by his own drunken driving only by paying an additional premium. The necessity of the general insurance consumer's financing the drunken driver's recovery, as would be the case without the additional premium, is thus avoided.[169]

H. *Cost of Administration, Court Congestion, Fraud*

Basically, the contentions that no-fault will reduce (1) the cost of administration of the auto insurance system, (2) court congestion, and (3) fraud by the insured are unfounded.

Since more people are eligible for recovery under no-fault, the number of claims will skyrocket as will the administrative expense for processing them. In addition, payments under a no-fault system will be

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[164]AFTER CARS CRASH 119. It should be noted that it is impossible under any system to charge the drivers with bad driving records the actual cost of insuring them. Surcharging drivers with poor records generally has very little effect on the total premiums received because they are few in number when compared with the total number of drivers.

[165]Sargent on No-Fault 9.

[166]*O'Connell-Sargent Debate* 593.

[167]*Id.*

[168]See notes 28-36 and accompanying text *supra*.

[169]Keeton & O'Connell, CRISIS IN CAR INSURANCE 52 n.40.

made periodically rather than in a lump sum, thus greatly increasing the amount of administrative effort required.

Court congestion is a problem in only a few areas, and automobile accident cases are not so significant a contributor to remove this type case from the courts. In fact, court congestion would be aggravated, because the number of cases filed would double.[170] The real answer is an increase in efficiency, an increase in funds allotted to the justice system, and an increase in the number of judges.

The proponents of no-fault argue that increasing the number of judges to a number sufficient to cope with the congestion problem is not economically feasible. Adding new judges necessitates additional courrooms, clerks, bailiffs, and supporting personnel. The total cost for each additional judge has been estimated at 250,000 dollars.[171]

Since the only thing necessary for recovery under no-fault plans is on automobile-related injury, accidents arising from other sources will be claimed as compensable under the automobile policy. The no-fault system promotes fraud rather than remedies it.[172]

I. The Merit of the Present System

There is no need to abandon a system which has proved workable.[173] Instead, such improvements as making auto insurance mandatory and replacing the contributory negligence system in favor of comparative negligence would make the tort system more responsive to our needs.[174] This change, combined with the abolition of such antiquated concepts as governmental and charitable immunity and guest statutes,[175] would make the present system more efficient and equitable than any no-fault system.

The proponents of no-fault respond that even if the above measures were adopted, the difficulty in determining fault, the slowness of payment, and the necessarily pervasive and expensive role the lawyer plays

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[170]Townsend, BASIC INEQUITIES OF THE KEETON-O'CONNELL PLAN, 17 DEFENSE L.J. 133, 144 (1968).

[171]O'Connell, *"Is It Really Immoral to Pay Regardless of Fault?"* 3 TRIAL, No. 6, at 18 (Oct./Nov. 1967). It is not clear whether the figures here quoted represent the annual cost or the initial outlay.

[172]Sargent 15.

[173]Comment, *Reforms for California Automobile Liability Insurance: Recent A.B.A. Proposals and the Keeton-O'Connell Plan*, 1 PAC. L.J. 290, 302 (1970).

[174]TRIAL LAWYER REPORT 7-8.

[175]*Id.* at 8-9.

in the present system would continue, as would the great number of disasterous uncompensated losses.

CONCLUSION: NO-FAULT AND NORTH CAROLINA

There have been numerous complaints about the North Carolina Insurance system, particularly with regard to cancellations and the large number of motorists who can obtain insurance only through assigned risk plans.[176] Yet our automobile insurance system is not on the verge of collapse as in other areas of the country. Indeed, there are some good things to be said about the North Carolina reparation system. North Carolina was one of the first states to require insurance as a prerequisite to registration of autos. This ameliorates to a large extent the uninsured-motorist problem. The congestion in the courts is not such that automobile accident litigation is exceedingly burdensome or delayed. Yet, many of the problems inherrent to a tort liability system remain—uncompensated injuries, slowness in payment, high administrative costs, fraud, and disenchantment with the legal system.

The essential question is, therefore, whether no-fault will be better for North Carolina than the present tort system. To answer this question, it is first necessary to decide upon the criteria by which the two systems should be judged. In deciding on the essential criteria, personal interests must be placed aside. In addition, emotion-evoking arguments which merely cloud the issues should be avoided. For example, it now seems clear that because of the wisespread use of insurance, wrongdoers no longer bear the weight of the loss caused by them in auto accidents. Therefore, the immorality of not forcing a wrongdoer to pay for the damages he causes is not a legitimate argument against a no-fault system.[177] It is also clear that deviant driving behavior is not affected by possible tort liability.[178] An argument that removing tort liability will cause more deviant driving behavior also should not be considered when evaluating a no-fault system. Both of these arguments have great emotional appeal, however, and have often been used.

On the other hand, the amount of benefits received and certainty of recovery are two valid criteria for evaluating an automobile injury compensation system. It is not clear whether the amount of no-fault

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[176]GOVERNOR'S STUDY COMMISSION REPORT 13.

[177]Bombaugh 231.

[178]See notes 28-36 and accompanying text *supra*.

benefits actually paid to an auto-accident victim would be less than that amount to which he would be entitled if he could recover under a tort system. Even assuming that the amount recovered is slightly less, the certainty of recovery and the type of expenses compensated more than offset this reduction. For this reason, no-fault is to be preferred if certainty of payment is used as the criterion.

Whether no-fault can deliver a more extensive coverage at a reasonable price is, in the final analysis, the most crucial question. Unfortunately, this question is not easily answered. First, a preliminary determination of which no-fault plan to use as a pattern must be made. Secondly, the additional coverage necessary to make the plan truly comprehensive must be decided. Only then can the determination of cost to the consumer of the total package be commenced.

The only means for this cost determination short of actual installation of a no-fault system is extensive empirical research.[179] The difficulty of this undertaking is exacerbated by slowness in compilation of insurance data.[180] Current data is essential in order for the study results to have real validity. This difficulty of compilation is further compounded by the nature of the insurance data. Having been compiled by the insurance companies, this data is likely to have a built-in bias.

The technical nature of the subject matter demands a significant amount of expertise. Combining the scope of the undertaking and the expertise required, such a study will necessarily be expensive. The difficulty in obtaining extensive funds from the legislature is obvious.

In any case, prompt state action to remedy the inequities of the present system is essential. On the horizon the ominous cloud of federal intervention grows ever closer.[181] Most agree that systematic and widespread reform of some type by the states is to be preferred to a uniform federal plan because state-by-state reform could more adequately cope with unique local problems. It is questionable, however, whether the special interest groups can be prevented from blocking meaningful legislation at the state level.

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[179]The experiences of other states using no-fault are of limited utility. Most plans are so new that little comprehensive information is available. In addition, data from urban states like Massachusetts holds few answers for a more rural North Carolina.

[180]See note 12 *supra*.

[181]O'Connell, *The Automobile Insurance Industry and Federal Takeover*, 36 U. CHI. L. REV. 734, 740 (1969); Keeton & O'Connell, *Alternative Paths to No-Fault* 263.