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# A No-fault History

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## A NO-FAULT HISTORY

Hon. Jack Davies<sup>†</sup>

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### I. MY NO-FAULT START

The great thing about no-fault is that it is utterly logical. Since I am a pushover for logic, it caught me early on. One day, as a freshmen law student preparing for class, I came upon this question following a negligence case in William Prosser's torts casebook: "Is negligence the appropriate basis for paying compensation to an auto accident victim?" My silent answer was "no," for injury

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<sup>†</sup> Judge, Minnesota Court of Appeals. Judge Davies was the primary author of the original no-fault legislation introduced in the Minnesota legislature. He was a State Senator from 1959 to 1982 and a professor at William Mitchell College of Law from 1965 to 1990.

should be the basis for paying compensation.

I have carried that answer through all the years since. Consequently, I suffer continual frustration as I watch the waste of resources spent to determine which driver had the green light and which had the red light, and frustration, too, as superb lawyer talent goes into disputes over whether the degree of inattention is sufficient to impose liability, or to deny recovery.

There was soon added to my frustration the realization that the dollar value of pain and suffering is impossible to measure. At the height of the no-fault battle, an insurance executive properly identified determination of negligence and valuation of indeterminate damages as the "twin cancers" of the fault liability system.

When I entered the legislature in my third year of law school, my answer to Prosser's question was still fresh in mind. The first project file I opened as a legislator was "automobile accident compensation," with a title no more descriptive than that. Hoping to put useful material in that file folder, I sent letters off to the Canadian province of Saskatchewan and various other no-fault type jurisdictions, and I scanned legal literature looking for some guidance—and some ally—for a legislative effort to reform the automobile accident compensation system.

I waited from 1959 until 1965 before meaningful help appeared. Then, riding over the crest of the hill, came the cavalry of Professors Robert Keeton and Jeffrey O'Connell. At the first opportunity after the appearance of their 1965 book, *Basic Protection for the Traffic Victim*,<sup>1</sup> I introduced a no-fault automobile insurance bill based on the bill draft from their book. I was then, in 1967, a member of the minority caucus in the Minnesota Senate, and a rather young minority member, and although there was a bit of press attention paid, I was denied a committee hearing on the bill.

During the interim before the 1969 session, I redrafted the Keeton/O'Connell proposal into a neatly done, Minnesota-type bill. But again, in the 1969 legislative session, I was denied a hearing.

In 1970 I proposed to the Minnesota Law Review editors that they publish an article containing "The Minnesota Proposal for No-Fault Auto Insurance." They accepted the suggestion and that article appears in the April 1970 issue, volume fifty-four, page nine

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1. ROBERT E. KEETON & JEFFREY O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE (1965).

hundred twenty one.<sup>2</sup> The article does not look like most law review articles; it is my Minnesota draft, with comments explaining each section. For those of you who are interested in the early, early history of the Minnesota act, and no-fault nationally, I recommend that article.

## II. THE EARLY LEGISLATIVE STRUGGLE

By the 1971 session of the legislature, I was confident of the quality of the no-fault bill draft and of my capacity to make the case for it. By this time, consumer groups and a portion of the insurance industry had rallied around the no-fault idea. And the national press had picked it up as a significant public policy issue. But the DFL was still in the legislative minority by a single vote, and I could not get Senator Alf Bergerud, Chairman of the Commerce Committee, to schedule the bill. So I leaned on Alf, and leaned on Alf, and leaned on Alf, and leaned on Alf—and finally he said, “I’ll give you about twenty minutes.” So, we had a twenty-minute hearing.

That hearing was a turning point for no-fault in Minnesota, for during the hearing some games were played. Several lawyer senators had difficulty finding the bill in their committee materials. One lawyer senator dropped his entire meeting folder and asked, “Mr. Chairman, will you please wait until I get all my materials picked up and put in order?” Irrelevant questions were asked. I was facing a strange kind of filibuster. Yet something good was happening: the reporters were watching. One of those reporters was Bob Whereatt, whose *Star Tribune* byline you still see regularly; another was Gerry Nelson, now retired from the AP. They, and other reporters, recognized, first, that this was a pretty good show that was going to be fun to report, second, that here was an issue that was not going away—I was not going to let it go away—and third, the issue involved big money and deep public interest. So the newspaper stories the next day told all about lawyer filibuster by dropped files, lost bill drafts, and irrelevant questions. Public opinion was mobilized by that one hearing, and from then on trial lawyer opponents of no-fault were on the public-opinion defensive.

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

### III. LEGISLATIVE SUCCESS

#### A. *On the Agenda*

In 1973, the DFL took control of the Senate. I became Chairman of the Judiciary Committee and marvelous Nick Coleman became Majority Leader. With our leadership, it was quickly decided that the no-fault bill was going to pass in that session of the legislature.

#### B. *UMVARA*

The source of the 1973-74 Senate no-fault bill must be explained. I have been, for thirty-two years now, a member of the National Conference of Commissioners on Uniform State Laws. Halfway through my Minnesota effort, about 1970, I decided that no-fault was a good subject for a uniform act. My suggestion was picked up by the Conference leadership. The United States Department of Transportation was solicited and it provided a substantial grant to finance the drafting of a uniform state no-fault act. I was a member of the drafting committee, as was Professor Keeton.

There followed a most exciting intellectual experience. Over a twenty-one-month period, we had fourteen two-and-a-half-day committee meetings (we met Friday through Sunday noon). My Minnesota Law Review article served as the committee's first draft. The Conference promulgated our finished draft in 1972. It was called the Uniform Motor Vehicle Accident Reparations Act, or UMVARA.<sup>3</sup> My version of the pronunciation is a love call; the trial lawyers pronounced it as a battle cry.

#### C. *Success in 1974*

UMVARA was introduced in the 1973 session of the legislature and passed by the Senate that year. The legislature is, however, a bicameral institution; in the House my author was Representative Bruce Vento, now Congressman Vento. Bruce had a different set of problems—and different allies. Among those allies was Representative Tom Newcomb, who has had a warm and lifelong affiliation with State Farm Insurance. State Farm had independently drafted a compromise no-fault proposal. The State Farm proposal

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3. UNIF. MOTOR VEHICLE ACCIDENT REPARATIONS ACT, 14 U.L.A. 41 (1990).

was the bill the House passed. So we came to conference committee in the 1974 session with UMVARA from the Senate and the State Farm proposal from the House. I quickly decided that pure no-fault was beyond reach and that we would end up with a State Farm-UMVARA compromise. My mission became mostly technical—to ensure that the act passed was as close to pure no-fault as possible and that it contained as much as possible from the excellent UMVARA draft.

Our conference went quite smoothly, but the House conferees finally decided they were done. They just got up and started toward the door. One of the House conferees announced, “We’re all done; what we have now is what it’s going to be.” And I said, “One more thing.” They literally stood at the door and listened to my next suggestion. They said, “Okay.” And I said, “Just one more.” And they listened to one more and I got that one in. And one more. And then they left.

#### IV. WHY IN MINNESOTA?

The Minnesota act was effective January 1, 1975. So Minnesota is now in its twenty-fourth year of no-fault auto insurance. Minnesota is one of only a handful of states that adopted effective no-fault. I have reflected often on why Minnesota did so and why other comparable states, like Wisconsin, Iowa, Washington, and Oregon, essentially progressive states, did not do so. This is what I have concluded.

##### A. *Ron Hubbs & Saint Paul Companies*

Minnesota passed no-fault, first because there was in Minnesota at the time a great insurance executive, Ron Hubbs, the Chairman of the Saint Paul Companies. He bought into the no-fault idea, believing it to be in the public interest. He was accompanied in this support by a major trade association, the American Insurance Association (AIA). The AIA membership included the Saint Paul Companies, Aetna, Traveler’s, Hartford, and other stock companies.

The Saint Paul Companies and AIA were later on joined by State Farm. Together, Saint Paul Companies and State Farm gave no-fault a strong insurance industry political presence in Minnesota.

### B. *Industry Division Elsewhere*

Elsewhere it was different. The insurance industry across the country was, in the 1970s, divided three ways on the no-fault issue. There was the American Insurance Association's position of support for the strongest possible no-fault. The AIA was more or less allied with State Farm and a few other companies that believed in starting with compromise no-fault. Companies supporting no-fault constituted about a third of the industry.

Another third of the industry was simply confused and couldn't make up its mind. This third sat on the sidelines as this fight was going on, paralyzed by its own uncertainties. This made it a force for the status quo.

The last third of the industry made the calculations on what would happen to insurance premiums, and thus on insurance revenues, and thus on their profit. These companies decided that no-fault was going to save consumers money and thus make insurance companies less profitable. That a third of the industry opposed no-fault was not a decisive factor in Minnesota, however, because of the State Farm and Saint Paul Companies dominance.

### C. *The Media*

We also had, as I suggested earlier, media support in Minnesota. The newspaper reporters, especially, decided it was an interesting issue, worth reporting extensively. There was also editorial support. No-fault was presented as a showcase consumer issue of great significance.

### D. *A Liberal Political Climate*

In other jurisdictions apparently there was not a political climate as responsive to new ideas. And perhaps no legislator was willing to come back with the no-fault proposal, as I did, year after year after year, bloodied but unbowed. Despite the affirmative factors, it took seven years, from 1967, when I first introduced the bill, to 1974, when the legislature enacted no-fault.

## V. NO-FAULT POLITICAL FAILURE NATIONALLY

### A. *A Political Science Lesson*

The legislative failures of no-fault across the country since 1974 are tragic. These failures do, however, provide a political science study of some value. I have already offered, in the previous paragraph, lesson one, which is that, with the kind of opposition no-fault faces, supporters have to keep knocking on legislative doors. One defeat is just one defeat, for the legislative door is always present. There is no such thing as perpetuity in the legislature; if you have a meritorious idea, and if you keep asking, you can ultimately carry the day. But most no-fault supporters regrettably abandoned their effort.

Let us examine why the effort was largely given up.

### B. *The Industry*

#### 1. *Going to Congress*

The first thing that happened was that insurance industry support for it softened, and what support remained got misdirected. Insurance companies, and others who supported no-fault, decided it would be easy to sell it to a Congress with consumer-oriented Senators Warren Magnuson and Phil Hart as members—at least easier than it would be to sell no-fault to dozens of state legislatures that had not yet adopted it.

But when the no-fault effort shifted to Congress, opponents got a trump card—states' rights. That trump card appeals even to me, for I have serious doubt whether I want the United States Congress making this country's tort law. I could not tell from out here in Minnesota what the impact of the states' rights argument was. But the states' righters, combined with the trial lawyers, ensured that the battle in Congress was never even close.

#### 2. *The Insurance Crisis Passes*

After 1974, the insurance revenue crisis that had made the industry receptive to doing the right thing abated; premium rates were adjusted to match the previously unforeseen claim levels. Companies were no longer losing money. They were no longer desperate for efficiency and reform.



### 3. Documented Savings

Also after 1974 the no-fault systems in place could be evaluated. For example, the fact that honest no-fault cut automobile insurance premiums could no longer be questioned.

An anecdote illustrates the problem this created. In 1972 I addressed the annual meeting of the American Insurance Association. I was picked up at La Guardia Airport by one of the lobbyists for the AIA. Driving to the Plaza Hotel for the meeting, the lobbyist made this memorable observation: "We [meaning the AIA executives] have been careful not to tell our member companies how much no-fault could actually save. They might have second thoughts." After 1975, the savings could no longer be concealed. Under honest no-fault in Michigan, New York, Minnesota, Hawaii, and Florida, the savings could no longer be glossed over.

The lobbyist chauffeur made one other great comment: "I love lobbying for no-fault. On this issue I know I am on the side of the angels. So often I have not been on that side." Well, after the consumer savings became clear, the folks who ran the industry decided they were uncomfortable on the side of the angels, preferring instead the side of higher premiums.

### 4. Use as Defense

Over the last two decades the insurance industry has embraced no-fault selectively as a defense strategy, rather than as a continuing program of statesmanship and law reform. Thus, no-fault has mainly been pushed by the industry in initiative states in response to trial lawyer initiatives. Rather than being up front with the great reform, they have been reacting. And, the few times when the insurance industry has taken the lead, trial lawyers have responded defensively with some "hate the insurance industry" initiative. So what we've had is, not law reform, but competing proposals, which the public perceives to be mere self-interest on both sides.

It seemed, too, that industry support just sort of petered out. The Saint Paul Companies left insurance lobbying in other states to the AIA and the large domestic companies in each state. Insurance companies do not intrude single-handedly on somebody else's turf. Nationally, we lacked Ron Hubbs' on-the-scene statesmanship.

### C. Media Boredom

Another negative factor since 1974 has been media boredom.

A nine-year fight is beyond the attention span of the national and local media. No-fault became an old story.

*D. The Consequences of Phony No-Fault*

Gradually, too, it was revealed that no-fault, in the way it was passed in several jurisdictions—as an add-on to the liability system—was outrageously expensive. It actually increased payouts and, in turn, premiums. That armed the opponents with an effective, though misleading, story. The press lost its consumer tagline—save money. That was one of the things that drove the press away from this great consumer issue.<sup>4</sup>

*E. Loss of Academic and Political Pioneers*

Academic supporters have mostly disappeared too. Professor Keeton became Judge Keeton. Professor O'Connell has continued to be Professor O'Connell, but has concentrated on being a scholarly professor. He has taken the theme of no-fault and invented a series of other applications for the wonderful logic of no-fault. He has also pursued marketplace, consumer-choice routes to no-fault. This utilized his creative and scholarly mind, but took him too much out of the political battle for straightforward no-fault auto insurance.

Politician supporters, too, have moved on to other issues. Governor Dukakis became presidential candidate Dukakis—disastrously so, as I recall. In his presidential campaign, he talked about the “Massachusetts miracle” of welfare reform, rather than perhaps his greatest real accomplishment, no-fault auto insurance. Nelson Rockefeller died. As for myself, I was unwilling (perhaps inadvisably so) to make no-fault my lifetime project. I did not want to look like a Johnny-one-note politician, notwithstanding the fact that passage of no-fault auto insurance was my great legislative accomplishment.

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4. I want to put on the record that in Minnesota I used the “save money” argument only rarely, I think always in rebuttal. Others pressed that argument, but I did not. My argument was logic and efficiency—that a higher percentage of premium dollars would go to injured victims.

