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The Legal Profession's View of No-Fault

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I. INTRODUCTION

The first automobile liability policy was written in 1898 and was mainly devised to afford protection against liability arising from the use of horsedrawn vehicles. In May of 1935 the first standard provisions of the automobile policy were developed for nation wide use. The first family automobile policy was written in 1956. The early policies simply protected the purchaser from claims asserted by third parties. They were strictly "fault" policies. However, in the past forty years we have seen a trend of society shifting its emphasis to compensating the victims of all misfortunes and the automobile policy has not been an exception. Either by state statutes, court decisions or insurance industry ingenuity, we have seen the enlargement of the scope and purpose of the automobile policy: insurance companies not being relieved because of insolvency of insureds, vicarious liability, the omnibus clauses, substituted service of process on non-residents, financial responsibility laws, medical payment clauses, uninsured motorist coverage, direct action statutes, removal of immunities, collision coverage, strict liability in product cases and numerous other instances. We now have a no-fault system within a third party system. So no-fault is nothing new; but it is important to note that all of these changes have been brought about by the evolution (not revolution) of the industry itself and not by disrupting the present third party tort system.

No-fault plans are nothing new. The Columbia University Plan of 1932 was the first. It is still collecting dust on the university shelves. The second "first party" plan was adopted in Saskatchewan, Canada, in 1946 and is still in operation. This insurance is written by a government-operated insurance organization. Recently British Columbia adopted a plan. The only plans in existence within Ameri-

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can jurisdictions are the Puerto Rico and the Massachusetts plans. To Professors Keeton and O'Connell must go the credit for fanning the ashes with their *Basic Protection For the Traffic Victim* in 1965, and, as a result, we have today the three plans of the trade organizations — the American Insurance Association, the National Association of Independent Insurers, and the American Mutual Insurance Alliance — the Senators Hart-Magnuson Plan, Representative John Moss' Plan in the Congress, the Massachusetts Plan, the Cotter Plan, the Stewart-Rockefeller Plan and numerous others.

It is not within the scope of this article to cover each of these plans and specifically outline their faults. More importantly, I want to focus on the reasoning which exists at the base of and is common to all of these proposed no-fault systems and discuss the lawyer's plan for retaining and improving the present system.

II. The Fallacy of No-Fault Supporters' Reasoning

A main hypothesis upon which "no fault" arguments are built is the idea that there is a great ground swell of public opinion dissatisfied with the present tort liability system and anxious to abandon it for some system of no-fault automobile reparations. I am not aware of a single reputable public opinion sampling which has demonstrated such a weight of public support for the abandonment of the established system of tort liability.

(1) The Pennsylvania Chamber of Commerce reported in November, 1970, that 58 percent of those answering its survey voiced a resounding "no" to the following question: "Would you favor changing the present automobile liability system so that any reimbursement for damages or injuries would have no relationship to who was at fault for the accident?"

(2) A 1970 survey conducted nationally by Market Facts, Inc., Chicago showed that six out of ten consumers oppose no-fault; more than 90 percent of motorists believe that the cause of accidents can be determined; 6 out of 10 opposed elimination of recovery for "pain and suffering"; and a majority were opposed to using up collateral benefits before recovering on the automobile policy.

(3) A total of 2,609,034 policyholders of State Farm Mutual Insurance Company, or 94 percent of the respondents to a 1969 survey, approved the fault concept and affirmed the basic precept of tort liability that "the driver who causes an accident or his insurance

company, should pay for the losses of the other people in the accident."

(4) Insurance agents in a six-state area supported the fault concept in a 1969 survey by a vote of 41 percent against to 21 percent for no-fault.

(5) A Drake University survey in Des Moines, Iowa, revealed that a great majority of those interviewed were opposed to no-fault insurance plans.

(6) Out of 1991 persons who were former jurors in Minnesota, 1113 of them agreed in 1969 that the present liability system should be continued.

(7) The Survey Research Institute, Institute of Social Research of the University of Michigan conducted a survey of public attitudes toward automobile insurance. Heads of car-owning families were asked the general question whether they were satisfied or dissatisfied with auto insurance. In reply, 22 percent expressed dissatisfaction, 13 percent were neutral and 65 percent expressed satisfaction.

(8) Even the Department of Transportation study of public attitudes toward auto insurance, using what is generally conceded to have been a rather pro-no-fault questioning system, failed to demonstrate such a weight of public opinion. Only 40 percent favored a no-fault system as such, and another 15 percent favored such a system only if it would result in a decrease of their own insurance premium costs.

III. Effect of No-Fault System

Before we hastily discard a legal system based upon centuries of growth and experience, we must be convinced that the American people are willing to discard a basic principle of American jurisprudence — that a party causing an injury to a person or property must bear the costs of his wrongful act. We should not think seriously of adopting one of the proposed no-fault systems without considering the effect of the adoption upon various segments of our population.

A. The Injured Person Himself

He is being asked to give us his claim for pain and suffering, inconvenience, future impairment of earning capacity, disfigurement, loss of limbs, sight, hearing, consortium, pre-natal injuries, impotency,

catastrophe hazard and many other losses in return for a certainty of payment of his medical and hospital bills and some loss of earnings. The housewife, the minor, the elderly, the disabled and the unemployed will receive nothing above his or her medical expenses and probably not even that since some plans pay nothing if collateral benefits are available.

B. The Premium-Payer

How will the insurance cost be distributed among policy-holders? A large portion of the insurance costs is shifted from those people most likely to cause accidents to those people likely to collect the least money as a result of accidents. Commercial trucking concerns will pay less while a school district, operating a fleet of busses on short distances will pay a larger share. A middle-aged, middle-income family will pay more than a college student with a small sports car. The farmer, the small entrepreneur, and the people who live in small cities will pay more because they do not have workmen's compensation and group accident and health insurance benefits.

The premium payer who also pays premiums for his own health and accident insurance will be penalized because, while there is no reduction in premiums for his basic protection policy, he will not receive any benefits under it if he receives benefits from his collateral sources such as Blue Cross and Blue Shield. In short, he pays a premium and gets nothing from basic protection. A basic premise of the reformers is that a person should not make a profit because he is injured by an automobile. But should a prudent person forfeit the benefits of his prudence because he is unfortunately injured by an automobile and not by a train, escalator, plane, elevator, or products? The Keeton-O'Connell Plan and some of the others ask the premium payer to waive substantial benefits. Collateral source payments may be made from such sources as insurance proceeds (life insurance, health and accident insurance, hospital and medical insurance), employment benefits (sick leave, voluntary wage payments, pension and retirement benefits, medical services furnished by the employer, workmen's compensation, perhaps even vacation time and gratituties), and social legislative benefits (unemployment compensation, social security, tax advantages, Medicare and Medicaid).

The average premium payer will be giving up much. Statistics from the *1967 Source Book on Health Insurance Data,* published by the Health Institute show that four out of every five Americans

were insured through one or more forms of private health insurance at the beginning of 1967. More than 82 percent of the civilian population of the United States — 163 million people — were covered under private hospital expense insurance, and of the 163 million, more than 92 percent also had surgical expense protection and 74 percent had regular medical expense protection. Three out of every four persons surveyed in insurance company health plans had some form of major medical protection ($5,000 to $10,000 with normal deductible). More people than ever before — a rise of 33% in the last 10 years — had disability (lost wages and income) protection. An estimated 57 million workers were covered through insurance companies, formal paid sick leaves, and employee organization plans. These statistics do not include other millions of workers covered by informal sick leave arrangements and state and federal disability payments.

C. Upon the Insurance Industry

More than 800 companies compete actively for an estimated 92 to 95 percent of the total insurance market — the remainder of the market being a smaller segment which, because of loss predictability and loss experience, must be written at surcharged rates or placed in the assigned risk plan. If some of the plans now actively promoted, for instance the Keeton-O'Connell plan or the American Insurance Association Plan, were widely enacted most of the highly competitive and efficient small and medium-sized auto insurance writers would be doomed to extinction. None but the giants would be able to afford the rating uncertainties, administrative costs and retraining of personnel necessary to make the basic protection plan an operative reality. Huge blocks of automobile insurance would move out of the hands of smaller companies and their agents into mass merchandising and group programs — a market available almost exclusively to the giants of the industry.

An even more ominous impact must be considered. The adoption of any comprehensive no-fault insurance plan will ultimately lead to federal take over of the industry. The surest road to federal regulation and federal automobile insurance is the Keeton-O'Connell Plan, even though Professor O'Connell has publicly stated that he is for state regulation of insurance and for private insurance coverage. It would be a simple matter to tack onto the social security system a plan to compensate victims of automobile accidents. Already there are those in the national government who have advocated a federal

plan, such as Representative Cahill (Dem. N.J.), now Governor Cahill (N.J.), who would process all claims up to $2,500 by a federal bureau in Washington; Senator Hart, who would eliminate state regulation and control; and Professor Daniel Patrick Moynihan, formerly President Nixon's close advisor on Urban Affairs, who would finance reparations by adding a penny or two to the gasoline tax, when federal road studies show that it would require a tax of 21 to 22 cents per gallon to finance the plan. Because of interstate complications, any basic protection plan must be widely adopted to be effective, and we know that no two states will adopt the exact same plan. If Ohio should adopt such a plan and Kentucky did not then Ohio premium payers would be financing from its assigned claims fund any losses incurred as a result of a Kentucky reckless driver colliding with a tree in Ohio.

IV. The Lawyer's Plan

Because compensation to persons injured by the operation of automobiles is presently being administered within the fault system through the courts and since some leaders of the insurance industry have publicly stated that until the legal system is changed the industry is powerless to act, the legal profession through the organized bar has been studying the problem in depth. A special committee of the American Bar Association composed of representatives of the plaintiff bar, the defense bar, general practitioners, judges and insurance lawyers, a commission composed of representatives of government, academicians including Professor Keeton, representatives of the three trade organizations in the industry, consumer organization representatives, and state insurance department representatives, has been working over a year on the subject. It submitted its recommendations to the House of Delegates of the Association on Monday, January 27th, 1969. The House approved the recommendations and ordered a more detailed study of the twenty-nine proposals to improve the present system. The organized bar of this nation is therefore on record as follows:

> The present system for providing reparations for those injured in automobile accidents, based upon the concept that if there is no fault there is no liability and relying upon an adversary method of trial before a court or jury as the means of determining liability and the amount of damages, be retained as the basic legal structure for dealing with such cases, but that the following proposals, changes in,

> additions to, and modifications of such system should be further considered and a final report submitted in time for distribution to members of this House at least 30 days prior to the 1969 annual meeting, at which meeting it shall be presented.

The Association also went on record as opposing such plans as the Keeton-O'Connell Basic Protection Plan and the "Complete Automobile Protection Plan" announced by the American Insurance Association or any other proposal which would severely reduce benefits payable to persons injured in automobile accidents and would abolish or substantially abolish the tort basis for the automobile accident reparations system.

Our conviction is that the best prospect for improvement lies in the retention of the present system with the changes, additions and modifications that we hereinafter propose. The legal profession realizes that the present system can be improved so that people are compensated more fairly and more quickly. In its deliberations the committees attempted to not only keep costs within reason but to provide more benefits to injured persons.

Several specific recommendations are offered for overhauling the present system. In the field of substantive law, we believe that the doctrine of contributory negligence should be abolished and in lieu thereof a doctrine of comparative negligence, preferably the Wisconsin type, should be substituted. Certain doctrines providing legal immunity for the negligent defendant should also be abolished, namely: the immunity of charitable organizations, the immunity of governments, and the intra-family immunities.

With regard to the courts and the trial of cases, we make thirteen recommendations, namely:

1. Increase judicial power where needed.
2. Increase training in trial advocacy.
3. Establish judicial commissions.
4. Expand programs of judicial education.
5. Foster public concern with judicial administration.
6. Appoint court administrators where needed.
7. Adopt trial by less than the traditional twelve jurors with less than unanimous verdicts.

8. Utilize pre-trial settlement conferences.
9. Utilize full-scale pre-trial conferences.
10. Remand cases to lower courts where amounts warrant.
11. Preserve medical testimony with video tape.
12. Establish voluntary arbitration of small claims.
13. Provide for waiver of jury trials in small cases.

In settlement of cases, we advocate prompt disposition of claims, use of periodic advance payments, penalties for failure of either defendants or plaintiffs to accept reasonable offers in settlement, the study of a "quick settlement option" plan under which the insurance company is given the option to limit its liability by making prompt settlements at an established multiple of medical expense, and the disclosure of insurance limits of liability.

In so far as damages are concerned, we believe that the statutory limitations upon damages in death cases in those states in which recovery is measured by pecuniary loss should be removed; that the general rules for the ascertainment of damages, including the collateral source rule, should be retained; and that awards of excessive damages should be corrected by remittitur and awards of inadequate damages should be corrected by additurs.

With reference to automobile bodily injury liability insurance, we believe that further and persistent efforts to find better and less costly ways of providing and distributing the insurance product and performing all insurance services with maximum speed and economy should be made, and that the "insure the driver" plan is not feasible; that deductible provisions in policies issued to individuals present too many obstacles to warrant extensive use; and that a study should be made of the mandatory inclusion in auto policies of a form of medical payments coverage on a cross-over basis.

The cost of legal services is also an important item to be considered. Counsel fees and litigation expenses should continue to be subject to the canons of ethics and should be subjected to such court supervision as may be required for the application and enforcement of the canons.

To assure the collectibility of judgments for damages, and also for the protection of the defendant, we recommend:

(1) liability insurance, or the posting of a bond or securities as a prerequisite to securing registration of an automobile;

(2) the policy mandatorily include uninsured motorist coverage to provide insolvency protection, and protection against hit and run or stolen cars; and

(3) limits of liability of not less than $10,000/$20,000/$5,000 be required, and efforts to persuade insurance buyers that the purchase of higher limits is advisable continue.

We believe that the present system fosters deterrence. Efforts to utilize the tort law and the insurance rating system, as well as the criminal law, to strengthen deterrence of dangerous driving should be continued. Studies seeking further enlightenment as to how such deterrence can be more effectively and acceptably produced should be encouraged.

We considered highway safety and concluded that it is the continuing duty of the bar to study and support all wisely conceived programs aimed at the reduction of highway accident and injuries.

In support of these recommendations the committee submitted a report consisting of 222 pages, single spaced, which should indicate the thoroughness of its research. We believe that the above outlined changes in, additions to, and modifications of the present system are attainable, workable and practicable and with them the present system of compensating injured persons is far more preferable than any of the radical and unpredictable plans now offered.

V. Criticisms of the Present System

We examined all of the usual and frequently stated criticisms of the present system. First, it is contended that it costs too much to put too little in the hands of claimants. Proponents of "no-fault" claim their system would save the premium payers substantial sums. There is a wide divergence of opinion on this score even assuming that the American people are willing to give up substantial rights for a savings of ten to twenty dollars per year on their premium. It is possible to save on premium dollars by curtailing the payment of benefits. If none are paid out the premium is zero. Very simple. But the people should know that they are sacrificing the right to trial by jury, the right to hold the wrongdoer responsible, and the right to recover present benefits, such as pain and suffering, etc., before they discard the present system.

Experts differ on the questions of cost savings. Actuaries can quote you figures both ways. In evaluating the Keeton-O'Connell

claim of reduced cost of administration and cost of premiums, keep in mind that Basic Protection is "bare bones" protection, and that to equal present protection policies, the policy holder would need policies for "pain and suffering," for "inconvenience," for liability coverage (since the first $100 is excluded), for first part catastrophe protection to insure against economic loss above the Plan's limited benefits, and for collision insurance.

Second, it is argued that insurance rates have increased too much and too rapidly. Available statistics and comparisons will show that they have not increased as much as hospital and physicians fees, garage repair costs, wages, and other costs of living.

The third contention is that automobile cases clog the court calendars, causing court congestion. We can prove that court congestion exists in only seventeen communities within eleven states having a population of 50 million. Admittedly, this is bad and something must be done in those areas. However, court congestion can also be based on other causes, such as the population explosion, lack of judge power, criminal cases, juvenile cases, condemnation cases, lack of business methods in our courts, anti-trust cases, etc. Many types of litigation are given precedence over auto cases. This charge can be so easily refuted that even Professors Keeton and O'Connell have abandoned it.

Fourth, it is argued that fault is difficult to determine and that jurors are incapable of determining the cause of accidents. Any trial lawyer knows that a large proportion of automobile accidents are uncomplicated events in which the fault determination is easy. Furthermore, many of the more complex accidents can be accurately analyzed by people trained to do such work on the basis of physical facts, even when the impressions of the witnesses are confused.

VI. Examination of Existing Proposals for Change

An examination of many of the existing proposals for change shows serious flaws of one kind or another. Those that stress cost reduction propose to cut costs through reducing benefits by doing one or more of the following: (a) subtracting the benefits received from other sources; (b) using a deductible; or (c) limiting or eliminating damages for pain and suffering. Those that stress certainty of payment either eliminate or limit the use of the fault principle and/or use a formula to determine some or all of the benefits.

Those that do not abandon the fault test try to combine paying benefits without regard to fault with allowing the tort action to continue.

None of the plans have paid enough attention to the desirability and virtual necessity of making changes in a gradual and evolutionary way. Nor have they dealt with the severe disruptions to the insurance industry which would occur if they were to be adopted.

None of these plans that hold out a prospect of cost savings adequately preserve the values of the present system. None are as adaptable, as flexible, or as responsive to changing needs. In the effort to save existing values, some plans superimpose substantial benefits without regard to fault. When this route is followed the added expense in itself seems to assure the non-adoption of any such plan on a compulsory basis.

Those plans that either entirely abolish fault as a basis for recovery, or do so as to a large proportion of the cases, are not only going against our instinct and tradition that people should not benefit from their own fault, but they disregard the value of deterrence in our present fault system. Even Professors Keeton and O'Connell recognize this need for "fault" in their book, *Basic Protection For the Traffic Victim,* at pages 164-165:

> Proposals to eliminate completely the common law action for negligence are perhaps doomed to founder as unable to muster the necessary widespread political support. Moreover, even apart from such pragmatic considerations, and on grounds of principle, to make a case for some protection regardless of fault is not necessarily to make a case for total irrelevance of fault. Especially in the egregious case in which injuries and damages reached catastrophic proportions and fault is clear, there is much to be said for awarding tort damages against the person at fault and for including in those damages compensation for the pain and suffering accompanying a prolonged and bitter convalescence or permanent disability. Views in favor of basing liability on negligence cannot be ignored, even though it may be difficult to identify and articulate their supporting grounds. Too many people, for too many reasons, believe that negligence has at least some place in the automobile claims system. Moreover, perhaps they are right.

VII. Conclusion.

It would be difficult for any lawyer to leave this subject without some comment that goes beyond the economic realities involved. The law and all those involved in it can view with reasonable pride the advances in individual rights which have been made in the last twenty years. That a correlative growth in individual responsibility is often lacking seems all too obvious. A large part of the American population has abandoned the belief that one is responsible in the next world for what he does here. We are now busy considering plans which will tell people that they are not even responsible in this world for their acts. All the present "no-fault" programs contemplate one further abandonment of individual responsibility. No one can with any degree of certainty calculate the effect of this upon the level of death and injury on the highway. I think it can be said with reasonable certainty, however, that a system which boldly proposes to reduce benefits to the innocent in order to compensate the person at fault is not likely to contribute to added safety on the highway. Quite apart from its immediate effects on life and limb, no-fault strikes at the very core of the proposition that freedom is based upon individual responsibility.

When all is considered, the benefits to be received from any no-fault plan are wholly illusory; and the losses such a plan would bring are too high a price to pay for an experiment the public does not want.