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Basic Protection and the Future of Negligence Law

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BASIC PROTECTION AND THE FUTURE OF NEGLIGENCE LAW*

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COMING to full flower only in the nineteenth century,[1] negligence law is still a tender young plant among the hardy redwoods of legal history. Yet the jeopardy in which it stands is due not to its youth but to its aging inflexibility—to its failure to adapt to the era of the automobile. This is not to say that its end is at hand. Rather, a future of some kind for negligence law seems assured. The questions in doubt are what kind and for how long. The surest way of causing it to be inglorious and brief is to continue to ask more of this body of law than it can deliver, particularly in relation to compensating traffic victims.

I. MEASURING THE COMPENSATION SYSTEM BY SOUND OBJECTIVES

What objectives should a good set of laws for compensating traffic victims serve?

First, it should be aimed not simplistically at compensating but more

*This article is based in large part on talks before the National Conference of Bar Presidents at the mid-winter meeting in Chicago, February 16, 1968, and before a clinic sponsored by the Central Carolinas Chapter of the Chartered Property and Casualty Underwriters on February 14, 1968. I gratefully acknowledge also that in preparing the article I have drawn heavily on materials previously prepared in collaboration with Professor Jeffrey O'Connell of the University of Illinois, including BASIC PROTECTION FOR THE TRAFFIC VICTIM—A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE (1965) [hereinafter cited as BASIC PROTECTION] and AFTER CARS CRASH—THE NEED FOR LEGAL AND INSURANCE REFORM (1967) [hereinafter cited as AFTER CARS CRASH].

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[1] *E.g.*, Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850); Vincent v. Stinehour, 7

sensitively at compensating fairly. That is, it should determine both entitlement to compensation and liability for compensation on principles that are fair and just. There are differences about implementation no doubt, but surely a consensus on this objective.

Second, a good set of laws should offer reasonable assurance of financial responsibility for paying the compensation determined to be legally owing. Up through the nineteenth century the common law did very little about this. Today, in contrast, every state legislature has enacted some form of financial responsibility legislation.[2] Thus it appears we now have a consensus on this objective, too.

Third, a good set of laws for compensating traffic victims ought to distribute losses to some extent rather than imposing catastrophic burdens on individuals, whether victims or defendants. Perhaps a few will dissent here, but the history of state legislation encouraging the purchase of liability insurance, and sometimes even compelling it, is not to be explained solely as a movement for assuring financial responsibility. That objective could have been served by bonds or policies under which the bondsman or insurer, having paid a victim, was always entitled to recover in turn from the tortfeasor. Instead liability insurance pays on behalf of the tortfeasor. In short, liability insurance distributes losses. Its prevalence manifests a consensus for a system of distribution and against a system involving crushing individual burdens, whether upon victims or upon tortfeasors.

Fourth, a good set of laws ought not only to *distribute* but also, in the process, to *allocate fairly* the cost of compensating for injuries in traffic accidents. This objective is, in a sense, a corollary of the first objective of compensating fairly. It is simply a somewhat more specific development of that point. Here, too, there may be differences about implementation, but surely not about the objective.

Fifth, a good set of laws ought to operate with reasonable efficiency, minimizing waste.

Sixth, a good set of laws ought to minimize inducements to exaggeration and fraud.

Seventh—and I place this so late in the catalogue of objectives because there is more dissent about it, not because it occupies this place in my own order of priorities, in which rather it comes alongside providing fair and just compensation—a good set of laws ought to provide its payments promptly to meet the resulting economic burdens as they occur and to provide medical and other rehabilitative services as soon as they are needed.

Vt. 62 (1835); *see* 2 HARPER & JAMES, THE LAW OF TORTS 748-52 (1956).

[2] BASIC PROTECTION 76-109.

How well does the common law of negligence serve these seven objectives?

Measured against the first objective, the present system fails even to do well in compensating, much less in compensating fairly. It pays nothing to some deserving traffic victims and too little to others. It underpays especially the most severely injured persons, if it pays them at all.[3] Moreover, among these are the most deserving of all traffic victims. In contrast, as field studies in state after state demonstrate, it overpays victims with minor injuries.[4]

The present system also distributes unfairly the burden of costs resulting from accidental losses. We can predict the number of accidents and the toll of losses that will occur on roads of the quality we choose to provide, crowded with cars in the numbers we choose to operate, in the hands of drivers we choose to license. It is not alone carelessness of individual operators that produces these accidents. In the phrase of Professor Calabresi, we have made a "decision for accidents" of this order of magnitude by choosing not to spend more for safer roads and not to give up the many advantages we gain from using so many vehicles and licensing drivers so freely.[5] In reality, then, part of the cause of the accident toll is the set of community choices about roads and vehicles and drivers. The law, too, should attribute part of the accident toll to these choices. That is, it should place part of the burden on the whole group who benefit from these choices, and it should distribute the burden, to the extent it is feasible to do so, in proportion to the benefits derived from motoring of this degree of intensity. In this sense, motoring should pay its way in our society.[6] Moreover, insurance is a mechanism through which it is quite feasible to distribute this burden widely and fairly. Under the present system, in contrast, motor-

[3] A thorough documentation of this point appears in CONARD, MORGAN, PRATT, VOLTZ & BOMBAUGH, AUTOMOBILE ACCIDENT COSTS AND PAYMENTS—STUDIES IN THE ECONOMICS OF INJURY REPARATION (1964) [hereinafter cited as CONARD *et al.*]. *See, e.g., id.* at 179, 196-98, 222, 250. *See also* the additional studies cited in note 4 *infra.*

[4] *See, e.g.,* CONARD *et al.,* HUNTING & NEUWIRTH, WHO SUES IN NEW YORK CITY? A STUDY OF AUTOMOBILE ACCIDENT CLAIMS (1962); Morris & Paul, *The Financial Impact of Automobile Accidents,* 110 U. PA. L. REV. 913 (1962); Franklin, Chanin & Mark, *Accidents, Money and the Law: A Study of the Economics of Personal Injury Litigation,* 61 COLUM. L. REV. 1 (1961); James & Law, *Compensation for Auto Accident Victims: A Story of Too Little and Too Late,* 26 CONN. B. J. 70 (1952); COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES, REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS (1932). The findings of these studies are summarized in BASIC PROTECTION 34-69

[5] Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs,* 78 HARV. L. REV. 713 (1965).

[6] *See* BASIC PROTECTION 256-72, for a more extended development of this point.

ing and motorists generally escape a large part of accident costs. It is imposed instead on the unlucky persons who are the victims of uncompensated loss.

Second, the present system falls well short of the objective of assuring financial responsibility for payment of the benefits it declares to be due. Countrywide, it is a fair estimate even today that somewhere between ten and fifteen percent of the cars on our highways are uninsured for coverage that would pay victims injured by their operation.[7] Moreover, the persons operating these cars tend to be the less responsible drivers, causing a disproportionate percentage of injuries. It is true that through uninsured motorist coverage and like devices the percentage of wholly uncompensated injuries is sharply reduced. But provisions of this kind are almost always subject to low limits, besides being very unfair in that they make the wrong people bear the burden of losses even within the limits.[8]

Third, the present system falls even further short of the objective of distributing loss to avoid catastrophic burdens on individuals. Financial irresponsibility itself accounts in part for this failure because it leaves legally deserving victims of severe injury uncompensated and thus under crushing economic burdens. In addition, the present system leaves many other victims uncompensated because of its harsh rules for determining who are the legally deserving victims—its rules, for example, against allowing any compensation at all in cases of unavoidable accident and contributory fault. Who among us can defend as a work of justice the denial of compensation to the pedestrian who is struck on the sidewalk by a car out of control as the result of a so-called unavoidable accident, occurring when an apparently healthy driver suffers an unpredictable heart attack?

The last illustration is one of many that mark the present system as a failure under the fourth objective also—the objective of allocating fairly the costs of injuries sustained in traffic accidents. Moreover, the proposition that motoring should pay its way is relevant to this as well as to the first objective of compensating fairly. Not until much greater recognition is given to this proposition will the unfair allocation of the burden of accident losses be corrected.

Fifth, the present system is wasteful, requiring an annual fortune in tax dollars to support the trial of claims of traffic victims, and requiring too that motorists maintain a form of insurance so inefficient that it delivers net

[7] The estimated percentage of uninsured vehicles varies widely among states and among estimators and probably continues to grow smaller. Concerning published estimates that about 85 per cent of the nation's vehicles were insured in 1959 and 1960, see BASIC PROTECTION 65-66.

[8] *See* BASIC PROTECTION 67.

benefits of less than forty-five cents for each dollar of premiums paid in.[9]

Sixth, the present system has built-in inducements to exaggeration and even outright fraud that add both to its unfairness and to its wasteful costs. It lends itself on the one hand to an appalling percentage of shoot-the-moon, go-for-broke claims and on the other hand to bargaining on distress in defense. As the Governor of the Commonwealth of Massachusetts put it, describing the claims side of this picture in a message to the legislature in 1966, "too many motorists view our present insurance system as a treasure trove to be exploited whenever one is 'fortunate' enough to be involved in an accident." [10] The effects of the other side of this dismal picture—the hard-bargaining defense the system inherently encourages—is summarized in the report of Professor Conard and his colleagues at Michigan, telling us that "the man who has a severe injury is likely to settle for it quickly only if he settles for a relatively small amount." [11]

This last point is perhaps the most severe manifestation of the failure of the present system to meet the seventh objective—prompt payments. Payments are delayed, however, not only in these severe cases but also in cases of less severe injury. Indeed, any system of compensation that depends typically on one lump-sum settlement of each claim will commonly make its payments too late, even when it is operating at its best and the delay is only weeks or months. At its worst, with delays of years,[12] it cruelly aggravates the hardships inevitably produced by injury because the payments are delayed so long that they cannot serve the important needs they are designed in theory to serve.

II. Tailoring Reform to the Need

These severe shortcomings are the symptoms of a system that cannot survive. Fundamental change is imperative.

A number of responsible and thoughtful people have urged the abolition of jury trials in all automobile accident cases. Among them are some who urge also that we shift responsibility for this problem from the states to the federal government by adopting a national compensation plan for auto-

[9] *See, e.g.*, Conard *et al.*, *supra* note 4, at 8, 60 & n.82, 61.

[10] This passage from the Governor's 1966 message is quoted in an article by Christopher Lydon, reviewing the debate on automobile insurance reform, Boston Globe, Aug. 25, 1967, at 13.

[11] Conard *et al.*, *supra* note 4, at 222.

[12] The data are reported annually in Institute of Judicial Administration, State Trial Courts of General Jurisdiction—Personal Injury Jury Cases (Calendar Status Study). In very recent years the pressures of greatly increased criminal dockets have exacerbated already intolerable delays in most metropolitan areas.

mobile victims, patterned after workmen's compensation.[13] Some, too, are urging a greater role for government and a reduced role for private insurance. Preliminary investigations of the whole problem of automobile insurance have already occurred in Washington, and more are promised.[14]

Adopting a system of government insurance, or even a national compensation scheme operated mostly by private insurers, or abolishing jury trials in all traffic injury cases would be resorting to drastic remedies that still would not meet the need. More moderate and more suitable reform could be accomplished now with speed but for vigorous opposition from segments of the bar and the insurance industry—two groups that stand to lose the most if proponents of more drastic reform have their way.

Observe the position of the insurance industry today. Whatever the truth may be about whether insurance companies are losing or making money on automobile insurance, it is clear they are not doing as well as they did ten or twenty years ago, and not as well on this kind of insurance as they continue to do even today on other kinds of insurance. As a result many executives in the industry are trying to find ways to withdraw selectively from the automobile liability insurance business—to pick the customers they want and decline to write insurance for others. Inevitably, then, the number of people who cannot get the insurance they want is growing. This failure of the private industry to fulfill the public demand for insurance, if allowed to continue, will leave no alternative but some form of government insurance to fill the gap. Moreover, nobody can reasonably believe that government insurance, once introduced to this field, will be limited to writing insurance that private companies do not want to write. Thus, the most severe and immediate threat to the insurance industry is a threat more internal than external—a threat not that the government will move in and take the business away from an industry that is doing its best to meet the public demand and keep the business for itself, but rather that the industry will partly move out, leaving a vacuum that must be filled by government action. If the government must act—if it must either become the supplier itself or else compel a recalcitrant industry to meet the need, it is not hard to believe the former course will be the path of least resistance. If enough leaders of the insurance industry and the bar continue to oppose change until this fateful step is taken, the industry will be well on its way to losing its whole stake in the present system. And so will the bar, since any

[13] Hofstadter & Pesner, *A National Compensation Plan for Automobile Accident Cases,* 22 RECORD OF N.Y.C.B.A. 615 (1967).

[14] *See, e.g.,* STAFF OF HOUSE ANTITRUST SUBCOMM. OF THE COMM. ON THE JUDICIARY, 90TH CONG., 2D SESS., REPORT ON AUTO. INS. STUDY (1967); Turner, *Auto Insurance Facing Inquiries,* New York Times, Dec. 18, 1967, at 1, col. 5.

system of government insurance is certain to reduce drastically the role lawyers enjoy today.

Let it be clear, though, that more moderate reform should be favored not just because it happens to perserve a greater role for private insurance and for lawyers, but because it would better serve the public interest than either government insurance or the present system.

Defenders of the present system often argue that restrictive underwriting practices (involving cancellations, non-renewals, and refusals to write coverage for some classes of applicants) are an independent problem, unrelated to the system's performance in compensating traffic victims. But the increasingly restrictive underwriting of recent years has developed as an industry response to the upward spiral of claims costs and the increasing difficulty insurers have experienced in obtaining approval of rates they consider adequate. Thus, to the extent that wasteful features of the present system have contributed to the cost spiral, they have contributed also to the industry response of more restrictive underwriting. In turn, a cure for the waste would relieve the pressures for more restrictive underwriting and facilitate the development of voluntary pooling or other arrangements to meet in full the public demand that automobile insurance be available to all duly licensed drivers.

Moreover, although in some states restrictive underwriting practices produce more complaints than any other single evil, this is not the case everywhere. In others areas, wastefully high insurance costs are the prime complaint. Also, particularly in those areas that include congested metropolitan centers, delays in trials and settlements account for much of the dissatisfaction. Thus, the details of the system for compensating traffic victims vary from state to state, and so do the relative intensity of the different complaints it spawns.

Despite all these variations in detail, the underlying causes of deep trouble are built into any system founded primarily on negligence law and liability insurance, and they are at work in every state. The central source of the varied ills of the present system is the way it treats the multitude of claims that do not involve severe injury. The indictment, then, should be leveled not at the persons operating the system—neither the lawyers nor the insurance personnel—but at the system itself, and not at the whole system but more specifically at that part of the system concerned with the treatment of the claims based on less than severe injury—those that one might refer to as small or medium-sized.

The importance of dealing with this central problem of the small and medium-sized claims is driven home by data concerning the number of

these claims. Countrywide, of all bodily injury claims paid by liability insurance companies on passenger car coverage in a recent year, approximately 89 per cent were paid in amounts less than $2,000 per case, 79 per cent in amounts less than $1,000, and 62 per cent in amounts less than $500.[15] Field studies indicate that in typical settlements for amounts around $400, the loss is often less than $100. And it commonly happens that the net loss is still less because the bills are covered—and sometimes covered twice or more—by other kinds of insurance.[16]

Defenders of the present system argue that these payments above and beyond loss are based on fault and are paid for pain and suffering. But a liability insurance company can and usually does make a settlement with the other person even when its policyholder thinks he was not at fault. The reason is that it costs the company far more to defend against a small claim than to pay it. It would cost several times as much to fight a claim all the way through the courts as to settle it, for example, for $400. Thus, these payments and the ballooning of insurance costs caused thereby are not explained by the fault of the insured defendants, or the pain and suffering of the victims, or the undue generosity of insurance companies, or even all these things combined. Rather, this happens because every claim of a "twinge in the back," whether real or imaginary, has a substantial nuisance value.

Reform should be tailored to the distinctive need—tailored to change the way the present system treats the multitude of small and medium-sized claims. This is the key to the Basic Protection plan.

III. Central Principles of the Basic Protection Plan

Basic Protection insurance is founded on two major principles—first, paying losses from traffic injuries up to a moderate limit regardless of fault and, second, doing away with most negligence claims below a similar limit.

Observe the contrast between the non-fault principle of Basic Protection and the fault principle of the present system. Today, typically, claims are made against the other driver's insurance company, based on negligence, seeking a lump-sum payment. This payment, if obtained, ignores—and therefore overlaps with—reimbursement already received from other sources, such as Blue Cross, accident and health insurance benefits, and sick-leave pay. This offers an inducement to a claimant to realize a handsome cash profit—for example, by having a few x-rays he does not need

[15] These estimates were calculated from data for 1962 made available by Frank Harwayne, independent consulting actuary. Data for the most recent years are always incomplete because of delayed settlements.

[16] *See* the studies cited in note 4, *supra*.

and collecting the bill several times, as well as adding it to the "specials" that are customarily multiplied in arriving at a settlement of his negligence claim. The present system also attempts to pay dollars for virtually unmeasurable claims—which, especially in the trivial cases, often amount to uncorroborated assertions of a "nagging headache" or a "pain in the back." Basic Protection insurance, in contrast, applies a straight-forward, nonfault insurance principle—the one already applied in health and accident insurance, in fire insurance and even in the medical payments coverage and collision coverage of the automobile policy itself. That is, it pays for accidental losses within the defined coverage of the policy, regardless of fault. Thus payments are typically made by one's own insurer rather than the "other driver's" insurer. Also, they are made month by month, as losses occur, rather than in lump sum, and they reimburse only for net out-of-pocket loss, which ordinarily is objectively measurable and not likely to be a source of dispute.

The second major principle of Basic Protection is fulfilled by a partial exemption from liability for negligence extended to Basic Protection insureds.[17] Claims based on negligence are still permitted for severe injuries, however. That is, an injured person can recover as he does today for so much of his damages as are higher than $5,000 for pain and suffering or higher than $10,000 for all other items such as medical expenses and wage loss. Also, he can still press a claim based on negligence to recover the first $100 of out-of-pocket loss, which Basic Protection insurance does not pay to one who elects the standard deductible. Few people would actually choose to press these very small claims, however, once the nuisance value incident to an added claim of pain and suffering was removed. Moreover, those persons who wanted to be sure this first $100 of loss was covered could elect to eliminate the deductible from the Basic Protection insurance.

As a practical matter, then, the exemption would do away with a very high percentage of claims against Basic Protection insureds based on negligence. Since having Basic Protection insurance would be a prerequisite to registering an automobile,[18] this would mean that all but a very small percentage of the claims for personal injuries in automobile accidents would be handled entirely under the new Basic Protection insurance.

Basic Protection would be more efficient as well as more equitable than the present system. It would cut sharply into the wasteful litigation of small

[17] Basic Protection Insurance Act §§ 4.1-4.4, BASIC PROTECTION 323-26, 341-43. This act will be cited hereinafter as BPI Act.

[18] BPI Act § 5.1, BASIC PROTECTION 326-27, 341-43.

and medium-sized cases and the wasteful duplication of coverages for the same loss.

IV. Claims for Pain and Suffering

Even though Basic Protection insurance itself does not pay benefits for pain and suffering, those who believe in compensation for pain and suffering as well as economic loss are offered a better and fairer deal under the Basic Protection plan than they get under the present system. Today, trivially injured victims receive several times as much compensation as their out-of-pocket losses.[19] This is justified as pain and suffering damages, but in fact it is mostly the reflection of the nuisance value of claims growing out of the fact that the amorphous, indefinite valuation of pain and suffering makes every claim potentially expensive to defend. In contrast with this overpayment for trivial injuries, those who suffer the most pain—the most severely injured victims—receive less than their out-of-pocket losses. Few among them receive more than a fraction of loss; thus they receive nothing extra for their pain. The Basic Protection plan seeks to do more for the severely injured person by guaranteeing payment of his out-of-pocket loss up to $10,000 while preserving his right to recover in a negligence claim for his pain and suffering damages above $5,000 and his out-of-pocket loss above $10,000.

Moreover, one would have a choice about whether to have insurance coverage for pain and suffering damages under the Basic Protection plan. Today, a person is forced to pay the cost of pain and suffering damages, whether he likes it or not, if he buys any liability insurance at all. This is true because pain and suffering damages are part of the claims his insurance company pays to others, not him, and it is not feasible to give him an option. Under Basic Protection, in contrast, people could decide for themselves whether pain and suffering damages are worth the cost.

Note, too, that the motorist could buy such optional coverage with savings realized under Basic Protection insurance. Thus, Basic Protection would provide a better deal for motorists and for victims generally—with an exception, however, as to the trivially injured person who is overpaid today, really because of the nuisance value of his claim though on the theory of pain and suffering. He would get less under Basic Protection. That is part of the strength of the plan. It redresses this serious inequity of the present system.

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[19] *See* note 4, *supra*.

V. Cost Savings under Basic Protection

The increased efficiency of Basic Protection would produce savings of two principal types. One type concerns tax dollars the public pays to provide courts for the trial of these automobile accident cases. This burden in taxes runs even higher than the amount of the benefits delivered in tens of thousands of the less severe cases every year. This is clearly demonstrated by calculating the cost to the public of providing a courtroom, a judge, an officer, a court reporter, clerks, clerical personnel, and a jury to spend two days or more trying a case in which, as happens in a high percentage of trials, the traffic victim wins a verdict of no more than $1,500, of which he receives less than $1,000 above his lawyer's fees and other expenses. Plainly the taxpayers' costs of such a trial far exceed the amount the claimant recovers.

A second type of saving concerns insurance premium dollars. Countrywide, policyholders are paying $2.20 in automobile liability insurance premiums for each dollar in net benefits returned to injured persons.[20] Moreover, a large part of the reason for this low efficiency is the cost of controversy, investigation, and negotiation concerning all the multitude of small and medium-sized claims, together with the cost of full-dress trial in a number that are a small percentage of the total volume of these claims but enough to be a large percentage of court dockets.

Consider how great the savings in insurance costs can be. Under the negligence system the endless and innumerable fights over fault and over how much pain is "worth" are big items of expense. These are eliminated under Basic Protection insurance. The actual cost of paying for pain and suffering up to $5,000 is also eliminated. Since this often equals several times the out-of-pocket losses in the smaller cases of which there are so many, this means a very substantial saving. Also Basic Protection does not duplicate payments made from other sources such as sick leave or Blue Cross. In contrast, a tremendous amount of waste accumulates under the present system from the fact that payments are so often made to cover losses already paid for. And the waste includes a heavy charge for the overhead of paying these duplicating benefits through an insurance system. Finally, because of deductibles, Basic Protection insurance does not pay for the first $100 of loss or 10 per cent of wage loss, whichever is greater, and this means substantial savings. It reduces payments by these amounts and also avoids the administrative expense and waste of having small amounts paid through the mechanism of insurance.

The prediction of substantial savings is verified by actuarial studies.

[20] *See, e.g.*, Conard *et al.*, *supra* note 4, at 8, 60 & n.82, 61.

Frank Harwayne of New York City, one of the most distinguished and respected independent consulting actuaries in the United States, has conducted studies of the expected impact on costs if Basic Protection were introduced in New York[21] (a state that now has compulsory liability insurance) or Michigan[22] (a state that now has financial responsibility legislation as distinguished from compulsory insurance). In both instances he concluded that under the Basic Protection system costs would be substantially less than under the negligence system, even though Basic Protection insurance would pay substantially more people.

To the very limited extent that results of very extensive industry studies of projected costs of Basic Protection have been made public,[23] they indicate that Harwayne's estimates of savings are too conservative rather than too generous. This is not to say that industry actuaries are coming out for Basic Protection. Rather, they seem more often to be arguing that Basic Portection reduces payouts more than Harwayne estimates and more than the public will approve. As for the question whether the public would find the change an acceptable bargain, it would be helpful if the industry would make their actuarial studies public—all of them—and let the public make an informed judgment. In any event, industry actuaries agree that reductions in payouts mean reductions in costs as well. Indeed, sometimes they seem to be making the point that Basic Protection would sharply reduce total premium volume and, in turn, insurance company profits, since profit allowances in rating standards are stated as a percentage of premium volume.

Building in part on industry actuarial findings that Harwayne has underestimated the extent to which insurance payments will be reduced—for example, by eliminating payment a second time for a bill already covered

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21 HARWAYNE, THE RELATIVE COST OF BASIC PROTECTION INSURANCE IN NEW YORK STATE—AN OBJECTIVE DETERMINATION (1968); Harwayne, *Insurance Cost of Automobile Basic Protection Plan in Relation to Automobile Bodily Injury Liability Costs* (1966), reprinted in 13 PROCEEDINGS, CAS. ACTUARIAL SOC'Y 122 (1966).

22 Harwayne's report of his Michigan study is being published in the UNIVERSITY OF ILLINOIS LAW FORUM and subsequently by the University of Illinois Press in the book, CRISIS IN CAR INSURANCE (Keeton, O'Connell & McCord eds. 1968).

23 *See, e.g.*, Wolfrum, Discussion [of Harwayne's paper], reprinted in 13 PROCEEDINGS, CAS. ACTUARIAL SOC'Y 164 (1966). Wolfrum's comments on Harwayne's Michigan study are being published in the UNIVERSITY OF ILLINOIS LAW FORUM and subsequently by the University of Illinois Press in the book, CRISIS IN CAR INSURANCE (Keeton, O'Connell & McCord eds. 1968). *See also* Boston Globe, Feb. 18, 1966, at 34, quoting a spokesman for mutual insurance companies in Massachusetts as saying that studies by the mutual companies themselves confirmed estimates that Basic Protection insurance would produce savings of about 25 per cent for policyholders in comparison with costs under Massachusetts' compulsory liability insurance system.

by Blue Cross or other insurance—some opponents of Basic Protection persist in arguing that Basic Protection reduces costs (if indeed they concede that much) only by reducing benefits.[24] In so arguing, they fail to take account of the savings in litigation costs. Or perhaps they imply that lawyers' fees and investigation expenses are benefits. It is interesting that in informal discussions some insurance executives have said specifically that from their point of view as liability insurance companies the lawyers' fees they pay are benefits they deliver to their policyholders. But whatever characterization they might be given from the point of view of lawyers and insurance companies, from the point of view of the public these lawyers' fees and other investigation and litigation costs are not benefits but are administrative costs of a negligence and liability insurance system. A substantial part of the savings of Basic Protection are achieved by reducing these wasteful costs, without reducing benefits to victims.

As noted before, additional savings come from eliminating that part of small settlements that theoretically is compensation for pain and suffering but actually is mostly a reflection of nuisance value. This can be called a reduction of benefits, if we call anything that is paid to any victim a benefit. But if we think of benefits as payments that meet some worthy need, then payments for nuisance value do not deserve to be called benefits. Similarly, duplicating payments for loss already reimbursed from Blue Cross or medical payments coverages do not deserve to be called benefits from this point of view. Eliminating this duplication reduces payments, certainly, but these are reductions that serve to eliminate one of the evils of the present system—its crass inducement to what is kindly called overutilization of medical coverages. Thus, these reductions in payments that Basic Protection provides for are carefully chosen to serve not only the purpose of reducing costs but also the purpose of redressing other shortcomings of the present system.

VI. Equity in Insurance Rates

The Harwayne studies of cost comparisons between Basic Protection and the present system in New York and Michigan[25] concern average savings among all policyholders within each of these states. Certainly some changes in distribution of costs would occur, with the consequence that some policy-

[24] *E.g.*, Kemper, Automobile Insurance: The Criteria for Survival 5 (Address at midwinter meeting, Federation of Insurance Counsel, Feb. 2, 1968): "It can reduce costs only in proportion to a reduction of benefits, by offering an inferior service rather than a more efficient one. And even for the inferior service, lower cost is highly doubtful."

[25] *See* notes 21, 22, *supra*.

holders would realize greater than average savings and others less. Indeed, one of the advantages of a reform such as Basic Protection is that it would open the door to curing some glaring rating inequities of the present system.

A striking example of inequity today is charging identical rates to two policyholders for whom all factors affecting probable accident involvement are alike but whose annual earned incomes are $5,000 and $50,000 respectively. To the insurance system as a whole, these two represent very different risks because an injury causing six months of total disability produces a $2,500 wage loss in one case and a $25,000 wage loss in the other. This is disregarded in rating plans under the present liability insurance system, however, because the company paying the $25,000 loss is not the high earner's own company but some other. Since payments made by a liability insurance company ordinarily go to strangers rather than to its own policyholder or members of his family, the companies do not charge a higher or lower rate because of the probability of higher or lower losses resulting from a given kind of injury. In contrast, imagine what the reaction would be if fire insurance companies charged the same total dollar premiums to two policyholders for full coverage of their respective houses when one's house was worth $5,000 and the other's worth $50,000! This kind of subsidy of high earners by low earners because the same rate is charged to both is built into the present liability insurance rating system.

Under Basic Protection, a company would be vitally interested in the potential earnings loss of its policyholder and members of his family, since a large percentage of its payments would go to them rather than to others. Thus, it would cost the company less to insure the $5,000 earner than the $50,000 earner, and rates would quite naturally be adjusted accordingly. The need for a very wide discrepancy between rates to achieve equity is avoided, however, by a limitation of benefits for lost wages to a maximum of $750 monthly.[26] The high earner desiring higher coverage would pay his added rates in purchasing voluntary coverage in excess of this amount.

It is often argued by opponents that the Basic Protection plan would produce a converse inequity by giving commercial risks an unfair advantage. It is said, for example, that trucks would be unfairly favored at the expense of private passenger cars—because trucks cause more injuries to occupants of cars than to occupants of the trucks and the insurers of trucks would thus pay fewer claims under Basic Protection than they do under liability insurance. Surely it would be inequitable to allow rates to be fixed on this basis. But it is not necessary that such an unfair rating system be used with Basic Protection. Rather, the tendency of trucks to cause more injuries

[26] BPI Act § 2.3(d), BASIC PROTECTION 309.

to occupants of other vehicles should be taken into account in fixing their rates, and the bill filed in Massachusetts for the 1968 session provides specifically for this to be done.[27] It also provides for a system of equalization among insurance companies to avoid inequity among them, for example, in the event of disproportionate distribution among companies of the coverage written for truck lines.[28] It may be argued that some comparable kind of revised rating system could be devised to correct inequities of the present liability insurance system, and perhaps this is so. Two things seem clear, however—first, that it is highly unlikely that such a revision of liability insurance rating will occur in the absence of more fundamental changes and, second, that arguments leveled against Basic Protection on the assumption that it would be rated so as to favor such policyholders as truck lines can be met effectively with a sensible and equitable design of the rating system.

Another argument advanced by opponents is that Basic Protection would disfavor policyholders who have especially good coverage of other types such as Blue Cross and wage continuation plans because their benefits from Basic Protection would be lower than the benefits of persons having no such coverage of other types. This argument, too, fails to take due account of the fact that different rates can be charged to these different types of policyholders, and the bill filed in Massachusetts for 1968 includes specific guidelines for rating in this way.[29] As noted above, the savings predicted in the Harwayne studies are average savings. Under a sound and equitable rating plan, policyholders having better than average insurance of other kinds such as Blue Cross, sick leave and wage continuation plans will save even more. Naturally insurance companies would prefer the business of such policyholders and, if allowed to do so, would compete for that business by offering lower rates to those with significantly better than average coverage of other types.

Some comments are in order, too, about the horrible examples cited by opponents in arguing that Basic Protection disfavors those with virtually full coverage of their medical and wage losses from other sources. In the first place, the alleged inequity under Basic Protection is completely answered by allowing a lower rate, properly adjusted to the reduced risk (which still, however, must include a premium appropriate to cover losses to others covered under the policy, such as passengers and pedestrians, as well as the possibility of excess losses to the policyholder himself). In the second

27 House Bill 2712 (Mass. 1968).

28 *Ibid.*

29 *Ibid.*

place, an example such as that of the person who has a loss of $4,150, receives reimbursement of $3,650 from other sources,[30] and is still allowed to recover the full $4,150 as part of his tort claim is truly an example of one of the things horribly wrong with the present system. The law should not and generally does not tolerate this kind of profiteering by double recovery for loss in fire insurance. Neither should it do so in bodily injury insurance. It not only builds into the system terrible inducements to exaggeration and dishonesty but also requires every honest policyholder to pay an unnecessarily high premium to help finance all the double recoveries —those that are exaggerated as well as those that are scrupulously honest.

It is argued, also, that because a Basic Protection insurance company commonly pays benefits to its own policyholder and pays regardless of fault, this system inequitably redistributes the burden of insurance premiums, favoring bad drivers and disfavoring good drivers.[31] Insofar as this is a protest against taking into account the extent of one's own potential loss because of such factors as his high or low earning capacity and his good or poor collateral source coverage, it is, as shown above, a protest against correcting some of the inequities in rates charged for liability insurance under the present system. For example, a driver who is good enough that he is likely to be involved in only half as many accidents as the average driver but whose predictable earnings loss from a given kind of injury is ten times as high as the average ought to pay a higher than average rate because he represents a higher than average risk to the insurance system, even though he is a better than average driver.

Another element of the arguments opponents advance in contending that Basic Protection would disfavor good drivers is based on the two assumptions that bad drivers pay higher rates than good drivers under the present system and that this would no longer be true under Basic Protection. That is, these arguments are based on the assumptions that if benefits are based on fault so are rates and that if benefits are not based on fault neither are rates. In fact the criterion for benefits and the criterion for rates are quite separable. Generally they are not the same under the present system, and they need not be the same under Basic Protection. Under the present system, as already noted,[32] about 62 per cent of all paid claims are closed at amounts less than $500. Thus, most settlements are within the range

[30] This example was presented in writing by Philip Magner, Esquire, at a meeting sponsored by the Greater Buffalo Association of Insurance Agents on February 23, 1968.

[31] *See, e.g.*, Kemper, Automobile Insurance: The Criteria for Survival 5 (Address at mid-winter meeting, Federation of Insurance Counsel, Feb. 2, 1968).

[32] *See* text at note 15, *supra*.

in which nuisance value plays a considerable role. More often than not, a company settles even when its policyholder firmly believes he was not at fault. Thus, it is pretense to assert that benefits under the present system are genuinely determined by fault. If premiums for a policyholder are increased just because his company has settled a claim against him, the criterion for surcharging is not truly fault but rather involvement in an accident that leads to a paid claim. No rating system in operation anywhere functions on a basis of genuine determinations of fault, though some systems aim in this direction by using rough determinations of fault in setting rates for individual policyholders. This could be done under Basic Protection, too. Moreover, it could be done either according to involvement leading to payments by the policyholder's company, or instead by involvement leading to payments by another company if it were considered that this would come closer to correlating with genuine fault. Also, it could be done on the basis of negilgent involvement, to the extent that can truly be determined at reasonable cost. Thus, even though benefits are paid without regard to fault, "bad" drivers (as determined by whatever criterion one thinks fair and just) can be charged higher rates than "good" drivers. To the extent that it is administratively feasible to do so, rating should be done in this way.[33]

VII. Property Damage Coverage

A new bill filed for the 1968 session in Massachusetts extends the Basic Protection principle to damage to cars as well as injuries to people.[34] Under this bill insurance covering damage to cars would be simplified and improved by replacing three separate kinds of insurance in today's policies with one new coverage. The present coverages to be replaced are collision coverage, property damage liability coverage, and comprehensive coverage.

Comprehensive coverage pays for such things as theft and windstorm damage to the policyholder's car.

Collision coverage, which is carried by somewhat more than half of the car owners in most states, pays for damage to the policyholder's own car regardless of fault, usually subject to a deductible of $50, though one can get collision coverage with a higher or lower deductible.

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[33] For one example of statutory provisions for such a rating system under Basic Protection, see House Bill 2712, at 37 (Mass. 1968).

[34] House Bill 696 (Mass. 1968). A form of bill identical in substance with this one, and an explanation of this extension of the Basic Protection principle to damage to vehicles, is being published in the University of Illinois Law Forum and subsequently by the University of Illinois Press in the book, Crisis in Car Insurance (Keeton, O'Connell & McCord eds. 1968).

Property damage liability coverage pays for damage to the cars of others negligently caused by the operation of the insured car.

If, having all these coverages, you negligently cause your car to collide with a car owned by a person who happens to be among those (a majority) who have collision coverage, his company pays him and (unless barred by his contributory negligence) is then entitled to get its money back from your company. This means that he and you have both paid premiums to provide coverage against damage to his car, and even though only one of the two insurance companies finally bears this loss, your premiums and his must together pay for the overhead of two insurance companies and the cost of their fight over which will bear this loss.

Paying for this double overhead and for these claims between companies is a needless waste that can be avoided by applying the Basic Protection principle. The new bill does this by setting up a single new coverage to replace these two old coverages and also the old comprehensive coverage.

This new coverage is called Property Damage Dual Option coverage. It protects you, first, against damage to your own car from things now within the comprehensive coverage, such as theft and windstorm. Second, it protects you against being held liable for damage to any car owned by someone else. Third, it protects you against damage to your own car from collision or upset, and in this connection you have a choice—a dual option. Under one option—the non-fault option—you are paid for damage to your own car regardless of fault, subject to whatever deductible you wish. Under the other option—the fault option—you are paid for damage to your own car only if somebody else was at fault and you were not.

The non-fault option will naturally cost more than the fault option. But it will cost much less than you pay under the present system for comparable benefits. The reason is that this plan eliminates most negligence claims for damage to cars and eliminates the waste of passing money back and forth between insurance companies, as is done today when a collision insurer pays for the damage to a car and then tries to get its money back from a property damage liability insurer.

The key idea of the Property Damage Dual Option coverage is the provision for mutual exemptions that do away with negligence claims for damage to cars whenever two cars that are both covered by a non-fault option collide. Each collects for his car damage from his own company regardless of fault, subject to whatever deductible he elected, and that ends the matter.

Mutual exemptions apply also to a collision between a vehicle with non-fault coverage and one with fault coverage, but necessarily in a somewhat

different way. For convenience, let us refer to the owner of the vehicle with non-fault coverage as *N* and the owner of the vehicle with fault coverage as *F*. *N* is paid by his insurance company, subject to his deductible, without regard to fault, and that ends the matter as to damage to his car. Thus *F*'s company has the advantage that no longer can it be sued by *N* (or by *N*'s company after it pays *N* and becomes subrogated) on a negligence claim. To equalize matters between the companies, then, *F*'s company must assume responsibility for the negligence claim of its policyholder that, under the present system, would be made against *N* and his company. Thus, since *F* elected the fault coverage, he can recover for damage to his car only if he proves that *N* negligently caused it, and as between insurers the burden of this claim is borne by *F*'s company rather than *N*'s to make up for the fact that *N*'s negligence claim against *F* and his company is eliminated by the exemption. Another way of describing the situation is to say that in this case *F*'s company provides for *F* an "exempt motorist coverage" somewhat like the uninsured motorist coverage in current policies. *N* is an "exempt motorist" because of the mutual exemptions incident to his election of non-fault coverage. *F*'s company no longer has the burden of meeting negligence claims against *F* by *N* and others who have elected the non-fault option, and to equalize the burden between companies *F*'s company assumes the burden of *F*'s negligence claims against persons in that same group.

If two vehicles that are both covered by the fault option collide, coverage operates in exactly the same way as it does today when there is property damage liability coverage on both vehicles and collision coverage on neither. That is, each car owner must proceed with a negligence claim against the other and the other's insurance company. No cost saving would result in this instance. Thus, the cost savings effected by the Property Damage Dual Option coverage are realized only by policyholders who today carry collision coverage as well as property damage liability coverage.

VIII. Incentives for Safety

Some opponents of Basic Protection have argued in various ways that paying benefits without regard to fault would tend to encourage careless driving. These arguments are based on assumptions that should be brought into the open and examined.

In the first place, liability insurance has sharply affected whatever incentives to safety might be assumed to inhere in the threat of liability based on negligence. It is hardly reasonable to expect that a driver will be greatly concerned about the prospect that his liability insurance company might have to bear a loss if he carelessly has an accident. Moreover, if

drivers are sufficiently concerned about the impact of an accident on future premiums to cause them to be safety conscious, that incentive can be used in a system that pays benefits without regard to fault as well as in a fault-based system. That is, whether *premiums* should be based on fault is completely separable from the question whether *benefits* should be based on fault.[35]

What of the possibility that one's claim to benefits will be barred by his own negligence? Does concern about this possibility deter carelessness? Underlying every argument that it does is an assumption that a person's driving habits and decisions depend to a significant extent upon his thinking about the prospect of his being injured and about the effect of his carelessness on his claim. Is that assumption valid?

The typical motorist fears the consequences of bad driving, no doubt. Probably uppermost among his concerns is fear of injury to himself or to members of his family, fear of criminal fines for violating traffic laws, and fear of loss of his driver's license. If the combination of these fears will not stop him from taking unreasonable chances in driving, it is hardly realistic to believe that fear of the claims aftermath will do so. Among other reasons for this conclusion is the fact that one does not reach the threshhold of thinking about the legal consequences of his carelessness until his mind admits that he is driving carelessly and that he may have an accident. But people are notoriously optimistic about not becoming accident statistics themselves, notoriously quick to blame others when an accident occurs, and notoriously generous in appraising the quality of their own driving. Thus it is fighting an uphill battle against human nature to base a campaign for safe driving on the fear of what will happen with reference to insurance claims.

There is another way in which safety can be promoted by an insurance claims system, however. The point was forcefully made by the late Richard Wolfrum in his comments upon factors relevant to rate-making. Under a liability insurance system, he observed, an insurance company is little interested in whether the car to which its policy applies has safety devices for the protection of passengers, such as seat belts, a padded dashboard, and a collapsible steering wheel. This is the case because most of the claimants for whose injuries it pays will be pedestrians or occupants of other cars rather than occupants of the insured car. In contrast, under Basic Protection, most of the claimants for whose injuries the company would be obligated to pay would be occupants of the car to which its policy applied. Thus it would be vitally interested in these safety features, for

[35] *See* text at note 32, *supra.*

purposes of both rating and underwriting decisions.[36] The Basic Protection system would thus introduce a new economic incentive to encourage safer design of vehicles.

An insurance claims system cannot be expected in itself to make a very great contribution to safety. The present system based on negilgence law and liability insurance does not, and it would be a mistake to assume that a reformed system would do so either. But to the limited extent that incentives for safety can be built into a system for compensation, it may well be that a system under which insurance companies are ordinarily paying for injuries to occupants of the cars they insure will actually offer significantly greater safety incentives than a liability insurance system.

IX. Controversy over Details

Critical discussion of details of the Basic Protection plan has been useful. Indeed one of the purposes in organizing the study out of which the Basic Protection proposal emerged was to seek informed criticism of details of tentative drafts. But discussion of details should not be permitted to divert those interested in making informed judgments from giving primary attention to the central problem—the way the system treats the multitude of small and medium-sized negligence claims—and to the central need for a system founded on the two basic principles of paying losses up to a moderate limit regardless of fault and doing away with most negligence claims within a comparable limit.

An example of diversionary arguments frequently used by critics of the Basic Protection proposal is their assertion that Basic Protection rewards wrongdoers. In the first place, there is a curious contradiction in defending liability insurance, as these critics do, and at the same time arguing that insurance paying non-fault benefits rewards wrongdoers. The very theory of liability insurance is to provide benefits for wrongdoers—indeed for *nobody but wrongdoers.* In other words, by its own theory liability insurance is designed not to benefit victims but to protect the assets of wrongdoers by paying claims against them on their behalf. Nor does the contradiction

[36] *See* Wolfrum, Discussion of *Insurance Cost of Automobile Basic Protection Plan in Relation to Automobile Bodily Injury Liability Costs,* 13 Proceedings, Cas. Actuarial Soc'y 164, 173-74 (1966). This paper refers, at 174, to a document, "a comparison of the characteristics that would be considered under a three-party negligence system to those in any classification system that I [Wolfrum] believe might well be followed under a two-party 'related insured' system such as the Basic Protection coverage." The statements in the text above are based in part on this separate document, copies of which were available when the paper was delivered at the meeting of the Casualty Actuarial Society in May, 1966. For further development of the point stated in the text, see After Cars Crash 85-96.

disappear if one takes the pragmatic view that, whatever its theory may be, liability insurance is really used more as a system for paying victims than as a system for protecting tortfeasors' assets. It still is the case that the funds with which a liability insurance company pays a victim were collected from thousands of premium payers all but one of whom had even less to do with causing the victim's injury than the victim himself, however innocent he may have been. Moreover, the vast majority of these premium payers will have had no connection with *any* accident during the entire period for which their premiums purchased coverage. Thus, a liability insurance system protects the wrongdoer from the economic consequences of his own wrong with a fund collected from people even more clearly innocent than the innocent victim. If this is not "rewarding" wrongdoers, then *a fortiori* an insurance policy under which a policyholder collects from his own company, to which he has paid the premium for his own protection, is not "rewarding" wrongdoing or wrongdoers merely because it reimburses losses regardless of fault. Under both forms of coverage, in fact, the payments are not rewards but insurance benefits—paid to reimburse losses accidentally sustained.

The time has come to make aid to victims of traffic accidents a primary objective. Moreover, we can wisely choose still to adhere to this objective even if it sometimes happens incidentally—though no longer as the fulfillment of a primary objective, as under liability insurance—that losses suffered by wrongdoers are reimbursed. Also, we can do this and still avoid paying to victims—whether innocent or at fault—real profits such as the present system allows by permitting overlapping benefits and by encouraging nuisance settlements for claims of pain and suffering based on negligence.

Let it be clear that all this is not in opposition to merit rating and competitive rating. A system can pay claims to injured victims without regard to fault and still allow competition and a merit plan that charges higher rates to bad drivers. The Basic Protection plan can work with or without competitive and merit rating.[37]

The example to which critics most often refer in making an argument about rewarding wrongdoers is the drunken driver. If the objection to reimbursing losses of drunken drivers is genuine and not simply a debater's point, the solution is very simple with straightforward insurance coverage such as Basic Protection, under which a policyholder claims against his own insurance company rather than some other. Just allow an optional exclusion for benefits to a person whose conduct such as drunken driving contributed to his injury. Thus, nobody is forced to pay premiums to cover injuries

[37] *See* text at notes 31-33, *supra.*

to somebody else who was guilty of drunken driving, but if a person prefers to include coverage for himself in case he happens to be involved in an accident after social drinking, he may pay whatever premium is needed and have this coverage in his policy. A provision for such an option is incorporated into the Basic Protection bill filed in Massachusetts for the 1968 session.[38]

Another example of a criticism of detail that should not be credited as an argument against the whole Basic Protection plan is the argument that the $100 deductible provided in the original proposal is unfair to a family of five, each of whom has medical expenses of about $100 arising from a single accident, resulting in a total deductible of $500. It is a simple matter to limit the deductible to $100 per family. Indeed this revision is also incorporated in the bill filed in Massachusetts for the 1968 session.[39]

In fact, criticisms of details of the Basic Protection plan are often advanced in an effort to defeat the whole plan rather than to show how it might be improved. Such criticisms should not be permitted to divert attention from the central need for reform. This is not to oppose discussion of details, however. Indeed, such discussion is essential. From an early date in our study—and especially since 1964—we have actively sought candid criticism of details of drafts out of which the Basic Protection proposal emerged. We had less success in stimulating such criticism in those early days than since the Massachusetts House of Representatives passed the Basic Pro-

[38] This provision is to be inserted in BPI Act § 2.4, BASIC PROTECTION 309-10. The revised section will then read in part as follows:

> Section 113-2.4. Coverage less than standard prohibited except for optional deductibles and optional exclusions.—Every insurer writing basic protection insurance within the state shall offer optional exclusions as described in this section, at appropriately reduced premium rates, and may offer singly or in combination, and at appropriately reduced premium rates, any of the types of optional deductible provisions described in this section, in lieu of the standard deductible. With this exception, insurance providing benefits less in any respect than under standard provisions does not qualify as basic protection insurance. . . .
>
> (c) Optional exclusion of persons committing specified offenses.—Each insurer shall offer an optional exclusion denying benefits to each injured person, whether the policyholder or some other person, whose conduct in any of the following ways contributed to the injury because of which he claims benefits: operating a motor vehicle while under the influence of intoxicating liquor or narcotic drugs; using a motor vehicle without authority knowing that such use is unauthorized; operating a motor vehicle after suspension or revocation of his license or right to operate without a license; operating a motor vehicle upon a bet or wager or in a race; refusal to stop when signaled by a police officer. A person who is disqualified from receiving benefits because of this exclusion in a policy otherwise applying to his injury is also disqualified from receiving benefits under the assigned claims plan established pursuant to section 9.1 of this Act.

[39] This provision is to be inserted in BPI Act § 2.3(a), BASIC PROTECTION 309. The

tection bill in August 1967.[40] We are grateful for the help these latter-day criticisms have given us in improving the Basic Protection plan, regardless of whether this was the result intended by the critics. The amendments just referred to are examples of the strengthening of the bill as a result of the debate in Massachusetts. We continue to be receptive to ideas for improvement, and grateful to the critics who advance them, whether friendly or unfriendly.

X. Conclusion

All across the nation, the present system for compensating traffic victims displays intolerable shortcomings, and the pressure for reform grows more intense.[41] The need cannot be met without a fundamental change that attacks the root causes of the system's evils.

A system founded on the two central principles of Basic Protection would eliminate the wasteful expense of fighting over fault and over the so-called value of pain and suffering in the multitude of cases based on minor injuries. It would render surer and quicker compensation for immediate out-of-pocket losses. It would render fairer treatment to victims and motorists alike. It would reduce the incentives to exaggeration and fraud. And finally, no longer would it be true, as it is today, that even when everyone in a collision luckily escapes without physical injury, the system turns a simple accident into a frustrating, time-consuming, unmitigated nuisance.

The need for reform is already critical, and reform should be tailored to the distinctive need—avoiding more drastic remedies that still leave the problems unsolved—preserving private insurance and as much of the present system as can continue to serve our society well. This is the objective of the Basic Protection plan.

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revised paragraph will then read in part as follows:

> (a) Standard deductible.—The greater of the following amounts otherwise qualifying for reimbursement under this insurance is to be excluded in calculating benefits to each claimant arising from one accident: (i) the first one hundred dollars of net loss or (ii) ten per cent of all work loss. Provided, however, that if two or more persons who are relatives residing in the same household are injured in one accident, the deductible shall be one hundred dollars for all such persons combined or ten per cent of all work loss, whichever is greater.

[40] *See, e.g.,* Boston Globe, August 16, 1967, at 1, 5. The bill was later defeated in the Senate. *See, e.g.,* Boston Herald-Traveler, Sept. 19, 1967, at 1, 15.

[41] *See, e.g., The Business with 103 Million Unsatisfied Customers,* Time, Jan. 26, 1968, at 20-21; *Auto Insurance Reform,* Consumer Reports, Jan. 1968, at 9-15.

BASIC PROTECTION AUTOMOBILE INSURANCE PLAN

Robert E. Keeton and Jeffrey O'Connell

1. NEW FORM OF COVERAGE—Basic Protection coverage is a new form of automobile insurance; most of its features, however, are derived from types of insurance already in use, medical payments coverage of current policies being the closest analogy.

2. PARTIAL REPLACEMENT OF NEGLIGENCE LIABILITY INSURANCE WITH LOSS INSURANCE—The new coverage partially replaces negligence liability insurance and its three-party claims procedure with loss insurance, payable regardless of fault, and a two-party claims procedure under which ordinarily a victim claims directly against the insurance company of his own car or, if a guest, his host's car or, if a pedestrian, the car that struck him.

3. EXEMPTION FROM NEGLIGENCE LIABILITY TO SOME EXTENT—If damages for pain and suffering would not exceed $5,000 and other bodily injury damages, principally for out-of-pocket loss, would not exceed $10,000, an action for Basic Protection benefits replaces any negligence action against an exempt person (that is, a Basic Protection insured) for bodily injuries suffered in a traffic accident; in cases of more severe injury, the negligence action for bodily injuries is preserved, but the recovery is reduced by these same amounts.

4. BASIC PROTECTION FOR BODILY INJURIES ONLY—Basic Protection insurance applies to bodily injuries only. Property damage, including damage to vehicles, is covered by a separate new form of insurance called Property Damage Dual Option coverage. (See paragraphs 23-26).

5. BENEFITS NOT BASED ON FAULT—In general, a person who suffers injury arising out of the ownership, maintenance, or use of a motor vehicle is entitled to Basic Protection benefits without regard to fault, though one who intentionally suffers injury does not qualify for benefits.

6. PERIODIC REIMBURSEMENT—Basic Protection benefits are payable month by month as losses accrue, subject to lump-sum payments in special circumstances.

7. REIMBURSEMENTS LIMITED TO NET LOSS—Basic Protection benefits are designed to reimburse net out-of-pocket loss only; overlapping with benefits from other sources is avoided by subtracting these other benefits from gross loss in calculating net loss.

8. LOSS CONSISTS OF EXPENSES AND WORK LOSS—Out-of-

pocket loss for which Basic Protection benefits are payable consists of reasonable expenses incurred and work loss. Work loss consists of loss of income from work (for example, wages) and expense reasonably incurred for services in lieu of those the injured person would have performed without income. For example, the expenses of hiring household help to do work a housewife had been doing before being disabled by injury are reimbursable.

9. DEDUCTIBLE LOSSES—The standard deductible of Basic Protection coverage excludes from reimbursable losses the first $100 of net loss of all types or 10 per cent of work loss, whichever is greater.

10. STANDARD LIMITS OF LIABILITY—The standard maximum liability of an insurance company on any Basic Protection policy is $10,000 for injuries to one person in one accident and $100,000 for all injuries in one accident; an additional limitation prevents liability for payments of more than $750 for work loss in any one month.

11. OPTIONAL MODIFICATIONS OF COVERAGE; ADDED PROTECTION BENEFITS—Coverage with the standard limits (see paragraph 10), exclusion (see paragraph 17), and deductible (see paragraph 9) is the minimum that qualifies as a Basic Protection coverage except that larger deductibles, which result in reduced benefits, are offered on an optional basis at reduced premiums. Policyholders are also offered on an optional basis enlarged coverage, called Added Protection coverage (see paragraphs 12 and 13).

12. OPTIONAL ADDED PROTECTION BENEFITS FOR PAIN AND INCONVENIENCE—Basic Protection benefits are limited to reimbursement of out-of-pocket losses and provide no compensation for pain and suffering; a policyholder may purchase an optional Added Protection coverage for pain and inconvenience benefits.

13. CATASTROPHE PROTECTION—One optional form of Added Protection coverage is Catastrophe Protection coverage, which provides benefits up to $100,000 in addition to Basic Protection benefits.

14. BASIC PROTECTION COVERAGE COMPULSORY—Basic Protection coverage is compulsory in the sense that this insurance coverage is a prerequisite to registering or lawfully operating an automobile.

15. AN ASSIGNED CLAIMS PLAN—Through an assigned claims plan, Basic Protection benefits are available even when every vehicle involved in an accident is either uninsured or a hit-and-run car.

16. INJURIES INVOLVING NONRESIDENTS—Motoring injuries that occur within the state enacting the plan and are suffered or caused by nonresidents are covered by Basic Protection; when no policy in effect

applies to such injuries, they are handled through what is called an "assigned claims plan."

17. EXTRATERRITORIAL INJURIES—Motoring injuries suffered out of state by a person who is an insured, or is a relative residing in the same household, or is an occupant of a vehicle insured for Basic Protection, are covered by Basic Protection; except for this provision, no attempt is made to extend the Basic Protection system to injuries occurring outside the state enacting it.

18. MULTIPLE POLICIES AND MULTIPLE INJURIES—Provisions are made for allocating and prorating coverage when two or more policies or two or more injured persons are involved.

19. DISCOVERY PROCEDURES—Special provisions are made for physical and mental examination of an injured person at the request of an insurance company and for discovery of facts about the injury, its treatment, and the victim's earnings before and after injury.

20. REHABILITATION—Special provisions are made for paying costs of rehabilitation, including medical treatment and occupational training, and for imposing sanctions against a claimant when an offer of rehabilitation is unreasonably refused.

21. CLAIMS AND LITIGATION PROCEDURES—In general the Basic Protection system preserves present procedures, including jury trial, for settling and litigating disputed claims based on negligence; modifications adapt these procedures to the Basic Protection system and particularly to periodic payment of benefits.

22. RULES APPLICABLE IF A VICTIM DIES—The benefits of Basic Protection extend to survivors when a motoring injury causes death; the exemption (see paragraph 3) applies and special provisions treat the problem of overlapping benefits.

23. PROPERTY DAMAGE DUAL OPTION COVERAGE COMPULSORY—Property Damage Dual Option coverage is compulsory in the sense that this insurance coverage is a prerequisite to registering or lawfully operating an automobile.

24. COVERAGE FOR DAMAGE TO PROPERTY OF OTHERS—Under the Property Damage Dual Option coverage, each policyholder has protection against liability for damage that he negligently causes to others (see paragraph 25).

25. COVERAGE FOR DAMAGE TO THE POLICYHOLDER'S VEHICLE—The Property Damage Dual Option coverage can apply also to damage to the policyholder's own vehicle, and in this respect the policyholder has a dual option. If he elects what is termed the "Added Protection

Option," he is paid for damage to his own car regardless of fault. If he elects what is termed the "Liability Option," he is paid for damage to his own car only if he can prove a valid claim based on the negligence of another person—for example, the other driver in the typical two-car accident.

26. MOST NEGLIGENCE CLAIMS FOR PROPERTY DAMAGE ELIMINATED—In order to avoid administrative waste that occurs in the present system, the new Property Damage Dual Option coverage, through its system of mutual exemptions, does away with most claims by which one driver's insurance company, after paying for a loss, tries to get money back from the other driver's insurance company.

27. THE INSURANCE UNIT AND MARKETING ARRANGEMENTS ARE NOT ALTERED—The insurance unit under the Basic Protection plan is the same as under the present system; ordinarily a policy will be issued on a vehicle described in the policy to the owner of that vehicle. It is expected that the new coverage will be marketed in the same way as automobile negligence liability insurance.