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## No-Fault: Pure, Partial or Paltry

Jack Davies\*

At its annual meeting this year the National Conference of Commissioners on Uniform State Laws gave a first reading to the Uniform Motor Vehicle Accident Reparations Act (UMVARA), a no-fault auto insurance proposal.<sup>1</sup> With four three-hour sessions allocated to UMVARA, the Conference spent all of the first two, most of the third and a bit of the fourth session debating a single provision of the 7000 word draft.

The Commissioners knew what they were doing; the controversial provision preserves a limited right to a negligence action in auto accident cases. The content of that section, and its inclusion or exclusion, determines the essential question of whether the bill will be pure no-fault, partial no-fault or paltry no-fault. A no-fault bill is measured by the sections which determine how much or how little of the fault system will be retained.<sup>2</sup>

Essentially, the no-fault movement seeks to increase the percentage of auto insurance premiums which are returned to motorists as first-party, no-fault benefits and to eliminate or reduce the dollars which go into the third-party, fault-liability system.<sup>3</sup> In the third-party system a substantial share of the premium is inevitably used up by investigation costs, lawyers fees, nuisance claim negotiation and settlement—the frictional costs of the adversary system.<sup>4</sup> To the

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1. The meeting took place at Vail, Colorado, in late August. Conference rules require a second reading at the 1972 annual meeting for formal promulgation.

2. The goal of the system should be that no recovery for any loss of a type covered by the applicable required coverage would be permitted in any private action for damages. The insured victim's sole recourse for benefits for wage loss, medical loss, lost services, funeral expense and perhaps property damage should be limited to the insured's required coverage and any additional optional coverages that he has elected to purchase. . . .

U.S. DEP'T OF TRANSPORTATION, MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES 136 (March 1971) (prepared by J. Volpe).

3. "Basically, in a no-fault system the auto owner's own insurance company pays for his costs for car repairs, injury expenses, or time lost from work; it does so directly, without going through the often costly legal process of proving one driver or another at fault and then making the at-fault party's insurer pay." *Christian Science Monitor*, May 17, 1971, at 16, col. 2.

4. N.Y. DEP'T OF INSURANCE, AUTOMOBILE INSURANCE . . . FOR WHOSE BENEFIT? 35 (1970).

full extent possible legal dispute and costs should be removed from the system of auto accident reparations. A no-fault plan avoids the fact issues of accident causation and the value of indeterminate damages.<sup>5</sup> It thus eliminates substantial legal dispute. The crux of the no-fault battle is lawsuit system vs. insurance system.<sup>6</sup>

### *The Uniform Act*

The UMVARA will likely become the basis for state no-fault legislation unless Congress preempts the field with a national no-fault law. The National Conference of Commissioners on Uniform State Laws (NCCUSL) has had a committee watching the no-fault issue for two years. In September, 1970, with enactment of the Massachusetts no-fault law in headlines, a drafting committee was named.<sup>7</sup> Last spring the Department of Transportation made a substantial grant to finance the drafting project. Work began at once in a race with the calendar. The committee faced two deadlines: (1) late August when a no-fault bill would have to be presented for first consideration at the annual meeting of the Conference, and (2) December 1 when a complete though not necessarily final draft was to be presented to the Department of Transportation (DOT).

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5. "We traced each major criticism and defect back to what we think of as the twin cancers of the present auto insurance system—the principles of a fault concept and indeterminate damages." Statement by T. Lawrence Jones, President, American Insurance Association *Hearings Before The Senate Antitrust and Monopoly Subcomm.*, Dec. 15, 1969.

6. Three secondary, but controversial, issues have taken substantial amounts of time in deliberations of the committee drafting the UMVARA. They are in the order of political significance:

(1) How, within the scheme of first party insurance, to reallocate to heavy vehicle owners appropriate portions of the cost of injury caused by heavy vehicles.

(2) How to coordinate various insurance coverages and compensation systems to avoid double recovery without legislatively allocating market shares, and

(3) What level of first party coverage should be mandated and what part left for individual decision through deductibles, limits on monthly income reimbursements, exclusions, etc.

These issues are not discussed further in this article. I am confident the resolution of these issues in the final draft of UMVARA will be realistic and fair.

7. Members of the Committee are: Chairman, Dean Lindsey Cowen, University of Georgia School of Law; Prof. Jack Davies, William Mitchell College of Law; Tom Downs, Detroit, Michigan; M. King Hill, Jr., Baltimore, Maryland; Prof. Robert E. Keeton, Harvard Law School; Prof. William A. Kelly, School of Law, University of Kansas; Howard G. Kulp, Jr., Camden, New Jersey; Kelton S. Lynn, Rapid City, South Dakota; Vincent L. McKusick, Portland, Maine; Fred Puckett, Ohio Legislative Service Commission; George A. Ranney, Jr., Bureau of the Budget, Springfield, Illinois; Judge Irving Merrell Strauch, Memphis, Tennessee; Don J. McClenahan, Boise, Idaho.

Committee Staff are: Project Manager, Robert Bombaugh, Chicago, Illinois; Reporter-Draftsmen, William Cohen, Stanford University Law School and Roger C. Henderson, University of Nebraska Law School; Consultant—Dean Richard S. L. Roddis, University of Washington Law School.

The committee is assisted by an advisory committee which includes lawyers, insurance executives, professors, government officials, and business representatives.

The December 1 deadline has been both met and deferred. As of December 1, four successive drafts had been presented to the DOT, but the DOT and the NCCUSL have agreed that formal DOT comment upon the conference work will be directed to one of several drafts to be delivered during the spring of 1972. The drafting committee will conclude its major efforts by May 1972 with a draft to be considered for promulgation as a uniform act at the August 1972 meeting of the NCCUSL.<sup>8</sup>

After examining no-fault bills from various states the committee and staff selected the Minnesota bill as the focus for the drafting effort.<sup>9</sup> Eight full days of committee work plus independent redrafting by the reporters and other staff members produced a substantially completed bill representing committee consensus in time for first consideration by the NCCUSL.

The proposal went to the floor on August 27 containing a limited retention of fault liability. To amend the key provisions to provide either pure no-fault, a watered-down no-fault or any degree of no-fault in between was simple, however. The bill was drawn to accommodate these amendments and to make debate on this essential issue nearly inevitable. Since the same format will be in the final draft, battle over pure, partial or paltry no-fault will undoubtedly arise in those state legislatures that consider the Uniform Act. It is to be expected that when opponents cannot defeat a no-fault bill, they will seek a compromise retaining as much of the liability system as possible.<sup>10</sup> Therefore, a description of the sections and the amendments considered by the NCCUSL in August should be enlightening.

### *The Committee Draft*

The key provisions begin with a blanket abolition of tort liability "arising from the ownership, maintenance or use of a motor vehicle."<sup>11</sup> This provision stand-

8. Preliminary drafts are available from the NCCUSL office upon request. The address is 1155 East 60th Street, Chicago, Illinois 60637. The DOT grant has been supplemented with a \$100,000 grant from the Ford Foundation.

9. See Davies, *The Minnesota Proposal for No-Fault Auto Insurance*, 54 MINN. L. REV. 921 (1970).

10. "It was charged this week, by a young Boston lawyer, that American trial lawyers who often make careers in settling claims under the present 'fault' system—have begun a stealthy campaign to ruin the insurance reform's chances, or, probably more accurately, to see that reform bills that emerge in state legislatures obfuscate the real issue involved." *Supra* note 3, at 16, col. 1.

11. SECTION [ ] [PARTIAL ABOLITION OF TORT LIABILITY] Tort liability arising from the ownership, maintenance or use of a motor vehicle within this state is abolished except as to:

- (a) damages to property other than motor vehicles and their contents;
- (b) intentional assault and intentional battery;
- (c) damages for noneconomic detriment as permitted by Section [ ] [RESTRICTION ON RECOVERY FOR NONECONOMIC DETRIMENT]. . . ." UNIFORM MOTOR VEHICLE ACCIDENT REPARATION ACT 5 (Second Tentative Draft, Aug. 24, 1971) [hereinafter cited as UMVARA].

ing alone produces pure no-fault. In fact, this abolition produces a bit purer no-fault than is desired by anyone, so an "except" clause preserves liability for "intentional assault and battery."

A second "except" preserves negligence liability for damage to store fronts, traffic signs, lampposts and all other property which does not constitute "motor vehicles or their contents."<sup>12</sup> Neither of the above exceptions received much floor discussion.

However, the third exception was debated for nine hours. As presented to the floor, the provision read:

SECTION [ ] [RESTRICTION ON RECOVERY FOR NON-ECONOMIC DETRIMENT.] A person remains subject to tort liability for noneconomic detriment<sup>13</sup> caused by his ownership, maintenance or use of a motor vehicle only if the injured person has suffered permanent significant loss of body function, including death, permanent serious disfigurement or an injury resulting in medical expenses exceeding \$5,000. In all such cases, the party liable is entitled to an exemption reducing such liability in the amount of \$5,000.<sup>14</sup>

Commissioners *resistant* to the no-fault concept attacked the first \$5,000 figure as too high. "Yes, it is high," was the response, "but most really serious injuries will become eligible for non economic benefits because they involve 'permanent significant loss of body function.' The \$5,000 is only intended to cover very serious cases where there is a good medical recovery. A lower figure would bring in too many lawsuits." The committee also argued that a lower figure would encourage victims to build medical costs artificially to climb over the threshold.

A commissioner suggested from the floor that medical costs vary so much

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12. In a no-fault scheme damage to property other than motor vehicles may be compensated on the basis of strict liability against the car owner and his insurer or on the basis of fault. The decision to retain fault and thus leave some of the loss on roadside property instead of imposing the entire cost on the auto insurance system through strict liability is supported by one commissioner's suggestion that some of the insurance cost should be included in the premiums of the man who "builds his house by the side of the road." Since driver fault is almost presumed whenever an auto hits a house, store or sign, the commissioner's decision to stay with fault for damage to property other than motor vehicles or their contents does not significantly change where costs will ultimately fall.

13. The term "noneconomic detriment" is a euphemism for "pain and suffering."

14. UMVARA, *supra* note 11, at 6. UMVARA contains at this time one more element of retained tort which is omitted from this discussion because it is of limited application, indefensible, and under continuous attack in the drafting committee. It retains an action for income loss exceeding the level of compulsory coverage. This makes the action available only to victims with lost earnings exceeding approximately \$15,000 per year, a group well able to purchase voluntary no-fault coverage to protect its high standard of living.

from area to area that a uniform figure nationwide was inappropriate. That argument carried the day. The \$5,000 figure for medical expense was stricken and the drafting committee was instructed to prepare a comment to guide legislatures in filling the blank. The compromise insures that in each legislature considering the bill no-fault opponents will have an opportunity to open the door to more lawsuits by inserting figures such as \$500 or \$1000, the lawsuit thresholds in Massachusetts and Florida respectively.<sup>15</sup>

The defense of the first \$5,000 had been mild, however. The drafting committee saved its heavy guns to resist an effort to reduce the \$5,000 figure in the last sentence of the section. That sentence provides a \$5,000 deduction from pain and suffering damages awarded in the retained fault lawsuits. When the exemption was attacked the committee raised a vigorous defense.

Committee members asserted that a lower figure would tempt juries to inflate verdicts so as to negate the exemption. The \$5,000 figure would communicate to juries and judges the strong policy that all victims were to bear a significant measure of noneconomic loss without money succor. The high figure preserved the lawsuit for the serious cases, but cut out the mass of trivia which costs the auto insurance system billions of dollars.<sup>16</sup> With each dollar the figure is lowered, the temptation to the claimant and his attorney to give the lawsuit a try becomes greater. With each reduction in the exemption the nuisance claim value of auto injuries is increased. The drafting committee asserted that the conference could tamper with the \$5,000 exemption only at grave risk to the no-fault system. The committee was asked for statistical support for the \$5,000 exemption. It had none because the figure is based on subjective judgment.<sup>17</sup> Furthermore, no other figure could be supported statistically, so those who wanted to reduce the deduction were equally unarmed on the issue.

A compromise was offered from the floor which would retain the \$5,000 figure, but put it in brackets to flag it for further consideration at the 1972 NCCUSL annual meeting. In the meantime the brackets would suggest to legislatures looking at preliminary drafts that the dollar figure represents a judgment rather than a statistically determined "benchmark" and that legislatures can make independent judgments on the issue if they choose. The compromise was adopted.

#### *Basis for Tort Retention*

The retention of even limited tort liability in the Uniform Act should be ex-

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15. MASS. GEN. LAWS ANN. ch. 231, § 6D (Supp. 1971). FLA. STAT. ANN. ch. 71-252, § 8(2).

16. *Supra* note 4, at 25-30.

17. Its origin is § 4.2(2) of the Keeton-O'Connell bill. R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 323 (1965).

plained, for the drafting committee is generally committed to the no-fault concept. Why were no-fault opponents provided with a retained tort section which can serve as a vehicle for their efforts to dilute the potentials of no-fault?

Some compromise within the drafting committee is involved. But the asserted, logical basis for retaining tort in serious cases is concern that grievously injured traffic victims may not be adequately compensated by reimbursement of economic losses and nothing more. However, providing a method of fair compensation for noneconomic losses in serious cases is difficult. The American Insurance Association (AIA) in its initial proposal offered fifty percent of medical expense as a benefit provided in addition to compensation for economic loss.<sup>18</sup> The AIA quickly dropped that part of its plan because the amount of medical expense often has no correlation with pain, inconvenience or any other justification for compensation for noneconomic detriment.<sup>19</sup>

The Minnesota bill included a fixed schedule of benefits for "medical impairment."<sup>20</sup> The schedule approach has not found favor, primarily because of workmen's compensation experience under which the schedules have become unreasonably low with the passage of time. Perhaps a schedule approach will eventually win favor, but the drafting committee for the Uniform Act has passed it by.

Lacking any other formula for awarding benefits for noneconomic loss, the committee chose to retain the limited tort action now found in its draft. This follows the Keeton-O'Connell bill formula.<sup>21</sup> Retention of tort has the advantage of providing no debating points to opponents of no-fault. Tort is familiar, even if discredited. Tort damages in serious cases provide a handy answer to the "horrible hypotheticals" used by foes of no-fault to imply that benefits will be inadequate under first party insurance.<sup>22</sup>

There is another method of providing benefits above economic loss reimbursements. It lacks the political advantages of retention of tort, but is honest and logical. The alternative is to leave the problem of providing compensation for noneconomic loss to the insurance marketplace by allowing insurance companies and their customers to work out whatever coverage they choose. Voluntarily purchased coverage might take the form of a schedule, or a percentage

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18. AMERICAN INSURANCE ASSOCIATION, REPORT OF THE AMERICAN INSURANCE ASSOCIATION'S SPECIAL COMMITTEE TO STUDY AND EVALUATE KEETON-O'CONNELL BASIC PROTECTION PLAN AND AUTOMOBILE ACCIDENT REPARATIONS 5 (1968).

19. See Maynes & Williams, *Fault or No-Fault?*, PROCEEDINGS OF A NATIONAL CONFERENCE ON AUTOMOBILE INSURANCE REFORM 84 (1970); Statement of T. Lawrence Jones, President, American Insurance Association.

20. *Supra* note 9, at 935-39.

21. *Supra* note 17.

22. See Simonett & Sargent, *The Minnesota Plan: A Responsible Alternative to No-fault Insurance*, 55 MINN. L. REV. 998 (1971).

of lost earnings, or a percentage of medical expense or, most unlikely, an indeterminate benefit like today's pain and suffering awards.<sup>23</sup>

### *Legislative Battles*

The extent to which fault lawsuits will be retained has been the key issue in each legislature which has considered a no-fault law and in the succeeding drafts of the Hart-Magnuson bill in Congress. The extent to which fault is retained marks the distinction between (1) the pure no-fault bills—American Insurance Association,<sup>24</sup> Stewart-Rockefeller,<sup>25</sup> Minnesota proposal,<sup>26</sup> latest Hart-Magnuson draft,<sup>27</sup> (2) the partial no-fault bills—Keeton-O'Connell,<sup>28</sup> Massachusetts law,<sup>29</sup> Florida law,<sup>30</sup> first Hart bill<sup>31</sup> and (3) the paltry no-fault bills—Delaware<sup>32</sup> and Illinois<sup>33</sup> laws, the American Mutual Insurance Alliance bill,<sup>34</sup> National Association of Independent Insurers bill.<sup>35</sup>

Some effort has been made to represent that Oregon, Minnesota and South Dakota have adopted no-fault legislation. Since there is no restriction on auto negligence lawsuits whatsoever under the legislation adopted in these three states, the claims are without foundation. Oregon does compel purchase of some no-fault coverage.<sup>36</sup> Minnesota and South Dakota simply require insurance companies to offer supplemental no-fault coverage along with liability policies.

### *Conclusion*

There is much room for politically expedient compromise through combining in a bill various proportions of fault and no-fault. There is little room for intellectual compromise on the issue. Once one rejects the utility of civil liability

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23. Committee Print 1, of the Hart-Magnuson bill (S.945, 92d Cong., 1st Sess. (1971)) compels the offering of optional coverage with pain and suffering benefits measured by the standards of today's tort system. The price of such coverage, with its inherent inefficiency, makes its widespread utilization unlikely. Still, this bill would add an unnecessary complexity to the insurance marketplace if it, as adopted, were to require companies to offer an irrational coverage.

24. *Supra* note 18.

25. *Supra* note 4.

26. *Supra* note 9.

27. S.945, 92d Cong., 1st Sess. (1971).

28. R. KEETON & J. O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM* (1965)

29. MASS. GEN. LAWS ANN. ch. 231, § 6D (Supp. 1971).

30. FLA. STAT. ANN. § 71-252 (West Supp., June 1971).

31. S.4339, 91st Cong., 2d Sess. (1970), 116 CONG. REC. 31,521 (1970).

32. Ch. 98, [1971] Del. Laws 55.

33. ILL. ANN. STAT. ch. 73, § 1065.150 (Smith-Hurd 1972).

34. The National Underwriter (Property and Casualty Insurance Edition), December 18, 1970, at 1, col. 4.

35. *Id.*

36. Ore. Rev. Stat. § 731.418, § 743.786 (1971).



as a deterrent to poor automobile driving, retention of any of the fault system is demonstrably pointless and expensive.<sup>37</sup> The retained tort section of the UMVARA is so limited that it will add only slightly to auto insurance costs. Its more serious negative aspects are that it interferes with the development of a sound first-party coverage compensating for non-economic loss and that it gives a tactical opening to those who would like to water down no-fault legislation.

Whatever opponents of no-fault insert as an exception to the abolition of tort liability shrinks the impact of the no-fault system. In the Uniform Act itself the opponents have a bridgehead from which to amend the act to expand the area of retained tort. On the other hand no-fault purists need not accept the \$5,000 deduction from pain and suffering awards as a minimum. If the deduction is raised, the bill becomes purer no-fault and a greater proportion of the no-fault potential will be realized. If liability for noneconomic damages is eliminated entirely, the bill becomes pure no-fault and will deliver the full no-fault potential in efficiency and justice.

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37. U.S. DEP'T OF TRANSPORTATION, CAUSALITY, CULPABILITY AND DETERRENCE IN HIGHWAY CRASHES (July 1970) (prepared by D. Klein & J. Waller).