

A Choice of Choice: Adding Postaccident Choice to the Menu of No-Fault Models†

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INTRODUCTION

In the face of steeply rising automobile insurance premiums, many people in North America are taking another look at no-fault insurance. In the past, evidence that no-fault outperforms tort in terms of the number of automobile accident victims compensated and the speed and economy at which this is achieved, has had a modest political impact at best. But the promise of low premiums may, in the current environment, be succeeding where other arguments have failed.¹

But no-fault is not a uniform concept. A no-fault plan can take various forms.² Indeed, new ideas are continually emerging.³ Nevertheless, schemes which have the best chance of acceptance by North

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1. Although this paper mainly concerns containing premiums, it should not be forgotten that the case for no-fault is rooted most strongly in its humanitarian advantages discussed in a multitude of articles and books. *See, e.g.*, T. ISON, *THE FORENSIC LOTTERY* (1967); J. O'CONNELL, *THE INJURY INDUSTRY* (1971). While compensation in individual cases is usually lower in no-fault than in successful tort claims, no-fault recovery is more likely. Still, no-fault plans can vary in terms of benefit levels depending on premium levels. Higher premiums are the cost of higher benefits, lower benefits are the cost of lower premiums.

2. *See* J. O'CONNELL & R. HENDERSON, *TORT LAW, NO-FAULT AND BEYOND* 178-84 (1975).

3. *See, e.g.*, Cooter & Sugarman, *A Regulated Market in Unmatured Tort Claims: Tort Reform by Contract* in *NEW DIRECTIONS IN LIABILITY LAW* 174 (W. Olson ed. 1988).

American legislatures⁴ have one thing in common. They retain some tort law which seems to represent a powerful symbol⁵ of individual responsibility, even retribution. This is true despite the widespread existence of liability insurance which has severely reduced the extent to which these values are actually implemented.

To date, two basic models have been developed for integrating tort and no-fault. One combines both so that at least some accident victims have access to tort *and* no-fault remedies. The other gives a buyer of insurance, at the time of purchase, a choice of tort *or* no-fault as the means of determining her compensation entitlement should she become an accident victim.

In this article I propose a third model: a scheme which allows an accident victim to choose between tort and no-fault *after* the accident has occurred. I present this not as a superior model, but as an additional item to the menu from which reform minded legislatures may select. Each of these three basic models can reduce and stabilize costs. However, each has features which may appeal more or less to different policy makers. These features relate to the residual role of tort law. One of the truths about automobile accident compensation policy is that it is nothing if not a matter of values.⁶ Different values may be given different emphasis in different jurisdictions. This does not mean that all jurisdictions cannot have no-fault laws that achieve the basic goals of wider adequate compensation and lower premiums than delivered under a system based primarily on tort.

OPTION I: COMBINATION TORT-NO-FAULT

Until recently, no-fault plans have coexisted with tort in one of two ways: (1) the "add-on" method; or (2) by the "modification" of tort law. Add-on no-fault provides first party benefits without affecting tort rights, except for the fact that no-fault benefits cannot be duplicated by tort recovery and tort damages are reduced accordingly.⁷ Modified schemes confine lawsuits to cases involving the more

4. The only exception is in Quebec where a "pure" no-fault scheme has been implemented. See C. BROWN, *NO-FAULT AUTOMOBILE INSURANCE IN CANADA* 32 (1988).

5. See C. OSBORNE, *REPORT OF INQUIRY INTO MOTOR VEHICLE ACCIDENT COMPENSATION IN ONTARIO* 548-49 (1988). My appreciation of the functional value of symbolism in legal institutions including tort law is attributable to the seminal work on the subject by Thurman Arnold, *The Symbols of Government*. T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935).

6. In his report, Judge Osborne stated: "[I]n the final analysis value judgments have to be made. They have been, and they are mine." C. OSBORNE, *supra* note 5, at 506.

7. Add-on plans are in place in Delaware, Maryland, Oregon, Pennsylvania, Arkansas, Texas, South Carolina, and Washington in the United States. See U.S. DEP'T OF TRANSPORTATION, *COMPENSATING AUTO ACCIDENT VICTIMS: A FOLLOW-UP REPORT ON NO-FAULT AUTO INSURANCE EXPERIENCES* 41 (1985). All Canadian jurisdictions,

seriously injured who are identified by the amount of medical expenses paid or by reference to a verbal formula such as "serious impairment or permanent disfigurement."⁸

Studies suggest that an improperly designed combination tort-no-fault plan may be more expensive than pure tort.⁹ Obviously, to achieve savings under any type of plan, there must be a reduction in current tort costs. The usual targets for achieving this reduction are litigation expenses and payments for pain and suffering, especially in minor cases. Add-on plans save nothing in pain and suffering payments and very little in transaction costs because all victims are entitled to pursue at least some tort damages. Even if the no-fault benefits are generous, and the offset against damages therefore significant, pain and suffering damages are still available. Some modified plans fail to foreclose enough claims for pain and suffering to achieve sufficient savings. Those that do achieve savings overall are said to be "in balance" in that there is a sufficient reduction in tort related expenses to cover the cost of the no-fault benefits provided. Another factor in these combination plans is that no-fault benefits provide a measure of financial security so that recipients can afford to pursue litigation for pain and suffering which they might otherwise have been forced to abandon or compromise. This tends to increase costs.¹⁰

A tightly worded and administered threshold can overcome this problem.¹¹ Moreover, there are valid reasons for distinguishing between, say, permanent and nonpermanent injuries in defining eligi-

other than Quebec, also have add-on schemes. *See* C. BROWN, *supra* note 4, at ch. 1. The Ontario government has announced its intention to introduce a threshold scheme in the near future.

8. Modified schemes exist in Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Dakota, Puerto Rico, and Utah. *See* U.S. DEP'T OF TRANSPORTATION, *supra* note 7, at 23.

9. *See, e.g.*, U.S. DEP'T OF TRANSPORTATION, *supra* note 7, at 86-87.

10. *See* O'Connell & Guinivan, *An Irrational Combination: The Relative Expansion of Liability Insurance and the Contraction of Loss Insurance*, 49 OHIO ST. L.J. 757 (1988); *see also* O'Connell & Joost, *Giving Motorists a Choice Between Fault and No-Fault Insurance*, 72 VA. L. REV. 61, 71 (1986). This point is directed solely to the question of cost. If there is a valid case for allowing relatively minor noneconomic claims, and if this case overrides the case for wider recovery for economic loss, then removing unfair financial pressure to settle might be a good thing.

11. The Michigan, Florida, and New York thresholds have been the most successful in achieving balance, but even these have been subject to wider than expected interpretation. *See, e.g.* C. OSBORNE, *supra* note 5, at 472-81 (concerning Michigan). A related problem is whether the test is one for the jury or the judge, the concern being that a jury is more likely to allow a tort suit.

bility for pain and suffering damages.¹² Yet, some consider any threshold to be an arbitrary denial of some victims' access to tort law.¹³ To them the value of the opportunity to sue outweighs the value of wider eligibility for compensation.

OPTION II: A CHOICE BETWEEN TORT AND NO-FAULT

Recently, the no-fault debate has entered a new dimension. Professor O'Connell and Robert Joost have devised an ingenious means of providing no-fault insurance while preserving the symbols of tort law in a way which would achieve overall cost savings.¹⁴ They propose giving insureds, at the time they purchase coverage, a choice between a no-fault policy and a tort policy. Those choosing no-fault would opt out of tort entirely¹⁵ and would pay significantly less for their coverage as a result.¹⁶ In the event of an accident, a person having made that choice would receive no-fault benefits, but would not be able to sue a wrongdoer even for pain and suffering damages. Neither could she be sued, if she happened to injure another person. Someone opting for tort would have her entitlement to damages determined according to the rules of tort. That is, if she was at fault, she would have no entitlement to compensation; if she had been injured by someone else's negligence, there would be an entitlement to damages measured according to tort rules.¹⁷ Where an accident involved one person who was a tort chooser, and another who was a no-fault chooser and the no-fault chooser was at fault, the tort chooser would have to turn to her own insurer for her tort compensation. This would operate in much the same way as uninsured motorist coverage operates today.¹⁸

12. Provided the no-fault scheme delivers relatively generous benefits for medical and rehabilitation expenses, including coverage for such items as house and car renovations, occupational retraining, and recreational therapy, the need for pain and suffering damages decreases, especially for claimants whose recovery is sufficient to allow them to resume a normal lifestyle.

13. See, e.g., C. OSBORNE, *supra* note 5, at 567.

14. See *supra* note 10.

15. Note that even those opting out of tort "entirely" may be subject to claims which might be brought against them arising from accidents out of the jurisdiction or (perhaps) by pedestrians who have no auto insurance themselves.

16. Depending on the level of benefits provided in the no-fault package, the price differential is likely to be significant. An actuary's report on a recent proposal by the Ontario Insurance Industry for a choice model predicted savings of about 25%. Insurance Bureau of Canada Choice Proposal (Dec. 13, 1988) [hereinafter Choice Proposal] (on file with the author). The plan called for generous benefits. See *infra* notes 43-49 and accompanying text.

17. Since this preference entails litigation expenses and an entitlement to pain and suffering damages, the premium will be higher. See *supra* note 16.

18. The Ontario proposal was that *all* claims under tort policies be referred to claimants' own insurers. Thus the whole scheme would be first party but tort-choosers would be entitled to tort-style damages, if they could prove fault on the part of a third party. See Choice Proposal, *supra* note 16.

The beauty of this scheme is that it responds both to the urge for security represented by no-fault and to the urge for symbolic accountability represented by tort law. It also incorporates another powerful symbol, freedom of choice. However, it also demonstrates clearly the economies of no-fault. Those who are not prepared to forgo the psychological or other attractions of tort do not have to do so, but they must pay the additional costs attendant upon that system—chiefly the costs associated with quantum of damages and proving fault.

This brilliant concept can work.¹⁹ Nonetheless, some may hesitate to embrace it. Perhaps the principal concern is that many consumers will not be fully informed when they make their choices. The details and implications of tort law and no-fault schemes are complex, and it may be that some consumers may not fully understand the options they have. A related question concerns brokers' liability. A claimant, who in retrospect feels disadvantaged by her choice, may seek to blame her broker for failing to explain the choice fully. While brokers can be given reasonable protection if they use approved forms and descriptive material, this does not necessarily improve the ability of consumers to understand the scheme. It may be thought that the choice appropriately should not be made until injury has actually occurred. Another concern might relate to the fact that, in some circumstances, insureds will have the choice made for them by others. Depending on the structure of the scheme, this could happen to passengers of vehicles owned by other people, or to members of a family in which the head of the household owns and insures the single family vehicle.²⁰ There may also be philosophical objections to a scheme which allows different motorists to operate under different liability rules in the same jurisdiction,²¹ or one that in effect enables some people to buy immunity from suit. But this same objection should logically apply to all liability insurance, and seems not to have been raised in that context recently.²²

19. Recently a consumer group in the United States has initiated "Project New Start" which promotes the concept of "The Personal Protection Policy," a variant of the O'Connell-Joost choice proposal. Consumer Insurance Project, News Release (Feb. 24, 1989).

20. Of course, under any scheme, including tort, some people have choices effectively made for them by others. In the case of an injured child, for example, decisions about settlement are made by parents. Even adult claimants often have options foreclosed by the defendants' choices about the level of liability insurance they carry.

21. Carr, *Giving Motorists a Choice Between Fault and No-Fault Insurance: An Economic Critique*, 26 SAN DIEGO L. REV. 1087 (1989).

22. For a description of early objections to liability insurance along these lines, see

A THIRD OPTION: POSTACCIDENT CHOICE

If any of these concerns seriously troubles a legislature, there is another way in which the benefits of no-fault and the attractions of tort may be joined while preserving freedom of choice. The choice could be permitted *after* an accident. Every insured would have the same kind of policy providing (a) no-fault benefits conditional upon the insured's agreeing not to sue a third party in tort and (b) liability insurance covering the possibility that the insured will be sued by another person who had elected not to pursue a no-fault remedy. Thus, after an accident, a victim (any person seeking compensation) could choose the tort remedy *or* no-fault, but not a combination of both.²³ Concerns about immunity, choosing for others, and, most importantly, the problem of informed choice at the time of insurance purchase would be met.²⁴ Moreover, since every motorist would continue to be subject to possible tort sanctions (since no one would know when she was going to be sued), whatever deterrent effect tort achieves would be preserved.²⁵ The security and certainty provided by no-fault payments would be available to all. The right to sue would be available to all. But, unlike threshold plans, the security provided by no-fault could not be used to finance the pursuit of tort claims.

Gardner, *Insurance Against Tort Liability*, 15 LAW & CONTEMP. PROBS. 455, 462 (1950). There are related pricing concerns. How, for example, should the scheme deal with motorcycles and heavy commercial vehicles? The former group are a high risk category for no-fault and low for tort. For the latter group, the reverse applies. If all trucks were covered by no-fault—and immune from suit—this, it is argued, would drive up the cost of tort-choosers' policies. In other words, tort premiums could subsidize no-fault policyholders. If this is indeed a problem (and at present it is merely theoretical)—it can be addressed in one of two ways. The high risk categories mentioned are either excluded from the no-fault option (as motorcycles are in Michigan) or subrogation is allowed where, for example, a motorcyclist is injured or a claimant's injuries are caused by a truck. Cf. C. OSBORNE, *supra* note 5, at 590.

23. Professor O'Connell has designed a proposal broadly along these lines for high school athletic injuries. See O'Connell, *A "Neo No-Fault" Contract in Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers*, 73 CALIF. L. REV. 898, 914 (1985). Postaccident choice also exists in the Swedish medical accident compensation scheme. See Brahms, *The Swedish "No-Fault" Compensation System for Medical Injuries*, 138 NEW L.J. 14, 31 (1988); Cohen & Korper, *Medical Malpractice in Sweden*, 21 TRIAL 52 (1985); Hellner, *Compensation for Personal Injury: The Swedish Alternative*, 34 AM. J. COMP. L. 613 (1986); Oldertz, *The Swedish No-Fault Patient Program: Provisions and Preliminary Findings*, 637 INS. L.J. 70 (1976). Concerns about immunity, choosing for others, and, most importantly, the problem of informed choice at the time of insurance purchase would be met.

24. See *infra* note 42.

25. Curtailment of tort rights for personal injury claims arising from auto accidents seems to have little adverse effect on accident rates. See U.S. DEP'T OF TRANSPORTATION, *supra* note 7, at 141-43. One of the most significant deterrent factors in any type of insurance scheme is its pricing mechanism. See Trebilcock, *Incentive Issues in The Design of "No-Fault" Compensation Systems*, 39 U. TORONTO L.J. 19 (1989). However, a no-fault scheme can have classified (including experience) ratings. See Brown, *Deterrence and Accident Compensation Schemes*, 17 U.W. ONT. L. REV. 111 (1979).

But would this work? Would it be cheaper than a tort-dominated regime? A reader's initial reaction might be that adverse selection would result in increased costs. I believe that, if the plan is properly structured to include significant incentives even for victims with good tort claims to choose the no-fault remedy, this will not occur. After his inquiry relating to no-fault in Ontario, Judge Osborne thought a system providing both generous no-fault benefits for all *and* a further right for all to sue in tort for additional damages could be implemented without adding to costs, if certain tort reforms were implemented.²⁶ That suggests that this plan, which would let a victim have one but not both of these features, would be cost effective, especially if some refinements could be made to tort. Even if the Osborne view cannot be sustained,²⁷ there are other reasons for predicting that this plan would save money compared to a system based chiefly on tort if relatively minor tort cases could be eliminated. Assume the no-fault package was sufficiently generous to provide for most of the economic losses suffered by most accident victims. People with significant economic losses could be expected to prefer the certainty and speed of the no-fault remedy over the expense and delays of tort, even though potential tort damages, especially with noneconomic loss included, could be greater.²⁸ This result would be even more likely should tort be reformed so that damages would be reduced. A reduction in tort damages could be achieved, for example, by avoiding duplication of collateral sources, making structured settlements mandatory, and limiting awards for pain and suffering.²⁹ The class

26. C. OSBORNE, *supra* note 5, at 568.

27. One reason to doubt the viability of the proposal is his assertion that "the no-fault benefit plan I have proposed should work to limit the number of cases entering [the tort system] . . . in that the increased benefits will make it less likely an injured person will feel required to sue to secure compensation." *Id.* at 587. This ignores the phenomenon, observed in the United States, of no-fault benefits serving to finance tort claims for additional damages—especially for pain and suffering. *See supra* note 10 and accompanying text.

28. This hypothesis seems to be borne out by the experience under an O'Connell-inspired, postaccident choice proposal dealing with high school athletic injuries. *See generally* O'Connell, *supra* note 23. O'Connell has written, referring both to the athletic injury plan and the experience of jurisdictions that allow injured workers to choose either tort damages or workers' compensation, that "claimants who have suffered serious injury are likely to become risk averse even if they have an arguably valid tort claim given a choice between certain, if limited, benefits and the gamble of a lawsuit." *Id.* at 911.

29. *See* U.S. DEP'T OF JUSTICE, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY (1986). Similar measures have been recommended in Ontario. *See* C. OSBORNE, *supra* note 5, ch. 10. It might also be possible to restrict tort claims to those who can prove fault according to a tighter standard of care

of claimants most likely to opt for tort would be those who suffer no significant economic loss or suffer losses which are compensated from other sources, and whose tort claims consist mainly of noneconomic loss. If some method could be found to eliminate the bulk of these cases for noneconomic loss, there should be sufficient savings to fund the no-fault cover and still reduce overall costs.

According to the claims survey commissioned by Judge Osborne, more than ninety percent of the claims in tort in automobile cases in Ontario achieve awards or settlements of \$20,000 (1983 dollars) or less.³⁰ Further, awards of \$20,000 or less account for approximately seventy percent of all money paid out under the tort system.³¹ From other figures given in the Osborne report, it can be estimated that, of this money paid out in amounts of \$20,000 or less, more than sixty percent represents noneconomic loss.³² That means that at least forty percent³³ of all money being paid out to tort claimants is paying for noneconomic loss in relatively minor cases. Figures like this enabled insurance industry actuaries in Ontario to predict that a threshold no-fault scheme (precluding suits for noneconomic loss unless a threshold of serious and permanent injury was met) would effect savings of twenty percent compared to a tort system with modest add-

(for example, "gross negligence") or according to a higher standard of proof or both. This would restrict the symbolic value of tort cases to truly egregious conduct and exclude mere inadvertence. See Johnston, *Punitive Liability: A New Paradigm of Efficiency in Tort Law*, 87 COLUM. L. REV. 1385 (1987).

30. C. OSBORNE, *supra* note 5, at 576.

31. *Id.*

32. *Id.* at 260, 359. One table shows that of the money paid in settlements and judgments in amounts of \$10,000 or under in 1986, 70.5% represented payments for nonpecuniary damages. A second table puts the figure at 47.2% for settlements and judgments between \$10,000 and \$75,000. Given the pattern that, the lower the total the higher the proportion for nonpecuniary damages, it can be conservatively estimated that in the zero to \$20,000 range of settlements and judgments, the figure is closer to 70% than 47%, that is, something over 60%.

33. $60\% \times 70\% \times \text{total payments} = 42\% \times \text{total payments}$

Another table presented by C. OSBORNE, *supra* note 5, at 258, shows that 45% of the total of *all* settlements and judgments is attributable to nonpecuniary loss.

In Ontario, there is little need to worry about the upper end of the scale of nonpecuniary loss awards because a judicially imposed cap on nonpecuniary damages has been applied since *Andrews v. Grand & Toy Alberta Ltd.*, 2 S.C.R. 229 (1978) and two other seminal cases were decided by the Supreme Court of Canada in 1978. In the United States, on the other hand, the large size of the relatively few payments made for noneconomic loss in excess of \$100,000 has caused a major problem and caps have been imposed or proposed in several jurisdictions (although some courts have held such caps to be unconstitutional). See U.S. DEP'T OF JUSTICE, TORT POLICY WORK GROUP, UPDATE ON THE LIABILITY CRISIS 78 (1987). Nonetheless, there is in the United States, as in Ontario, potential for great savings in the elimination of claims at the lower end. See J. O'CONNELL & R. HENDERSON, *supra* note 2, at 100. Note that other features of the Ontario system affect a comparison with United States jurisdictions. These include the existence of state administered universal health insurance, restrictions on contingency fees, imposition of some legal costs on the losing party in a lawsuit, and fewer awards in punitive damage.

on benefits.³⁴ If these figures are valid for a combination scheme in which claimants get both no-fault benefits and tort rights in serious cases, at least similar savings should be achieved where claimants can pursue only one of these remedies.

As with threshold schemes, some may question whether elimination of claims of this type and amount is appropriate. I believe it is. When there is increasing public demand to reduce the cost of auto insurance, it is appropriate to look to the various components of auto insurance coverage and curtail those which, relative to the others, are least important. If we can offer a scheme that provides for virtually all economic losses, retains for those who want it the right to sue with respect to serious injury, and still achieves considerable cost reductions, the elimination of claims for relatively minor noneconomic loss is justified.

Another question is: How can these claims be eliminated in practical terms? As I see it, there are three broad options. The first is a verbal threshold similar to that used in modified no-fault plans such as Michigan's.³⁵ Although anyone could choose to sue in tort (and forgo no-fault benefits), her tort claim could not include any amount for noneconomic loss unless she could demonstrate that she had, for example, suffered serious impairment of a body function or serious permanent disfigurement.³⁶ A second method is a deductible which would be applied to any part of a tort judgment representing noneconomic loss. For example, a deductible of \$20,000 would mean that where an award is made for noneconomic loss for \$50,000, the victim would receive only \$30,000. A third method is a dollar threshold. A victim who chose to sue in tort would have to demonstrate that her damages for noneconomic loss, measured in the normal way, exceeded the threshold. If the damages in that category exceeded the threshold, she would receive them all. If they did not, she would receive none.

However, the dollar threshold could be too easily undermined. There might be a temptation on the part of courts to make sure awards met the required amount, especially where they are within \$200 or \$300 anyway. The deductible method avoids this although it

34. Submission by Insurance Bureau of Canada to Hon. Justice C.A. Osborne, Inquiry into Motor Vehicle Accident Compensation in Ontario 39 (1987) [hereinafter Submission by I.B.C.].

35. The threshold is "[d]eath, serious impairment of a body function, or permanent serious disfigurement." See U.S. DEP'T OF TRANSPORTATION, *supra* note 7, at 34.

36. The threshold could be tighter than this and allow only the *permanently* as well as seriously injured to sue. See Submission by I.B.C., *supra* note 34, at 15.

may be considered unfair to those with genuinely serious injuries. After all, it would operate across the board and would be subtracted from even a \$200,000 award for noneconomic loss. The United States experience with verbal thresholds in modified no-fault schemes has been mixed.³⁷ Some have been unexpectedly widely interpreted, especially where juries are involved, so that cost assumptions have been undermined.³⁸ It is possible to guard against this, but thresholds that are too strict attract the criticism that too many appropriate cases are excluded.³⁹

I propose a combination of the dollar threshold and a deductible. It would work in this way. Any claim for tort which resulted in an award for nonpecuniary loss of \$40,000 or less, for example, would be subject to a deductible of \$20,000. Thus the deductible only works at the lower end and does not penalize the genuinely seriously injured. With the threshold for operation of the deductible at \$40,000, manipulations of awards to satisfy it will not seriously undermine the costing of the scheme which is based on the elimination of awards in the \$20,000 range.

Safeguards would have to be built into a postaccident choice plan to address the fact that, in making the choice, victims will often be guided by advice, either from lawyers or insurers or both. Both have financial incentives to encourage victims to choose tort. While both insurers and lawyers would be bound by duties of care and utmost good faith with respect to claimants,⁴⁰ there should also be legislation requiring certain information, such as the projected time and costs involved in pursuing a tort action, be given to the victim in approved form before the choice is considered binding.⁴¹

Unlike the O'Connell-Joost plan, this scheme does not give full credit to those people who are inclined to elect no-fault for the savings that exercise of their preference would bring. This is because they continue to carry liability insurance. Remember that although their general inclination might be to choose no-fault, circumstances may arise where, after all, they wish to pursue actions in tort. This scheme gives them that continued right in return for the additional premium.⁴² This is the key difference between the two choice op-

37. See *supra* note 9 and accompanying text.

38. See Ransom & Sinas, *The Evolving No-Fault Tort Threshold*, 65 MICH. BUS. J. 528 (1986).

39. See, e.g., C. OSBORNE, *supra* note 5, at 567.

40. See, e.g., *Crisci v. Security Ins. Co.*, 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).

41. Official approval of auto insurance forms is common. See, e.g., Insurance Act, ONT. REV. STAT. ch. 218, § 203 (1980).

42. Despite the premium, this is perhaps the chief appeal of the plan. No one is forced to choose in the abstract. Everyone retains tort rights until they are in a position to determine what those rights are (or are not) in a particular case, and what their needs are.

tions. Which option should be taken is a matter of policy preference and it is for legislatures to decide which is more important: lower premiums for no-fault choosers or an enhanced freedom of choice of remedy. Either is possible at a price below that of a system based mainly on tort.

THE NO-FAULT BENEFIT PACKAGE

The attraction of the no-fault option in the postaccident choice proposal, and also, to some extent in pre-accident choice,⁴³ will depend on the levels of the no-fault benefits. This means that benefits must be adequate. However, they must not be so generous as to frustrate the demand for premium level containment. In Ontario, a proposal made recently for a pre-accident choice plan recognizes this.⁴⁴ By way of illustration, the following sets out a benefit package and some relevant design considerations which have been found to satisfy these requirements in Ontario.

Medical and Rehabilitation Benefits

Elimination of compensation for pain and suffering can be justified in part if victims can have access, through the no-fault scheme, to adequate coverage for medical care and rehabilitation which directly address pain and other nonpecuniary aspects of an injury. Effective rehabilitation also helps many victims recover more quickly and thereby, over the long-term, saves the scheme money in that the sooner the recovery, the sooner the return to work and the termination of income replacement benefits. In its choice proposal, the Ontario Insurance Industry has specified \$500,000 for this category. However, it is necessary to provide some controls so that cost assumptions are borne out. One way is to limit recovery for specific items in terms of how often they can be claimed and in what amounts. For example, alterations to a house or automobile might be provided only once.⁴⁵ Medical bills must be paid in amounts commensurate with the standards of the jurisdiction involved.

43. Although premium levels in pre-accident choice will probably be the most significant factor.

44. See Choice Proposal, *supra* note 16. Note that this proposal was not accepted. The government has since introduced a threshold plan.

45. See C. BROWN, *supra* note 4, at ch. 1.

Long-Term Care

Where tort is not available, it is necessary to provide a substitute source of compensation for long-term care. The Ontario proposal envisages a sum of \$500,000 for this category. Reasonable limits can be placed on individual claims. For example, the periodic payment of future care benefits could be limited to the lesser of "the monthly cost of a group residence that will be appropriate to the needs and lifestyle of the insured, or the monthly cost of homemaker services not exceeding 12 hours a day."⁴⁶

Income Replacement Benefits

No-fault schemes usually pay income replacement benefits according to a victim's actual income loss, subject to a maximum. This maximum should be sufficiently high to provide real compensation to most claimants. The Ontario proposal suggests a level of \$600 per week which would cover in excess of ninety percent of claimants in that province. Here a balance must be drawn between completeness of coverage, given that no-fault will be chosen as a substitute for tort, and a concern that if the maximum is too high, many claimants would be paying for coverage that they do not need because their actual income is less than the maximum.⁴⁷

Pressure on this part of no-fault coverage can be mitigated by taking into account collateral sources. This can be done by making no-fault benefits additional to other sources of compensation, or by providing for pro rata contribution by all sources including no-fault benefits.⁴⁸

It is also necessary to provide for persons not employed at the time of the accident but who, because of the accident, are denied the opportunity to earn income in the future. This includes unemployed persons and persons yet to enter the work force. In dealing with these claims, it is necessary to be somewhat arbitrary, but then again, that is true for tort. The Ontario proposal recommends that certain categories of unemployed be compensated according to the income last received, and that students be paid an arbitrary amount

46. *Id.* I appreciate that whether provision of care to this standard is "reasonable" is controversial. But any assessment should be viewed in the context of the trade-off usually inherent in no-fault proposals and always involved in cost containment. *See supra* note 1.

47. However, those who earn more than the benefit level can purchase additional layers of coverage either in the general disability insurance market or, perhaps, under an endorsement to the auto policy. Similar arguments can be made for limiting coverage for medical and future benefits. *See supra* notes 1 & 46. There too insureds could voluntarily buy additional coverage for a higher standard of care.

48. For a combination of these methods, see Ontario Insurance Act, ONT. REV. STAT. ch. 218, sch. c (1980).

related to the average income in the jurisdiction.⁴⁹

It is appropriate that all of these benefits be indexed for inflation since tort law and its mechanisms for calculating inflation in assessing damages are not available.

Death Benefits

An amount (\$3,000 per claim in the Ontario scheme) should be available for funeral expenses. There should also be other death benefits where there are dependants. Although death benefits may be regarded as an inappropriate imposition of life insurance coverage, it should be remembered that the no-fault scheme replaces tort law which does provide for compensation to dependents in the event of death, and it is appropriate for no-fault to provide reasonably comparable death benefits. The Ontario proposal includes a lump sum payment equal to four times the gross employment income of the deceased as revealed in the last income tax return filed before death. This amount is subject to a minimum of \$50,000 and a maximum of \$200,000. Small payments are also provided for in the event of deaths of dependent children or of persons with no dependants.

Housekeeping and Child Care Services

The Ontario proposal provides a maximum amount of \$200 a week, payable on the basis of reasonable expenses incurred for up to three years for housekeeping services necessitated by the injury or death of the person who normally contributed those services. A further \$200 a week plus \$50 a week per additional dependent child to a maximum of \$350 a week is payable for child care expenses.

CONCLUSION

The costs of combination and pre-accident choice no-fault schemes with benefit packages like those described above have been estimated. It is predicted they would produce net savings to premium payers. Savings are achieved by eliminating substantial amounts of tort activity. This is achieved either by legally abolishing some tort actions or by providing an option wherein significant incentives are provided for claimants to reject tort and prefer a no-fault option without tort's attendant litigation expenses and without claims for

49. See C. OSBORNE, *supra* note 5, at 574-80 (from which this aspect of the insurance industry's proposal is derived).

pain and suffering. In my view, savings could also be achieved with the model involving postaccident choice I have described, since it too is designed to reduce tort claims.⁵⁰ But which of these methods of achieving savings and stability should be used will depend on other policy preferences of the jurisdiction in question. These preferences will relate to the role of tort, and the importance of choice at either the pre-accident or postaccident stage. But, whichever option is chosen, opportunities exist for considerable improvement both in terms of the treatment of victims of accidents and the cost of the scheme to all motorists.⁵¹

50. Note the postaccident choice model is adaptable to other classes of accidents such as medical accidents and those caused by products. *See supra* note 25.

51. C. OSBORNE, *supra* note 5, at 580.