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At the annual meeting of the Association of American Law Schools, December 27, 1974, the Torts Section sponsored a panel discussion of Professor Jeffrey O'Connell's proposal that no-fault insurance be expanded beyond the field of automobile accidents. The proposal, as presented in O'Connell, *Expanding No-Fault Beyond Auto Insurance: Some Proposals,* 59 VA. L. REV. 749 (1973), advocates "enterprise liability" for any entity or person that systematically creates risks of personal injury. It would be "no-fault" liability, blind to the fault of either party, and paid by the enterprise's insurer or by the enterprise as a self-insurer. Payments would be limited to out-of-pocket losses not compensated from collateral sources, and no recovery would be allowed for pain and suffering. The plaintiff would have the option of asserting his claim either under regular tort liability or under enterprise liability, unless the defendant elects in advance to be covered exclusively by enterprise liability. Enterprise liability would not apply to injuries intentionally caused by the enterprise or intentionally inflicted by the victim upon himself.

The following is Professor Green's response to the O'Connell proposal. These remarks were delivered in acknowledgement of the William Lloyd Prosser Award "for outstanding contribution to the development of the law of torts" presented to Professor Green at the meeting. Editors.

In discussions with philosophers, economists, and other abstract artists, I am always ill at ease if not terrified. Their broad assumptions and sweeping conclusions leave a mere lawyer, with his meager history and earthy arguments, little chance of survival. Please do not misunderstand me. I am aware that philosophies, economic theories, and scientific projections had their beginnings in hunches, bubble blowing, daydreams, and inspirations at first simple and definite, but I am also aware that they later became expanded to abstractions incomprehensible other than by the elite. I do not question the validity of any of them. Instead, I recognize in them the unlimited creative power of human beings. Nor does it bother me that most of their creations have flourished for a season and then collapsed or have had to wait until a later day for their acceptance. For example, it does not destroy my faith in economists that today they are bewildered by the coexistence of inflation and depression. I am sure that after we have weathered this illegitimate crisis they will regroup and explain to those who come after us how such phenomena could appear simultaneously and how successfully they were dealt with on sound economic principles.

When I first read Professor O'Connell's article, "Expanding No-Fault

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Beyond Auto Insurance,"[1] I marked it as a worthy inspiration of an able daydreamer. Successive readings have deeply engraved that impression. Under the seductive title "No-Fault," he has created a structure for the care of those who fall victim to the hazards of enterprise that would leave it free to give us more and better goods and services without subjection to the delays, expense, and encumbrances of courts and lawyers. It could prove as exciting as the bubble-blown creation that made it possible a few days ago to look in on Jupiter with a promised visit to one of Saturn's moons some 5 years hence. Or it could prove as practical as the inspiration that gave us the blessings of Geritol. But whatever it may do will be of great concern to those who spend their days with torts.

If our people continue to maintain a free society, my perspective is that No-Fault will be woven into the texture of tort law in a manner that will not conflict with our goals of peace, happiness, health, justice, economic welfare, law and order here on earth and in heaven hereafter. But it is entirely possible that No-Fault will have considerable influence on our more practiced and negative virtues of war, power, greed, deceit, waste, riotous living, sex, hate, and death. This does not mean there will be breeds of full-fledged saints and dedicated sinners at one another's throats, but that everyone will take turns as saint and sinner at many points in time. Creation and destruction will continue to go hand in hand as they have done from the beginning, and thus the schizophrenic balance of love and fury will be maintained. It is in this murky atmosphere that tort law best serves to penalize and ameliorate the faults of people, and, if No-Fault can lessen tort law's labors and increase the bounties, No-Fault will find a home in torts. In support of this distant perspective, I offer my further remarks.

A Little History

For more than four centuries tort law was developed on the premise that one must so conduct himself as not to injure another, but if he did injure another he must compensate him.[2] When industrial enterprise became a dominant social factor in the early 1800s, that premise was modified to enable enterprise to base its liability on a duty of care commensurate with the risk of injury. By the use of this social "gyroscope" the courts have developed modern tort actions appropriate to the risks of physical injury to which anyone at any moment may become a victim —

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[1] 59 VA. L. REV. 749 (1973); *see also* O'Connell, *Elective No-Fault Insurance for Many Kinds of Accidents: A Proposal and an "Economic" Analysis*, 42 TENN. L. REV. 145 (1974).

[2] Green & Smith, *Negligence Law, No-Fault, and Jury Trial — I*, 50 TEXAS L. REV. 1093, 1096 (1972) [hereinafter cited as *No-Fault and Jury Trial — I*]; Green, *The Thrust of Tort Law, Part I: The Influence of Environment*, 64 W. VA. L. REV. 1 (1961), in L. GREEN, THE LITIGATION PROCESS IN TORT LAW 59 (1965); Wigmore, *Responsibility for Tortious Acts: Its History* (pts. 1-3), 7 HARV. L. REV. 315, 383, 441 (1894).

actions of trespass, nuisance, negligence, defective products, and ultrahazardous enterprise. The big change in tort law came in the development of the negligence action based on the fault of the victim, with many defenses directed at the victim's conduct, and with all of the burdens shifted to him instead of remaining on the defendant as under the early common law actions which were based on the fault of the defendant.[3]

The faults of victims and the defenses against liability were exploited throughout the 1800s with practical immunity of enterprise for personal injuries[4] until the casualties inflicted upon railroad and other industrial employees, passengers, and highway travelers received legislative attention. Legislatures enacted wrongful death statutes, limited No-Fault workmen's compensation and employer liability systems which, after considerable opposition, gained the approval of the appellate courts.[5] As a result, in negligence actions for personal injury and death, whether based on common law or statute, the color of fault as a basis of liability or defense has over the years faded considerably into the duty of care commensurate with the risk of injury.[6]

Beginning late in the 1800s and accelerating throughout the 1900s, one of the chief functions of state and federal courts in personal injury litigation has been the rejection or modification of the common law defenses developed during the 1800s.[7] These defenses could not withstand the changes in the social and economic environments largely created by enterprise itself. Its immunities were well entrenched and desperately defended, and there are still strongholds to be reduced and much doctrinal debris to be removed. Legislatures have given aid by many specific statutes and especially by consenting to the rulemaking power of the courts under which many procedures have enabled the lawyers of the victims of enterprise to become an effective and respected professional group.

But it must be added that the development of law schools; the publication of law reviews and professional journals generally; a multitude of able young lawyers who have become practitioners, judges, teachers, and law clerks; numerous continuing legal education institutes; and socially motivated bar and other associations, have created a great profession essential to the operations of enterprise of every character and to the enlightenment of the courts in the protection of its victims.

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[3]*No-Fault and Jury Trial — I* 1096-98; L. GREEN, TRAFFIC VICTIMS: TORT LAW AND INSURANCE 11-12 (1958).

[4]*No-Fault and Jury Trial — I* 1098-99.

[5]*Id.* at 1099; Green, *The Texas Death Act,* 26 TEXAS L. REV. 461 (1948); Malone, *American Fatal Accidents Statutes — Part I: The Legislative Birth Pains,* 1965 DUKE L.J. 673; Malone, *The Genesis of Wrongful Death,* 17 STAN. L. REV. 1043 (1965).

[6]*No-Fault and Jury Trial — I* 1099-1100.

[7]Green & Smith, *Negligence Law, No-Fault, and Jury Trial — II,* 50 TEXAS L. REV. 1297, 1298 (1972).

The Courthouse and the Courts

The county courthouse has been the citizen's school of democratic government from the beginning — a symbol of justice both trusted and feared. It is the lawyer's forum, and even those who never enter there do their work in its shadow. Here people stand more equal and those who have sinned and those sinned against may fight out their differences under law, and, win or lose, live to sin and fight again another day. In the meanwhile, the courts have become the basic Anglo-American institution for protecting against many types of injuries including the failure of enterprise to exercise care for its victims commensurate with the dangers of its activities. Any person, however insignificant, may bring any other person, however powerful, into court to give account for serious injury that has been suffered at his hands. This is the most valuable right any person has for the protection of all his other rights, and this protection is enjoyed by enterprise and also by its victims. The tort action is the ombudsman for both.

The courts are administered through judges, jurors, witnesses, and lawyers. They teach multitudes the disciplines of government they can learn nowhere else. They perform their services in the open for all to see, and their weakness is at times glaring and disturbing. But the courtrooms have been kept open to people who have suffered injury at the hands of others, and it is the lawyer's obligation to see that they are never closed. The courthouse lawyers of both enterprise and its victims are entrusted with great power and corresponding obligations. As officers of the courts they are essential to the administration of the law and to the protection of the rights of their clients under the law. They perform their functions always under the eyes of each other, the judges, the jurors, their clients, citizens at large, and are subject to discipline by their profession under the supervision of the courts. No other professional group could survive such surveillance. They are under the severest discipline of any officials who render the services of government or of other institutions. And it is the Warrens, the Jaworskis, and the Siricas who cleanse our temples and restore the faith of citizens in their law.

The gloomy arguments made by the advocates of No-Fault based on the delays, expense, and uncertainties of litigation; the inability to make proof against manufacturers, contractors, doctors, hospitals, and insurance companies; and the high fees exacted by lawyers for the cumbersome processes and inadequate judgments gained for their clients are supposed to be arguments that require the removal of the protection given by the courts. They are equally arguments that heap shame upon enterprise for the callous neglect of its victims and make imperative the more adequate administration of the courts. The courts can yield to no substitute at the ground level of citizenship for sustaining a stable and effective government. And it may be said in their behalf that they would have made the adjustments between enterprise and its victims more

rational long ago if enterprise had not interposed its stubborn and selfish resistance. There are other and better ways for eliminating the weaknesses of the courts than by reducing their responsibility and the protection they give.

If we as teachers of law acknowledge our own responsibility, the courts have a commitment of our fidelity. We teach their judges and those who appear before them in behalf of clients. We interpret their judgments and write the books they use, and are free to tell them when they err and to applaud when they score. We could not ask for more honorable service or have a more exacting obligation than to devote our energies to their successful administration. When they fail we also fail.

The Problem

The tort problems that come before the courts are not trifling. A serious personal injury is frequently the most severe tragedy a member of a family and the family itself can suffer. By statute the death action is a family action. The serious personal injury is even more a family action and has been so recognized by many judges and juries. The children and the disabled members of the family would not be in the courtroom during a personal injury trial were it not to demonstrate the obligations of the victim. They are not recorded as witnesses, and appellate courts, not knowing the weight they register with judge and jury, not infrequently reduce a victim's judgment. It is not too late to permit the full disclosure of the tragedies on which the courts pass judgment.

Nor is it too late to ask enterprise to modify its attitude toward its victims. With few exceptions, it has never recognized the full partnership it has with its employees, nor has it accepted its responsibility to its victims although it knows victims are inevitable in its operations. For a full century enterprise was given almost complete immunity from liability to its victims.[8] It had to be forced to protect its employees from the dangers of the crude machines and tools of infant industry — forced even to provide a safe place for employees to work. When enterprise became able to pay its way, it had been spoiled by irresponsibility and had to be forced to contribute to the welfare of its injured workers by an insurance device which was seldom adjusted to the economic environment in which the employees lived.[9] The early shortsightedness of enterprise continues to bring periodic power struggles with its employees that hurt numberless innocent people.

Enterprise is retarded in its social outlook. It goes to great expense to defeat the claims of consumers of its defectively dangerous products.[10] It still resents the use made of the courts by its victims and the contingent

[8]*No-Fault and Jury Trial — I* 1097-99.

[9]REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS (1972).

[10]Marschall, *An Obvious Wrong Does Not Make A Right: Manufacturers' Liability for*

fees it pays their lawyers if successful in litigating their claims, though in the price its consumers pay for their goods and services they also pay for the defenses and the judgments against enterprise and the fees of its lawyers.

Doctors are not different. They may even refuse to give evidence as experts in cases in which other doctors are sought to be held for malpractice.[11] There is no other instance of pure greed so heartless as the appropriation by the doctors and drug suppliers of the benefits of medicare and medicaid to the point of threatening their solvency.[12] Nor are the claim agents of insurance and other industries always found trustworthy. They have been known to bring pressures to delay and reduce settlements, harass victims, and to employ deceits to deprive them of just settlements. Even the self-insured industries that anticipate the necessity of paying claims by budgeting them as a cost of doing business are inclined to resist their payment with all the savagery of the insurance companies.

The victim's lawyer, who usually comes late into a case, is at great disadvantage when the claim agents of enterprise have investigated, made lists, and obtained statements of witnesses instantly or within hours after the victim has been injured. If the claim is successfully or unsuccessfully litigated, the lawyer is frequently called a shyster or ambulance chaser though the investigation is made by a professional investigator. Even if we assume that many of the complaints made against the courts, lawyers, and tort action are true, most of them can be laid at the door of enterprise. Its attitude has been progressively self-defeating. The courts have found it necessary again and again to develop rules and procedures that enable victims to litigate their claims on a more equal basis.[13] Advocates who seek to have enterprise freed by No-Fault from the only power its victims have to protect themselves would in large part shift the responsibilities to the insurance industry that makes its profits from high premiums and low settlements of strictly worded policies that leave a policyholder defenseless against its contentions. And if the policy is not sufficient to meet the victim's losses, he is left to the resources provided for other emergencies.

No-Fault Insurance

The freedom from litigation sought for enterprise sails under a banner that may imply something for nothing. Its wide legislative acceptance for

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Patently Dangerous Products, 48 N.Y.U.L. REV. 1065 (1973).

[11]Brown v. Keaveny, 326 F.2d 660 (D.C. Cir. 1963) (Wright, J., dissenting); Kelner, *The Silent Doctors — The Conspiracy of Silence*, 5 U. RICH. L. REV. 119 (1970).

[12]Chase, *Doctor's Bonanza: Inflationary Effects of Medicare and Medicaid*, 156 NEW REPUBLIC 15 (Apr. 15, 1967); DeWolf, *Medicare: The Easy Swindle*, 215 NATION 429 (1972).

[13]*See, e.g.*, FED. R. CIV. P. 7 (simplified pleadings), 15 (amended pleadings to conform to the evidence), 26-37 (extensive discovery), 54 (grant appropriate relief regardless of pleadings).

traffic injuries is limited to small claims.[14] Such an arrangement would seem to be highly desirable over the whole area of small claims. A wholesale method of dealing with mass problems that can be reduced to a statistical basis without injustice to the extremes is sensible. The big problem here is how much is small and how much is serious. The answer has apparently been found in a rather wide segment of claims left to the option of the victims. The heavy advocacy on so many fronts merely to gain the acceptance of No-Fault for small claims would be worthwhile but would seem to be an oversell unless something more is in view. The possibility that the small claims approach is the beginning of a campaign to bring serious injuries under No-Fault is enough to require that all No-Fault settlements be made of record open to public verification.

For serious injuries enterprise should never be permitted to be relieved of its obligation to care for its victims, even by shifting the responsibility to insurance. If deterrence has any social value, it must be sharply focused on this obligation case by case. If the economic burden borne by enterprise or its consumers is an important factor in caring for the injured and their families, the fact should be kept out in the open. Neither enterprise nor its consumers would have just cause for complaint. The care of victims is as much the cost of doing business as are the raw materials required for products and services. The pinch that would count can only be found in the day-to-day transactions, not in the broad concepts of the economic theorists.

I would not argue that a legislature may not strip citizens of their rights. I simply move to the higher ground that no other victim is required to surrender a comparable right and that such a deprivation would do great injustice and would take from the courts a power essential to a free society and leave those who should share the responsibility beyond the reach of both the victim and the courts. The tort way of justice is the examination of every case of serious injuries on its merits. The variations in serious injuries to victims under widely different circumstances are too diverse in the injuries and the victim's needs to submit to a statistical basis when we have well-established institutions for dealing with victims and those by whose operations they are injured on the basis of their conduct, responsibilities, burdens, and resources. It will be far easier and less expensive to prepare judges and lawyers to function responsibly to the ends desired than to develop other institutions to serve those ends.

It may be that beneath the hopes of those who place their faith in No-Fault insurance is a belief that the courts are not employing reliable, just, and consistent methods in evaluating the injuries suffered by the victims. Such belief would have a substantial basis for legitimate criticism of tort

[14]Keeton, *Compensation Systems and Utah's No-Fault Statute,* 1973 UTAH L. REV. 383, 385-90.

law and the courts, and would warrant great efforts to influence the courts and the legal profession to readjust their procedures to meet the criticisms lodged against them. It is on that hypothesis that I suggest that enterprise is able to pay its way, and should be required to provide care for its victims, and that the courts have the power and the responsibility to provide procedures for the judges themselves to evaluate the injuries inflicted by enterprise as determined by jury trial with full justice both to the victim and enterprise.[15] And as an incident of the exercise of this function of evaluation, the judges must also monitor the fees to which the lawyers of the victims are entitled.[16]

Assessment of Damages

The assessment of damages in serious personal injury and death cases is frequently the most difficult issue in a tort action.[17] In most cases it is beyond the competence of a jury of laymen. Although the courts have the power to control the issue, together with the rule-making power to initiate procedures, they have done little to meet the 20th-century magnitude of the assessment problem. For the most part they still rely on a poorly designed veto power if a verdict seems to be too big or too little.[18]

The assessment of damages on the basis of compensation for the injuries suffered is rarely possible in serious personal injury cases and also in death cases. The basic considerations in behalf of a seriously injured victim should be his rehabilitation or his care in light of his physical injuries and his economic obligations. The economic considerations of the defendant enterprise in many cases will be of equal importance. The verdicts of juries are little more than wild guesses. Only the judges are capable of making the studies and gaining the experience necessary to determine awards to meet the ends of justice to victims and to enterprise.[19]

Trial by judge and jury, or by trial judge alone, should determine the issues of liability, the items of injury, and the comparative fault percentages of the conduct of the litigants. Then the trial judge alone should continue the trial in the exploratory process for assessment of the damages based on the liability findings. The items of physical injury and expenses, together with the needs of the future, will frequently require the use of experts. The economic considerations are not those of eco-

[15]Green & Smith, *Negligence Law, No-Fault, and Jury Trial* (pts. 1-4), 50 TEXAS L. REV. 1093, 1297 (1972), 51 TEXAS L. REV. 207, 825 (1973).

[16]Green & Smith, *Negligence Law, No-Fault, and Jury Trial — IV*, 51 TEXAS L. REV. 825, 841-42 (1973).

[17]*Id.* at 828-29; Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 LAW & CONTEMP. PROB. 219, 221-22 (1953).

[18]Green & Smith, *Negligence Law, No-Fault, and Jury Trial — IV*, 51 TEXAS L. REV. 825, 829 (1973).

[19]*Id.* at 842-45.

nomic theory of commerce and trade, but the specific economic problems of the litigants — applied economics based on ascertainable factual data. The judges have no other function of greater importance. The insurance companies cannot provide adequate and consistent protection at reasonable costs until the courts provide a reliable basis for evaluating the losses. As difficult as the problem may seem, it will yield to study and experience.[20]

[20]A more comprehensive discussion of this proposal is presented in Green & Smith, *Negligence Law, No-Fault, and Jury Trial — IV*, 51 TEXAS L. REV. 825 (1973).