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Symposia on no-fault are common stuff. Ours is one of many, and there will be more until we can hack out a consensus among lawmen and the rest of the community. If editorial opinion is a criterion, the public is willing to buy no-fault now. And the new dispensation has more than a foot in the doorway. Legislatures in five states have approved it. Lawyers cannot duck it, no matter how much they would like to, and they will have to engineer it.

Language is inadequate to describe the civil suit for damages. It is a tremendous, comprehensive, and wonderful institution. Even "institution" may be the wrong word, but to the man in the street a lawsuit means the law. In torts the civil suit has been flexible enough and loose enough that we have been able to mold it to fit the exigencies of every generation. It is still growing although we have never eliminated the ambiguities of the taught law. We get results, and we come up with answers in thousands of instances with intricate combinations of fact. We rely on appraisals and evaluations of professional and lay judges according to community standards which we find in concrete police regulations and the generalities of foreseeability and the reasonably prudent man. It takes practical know-how to sift and divide the multiple issues of a case into questions of fact, questions of law, and mixed questions of fact and law.

With all of its flexibility and vitality, the civil suit for damages is only approximately good. It has never covered all the ground. The basic standard for conduct is too simplistic to support the intricate superstructure we have erected on it. The basic standard itself is unreal. It sounds too good to be challenged. Of course a man should pay for what he has done when he has injured his neighbor intentionally or inadvertently. However, there is a big "but" which made tort law academic until the last three generations. Most people could not pay for their torts. We had to wait for vicarious liability, railroad companies, proprietary functions for municipalities, the contingent fee and finally, the automobile and the underwriting business to make tort litiga-

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tion practicable for lawyers. It is a bluffer's game to suppose that due process and equal protection are inherent in the fault system and only in this system.

We have effected results we did not plan. We have created a world of "haves" and "have-nots." We have stimulated the development of an under-writing business to cover the costs of risk-bearing, and where there is the risk-bearing possibility, we have let it affect the kind of structure we have erected on the basic rule of conduct. In the little cases we have erased many of the distinctions between the "haves" and "have-nots"; underwriters settle many of these regardless of fault. In the bigger cases we have multiplied the possibilities for chance, and it is in these bigger cases where we have indulged our professional inclinations for casuistry. The whole operation costs the community in money, time, and court room efficiency, but it does support the adversary system. Lawyers will not buy an alternative that destroys their professional careers.

Right now when the pressures for no-fault are intense, lawyers are caught on the horns of a dilemma that challenges their ingenuity, their public spirit, and their sense of history. Perhaps Keeton-O'Connell is the ideal compromise. Many lawyers who oppose their plan have never read their book. Keeton and O'Connell want to save the civil suit for the bigger cases. Of course, it could be for a time at least after a legislature approves Keeton-O'Connell, that many lawyers and many clients will want to believe that all cases are big. That could defeat the purpose of the plan in spite of the opportunities it affords for contingent fees. The compulsory $10,000 basic protection plus the $5,000 optional coverage for pain and suffering, with the $15,000 minimum for the civil suit, is the heart of the plan. Even on the basic protection level some claimants will need the services of lawyers, and the lawyers will be paid from the system.

There are other alternatives than Keeton-O'Connell. Some of them would exclude the civil suit except as a penalty. Some of them have dollar limitations that suggest the kind of inflexibility we know in workmen's compensation, and this time we do not want a system geared to schedules that only a legislature can change. In an introductory essay it is not practicable to criticize plans or to offer alternatives, but you can pin down four basic factors which affect decisions on no-fault. First, we are facing a crisis in the personal injury field where we are pricing ourselves out of business. Secondly, and to summarize what is outlined in preceding paragraphs, fault is inadequate as a measure of social conduct. Third, our learning on damages is as artificial as the taught law on fault. We have been able to live with that taught law on compensatory, consequential, and punitive damages because we can tie up the loose ends through the flexibility of the jury system. That the price of a tort should be related to a defendant's conduct as a warning to others is as old as the action

of trespass. That price depends on the injured victim's needs and expense is as old as the action on the case. The two approaches are intertwined in thousands of cases. Paradoxical as it may seem, the jurors do a better job with the intertwining than the lawyers do in explaining it.

Most of the damage factors we lawmen articulate are so subjective that we can not trace their effects into a jury's verdict. When ceilings on judgments were at $50,000,[1] we could afford to put everything into the hopper. When we are pricing ourselves out of business, we have to re-examine the whole package. We cannot let ourselves be stymied on no-fault by the legalisms on damages. Let me cite two special areas, pain and suffering and loss of consortium. There is something of substance in each which legislatures cannot overlook when they try to restructure any part of the personal injury field, but they will have to look beyond the taught law and sample jury instructions to discover any part of that substance.

Finally, we have to prophesy the effects of a new dispensation on the adversary system. The personal injury business may need drastic surgery, but the community cannot afford to lose its tort lawyers. Personal injury practitioners are bound to suffer from the first impact of the new system, but they will not have to go out of business. Claims will not always be paid according to the expectations of injured victims. There will be adversary proceedings, and there will be court cases. Claimants will be represented, and the underwriters for the system will have to cover the lawyers' fees even when the claimants lose. Whether or not an adversary proceeding at the first level will be tried before a special administrator or in a civil suit is a policy choice for a legislature. Adversary proceedings can encompass many issues, the extent of economic loss, allowing something for physical disability according to the schedules of the scheme and effecting dispositions in death cases according to dependency and need. There will be possibilies for third-party actions against manufacturers although not in great quantity. The opportunities for lawyering will be many. Lawyers are adjusting now to new conditions in the community, and they are prospering.

Keeton-O'Connell is a practical scheme that saves much of the old system. Perhaps we have to save that much in the automobile-using field to sell the new plan, but no-fault as a concept is not something brand new in the law. We have it in work injuries, in products liability, and it could be that we shall have it in medical cases. Absolute liability can include a ceiling on benefits. For many years damages in personal injury cases were so inadequate that lawyers had to

1. This essay is like an editorial, and I have not tried to annotate it. Nevertheless the proposition I have marked is crucial, and it needs some explaining. I surveyed the case law thoroughly, and I published my article in 1930. Miller, *Assessment of Damages in Personal Injury Actions*, 14 MINN. L. REV. 216 (1930).

exploit every possibility to produce enough to cover attorneys' fees and the costs of convalescence. Since World War II the pendulum has swung the other way. Legislators must be realistic. The economy cannot absorb seven-figure judgments, although money damages in the big cases are never adequate. Members of the injured victim's family and his neighbors must share with him the burden of his hurt. The community can never make him whole. But legislators can be practical. The automobile-using community can give enough to its victims to cover economic loss, maybe something for physical disability, and the benefit of a penalty when the conduct of the defendant warrants it. All that suggests a lot of lawyering.

How to accomplish it taxes the ingenuity of statesmen. I am reminded of the story about a grasshopper and an owl. The grasshopper hated to see winter come. He wished he were a cricket who could find a warm hearth and live with people. One of the grasshopper's neighbors heard him musing to himself, and the neighbor told the grasshopper to visit the owl and ask for advice, which the insect did. The owl said the problem was simple. The grasshopper should turn himself into a cricket. When the grasshopper asked the owl how he could do that, the wise old bird said, "You asked for advice, and I have given you a plan. You implement it." The moral of the story: lawmen are not as bad off as the grasshopper, but they will have to sweat.