

## Article

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### "Compensation for Non-Economic Loss, the Tort-Liability Insurance System, and the 21<sup>st</sup> Century"

Roger C. Henderson

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# Compensation for Non-Economic Loss, the Tort-Liability Insurance System, and the 21<sup>st</sup> Century

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Roger C. HENDERSON\*

*Tort awards for non-economic loss have grown in an almost geometric progression in the United States since first recognized nearly 150 years ago. Not only have courts constantly expanded the areas in which claimants are permitted to recover pain and suffering awards, but at the same time they have liberalized the definition of pain and suffering itself. This may be traced in part from the way the judicial system was designed after the American Revolution, the role of lawyers in the system, and the affluence of the country. Consequently, awards for non-economic loss have taken on ever increasing importance, an importance that does not bode well for the prospects for future adoptions of no-fault auto insurance plans that would curtail such recoveries.*

*This article sketches historical influences on the tort-liability insurance system and summarizes modern developments in the law of damages for non-economic loss in the United States. It then raises questions regarding the prospects for adoption of the federal Choice No-Fault Auto Reform Act now pending in the U.S. Congress, a plan that would offer auto accident victims the choice of being compensated on a no-fault basis, while waiving their right to recover for pain and suffering. It concludes by offering a possible scenario of how future efforts to reform the tort-liability system in the United States may occur as we move into the 21<sup>st</sup> century.*

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*Les indemnités pour préjudice moral ont connu une hausse exponentielle aux États-Unis depuis la reconnaissance de ce préjudice il y a environ 150 ans. Les tribunaux ont non seulement étendu les cas où de tels montants peuvent être réclamés, mais ils ont également élargi la définition des notions de « souffrances et douleurs ». Cette évolution s'explique en partie par l'organisation du système judiciaire après la Révolution américaine, par le rôle joué en ce domaine par les avocats et par le niveau de richesse du pays. En conséquence, les indemnités pour préjudice moral ont pris une place de plus en plus importante en droit américain, place qui n'augure rien de bon quant aux chances de voir adopter des régimes d'assurance automobile sans égard à la responsabilité qui réduiraient ces indemnités.*

*Le présent texte donne un aperçu des facteurs qui ont historiquement influé sur le droit de l'assurance responsabilité aux États-Unis et résume les développements plus récents en matière de compensation du préjudice moral. L'auteur s'interroge ensuite sur les possibilités d'adoption d'une loi fédérale présentement à l'étude devant le Congrès américain, loi qui accorde aux victimes de la route le droit d'être indemnisées sans égard à la responsabilité, en échange d'une renonciation préalable au droit de réclamer une indemnité pour préjudice moral. Finalement, l'auteur met de l'avant des propositions de réforme envisageables en matière de responsabilité civile aux États-Unis, à l'aube du 21<sup>e</sup> siècle.*

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In considering the topic of non-economic loss and the ramifications of the law under the current tort-liability insurance system, I could not help but be reminded of some of the things that I came to appreciate while teaching in England a few years ago. Mind you, I was teaching American students, but one of the courses that I offered dealt with the differences between the American and English systems of compensating accident victims, including those who sustain injuries in motor vehicle mishaps. I was fascinated at the time by some of the contrasts and, in ruminating about them, I believe they also are relevant today as we explore what might be categorized as one of the most—if not the most—metaphysical areas of the law. Indeed, the more I think about it, it is very strange that we continue to press towards a theoretical goal—one of restoring the victim to his or her preinjury status—that is largely unobtainable and often bankrupt in practice under the current system, at least in the United States. In fact, one might legitimately ponder why the seemingly never ending quest in tort law to compensate accident victims in ever more situations for «loss» which cannot be measured in economic terms has not come under more serious scrutiny than it already has. In view of the fact that we are about to enter a new century that has all the promise of being even more technologically and socially revolutionary than the one we are concluding, one ought to wonder why the legal system continues to pursue so doggedly a concept that originated in the

19<sup>th</sup> century. Like so many other things, perhaps the answer partly lies in the past.

## **1. Vicissitudes of the Origins of Tort Law in North America**

When I ponder why things are the way they are in the realm of tort law in our two countries, there are a couple of things that occur to me. The most immediate is the origin of tort law in North America and the subsequent developments that occurred, developments largely based on happenstance. The other is more remote and involves forces that collided in the distant past; yet, the largely fortuitous effects are still being felt today in some respects.

### **1.1 Taking the Present System for Granted**

In considering what might have been, one should not take the common law system — much less a system that attempts to adjust losses on the basis of fault — for granted. We might just as well have inherited a civil law system in our countries, with the possible result that today we would have more integration of the tort-liability insurance system and social insurance programs. Were this the case, we might have much greater emphasis on the latter, such as you see in European countries like France and Germany. Had it not been for the peculiar cultural mix of the Norman conquest and some of the ramifications of Anglo-Saxon perseverance in 11<sup>th</sup> century England, things might have taken a different turn. Or, perhaps the French or even the Spanish could have been victorious in later wars with Great Britain. Again, had it not been for Elizabeth I, Sir Frances Drake, and a little help from the weather, we might be eating a lot more paella today than we do. Or, to bring things a little closer to home, what if France had prevailed in the Seven Years' War, that part of which was fought in America from 1754 to 1763 being known as the French and Indian War? Had the British lost, the rest of Canada — and for that matter, the United States too — might be speaking the same language that most people speak in this beautiful city. If so, would we have inherited a common law adversarial judicial system or would the system be more like what we find in European countries today?

I do not want to dwell on what might have been because that is not how things turned out, but it is useful to remind ourselves when we are asked to think about tort law as a mechanism for adjusting losses that our system is not premised on an eternal verity, but is largely the product or, perhaps even more remotely, the by-product of happenstance. Thus, when an individual asserts that the Anglo-American fault-based tort system can be traced back to the Code of Hammurabi or that it is rooted in the natural order of things,

we, at the very least, should be very skeptical of the person's sense of history and be mindful of the role that human foibles have played in making things what they are today.

## 1.2 Reasonable Alternatives

Things are the way they are because of the many quirks and vicissitudes that often not only defy reason, but that clearly would not have come out the same if the forces of change had converged a little differently in time or manner. Some things may be indispensable to our particular form of democratic government — such as the right to vote, freedom of the press, and the *writ of habeas corpus* — but the tort system that we have today surely is not one of them. There are reasonable alternatives for compensating accident victims and others who suffer harm at the hands of third parties, and within each alternative there are other reasonable choices to be made, including those regarding the types of harm for which there should be recompense. In fact, I would suggest that the decision of the citizens of Quebec to adopt such a marked alternative to the tort system for compensating auto accident victims is in large part attributable to their French cultural heritage. And, of course, the rest of Canada and the United States are tied more to their British heritage, which definitely has had its effect on their respective legal systems.

## 1.3 Our Common Law Legacy

We — and by that I mean those of us in the United States as well as in Canada — inherited many things, legal and otherwise, from England. Even though not all colonists were from England — as those who live in Quebec well know — as it turns out much of what endures in our legal system is traceable to that country, traceable either because our ancestors embraced the British legal system or rebelled against some parts of it.

Probably our greatest legacy from the English system is the common law, a system that prevails in every jurisdiction of the United States save Louisiana and, I would guess, in Canada save Quebec. And, of course, it was the common law process that gave birth to and brought to maturity the body of jurisprudence that passes under the head of tort law today — both in Canada and the United States. Those who were part of the British Empire in the 18<sup>th</sup> century and for periods thereafter were pretty much subject to the same body of tort law, with the London based House of Lords and Privy Council as the ultimate arbiters. Whether the country was England, Scotland, Ireland, Canada, or Australia, or the American colonies, there was in general one body of jurisprudence governing liability for personal injury and

property damage — sort of a *portmanteau* of tort law — for all the subjects of the realm.

#### 1.4 The Impact of Diverging Legal Systems

In fact, it was not until relatively recently that countries such as Canada and Australia opted to end the right to petition the Privy Council to resolve tort and other issues, something that came about much more abruptly and violently in the United States some 200 years earlier. Had Canadians declared their independence from Great Britain in 1776, the tort systems of our North American countries might have retained more similarities than they do. However, that is not what happened, with the consequence that the two systems began to diverge at the time of the American Revolution. Although similarities remain, they tend to reside in the basics ; and where the law has diverged, the more extreme examples tend to occur in the United States. I believe there is a fundamental reason for the latter.

One of the obvious differences, which is clearly a legacy of the British system, is that today Canada, and for that matter Australia too, have federal systems of tort law, with their respective national courts of last resort, the Supreme Court of Canada and the High Court of Australia, possessing the final common law authority on the subject. The fact that Americans opted, at least at the outset, for a loosely associated confederation of state republican governments cast the die against any sort of federal tort law. Other than the few and limited powers originally assigned to the federal government, all other powers were reserved to the states. Encompassed within these reserved powers were those matters that were traditionally governed by the common law, including legal actions for money damages which today pass under the head of torts. Although there was a period when the federal courts sought to exercise the right to determine the common law in tort cases that fell within their jurisdiction<sup>1</sup>, this did not endure<sup>2</sup>. Of course, an

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1. The federal courts in the United States promulgated their own brand of common law for tortious injury for almost a century in diversity cases under the doctrine of *Swift v. Tyson*, 41 U.S. 1, 16 Pet. 1, 10 L.Ed. 865 (1842) (holding that federal courts exercising jurisdiction on the grounds of diversity of citizenship need not, in matters of general jurisprudence, apply the unwritten law of the State as declared by its highest court, but that they were free to exercise independent judgment as to what the common law of the State is or should be).
  2. Despite the system of limited jurisdiction for federal courts actually adopted in the United States Constitution, it was not until 1938 that the Supreme Court of the United States recognized that there was no authority under that document for a system of federal common law of torts or other areas of « general law » : *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487 (1938).

exclusive federal system was not to be, except for certain things such as providing for a common defense, and for good reason.

Providing that the state courts would have exclusive jurisdiction over those matters generally left to the common law certainly stemmed from the political mood of the times. After all, the colonists had recently fought a war to oust a government exercising centralized control and there most definitely was little sentiment to install another to replace it, albeit one far more representative in form. Nonetheless, the reservation of tort law to the states was purely a by-product of a basic political decision exercised by the drafters and ratifiers of the Constitution. Had the colonists and Great Britain been able to reach a settlement short of war<sup>3</sup>, who knows what form of government the Americans would have set up or how their court system would have been configured. In fact, those in the United States might only look to you in Canada, their neighbor to the north, to see that there certainly was nothing intrinsic about the subject that would have prevented the American colonists from having a national or federal common law system, including the law of torts, had they so desired. Nonetheless, it is readily apparent today, although the two countries share a common heritage, that political forces have molded our respective governments so that in one there is more centralized control over developments in the tort system than in the other. Over time, this lack of centralized control explains, at least in my mind, some, if not much, of what has happened in the common law system in the United States in comparison with that in Canada, including developments with regard to tort awards for non-economic loss.

## 2. Common Law and Common People

### 2.1 Setting the Stage for Future Developments

At the time of the American Revolution there is little evidence that tort law, such as it was, needed to be different, or for that matter was different, from one jurisdiction to another. The same was also true in the main for some time thereafter<sup>4</sup>. As time passed and the frontiers of the nation

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3. Opinion among the colonists upon the subject of independence from England was much divided and a number of efforts were made to keep the colonies within the British realm. See P. MAIER, *American Scripture: Making the Declaration of Independence*, New York, Knopf Publ., 1997.

4. As late as the first half of the 19<sup>th</sup> century, « torts » was not an autonomous branch of law in the United States, but was a collection of mostly unrelated writs. See G.E. WHITE, *Tort Law in America*, New York, Oxford University Press, 1980, p. 8. Torts was not considered a discrete branch of law until the late 19<sup>th</sup> century (*Id.*, at p. 1). The first treatise on torts appeared in 1859: see F. HILLIARD, *The Law of Torts*, Boston, Little, Brown and Co., 1859.



expanded westward, the settlers simply took the law that was familiar to their new surroundings. Except for what statutory law there was, the common law was the only law they knew, and the source for the latter was primarily Blackstone's *Commentaries on the Laws of England*. As more land was formally acquired, the United States Congress, as part of the organic act creating a new territory, would usually adopt the common law of England as the rule of law insofar as it was suitable. In turn, when a new state was created from a territory and admitted to the Union, it usually did the same thing, either as part of its constitution or by statute<sup>5</sup>. However, even in the absence of an express provision, it was assumed that the common law would prevail unless some legislation indicated otherwise<sup>6</sup>. Consequently, as civilization pushed further West and as each new state was created, the opportunities with regard to future developments in the common law multiplied and was pregnant indeed. In short, the stage was being set for the rich jurisprudential outpourings that eventually followed.

## 2.2 Opportunities to Affect the Law

Like Canada, the United States was populated by wave after wave of immigrants. However, unlike the situation prior to the American Revolution, increasingly these immigrants came from countries other than England. Moreover, as they immigrated they tended to locate in specific areas of the United States, so that ethnic and cultural traits were focused in a way to influence local institutions, including those of a political nature such as the legal system<sup>7</sup>. It was also the case that there were few formal requirements in the early days in this country for becoming a lawyer—in fact, almost none in the territories and frontier states<sup>8</sup>. In many instances, one only had to « read law » and submit to a perfunctory examination to qualify as a member of the bar<sup>9</sup>. This meant that there were meaningful opportunities to become lawyers. This was true not only for the common folk who, over time, gradually moved west in search of a better existence, but it was also the case for newer citizens who literally had just gotten off the boat<sup>10</sup>. Not only could they be lawyers, soon they became judges, since most judges at the state level achieved office through popular elections rather than by

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5. See W.F. WALSH, *A History of Anglo-American Law*, 2<sup>nd</sup> ed., Indianapolis, Bobbs-Merrill, 1932, pp. 93-97.

6. *Ibid.*

7. See generally, J.W. HURST, *The Growth of American Law: The Law Makers*, Boston, Little, Brown and Co., 1950, pp. 11-19.

8. See L.M. FRIEDMAN, *A HISTORY OF AMERICAN LAW*, New York, Simon and Schuster, 1973, pp. 275-278.

9. *Ibid.*

10. *Id.*, at 549-561.

appointment<sup>11</sup>. And, finally, there was another very important factor that should not be overlooked. The right to trial by jury in civil disputes, as well as in criminal matters, was preserved with a vengeance in the constitutions of the new states, which meant that even those who were not lawyers had an important role to play in the legal system.

These phenomena converged to bring an unparalleled infusion of people with common values into the legal system in each state, states that contained in most instances vast expanses of land that contained rich resources that would eventually fuel the industrialization of the country. As the country transformed itself from an almost exclusively agrarian base, and concomitantly as manual labor gave way to machines, activity in general increased in an almost geometric progression. With this came the inevitable increase in accidents and the inherent toll on life and limb, all of which provided an unceasing diet of tort cases for the lawyers and courts to resolve. These developments occurred within the context of a society where Americans at all levels became increasingly enamored of and began to actually experience such New World privileges as individual freedom, social equality, and occupational mobility. And, if they did not experience it immediately, the ideal was still there to be sought. Of course, during this time there were, and still are, many other things, such as religious values, that also contributed, and still contribute, to the rich social fabric of the United States. In fact, there may be no other comparable period in history that parallels that which the average American experienced in the 19<sup>th</sup> and 20<sup>th</sup> centuries—an experience that inevitably would be reflected in the development of legal doctrine.

### 2.3 Laboratories for Experiment

By 1912, there were 48 separate and independent common law jurisdictions that were the originators and final arbiter of tort doctrine within their boundaries<sup>12</sup>. The courts of each jurisdiction were able to draw on, and

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11. *Ibid.* Even after more formal requirements for admission to the bar were imposed, the gatekeeping responsibility has largely become the task of law schools. Unless an applicant graduates from an American Bar Association accredited law school, he or she is not eligible to sit for the bar examination in most states. Although there was a time when many American law schools refused to admit women and certain minorities, this was not true of all schools, especially those schools that offered night programs. In general American law schools have prided themselves in admitting anyone with the ability to succeed and that has been especially true since World War II. In the process, the English guild system was rejected. See J.W. HURST, *op. cit.*, note 7, at pp. 276-294.

12. Although Louisiana, like Quebec, had a civil law system, the District of Columbia was a common law jurisdiction. Thus, even though one of the 48 states had a civil law system, the District of Columbia brought the total to 48 common law jurisdictions in the continental United States.

clearly were in a position to be influenced by, courts in their sister jurisdictions, but there was no overarching governmental institution in place to homogenize and mold tort doctrine into a single body of law. Moreover, although the fundamental precepts found in the Constitution of the United States governed the states, they were rarely invoked to limit the development of tort doctrine. In fact, the Supreme Court of the United States tended to treat the states as laboratories for experiments in tort law and almost never found state tort doctrine wanting on constitutional grounds<sup>13</sup>. In short, the courts of each jurisdiction were left largely unfettered to provide a popular response as the need increased to formulate appropriate remedies for those injured in accidents. And, as the following summary of developments will attest, that response was not only quick in coming, but once it started it accelerated with each generation of litigants.

### 3. The American Courts and Awards for Non-Economic Harm

#### 3.1 Early Cases and the Impact of the Industrial Revolution

Awards of damages for non-economic loss, as well as for economic loss, under the common law, of course, predate the American Revolution. There are records of cases in England dating from the 17<sup>th</sup> and 18<sup>th</sup> centuries which seem to countenance such awards even though they were not explicitly approved by the courts<sup>14</sup>. The awards, however, were often not itemized and it is not easy to discern when claimants were first officially allowed to recover for such things as pain and suffering as a distinct category of harm, as compared to what might pass under the head of general damages. Nonetheless, by the early 1800's both English and American courts were making reference to awards for « suffering » and « pain »<sup>15</sup>. It was not long thereafter that the Industrial Revolution ushered the newly emerged negligence action to the forefront of tort law, opening the court house doors to a much broader array of damage claims in general<sup>16</sup>. From this point on — with the ever

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13. See, e.g., *Chicago, R. I. & Pac. R. Co. v. Cole*, 251 U.S. 54, 40 S.Ct. 68, 64 L.Ed. 133 (1919) (per Holmes, J., holding that the Federal Constitution does not prevent a state from leaving the defense of contributory negligence to the jury in all cases, those in which it is a mere question of law as well as those in which it is a question of fact). The laissez-faire attitude still prevails. For example, it was only after many entreaties before the Supreme Court in a rare move finally applied the Due Process Clause of the Fourteenth Amendment to the United States Constitution to actually regulate awards of punitive damages in tort cases. See *BMW of North America Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996).

14. See J. O'CONNELL and R.J. SIMON, « Payment for Pain & Suffering: Who Wants What, When & Why », 1972 *U. Ill. L. Rev.* 1, 90-91.

15. *Id.*, at 92-93.

16. See G.E. WHITE, *op. cit.*, note 4, at p. 16.

increasing opportunities for the courts and juries to pass on the issue—there has been a constant expansion of awards for non-economic loss, not only of those made in connection with a negligence action for bodily injury but also of those made independently of any bodily injury<sup>17</sup>.

### 3.2 From Impact to Zone of Danger

At first courts required that a claimant suffer some injurious physical impact in an accident before he or she could claim damages for non-economic loss<sup>18</sup>, but it was not long before exceptions were recognized. The most common exception to the impact requirement involves the so-called « zone of danger » rule<sup>19</sup>. Although a claimant is not in any way the subject of physical impact, as long as he or she is situated so that a negligent actor's conduct creates an immediate risk of bodily harm to the claimant, a claim for emotional distress may be brought. Courts allowing such claims recognized that they could be exaggerated and some might even be fraudulent, but went on to point out that the same thing could occur under the impact rule if the claimant sustained only trivial or minor bodily harm<sup>20</sup>. The courts that recognized this expanded right to recover for non-economic harm reflected a popular attitude, an attitude that they were created to resolve the rights of citizens in individual disputes, no matter that the awards would be speculative and that the right to assert such claims might be abused<sup>21</sup>. Having side-stepped the physical impact hurdle, many courts saw no reason to stop there.

### 3.3 Physical Manifestation Requirement and its Erosion

Although most courts have now abandoned the physical impact rule in favor of the zone of danger rule, a split has developed among the various jurisdictions with the result that some jurisdictions have expanded the right to recover for emotional distress even further. Although injurious impact preceding emotional injury is no longer a general requirement for a claim of non-economic loss, most courts initially refused to permit recovery for emotional distress, such as fright or shock, alone. Instead, these courts

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17. Although recoveries for non-economic loss have long been recognized in the area of intentional torts (see W.P. KEETON *et al.*, *Prosser and Keeton on the Law of Torts*, 5<sup>th</sup> ed., St-Paul, West Publishing Co., 1984, §§ 8-12), the most dramatic growth has occurred in negligence law. Thus, this article will focus on developments in the latter area.

18. See, *e.g.*, *Mitchell v. Rochester Ry. Co.*, 151 N.Y. 107, 45 N.E. 354 (1896).

19. See, *e.g.*, *Batalla v. State*, 10 N.Y.2d 237, 219 N.Y.S.2d 34, 176 N.E.2d 729 (1961).

20. *Id.*, at 241, 219 N.Y.S.2d at 37, 176 N.E.2d at 731.

21. *Id.*, at 242, 219 N.Y.S.2d at 38, 176 N.E.2d at 731-32. An excellent review of the impact, zone of danger, and other rules to be mentioned can be found in *Camper v. Minor*, 915 S.W.2d 437 (Tenn. 1996).

insisted that where there has been no physical impact, a claimant cannot recover unless there is proof of some kind of objective physical manifestation of the distress occurring as a result of the exposure<sup>22</sup>. This, however, was a short lived requirement in some jurisdictions, as claimants continued to press the outer boundaries of the law.

In response to this pressure, some courts have modified or diluted the physical injury or manifestation requirement in zone of danger cases, but have not formally abandoned it. These courts have merely required a lower level of proof. For example, the Supreme Judicial Court of Massachusetts has held that it only requires that « plaintiffs must corroborate their mental distress claims with enough objective evidence of harm to convince a judge that their claims present a sufficient likelihood of genuineness to go to trial<sup>23</sup> ». Under this type of test, evidence of severe headaches, occasional suicidal thoughts, sleep disorders, reduced libido, fatigue, stomach pains, and loss of appetite has sufficed as physical symptoms of emotional injury to send a case to trial<sup>24</sup>. Of course, there is hardly a lawyer worth his or her salt that could not produce some evidence of this nature.

### 3.4 Abolition of Physical Manifestation Requirement

Other courts have taken the full step in recognizing claims for emotional distress by completely abolishing the rule that requires that some physical injury or manifestation result from the exposure to a negligently created risk of bodily harm because the claimant was in the zone of danger. These courts have emphasized that it is unfair to focus on a requirement of physical harm or physical manifestation as a way of determining whether or not a claim is genuine<sup>25</sup>. To do so, as one court said, permits recovery for

22. See, e.g., *Wilson v. Sears, Roebuck & Co.*, 757 F.2d 948 (8<sup>th</sup> Cir. 1985).

23. *Sullivan v. Boston Gas Co.*, 414 Mass. 129, 137-38, 605 N.E.2d 805, 810 (1993) (holding that, although temporary symptoms or mere upset or dismay, will not qualify as objective evidence, the claimant's sustained diarrhea was sufficient proof to establish a claim for emotional distress).

24. See, e.g., *Czaplicki v. Gooding Joint Sch. Dist. No. 231*, 116 Idaho 326, 775 P.2d 640 (1989). See also *Silberstein v. Cordie*, 474 N.W.2d 850, 857 (Minn. Ct. App. 1991) (headaches, insomnia, loss of appetite and muscle tension for several months satisfied the physical harm requirement); *Wright v. Coca Cola Bottling Co.*, 414 N.W.2d 608 (S.D. 1987) (symptoms of diarrhea, bitter taste, and regurgitating satisfied the physical harm requirement).

25. See, e.g., *Molien v. Kaiser Foundation Hospitals*, 27 Cal.3d 916, 167 Cal.Rptr. 831, 616 P.2d 813 (1980). Although *Molien* was not a « zone of danger » case in that it involved a husband's claim for emotional distress and loss of consortium based on a negligently incorrect diagnosis that his wife suffered from an infectious type of syphilis, the holding is not limited to any particular type of negligently induced emotional distress as long as it is severe.

emotional distress resulting from innocuous physical harm, while mechanically denying claims of a more serious nature that might be proved valid through other types of evidence<sup>26</sup>. In addition, opined the court, the distinction between physical and emotional injury is not clearly delineated, and there is greater likelihood that the trier of fact will be able to separate the false from the genuine claims based on the circumstances involved when compared to their own experiences<sup>27</sup>. Thus, not only have courts abandoned the physical impact rule in favor of the zone of danger rule, some courts have liberalized the list of kinds of evidence that can be adduced to prove compensable non-economic loss. Important as these court decisions have been, they have not been the only expansive developments in the law regarding claimants' rights to recover for non-economic loss.

### 3.5 The Bystander Cases

In addition to the developments regarding non-economic loss discussed above, recoveries have been allowed for emotional distress where the claimant is neither physically injured nor in the zone of danger, but instead witnesses another close member of his or her family being seriously injured through the negligence of another. The latter type of case is known as a «bystander» case. At first, the right to recover in this type of case was limited to the situation where the claimant, from a nearby position, personally observed the relative being injured in the accident<sup>28</sup>. It was not long, however, before some relatives who were not present at, but who subsequently came upon, the accident scene also were allowed to recover<sup>29</sup>.

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26. *Id.*, at 929-30, 167 Cal.Rptr. at 838, 616 P.2d at 820.

27. *Id.*, at 930-31, 167 Cal.Rptr. at 838-39, 616 P.2d at 820-21.

28. See *Dillon v. Legg*, 68 Cal.2d 728, 69 Rptr. 72, 441 P.2d 912 (1968) (mother and sister observed vehicle strike and kill the deceased child as she tried to cross the road). In reaching its decision, the *Dillon* court relied heavily on the famous line of English cases beginning with *Hambrook v. Stokes Bros.*, [1925] 1 K.B. 141, the earliest case to recognize the right of a bystander, which also happened to be a mother fearing for the safety of her children, to recover for emotional distress even though not in any physical danger herself.

29. See, e.g., *Dziokonski v. Babineau*, 375 Mass. 555, 380 N.E.2d 1295 (1978) (holding that a complaint alleging that a mother who lived in the immediate vicinity of the accident and who went to the scene and witnessed her daughter lying injured on the ground stated a cause of action for the mother's death which resulted from the shock she experienced); *Roitz v. Kidman*, 913 P.2d 431 (Wyo. 1996) (allowing recovery by a parent who does not actually see a child killed, but who sees the body immediately thereafter, but denying recovery if the parent sees the child at a later time, such as in the hospital). See also *Camper v. Minor*, 915 S.W.2d 437 (Tenn. 1996) (holding, where truck driver sustained emotional distress after viewing body of negligent pedestrian whom his truck had struck, that negligent infliction of emotional distress claims should be analyzed under the general negligence approach, i.e., no differently from any other negligence case).

Although not all jurisdictions have embraced the result in the bystander cases and allowed claimants to recover, particularly if the claimant did not personally and contemporaneously observe the accident<sup>30</sup>, there are signs that other courts may be willing to go even farther in recognizing a right to recover for negligent infliction of emotional distress. Plaintiffs are not only pursuing more and more claims in the physical injury and exposure areas — for example, claims to recover where an alleged exposure to some toxic or contaminated substance has caused them to fear that they may eventually suffer harm, such as cancer or AIDS, sometime in the future<sup>31</sup> — but they also have branched out into areas where recoveries for consequential damages traditionally have not been countenanced at all.

### 3.6 Duties Arising Out of Direct Relationships

Perhaps the most surprising area of expansion for non-economic loss recoveries has come about in cases that do not involve risk of or actual physical injury, unlike the cases alluded to above which may be viewed as mere extensions of the physical impact rule to analogous areas of emotional impact. In the situations involving the « impact », « zone of danger », and « bystander » rules, there usually is no pre-existing relationship between a person who asserts a claim for negligently inflicted emotional distress and the individual who is alleged to have caused it. Or, even if there is, it is not the basis upon which the courts recognized the right to recover. There is another group of cases, however, that is different in that recovery turns on the existence of some pre-existing relationship that has been assumed by the parties or imposed on them by law. According to the courts, it is the relationship alone that creates a duty to protect a complaining party from unwarranted emotional distress. Some of these decisions appear to represent an even greater expansion of the law than those involving negligent infliction of physical harm and their progeny because they extend liability for emotional distress to situations that in a number of instances involve purely economic interests that arise out of a contractual relationship. Arguably, this is a marked departure from the classic rule limiting damages for

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30. See *Thing v. La Chusa*, 48 Cal.3d 644, 257 Cal.Rptr. 865, 771 P.2d 814 (1989) (denying recovery to a mother who, upon hearing that her son had been struck by an automobile, rushed to scene, and found her bloody and unconscious child lying in the road). However, in *Thing* the Supreme Court of California did affirm its earlier position in *Molien v. Kaiser Foundation Hospitals*, *supra*, note 25, that, at least as to those claimants who could claim to be « direct victims » of emotional harm, both the physical harm and the accident or sudden occurrence requirements were eliminated: *Thing v. La Chusa*, at 658-59, 257 Cal.Rptr. at 873, 771 P.2d at 822.

31. See, e.g., *Potter v. Firestone Tire & Rubber Co.*, 6 Cal.4th 965, 25 Cal.Rptr.2d 550, 863 P.2d 795 (1993); *K.A.C. v. Benson*, 527 N.W.2d 553 (Minn. 1995).

breach of contract announced nearly a century and a half ago<sup>32</sup>. Other relationships not involving purely economic interests involve more modest advances in the law regarding non-economic loss, but they, nonetheless, still serve to show the increasing importance that awards for such losses have come to play in our society.

### 3.6.1 Professional Relationships

Some of the cases allowing emotional distress recovery for negligent breach of a direct relational duty involve claims against those engaged in a profession<sup>33</sup>. One famous example involves a doctor and others who were sued by a woman and her husband for emotional distress when the woman was erroneously diagnosed as having contracted a contagious form of syphilis<sup>34</sup>. Not only has this case rightly been viewed as having created liability for negligent infliction of emotional distress unaccompanied by physical injury<sup>35</sup>, but it also supports the proposition advanced by some courts that a relationship alone can create a duty to avoid inflicting emotional distress upon another party, even though it is not done intentionally<sup>36</sup>. Nowhere is this better illustrated than in the area of the so-called tort of bad faith which has arisen in the context of insurance contracts.

### 3.6.2 The Tort of Bad Faith

In 1967 the Supreme Court of California, which until recently has been the most innovative American tribunal when it comes to tort law, created a new niche for emotional distress claims<sup>37</sup>. Citing a rather modest selection

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32. *Hadley v. Baxendale*, 156 Eng. Rep. 145 (Ex. 1854) (limiting damages for breach of contract to those reasonably in the contemplation of the parties at the time the bargain was struck).
  33. In addition to the recent cases dealing with professionals, there are two somewhat related special groups of cases that have long recognized that a recovery may be had for the negligent infliction of mental disturbance alone. Although the first is dated and the second occurs relatively infrequently, they too should be recognized as areas of liability that do not turn on the risk of physical harm to the claimant: (1) negligent transmission of a message by a telegraph company, especially one erroneously announcing the death of a close relative, which indicates on its face that mental distress will result and (2) negligent mishandling or treatment of corpses. See W.P. KEETON *et al.*, *op. cit.*, note 17, § 54, at p. 362.
  34. *Molien v. Kaiser Foundation Hospitals*, 27 Cal.3d 916, 167 Cal.Rptr. 831, 616 P.2d 813 (1980).
  35. See W.P. KEETON *et al.*, *op. cit.*, note 17, § 54, at p. 364.
  36. For another case recognizing a cause of action for negligently inflicted emotional distress that arose out of an employment relationship, and relying on *Molien* for authority, see *Sacco v. High Country Independent Press Inc.*, 271 Mont. 209, 896 P.2d 411 (1995).
  37. *Crisci v. Security Ins. Co.*, 66 Cal.2d 425, 58 Cal.Rptr. 13, 426 P.2d 173 (1967).



of precedents involving situations where claimants had been allowed to recover damages for emotional distress arising out of invasion of property rights, the Court in *Crisci v. Security Insurance Co.*<sup>38</sup> announced that a liability insurer owes a duty of good faith and fair dealing to its insured in considering whether to settle tort claims made against its insured. In doing so, the court allowed an insured to collect an award for emotional distress where her liability insurance company had unreasonably failed to settle such a claim brought against her when it had the chance to do so<sup>39</sup>. Although it was not clear at the time how far reaching this decision would prove to be, it was not long before the California Court applied the same duty to the area of first-party, as compared to liability or what is sometime referred to as third-party, insurance.

In 1973 the Supreme Court of California handed down the landmark decision of *Gruenberg v. Aetna Insurance Co.*<sup>40</sup>. In deciding whether benefits were owed under a fire insurance policy, the Court reiterated the principle that there is an implied covenant of good faith and fair dealing in all contracts of insurance and made it clear that a breach of this duty may give rise to an action in tort<sup>41</sup>. The rest, as they say, is history. Within two decades thereafter, over 30 states have embraced the tort of bad faith in insurance policy disputes<sup>42</sup>, and the end is not yet in sight. In addition to the situations in *Crisci* and *Gruenberg*, the former involving the duty to settle under a liability policy and the latter involving the duty to pay benefits under a first-party policy, courts are now beginning to recognize that a similar duty exists with regard to the obligation to provide a defense under a liability policy, and that non-economic loss may be recovered for breaches of the duty in this type of case too<sup>43</sup>.

These decisions represent a very important development despite the fact that some of jurisdictions embracing the new tort have limited the

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38. *Ibid.*

39. After the insured's liability insurer refused to accept the tort claimant's offer to settle for \$9,000, which came within the insured's policy limits, the jury awarded the tort claimant and her husband \$101,000. In addition to the serious financial problems suffered by the insured as a result of the judgment, the insured also suffered a decline in health, hysteria, and suicide attempts. In the trial by the insured against her liability insurer, she was awarded \$25,000 for emotional distress, in addition to her economic loss, an award that was affirmed on appeal (*ibid.*)

40. 9 Cal.3d 6, 566, 108 Cal.Rptr. 480, 510 P.2d 1032 (1973).

41. *Id.*, at 574-75, 108 Cal.Rptr. at 485, 510 P.2d at 1037.

42. See R.C. HENDERSON, « The Tort of Bad Faith in First-Party Insurance Transactions After Two Decades », (1995) 7 *Ariz. L. Rev.* 1153.

43. See, e.g., *Smith v. American Family Mut. Ins. Co.*, 294 N.W.2d 751 (N.D. 1980), 20 A.L.R.4th 1 (1983).

action to intentional or reckless violations of the duty. This is so because a number of jurisdictions, including California, appear to allow emotional distress awards in bad faith cases where the conduct of the insurer may amount to nothing more than negligence<sup>44</sup>. And, of course, time will only tell what other relational interests will give rise to claims for emotional distress. If these and the other developments described thus far constituted the only expansions in this area of tort law, they surely would be remarkable enough, but when they are coupled with other simultaneous and related expansions, they are indeed astounding.

### 3.7 Expansion of the Definition of Pain and Suffering

#### 3.7.1 The ATLA Influence

Prior to World War II, the concept of pain and suffering was applied in a relatively narrow manner by the courts. Claimants were allowed to recover for the physical discomfort and agony that they actually experienced and little more. In fact, there was almost no discussion in the cases regarding the elements that might be considered or the amount that might properly be awarded. This began to change in 1946 with the establishment of an organization by a group of claimants' attorneys that is now known<sup>45</sup> as the Association of Trial Lawyers of America (ATLA)<sup>46</sup>. This organization has enjoyed great success in enrolling new members and contains not only thousands of rank and file personal injury attorneys, but also is headed up by the leading members of the bar in that area. Moreover, it has developed educational materials and training programs, including clinics which are conducted by the most capable plaintiffs' lawyers in the United States.

There is no question but that ATLA has had a tremendous impact on developments in general in tort law and that it has had a particularly dramatic effect on the number and size of awards for non-economic loss in these types of cases<sup>47</sup>. Almost certainly the law would have been expanded

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44. See R.C. HENDERSON, *loc. cit.*, note 42, at 1156-59.

45. The organization was originally known as the National Association of Claimants' Compensation Attorneys (NACCA), but was later changed to the American Trial Lawyers Association (ATLA). The latter name subsequently was modified to its present form in settlement of a trade name dispute with the American College of Trial Lawyers.

46. See J. O'CONNELL and R.J. SIMON, *loc. cit.*, note 14, at 4.

47. It has been argued that the phenomenal development of awards for pain and suffering is attributable to the fact that personal injury lawyers representing accident victims in the United States are customarily paid on a contingent fee. This fee normally ranges from one-third to one-half of the total recovery, depending upon the type and difficulty of the case. Since the American personal injury lawyer, it is said, is clearly in a position to profit greatly from an increased settlement or verdict, this has helped to provide the

by the judiciary in any event because non-economic harm does involve real and meaningful losses, particularly in an affluent and increasingly hedonistic society. Nonetheless, the development has also been enhanced by the fact that almost all personal injury claims are tried to a jury in the United States, a right that is guaranteed not only under the federal constitution but, also, as mentioned earlier, in each state constitution. The result has been that trial lawyers have developed an impressive armament of tactics and techniques for imaginatively presenting evidence in an area of law that is truly protean. These creative efforts by trial lawyers to influence juries to return ever larger awards in turn has resulted in a host of cases expanding on the definition of pain and suffering.

### 3.7.2 The Influence of Affluence

In a hand-to-mouth society, pain and suffering does not rate that high on any scale of human values—mere survival being the main goal. In comparison, in an affluent society there is not only much more to lose in the way of economic matters, but the inability to enjoy the economic benefits of that society also looms larger. In short, disability takes on additional meaning when there are pleasurable alternatives. Consequently, it is only logical that pain and suffering has come to include any form of unpleasant emotional reaction to an injury or its consequences so long as it is proximately related to the tort in question<sup>48</sup>. Not only does it include such things as disfigurement and any resulting mental pain or embarrassment, but it also includes such negative emotional states as those associated with any terror the claimant felt at an approaching injury and the anxiety about the future course of an injury<sup>49</sup>. Apprehension and even guilt that comes with awareness of impending death are compensable, as well as various forms of depression, anxiety, and hysterical or conversion reaction<sup>50</sup>. The results of personality changes, which may result in altered relationships with family members and friends are included<sup>51</sup>. In addition, it has more recently come to include the mere loss of pleasure as well as the actual sensation of pain or discomfort.

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incentive to not only press for new and expanded bases for awarding non-economic loss, but also for employing ever more imaginative ways of persuading jurors to return progressively larger verdicts. See J. O'CONNELL and R.J. SIMON, *loc. cit.*, note 14, at 4-5.

48. For a more detailed discussion of the various elements that now go to make up this area of damages, see D.B. DOBBS, *Law of Remedies*, vol. 2, 2<sup>nd</sup> ed., St-Paul, West Publishing Co., 1993, § 8.1 (4).

49. *Ibid.*

50. *Ibid.*

51. *Ibid.*

### 3.7.3 Loss of Enjoyment of Life

Many courts now recognize that a claimant may recover for what plaintiffs' attorneys refer to as loss of enjoyment of life<sup>52</sup>. If the evidence warrants, a claimant is allowed to seek recovery for the fact that he or she can no longer engage in some favored activity even though it is not associated with any physical pain itself. In fact, it has acquired a label of its own—hedonistic damages. Carried to its logical conclusion, according to arguments by claimants' attorneys, such awards should be allowed as a separate element of damages in addition to an award for pain and suffering<sup>53</sup>. These arguments, if accepted, could lead—and it appears they are in part designed to do so—to an erosion of two general rules that have been fairly well settled in the United States until now. The first rule is that one has to be conscious of the pain or loss before a recovery may be had. The second is that, except for lost earning capacity and any actual emotional distress, no recovery may be had for the time that a claimant will not live because of an injury—the so-called lost years. Although it remains to be seen whether any significant number of courts will actually accept the «separate element» argument, there are at least two jurisdictions—New Jersey and West Virginia—that already have held that a comatose patient has a loss of enjoyment even though he was not aware and would never be aware of the loss<sup>54</sup>. If past experience is any basis for predicting the future, there is one thing for sure. We have not seen the end of developments with regard to recoveries for non-economic loss.

## 4. Non-Economic Harm and No-fault Insurance

### 4.1 General Concern and Attempts to Limit Awards

My attempt to summarize developments in the law surrounding non-economic loss in the United States are necessarily sketchy; nonetheless, it serves to bring into relief the ever larger role that awards for pain and suffering have taken on as courts and juries reflect the values of our society through the common law process. The constant expansion of the areas in which recoveries are allowed and the more liberal definitions of pain and suffering, when coupled with the enhanced adroitness of plaintiffs' attorneys, have resulted in more and larger jury verdicts for non-economic loss, all of which has not gone without criticism. In recent years, there has been a movement by those aligned with the interests of defendants and their

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52. *Id.*, at p. 385.

53. See, e.g., *Kirk v. Washington State University*, 109 Wash.2d 448, 746 P.2d 285 (1987).

54. *Eyoma v. Falco*, 247 N.J. Super. 435, 589 A.2d 653 (App. Div. 1991); *Flannery v. United States*, 171 W.Va. 27, 297 S.E.2d 433 (1982).

liability insurers to legislatively curtail awards for non-economic loss. These efforts have largely involved attempts to place monetary limits on the amount of such recoveries and have met with some success, particularly in the area of medical malpractice<sup>55</sup>. Of course, the right to recover for pain and suffering has always loomed large in the debates over no-fault automobile insurance, a subject to which I now would like to turn.

#### 4.2 State No-Fault Movement

In the words of Professors Robert E. Keeton and Jeffrey O'Connell, the tort-liability insurance system for bodily injury victims of motor vehicle accidents « provides too little, too late » and what benefits there are, are « unfairly allocated, at wasteful cost, and through means that promote dishonesty and disrespect for law »<sup>56</sup>. This indictment, although issued over three decades ago, still rings true in all but a handful of jurisdictions in the United States. After Massachusetts enacted the first no-fault auto insurance plan, which went into effect on January 1, 1971, less than one-half of the states followed suit during the height of the movement<sup>57</sup>. Of these jurisdictions, only two-thirds modified the tort system by disallowing in some manner claims for non-economic loss<sup>58</sup>. The other one-third merely pro-

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55. For example, in 1975 California enacted its Medical Injury Compensation Reform Act (MICRA) which included a \$250,000 cap on non-economic loss in medical malpractice cases. This limitation on recovery was upheld in a constitutional challenge in *Fein v. Permanente Medical Group*, 38 Cal.3d 137, 211 Cal.Rptr. 368, 695 P.2d 665, appeal dismissed for want of federal question: 474 U.S. 892, 106 S.Ct. 214, 88 L.Ed.2d 215 (1985). In addition to California, according to the American Tort Reform Association (ATRA) located in Washington, D.C., as of December 31, 1997, similar legislation with monetary caps that range from \$250,000 to \$1 million for non-economic loss in medical malpractice cases has been enacted in Florida, Massachusetts, Michigan, Missouri, Montana, Louisiana, North Dakota, Nebraska, New Mexico, South Dakota, Utah, Virginia, West Virginia, and Wisconsin.
- Also, according to ATRA, limits ranging from \$250,000 to \$500,000 on certain types of non-economic loss in personal injury cases in general have been enacted in Alaska, Colorado, Hawaii, Idaho, Illinois, Kansas, Maryland, Minnesota, Ohio, and Oregon. However, the Supreme Court of Illinois recently declared the Illinois legislation unconstitutional, *Best v. Taylor Machine Works*, 179 Ill.2d 367, 689 N.E.2d 1057 (1997), and the constitutionality of some of the other legislation has yet to be resolved.
56. R.E. KEETON and J. O'CONNELL, *Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance*, Toronto, Little and Brown, 1965, p. 3. This book was the product of a study conducted by Robert E. Keeton and Jeffrey O'Connell regarding ways of handling claims arising from automobile accidents. The study was funded by the Walter E. Myer Research Institute of Law, Inc.
57. See R.C. HENDERSON, « No-Fault Insurance for Automobile Accidents: Status and Effect in the United States », (1977) 56 *Or. L. Rev.* 287.
58. Those plans which eliminated the right to sue were of two types: (1) those that limited the right to sue for non-economic loss, *i.e.*, pain and suffering; and (2) those that not

vided enhanced first-party benefits without regard to fault without placing any limits on auto accident victims' rights to sue in tort<sup>59</sup>. And, of course, the remaining jurisdictions did even less to address the plight of motorists<sup>60</sup>. Although there have been a few no-fault enactments since the 1970's, about an equal number of states have repealed their plans, so that the situation at the state level remains about the same as it did 30 years ago.

### 4.3 The National No-Fault Effort

In addition to the activity within the state legislatures—or perhaps more accurately because of the general lack of success at that level—there was one serious attempt at the national level in the 1970's to require all states to adopt no-fault plans that would meet federal standards. This effort involved a very interesting cast of characters.

The bill, which was entitled the «National No-Fault Motor Vehicle Insurance Act» (1974), not only was introduced, but it actually passed the Senate in May of 1974. The lead sponsor was Senator Warren Magnuson, the politically powerful Democratic chair of the Senate Commerce Committee. At the time, the President of the United States was none other than Richard M. Nixon, a man who, despite his misdeeds, accomplished much while in office.

When Nixon took office in January of 1969, he appointed John Volpe to the office of Secretary of Transportation. John Volpe was the Governor of Massachusetts during the time a young and little known Representative—at least little known outside his Brookline district—to the Massachusetts Legislature introduced the first no-fault act in the country, the act that

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only limited the right to sue for pain and suffering, but also limited the right to sue for economic loss to the extent that one was entitled to collect no-fault benefits: *Id.* at 290-292. Only two of these jurisdictions—Michigan and New York—adopted plans that come close to what Quebec has done in completely eliminating the right to sue in tort: *Id.*, at 291-292.

59. *Id.*, at 289-290.

60. It was about this time that states began to mandate that motorists carry certain levels of liability insurance and, in some instances, uninsured motorist coverage. Although this helped to assure some minimal level of compensation for motor vehicle accident victims, it did little to alleviate the serious inefficiencies of the fault-based tort system identified by Professors Keeton and O'Connell (see *supra*, text accompanying note 56) and repeatedly confirmed in later studies. See U.S. DEP'T OF TRANSPORTATION, *Motor Vehicle Crash Losses and Their Compensation in the United States: A Report to the Congress and President*, Washington, U.S. Govt. Print. Off., 1971; U.S. DEP'T OF TRANSPORTATION, *Compensating Auto Accident Victims: A Follow-up Report on No-Fault Auto Insurance Experiences*, Washington, U.S. Govt. Print. Off., 1985; S.J. CARROLL *et al.*, *No-Fault Approaches to Compensating People Injured in Automobile Accidents*, Santa Monica, Rand Institute for Civil Justice, 1991.

ultimately passed in 1970 and went into effect on January 1, 1971. That man was Michael Dukakis who subsequently became the Democratic nominee for President in 1988. Dukakis was working with then Harvard Law Professor Robert E. Keeton in achieving this milestone. Professor Keeton and Professor Jeffrey O'Connell had recently published their book, *Basic Protection for the Traffic Victim* (see *supra*, footnote 56). The preface to the book reveals that in 1965 Governor Volpe and Lieutenant Governor Elliot Richardson appointed a member of Richardson's staff to serve as their liaison representative to the study that resulted in the book. Although Governor Volpe actually opposed the adoption of the Massachusetts no-fault bill introduced by Dukakis, he apparently viewed things differently once he joined the Nixon Administration in Washington.

While John Volpe was Secretary of Transportation, the Department undertook the most massive and thorough study of the auto accident system in the United States, concluding that no-fault was preferable to the existing system. It is hardly likely that this study was undertaken without the approval of Volpe and others in the Administration, including President Nixon himself. Moreover, it was this study and support from the Department of Transportation that was instrumental in leading the National Conference of Commissioners on Uniform State Laws to draft the *Uniform Motor Vehicle Accident Reparations Act* which was completed in 1972. And in turn, the Uniform Act served in many ways as the blueprint for the federal standards that the states would have to meet and that were contained in Senate Bill 354, the *National No-Fault Motor Vehicle Insurance Act*.

Had the National No-Fault Act also passed the House of Representatives, is there any other evidence that President Nixon would have signed it? Although one can only speculate about the answer, it is interesting that Richard Nixon, while a law student at Duke University in 1936, wrote an article on tort liability for auto accidents for the influential journal, *Law and Contemporary Problems*<sup>61</sup>. His article appeared as part of a symposium discussing, among other things, the sociology of compensation and the pros and cons of a no-fault system for auto accidents<sup>62</sup>. Whatever influence this may have had on him as President, as fate would have it, the Nixon Administration was awash in the Watergate scandal by 1974 and he resigned in August of that year, just a little over three months after the Senate passed Senate Bill 354. The companion bill was never seriously considered by the

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61. See R.M. NIXON, «Changing Rules of Liability in Automobile Accident Litigation», (1936) 3 *Law & Contemp. Probs.* 476.

62. See E. CORSTVET, R.M. NIXON *et al.*, «Financial Protection for the Motor Accident Victim», (1936) 3 *Law & Contemp. Probs.* 465.

House of Representatives and the effort to enact no-fault legislation at the federal level in 1974 failed.

What followed was a long drought through the 1980's as the no-fault auto insurance movement stalled at both the state and national levels. Consequently, in most states today, claims for injuries arising out of motor vehicle accidents remain exclusively within the tort system except to the extent these victims voluntarily carry some form of first-party insurance, such as medical payments coverage, to pay for their losses. This situation, however, may be on the verge of change.

#### 4.4 The Choice No-Fault Movement

As we have entered the last decade of this century, Professor Jeffrey O'Connell and others have attempted to revitalize the no-fault movement in advocating that motorists should be given a choice as to the type of system that would determine their compensation rights when injured in an auto accident<sup>63</sup>. In fact, this concept is now popularly known as choice no-fault or the choice plan. Although only two states — Kentucky and Pennsylvania — have adopted choice plans thus far, the last two Republican candidates for President of the United States have endorsed the choice concept<sup>64</sup>. Moreover, legislation once again has been introduced in Congress — the *Auto Choice Reform Act* of 1997<sup>65</sup> — in a bipartisan effort to implement a no-fault insurance plan for motorists. This time, however, unlike the legislation introduced in Congress in the 1970's, the federal plan would not mandate that states limit the right to sue for pain and suffering<sup>66</sup>; rather it

63. See, e.g., J. O'CONNELL and R.H. JOOST, «Giving Motorists a Choice Between Fault and No-Fault Insurance», (1986) 72 *Va. L. Rev.* 61; J. O'CONNELL *et al.*, «Consumer Choice in the Auto Insurance Market», (1993) 52 *U. Md. L. Rev.* 1016; J. O'CONNELL *et al.*, «The Costs of Consumer Choice for Auto Insurance in States Without No-Fault Insurance», (1995) 54 *U. Md. L. Rev.* 281; J. O'CONNELL *et al.*, «The Comparative Costs of Allowing Consumer Choice for Auto Insurance in All Fifty States», (1996) 55 *U. Md. L. Rev.* 160; See also, J. O'CONNELL and C.B. KELLY, *The Blame Game: Injuries, Insurance, and Injustice*, Lexington, Lexington Books, 1989.

64. Both President George Bush in his bid for re-election in 1992 and Senator Robert Dole in his campaign for the presidency in 1996 made auto insurance reform an issue when they endorsed the concept of giving motorists the choice of participating in a no-fault auto insurance plan. See «Bush Proposes Modified No-Fault Auto Insurance to Cut Premiums», *Buffalo News* (17 Oct. 1992) at A5; «Dole's Plan Would Create New Options on Auto Insurance», *N.Y. Times* (8 Aug. 1996) at D1. Dole, while still a Senator, was one of the co-sponsors of the bipartisan federal Auto Choice Reform Act of 1996, S. 1860, 104<sup>th</sup> Cong., 2d Sess. (1996).

65. *Auto Choice Reform Act*, S. 625, 105<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1997).

66. The federal bill that passed the Senate in 1974 did not require that the states completely eliminate the right to sue for pain and suffering resulting from auto accidents. Suit could



would let consumers elect whether to give up the right to sue for such awards in exchange for being compensated for economic loss on a no-fault basis. A Congressional study estimates the legislation would reduce auto insurance premiums 32 percent nationwide, which translates into a savings of \$243 a year for the average driver and a 48 percent, on average, savings for low-income drivers<sup>67</sup>. Over five years, the plan would make available a total of \$246 billion in savings<sup>68</sup>. In addition, it would address other problems in the tort-liability insurance system such as speeding compensation to accident victims and ensuring that more of the premium dollar is returned in the form of benefits instead of being used to administer the system. It is all so appealing, but will it pass ?

#### 4.4.1 Framing the Issue

As in any political debate, framing the issue is critical. The importance of this fact was demonstrated in the debates during the no-fault wars of the 1970's, much of which debate centered on the right to recover for pain and suffering<sup>69</sup>. No-fault opponents, primarily consisting of the members of the Association of Trial Lawyers of America (ATLA), were mainly responsible for defeating plans that limited the right to sue for pain and suffering. In fact, it was during this period that ATLA became what it is today — a major political force at both the state and national levels<sup>70</sup>. And this transforma-

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be brought when, among other exceptions, the accident resulted in «(A) death, serious and permanent disfigurement, or other serious and permanent injury ; or (B) more than ninety continuous days of total disability». S. 354, 93d Cong., 2d Sess., § 206 (a) (5) (1974).

67. JOINT ECONOMIC COMMITTEE REPORT, *The Benefits and Savings of Auto-Choice*, Washington, United States Congress, 1997.

68. *Ibid.*

69. These efforts were also aided by the fact that the three major insurer trade associations at the time — American Insurance Association (AIA), American Mutual Insurance Alliance (AMIA), and National Association of Independent Insurers (NAII) — were not able to unite behind one specific no-fault plan. The AIA and NAII, organizations that represented many large stock insurance companies, favored more ambitious no-fault plans with greater limitations on the right to sue in tort, while the AMIA, an organization that included many small mutual insurance companies, wanted more modest no-fault benefits and, concomitantly, fewer restraints on the right to sue.

70. Prior to the no-fault movement, the Association of Trial Lawyers of America (ATLA) mainly served its membership through educational programs and materials. Its offices were located in Cambridge, Massachusetts within a block of the Harvard Law School. Although it had no relation with Harvard, it did establish a foundation in the name of the Law School's former dean, Roscoe Pound, which still supports a number of activities involving issues in law and public policy. After the no-fault movement began, the ATLA offices were moved to Washington, D.C., at which time the organization became much more involved in the political process, particularly with regard to any attempt to limit

tion came about even though none of the plans actually proposed in that era eliminated the right to sue for pain and suffering altogether<sup>71</sup>. The right to sue for non-economic loss was always retained for the serious injury cases and, in many instances, there was no effective limitation on such claims at all<sup>72</sup>.

Much of the success of the ATLA forces hinged on their ability to frame the debate in a manner that focused on what a potential auto accident victim might lose in not being able to sue for pain and suffering under a true no-fault plan. Arguments that focused on the possibility of suing for painful injuries were much more effective than arguments that focused on certain benefits for economic loss. If the choice presented was one of being able to recover at all for an aching back versus quicker and certain payment for economic loss, with somewhat smaller premiums, it was not hard for the listener to identify more with the former than the latter situation. The fact that, once the claimant's attorney's contingent fee and litigation expenses were deducted, the claimant would end up with very little, if any, of an award for pain and suffering never quite resonated with many people. In short, the motoring public rarely appreciated that they would be better off under a well designed no-fault system than they were under the tort-liability insurance system. Consequently, for the most part, the right to sue for pain and suffering survived, and not only did it survive, as evidenced by the earlier summary of legal developments, it appears to have taken on even more importance in the meantime. Given the current situation, will the fact that motorists will be given a choice make any difference this time around?

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claimants' rights under the tort-liability insurance system, whether it be at the state or national level.

71. Although the American Insurance Association, one of three politically active insurer trade associations, initially took the position that a pure no-fault auto insurance system was to be preferred, it later endorsed the Uniform Motor Vehicle Accident Reparations Act promulgated by the national Conference of Commissioners on Uniform State Laws in 1972. The Uniform Act preserved the right to sue for non-economic loss in cases involving death, significant permanent injury, serious permanent disfigurement, or more than six months of total disability, but only if the damages exceeded a statutory figure. The Act suggested that the statutory figure be not less than \$5,000. See *Uniform Motor Vehicle Accident Reparations Act*, 14 U.L.A. 35, § 5 (a) (7) (1990).
72. Many acts, especially in the early stages of the movement, eliminated the right to sue for pain and suffering only when the medical expenses suffered in an auto accident did not exceed a monetary threshold, \$500 being a common figure. Other acts used a rather amorphous verbal threshold describing the types of injury for which a claim for pain and suffering could be maintained (see R.C. HENDERSON, *loc. cit.*, note 57, at 290). In either case, these thresholds were easily circumvented and proved inadequate in eliminating claims for pain and suffering in the less-than-serious injury cases.

#### 4.4.2 Will Offering a Choice Make Any Difference ?

Now nearly three decades have elapsed since the last major effort to bring no-fault auto insurance to America's motorists, an effort that largely failed over the issue of the right to sue for pain and suffering — a right that no-fault proponents only argued should be modified, not eliminated. Yet the current federal Auto Choice plan comes very close to accomplishing the latter for those accident victims who elect the no-fault option<sup>73</sup>. This has already rekindled the arguments of plaintiffs' attorneys and some consumer advocates that such a plan for auto accident victims takes away too many benefits and that it promises more than it can deliver<sup>74</sup>. In other words, they argue, it is such a bad deal that people should not even be given the right to choose for fear that they will act out of ignorance. And, of course, what is really at stake is the right to sue for pain and suffering.

Whether or not the federal *Auto Choice Reform Act* will be enacted is problematic because the ATLA forces and other self-styled consumer advocates have proved formidable. They have worked effectively to defeat ballot initiatives, for example in Arizona and California, in the past few years and can be expected to marshal every resource available to oppose the current no-fault effort at the federal level, albeit this effort would merely allow people to choose between fault and no-fault systems. Moreover, even if the opponents are not successful in defeating the proposed choice plan in Congress, a serious question still exists — will the President sign it<sup>75</sup> ? Only time will tell, but in the process the public's reaction to the proposal could well turn on how the debate is framed and, if the opponents have anything to do with it, the issue will be the right to sue for non-economic loss. *Déjà vu!*

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73. A no-fault electee retains the right to sue for pain and suffering under the federal *Auto Choice Reform Act* in only three situations : when the electee is injured by a tortfeasor-motorist who is operating his or her vehicle while unlawfully uninsured or under the influence of alcohol or illegal drugs or the tortfeasor-motorist intentionally injures the electee. S. 625, 105<sup>th</sup> Cong., 1<sup>st</sup> Sess., § 6 (c) and (d) (1997).
74. « Proposed Auto Insurance Law Would Reduce premiums ; But Trial Lawyers Oppose Eliminating Option to Sue for Pain and Suffering », *Balt. Sun* (20 Jan. 1998) at 7A.
75. During his 1992 and 1996 presidential campaigns, President Clinton's largest single source of campaign contributions was lawyers, many of whom were trial lawyers. In the 1992 presidential primary campaign, when he needed the money the most, he received nearly \$3 million from this source, see A. DEVROY and H. DEWAR, « Product Liability Pits 'Two Goliaths' ; Business Wins a Senate Battle, but Veto to Give Lawyers Their Day », *Wash. Post* (21 Mar. 1996) at A01. In 1996, by the end of June, with four months to go before the election, lawyers had donated nearly \$4 million to the Clinton campaign. See R. MARCUS, « Study Traces Sources of Record Fund-Raising by Clinton and Dole », *Wash. Post* (23 August 1996) at A09.

## Conclusion

As we approach a new century, it is discouraging, to say the least, that we are presently no better off in the United States than we were 30 years ago when it comes to compensation for auto accident victims. Motor vehicle liability insurance—the most inefficient of the private mechanisms for transferring and distributing losses—is now required for motorists in nearly all the states. Efficient no-fault plans that will compensate auto accident victims in more instances and at higher levels for economic loss than the tort-liability insurance system exist in only a handful of jurisdictions. The no-fault movement for the present has stalled at the state level and the chances of federal action are problematic at best. A compulsory pure no-fault plan for auto accidents, such as Quebec's, appears to be out of the question and now the opponents of no-fault are girding for the battle to preclude motorists from even being given a choice, all in the name of preserving the right to sue for pain and suffering. Yet, the 21<sup>st</sup> century may still witness the development of a more enlightened system for compensating auto accident victims, although it may be the result of indirect action by the federal government.

Eventually we will have some type of national health-care system in the United States. Whether this occurs through some type of federal effort, like the plan proposed by the Clinton Administration or some derivation, it will happen because times have changed. Prior to and even for sometime after World War II, there was no real expectation in this country that a person was entitled to health care. If you could pay for it, you could get the best, but if you could not, you got only what you could afford or whatever the medical profession would provide for free. Health insurance coverage did not exist, at least as we know it today. Kaiser had only recently begun—mainly in the wartime shipyards—what we would today call a health maintenance organization or managed care. Employer sponsored health insurance plans were yet to emerge in large numbers. There was no general feeling that health care was a basic human right on the same level as food. That is not the case today and it will probably never be the case again, at least in this country. People have definite expectations about their need for and right to health care and these expectations are growing, not diminishing.

Once health care is accepted as an inalienable, guaranteed right, it is going to make less and less sense to permit tort victims to sue third parties for their medical bills. It ultimately will be viewed as a « right » that everyone but the personal injury bar and liability insurers can well do without. I do not have time, nor is this the place, to pursue it here, but I am confident that we would lose nothing of real importance if we eliminated the redundancies that presently exist in the tort-liability insurance system and

health-care insurance programs. In fact, by doing so, I believe we could actually gain a great deal in the way of efficiency and benefits.

If one is no longer allowed to sue in tort for medical expenses otherwise compensated, it may follow that it is not worth fighting over who was at fault with regard to work loss either, particularly if the loss arises from an auto accident. In addition, one might observe that if most of the tort award for non-economic loss goes to compensate the claimant's attorney anyway, we may as well quit fighting over fault in a lot of situations and utilize a first-party insurance system for all out of pocket or economic loss. Not only could more people be compensated and to a greater degree for the same cost, but it could be accomplished faster and in a less aggravating manner. Thus, it is entirely possible that the movement for universal health care could significantly impact the tort-liability insurance system over the long haul and that the federal government could play an important role in the process. In the meantime, the people of Quebec enjoy the benefits of a pure no-fault auto insurance system while we in the United States continue to wait.