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# The Injury Industry - and the Remedy of No-Fault Insurance, by Jeffrey O'Connell

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# BOOK REVIEW

THE INJURY INDUSTRY — AND THE REMEDY OF NO-FAULT INSURANCE. By Jeffrey O'Connell. Chicago: Commerce Clearing House, Inc. 1971. Pp. 268. $8.50.

The name of Jeffrey O'Connell, Professor of Law at the University of Illinois, has gained national prominence. In 1965, Professor O'Connell, in joint venture with Professor Robert Keeton of Harvard, published *Basic Protection for the Traffic Victim*, commonly known as the Keeton-O'Connell no-fault concept for automobile insurance. Since then Professor O'Connell has extensively promoted no-fault insurance as the panacea to cure criticisms of the present insurance system that is based upon the proof-of-fault concept. He even suggests that no-fault, which in effect abandons personal responsibility, should not be restricted to the automobile.

The idea of applying the no-fault principle to automobile accident cases was first proposed in 1919[1] and again more specifically in 1932.[2] However, it was not until the Keeton-O'Connell assault on the proof-of-fault principle that the no-fault concept was given extensive publicity. In the last six years, at least 40 variations of no-fault insurance have been formulated, bills have been introduced in several state legislatures, and a number of states have enacted no-fault legislation.[3]

At first neither the insurance industry, the organized bar nor legislators took seriously the Keeton-O'Connell proposal, but eventually there was an awakening to the potential revolution. First, some of the insurance industry spoke out, although without a consensus, urging the widest possible range of proposals. Some of these proposals went further than Keeton-O'Connell, while others constructively opposed their plan. Belatedly the organized bar also began to express itself.

The fact is that today's no-fault proponents are asking for a return to the English common law of the 17th century, when one causing harm to another was required to pay damages regardless of

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[1] Carman, *Is a Motor Vehicle Compensation Act Advisable?*, 4 MINN. L. REV. 1 (1919).

[2] COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES, REPORT BY THE COMM. TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS 299 (1932).

[3] The Illinois statute has recently been declared unconstitutional. *See* Grace v. Hewlett, 40 U.S.L.W. 1105 (Ill. Cir. Ct. 1971).

fault.[4] Why now a return to this 17th century concept? Professor O'Connell argues that the automobile is the culprit, because its widespread use causes so many accidents and injuries and gives rise to so many claims and lawsuits that numerous court dockets become clogged. Also, O'Connell believes that too much is paid for minor injuries and too little for the serious ones, and that the cost of automobile insurance is too high. Whether or not one agrees that no-fault insurance is a cure-all, there is no question that the Keeton-O'Connell proposal of the mid-60's focused attention upon the need to face up to the "impact" of the automobile in producing death, injury and economic loss.

In legal parlance Professor O'Connell's latest work, *The Injury Industry — and the Remedy of No-Fault Insurance*, serves as the complaint, answer, some evidence and the jury's verdict. No one denies O'Connell's sincere commitment to no-fault insurance legislation, but to a knowledgeable reader his theme is weakened by dogmatic, extravagant, broad-brush accusations against those with a different point of view. One would think that anything wrong with the fault system is due to the venality of claimants, lawyers, the insurance industry or automobile manufacturers.

For example, Daniel P. Moynihan — who wrote the foreword and is quoted several times in the text, presumably with approval — states that the judicial system cannot allocate costs of motor vehicle crashes "efficiently or even, it would appear, fairly."[5] But the fact is the judicial system has been determining costs fairly for many years. In another instance, it is alleged that the allocation of collision costs "has brought on a near breakdown of the judicial system itself [and that the] courts are overwhelmed, swamped, inundated, choked."[6] To the contrary, the judicial system is making substantial improvements, through constitutional amendments, legislation and action by the courts themselves. Granted that an independent judiciary is among the most precious of our institutions, it is not being sacrificed as Moynihan claims. It is viable. Both Moynihan and O'Connell ignore the increase of criminal and divorce cases and

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[4] *See* Weaver v. Ward, 80 Eng. Rep. 284 (K.B. 1617); Dickinson v. Watson, 84 Eng. Rep. 1218 (K.B. 1682). *See also* Ames, *Law and Morals*, 22 HARV. L. REV. 97, 99 (1908); Wigmore *Responsibility for Tortious Acts; Its History — III*, 7 HARV. L. REV. 441, 443 (1894).

[5] Moynihan, *Foreward* to J. O'CONNELL, THE INJURY INDUSTRY — AND THE REMEDY OF NO-FAULT INSURANCE at xi (1971).

[6] *Id.*

the fact that negligence actions account for only a small fraction of the civil cases the court must consider.[7]

At the outset Professor O'Connell blasts the entire insurance system as "cruel, corrupt, self-righteous, dilatory, expensive and wasteful while it grimly goes about the business of failing."[8] Undoubtedly there are isolated examples to support some of these accusations but do we burn down the house to save the baby?

O'Connell constantly refers to the high cost of automobile insurance and contends that the limited no-fault Keeton-O'Connell plan would cost substantially less — if the modest no-fault bill in Massachusetts can result in savings, "the savings from a truly adequate no-fault bill [would] obviously be that much more impressive."[9] It is true that the limited experience in Massachusetts indicates lower insurance costs with the no-fault plan, but this is only part of the story. A recent United Press release from Boston states: "In fact, many drivers are paying more for auto insurance because reductions in bodily injury premiums under the no-fault plan have been more than offset by increased costs for property liability and collision coverage."[10] Moreover, there is still the cost of liability insurance protection from claims or lawsuits against the alleged wrongdoer for damages above the $2,000 no-fault limit in Massachusetts. In Appendix III, O'Connell himself expresses doubt about cost savings.

Some other examples of the author's barbs include: "Lawyers have traditionally been notorious for being dilatory and extravagant operators."[11] And while he suggests a milder course, nevertheless, the author quotes from Shakespeare: " 'The first thing we do, let's kill all the lawyers.' "[12] " 'All this chicanary by lawyers can lead to strong public reaction.' "[13] He justly criticizes ambulance chasing, fee-splitting and abuses of the contingent fee among plaintiffs' lawyers and then asks, "[w]here are the bar associations in the face of all this flaunting of their Canons of Ethics?"[14] The fact that such transgressions are hard to police is no excuse, but it is not fair to say that all bar associations fail to enforce the Canons of Ethics.

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[7] *See* Weston, *What Now? — Defense Counsel Viewpoint*, 34 INS. COUNSEL J. 530 (1967).

[8] J. O'CONNELL, *supra* note 5, at 2.

[9] *Id.* at 120.

[10] The Cleveland Press, Jan. 5, 1972, at F-9, col. 1.

[11] J. O'CONNELL, *supra* note 5, at 7.

[12] *Id.* at 7.

[13] *Id.* at 45.

[14] *Id.* at 63.

Why no word about the responsibility of law schools in the selection and training of students?

As with other advocates of no-fault, O'Connell asserts that any lawyer who questions its being a panacea does so out of self-interest. When the Keeton-O'Connell Plan first argued that the fault concept in automobile insurance creates a socio-economic deficit, this reviewer discussed the issues raised and suggested needed research and possible remedies.[15] It was proposed that, *if in fact* there is an important, unmet socio-economic problem, there should be first party compulsory accident automobile insurance to protect the driver, pedestrian and passenger against net economic loss from medical and hospital bills, lost wages and rehabilitation expenses. However, the claimant should be allowed recovery, upon proof of fault, for damages *not covered* by no-fault insurance. O'Connell is correct in opposing the collateral source rule which permits double recovery for payments from other sources for economic loss.

Concerning the "valuable asset" of traffic claims, the author states that "from the moment the asset is created, a skilled opponent (an insurance adjuster) is trying to take advantage of the owner's ignorance by 'buying' his asset at a fraction of its value."[16] All insurance adjusters? How does such a charge square with the complaint that more is paid for small claims than is justified? Or that many claims are built-up to force nuisance settlements? Will no-fault eliminate built-up economic loss claims?

The automobile manufacturer also does not go unscathed. According to O'Connell, "[j]ust as Detroit has long been notorious for building needlessly unsafe cars, so it has been equally guilty of building needlessly fragile ones."[17] And yet, in another place O'Connell argues that the decline in auto injuries and deaths is due not only to better highways but to engineering advancements now common in automobiles, such as seat belts, collapsible steering columns, and less dangerous windshields and dashboards.[18] As for more rigid licensing of automobile drivers or enforcing greater responsibility for safe driving, the author subscribes to a Department of Transportation study which regards present driver behavior

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[15] Weston, *At Fault or Not At Fault, That is the Question*, 32 INS. COUNSEL J. 264 (1965); Weston, *Defense Costs, Where Angels Fear to Tread*, 34 INS. COUNSEL J. 244 (1967).

[16] O'CONNELL, *supra* note 5, at 67.

[17] *Id.* at 109.

[18] *Id.* at 127.

as normal, indeed inevitable, and places it last in priority for traffic safety!

On the one hand, O'Connell urges a $10,000 limited no-fault plan, with the right of the seriously injured to sue under the fault principle for economic loss and "psychic" damage, which is not covered by no-fault insurance, but then states: "Why do we need to duplicate the no-fault insurance with liability insurance based on fault?"[19] He adds, "[w]ho benefits from all those suits over who was at fault except lawyers and insurance companies?"[20] Where, in fact, does the author stand?

O'Connell disputes the position that it is immoral for the wrongdoer to be reimbursed, arguing "that every form of insurance *except* liability insurance pays wrongdoers . . . ,"[21] giving as examples life, accident, health, fire, medical, collision and social insurance. Is one who dies, becomes ill, whose house is burned or whose car is stolen a wrongdoer? Is one who has an accident or collects collision coverage necessarily at fault?

O'Connell also criticizes trial lawyers who argue that it is wrong for no-fault to pay the drunk driver and allow him freedom from liability. Then, the author comments that "[i]t is time the problems of dealing with the drinking driver were discussed without fatuous fulminations commonly dominating such discussions."[22] He excuses the problem and social drinker on sociological grounds. "We are a society whose mores, like it or not, call for drinking and driving."[23] Will no-fault alter these mores? Should the problem drinker be entitled to drive? Ownership of guns is permitted but there is no right to use them to kill. If reimbursement to the alcoholic under no-fault is humane, is it not equally humane to prevent him from driving to avoid injury to others? Why the crying towel for the drinking driver as to automobile accidents? Neither fault nor no-fault will cure him. From the standpoint of responsibility for one's acts, what is the difference between the drunk driver who causes injury and death and the driver who is just plain reckless?

As the book progresses, the author's accusations are undiminished. In his last chapter the author draws a strained analogy between Detroit and the Pentagon:

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[19] *Id.* at 113.
[20] *Id.*
[21] *Id.* at 130.
[22] *Id.* at 132.
[23] *Id.* at 133.

> What with the pervasive presence and effects of the automobile and the dominant place it has in our society in so many ways — economically, culturally, socially, atmospherically, legally — General Eisenhower might just as reasonably have warned us of the insidious and invidious effects of the automobile-industrial-complex as of the military-industrial-complex.[24]

And after sweeping statements about lawyers and insurance personnel, the author concedes, in the Epilogue, that "[w]e certainly are not dealing, in the case of the defenders of the present system, with evil men," but two sentences later refers to "the extent of corruption in the present system."[25]

Professor O'Connell asserts that in auto insurance, the large losses are not covered.[26] No doubt too much is paid for minor claims, but there can be honest debate as to whether most serious losses are not well compensated by the party at fault. In any case, he recognizes that the seriously injured can recover only under the fault system, the system which he criticizes so vehemently. If it is so bad, why then such willingness to use it for recovery in serious cases against the wrongdoer? The only other recourse apparently would be for the car driver to buy sufficient first party coverage over and above statutory limitations, at an unknown cost.

It is not clear from the text whether O'Connell favors only a high limit no-fault (up to $10,000), without any recovery for pain and suffering, or whether he believes there should be a right to sue under the fault principle for economic loss and pain and suffering that no-fault does not cover. Appendices I, II and III give a better insight into his thinking, although even then his position is ambivalent.

In Appendix I, Vehicle Protection Insurance is recommended on an optional basis to cover property damage. It provides three options: no-fault protection for the insured's own car damage; protection for car damage only if the owner has a good fault claim against another; or "dispensing with all claims for damage to one's own car while remaining free of liability for damage he might negligently cause to cars of others."[27] None of these options include fire, theft or windstorm damage.

Appendix II suggests an optional voluntary plan that gives the individual the freedom to choose the kind of insurance he prefers.[28]

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[24] *Id.* at 151.

[25] *Id.* at 155.

[26] *Id.* at 5.

[27] *Id.* at 159.

[28] *Id.* at 163.

O'Connell mentions surveys indicating "that a significant number [of people] are apparently willing to live with the present fault system,"[29] and indeed it is heartening to find a concession to "the freedom and flexibility permitted by practical, competitive experimentation."[30] But the options in the overall plan are so varied that one wonders how the resulting complexities of coverage can be administered effectively, especially in view of the recognized statutory dissimilarities that would exist in various states. If the present system is complex, as the author maintains, no reader can fail to be lost in the complexities of Appendix II. If no-fault is the answer for small claims — and it may have to be — why not require limited compulsory no-fault ($2,000 to $5,000) and then third party liability coverage and uninsured motorist protection under financial responsibility laws, with the voluntary option to buy collision and comprehensive coverage?

Would the Keeton-O'Connell plans cost less? Evidentiary proof is lacking. To the cost of no-fault insurance must be added the cost of third party coverage plus property damage, collision and comprehensive, which is about twice as much as the bodily injury liability alone. More and more questions are being raised.[31]

Finally, Appendix III. Here the author concedes that no-fault coverage without limit is socially desirable, but he points out that this presents a "cost-equity dilemma" and returns, therefore, to the Basic Protection Plan, reserving tort action for severe cases. Appendix III indicates doubts in Professor O'Connell's mind as to just what he favors. He does say that the solution to the cost-equity dilemma is:

> (1) to provide by compulsory insurance a basic level of no-fault insurance for out-of-pocket losses of all victims, (2) to offer optional no-fault coverage for additional out-of-pocket losses without limit and (3) to provide that tort actions will be preserved for losses above the limit of the compulsory coverage, unless the victim has elected to carry the unlimited no-fault coverage that would correspondingly preclude his tort claim in full.[32]

But whether the foregoing is in fact what Professor O'Connell is recommending, this reviewer cannot answer. And in the last paragraph still another concept is suggested: the inclusion of "a basic amount of liability insurance in the compulsory package [of] at

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[29] *Id.*

[30] *Id.*

[31] *See, e.g.*, Barron's, Jan. 17, 1972, at 7, col. 1.

[32] *Id.* at 173.

least $10,000."[33] This leaves unanswered the question of what the car owner does for protection against suits for damages that exceed $10,000, other than carry third party liability coverage, not to mention property and comprehensive protection as to his car.

Everyone should acknowledge the need for some changes in answering the personal injury and property damage issues arising from the use of the automobile. Professor O'Connell forces us not to play ostrich by raising important questions. The problems are indeed complex, but O'Connell seems to further complicate this complexity. One feels that Messrs. Keeton and O'Connell would accept the general objective of serving the best interests of the public, but unfortunately, no method has been devised to bring together representatives of the public, proponents of no-fault, the judiciary, the legal profession and insurance companies for a dispassionate, constructive dialogue to design an acceptable solution. There is the danger of hopes becoming a mirage. In any case, the jury is still out, and the courts and legislatures will be the final arbiters.

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[33] *Id.* at 175.

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