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order and the desire for freedom is indispensable to a democratic society. Ultimately, triumph must not be by the evangelists of inflexible logic, the scope of which embraces only total interdiction of firearms, nor by those who subscribe to unfettered freedom, for in the final analysis they may well be the protagonists of near anarchy; rather, it must be by those who are willing to wean the extremes of their evils and secure the amalgamation of their virtues.

Bruce Petesch

AUTOMOBILE INSURANCE—AN EVALUATION OF A NEW PROPOSAL

The cost of automobile casualty insurance has consistently increased throughout the United States. In 1966 alone, insurance premiums rose in all but eighteen states,¹ and higher premiums are predictable as insurance companies contend that further increases will be needed to keep pace with their rising operation costs.² Insurers contend that the present liability system is marred by a significant number of unwarranted claims, which is a major contributor to the backlog of cases pending in our courts and a primary cause of increased insurance premiums.

With this increase in the number of claims, rising insurance premiums, and mounting court congestion, two law professors, Robert Keeton of Harvard Law School and Jeffrey O'Connell of the University of Illinois, believe that the present system for the recovery of damages incurred in an automobile accident is ripe for reform. Keeton and O'Connell have presented a plan of "basic protection for automobile accident victims," which is intended to alleviate many of the problems of the present system.³ The purpose of their plan is to eliminate litigation for recovery of bodily injuries in an automobile accident involving less than five thousand dollars in pain and suffering or less than ten thousand dollars in total economic loss. The injured would be compensated by his own insurer for economic loss regardless of fault. The "basic protection" plan was introduced before the Seventy-Fifth Illinois General Assembly as House Bill 1548. Although the proposal was not enacted in Illinois, being tabled by the House of Representatives, Professors Keeton and O'Connell anticipate having their plan introduced in other state legislatures.

¹ U.S. NEWS & WORLD REPORT, Apr. 17, 1967 at 68.

² *Id.*

³ KEETON & O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM—A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE (1965).

Essential to a meaningful analysis of how the plan will change the present system is an understanding of some of the fundamental concepts. Under the plan, net economic loss is defined as: "[A]ccrued economic detriment from accidental injury, consisting of allowable expenses and work loss. . . . Pain, suffering and inconveniences are not losses."⁴ Net loss is defined as: "Loss less subtractable benefits received from sources other than basic and added protection insurance."⁵ This indicates that where the injured party sustains losses of four thousand dollars in pain and suffering and two thousand dollars in net economic loss, he will receive reparation of only two thousand dollars because no remedy is provided for pain and suffering under the plan. In such a situation, no suit for tortious conduct would be permitted. The reparation would be available, under the plan, only from one's own insurer.

Their plan provides reparation, regardless of fault, in automobile accident cases which involve claims for less than five thousand dollars in pain and suffering, or less than ten thousand dollars in total net loss per person. When these prerequisites are satisfied, the injured party is compensated by his own insurance company for the net economic loss sustained, but no recovery is provided for pain and suffering under "basic protection." Should the plan be enacted, the injured party would not have a remedy in tort for claims under five thousand dollars in pain and suffering or under ten thousand dollars in total net loss. When either of these limits is exceeded, the injured party must proceed under the present tort liability system.

The "basic protection" plan is in direct opposition to the established rule that a tortfeasor compensates the injured for damages resulting from his wrongful acts. This note will be devoted to examining the effect of the "basic protection" plan in relation to the problems of the present tort liability system, in order to determine whether legislative enactment is desirable.

In order for the "basic protection" plan to function properly, compulsory insurance must be enacted. Without such legislation "basic protection" and the present tort liability system would be in direct competition.⁶ Innocent victims would prefer to litigate their claims under the present system since they could receive compensation for pain and suffering, and recovery would not depend upon whether the victim has insurance. Tortfeasors would prefer "basic protection" as they would receive compensation regardless of fault. Thus, it is necessary to evaluate compulsory insurance laws to determine the value of these laws and how they can effect the plan. At present only Massachusetts, North Carolina and New York have enacted compulsory insurance

⁴ Ill. Laws, 75th Gen. Ass. (1967), H.B. 1548, § 1-9, tabled May 20, 1967 (hereinafter cited as Ill. H.B. 1548).

⁵ Ill. H.B. 1548, § 1-10.

⁶ *Supra* note 3.

legislation; all three states have had only limited success.⁷ A prime reason for this limited success is the difficulty of enforcing such laws.

In order to enforce compulsory insurance in these states, the owner of a vehicle is required to obtain a certificate of insurance before vehicle license plates can be issued to him. Such a system would seem to eliminate uninsured motorists. However, in New York alone, official estimates show that there are approximately 226,000 uninsured motorists.⁸ The failure of compulsory insurance is exemplified by the fact that all three states require by law that uninsured motorist insurance be offered to provide compensation to persons injured by uninsured motorists.⁹ One reason advanced for this failure is that after vehicle license plates are issued, the owner cancels his insurance, thus avoiding compulsory insurance. It is also interesting that in New York State an insured motorist pays premiums of four dollars per year for uninsured motorist insurance which is as high as the national average.¹⁰ This again indicates that compulsory insurance has not been successful.

The declaration of purpose in New York State's uninsured motorist coverage statute states that compulsory insurance laws have failed to provide adequate recompense to the injured:

The legislature finds and declares that the motor vehicle financial security act [compulsory insurance] . . . fails to accomplish its full purpose of securing to innocent victims of motor vehicle accidents recompense for the injury and financial loss inflicted upon them.¹¹

Ever since these three states have enacted compulsory insurance laws, they have experienced more claims than ever before. A special legislative commission in Massachusetts which reviewed the state's compulsory automobile insurance system found, as a possible answer for the increase in claims, that the system induces unwarranted claims:

In view of the claim frequencies being higher in this Commonwealth than in any other state in the Nation, there must of necessity be a serious question as to whether or not a substantial number of these claims are unwarranted, exaggerated, or in some instances are even fraudulent. This claim consciousness unquestionably results from compelling all motorists to carry liability insurance on their vehicles. There can be no question but that the inducement to file a claim on the slightest

⁷ MASS. GEN. LAWS ch. 90, § 34A (1958); N.C. GEN. STAT. § 20-309 (1958); N.Y. VEH. & TRAF. LAWS § 312 (McKinney 1965); Article published by the National Association of Independent Insurers, *Story of Failure*, on file in the *DePaul Law Review* offices.

⁸ Martin and Sefton, *Cheats Run Wild Against Auto Insurance Law*, *New York Daily News*, Dec. 8, 1966.

⁹ *Supra* note 7.

¹⁰ *Supra* note 8.

¹¹ N.Y. VEH. & TRAF. LAWS § 600 (McKinney 1965).

provocation, or even on no grounds at all, is inherent under a compulsory insurance system.¹²

Motorists in Massachusetts and New York pay the highest insurance rates in the country, which are twice the national average.¹³ Also state administration of compulsory insurance is very costly. In New York State, it has been estimated that it takes one thousand or more state employees to handle the compulsory program and the Motor Vehicle Department spends in excess of 3.5 million dollars a year to administer the law.¹⁴

Without improvement in the enforcement of compulsory insurance, the success of "basic protection" appears to be doubtful. One possible suggestion to eliminate many of the uninsured motorists would be to charge a penalty for cancellation of insurance or not allow cancellation before the expiration of the policy by the insured. Before any state can adopt a "basic protection" plan, some workable compulsory insurance enforcement plan must be found.

One of the major contributors to the backlog of cases pending in our courts is claims resulting from automobile accidents. In Illinois, a backlog exists in many of the counties, with Cook County having a waiting period of over five years.¹⁵ Keeton and O'Connell hope that "basic protection" will significantly reduce the mounting backlog of cases pending in our courts by disposing of litigation for bodily injury from automobile accidents involving less than five thousand dollars in pain and suffering, or less than ten thousand dollars in total economic loss. However, careful examination of the plan reveals it will not eliminate a substantial number of cases involving automobile accidents and therefore will not significantly reduce court congestion.

By limiting the scope of "basic protection" to recovery of damages for bodily injury, the plan does not eliminate litigation for property losses incurred which have represented sixty-eight percent of all accident claims according to a Michigan survey.¹⁶ All injuries involving more than five thousand dollars in pain and suffering or more than ten thousand dollars in total economic loss will still require litigation. Also, suits for wrongful death will still require litigation.

The "basic protection" plan creates new legal questions requiring litiga-

¹² MASS. S. REP. NO. 466 (1959).

¹³ *Supra* note 7.

¹⁴ *Supra* note 7.

¹⁵ In the Law Division the waiting period is 60.2 months. INSTITUTE OF JUDICIAL ADMINISTRATION, 13TH ANNUAL SURVEY OF STATE COURT CALENDARS (1965); Comment, *Additur: Procedural Boon or Constitutional Calamity*, 17 DEPAUL L. REV. 175 (1967).

¹⁶ Conard & Jacobs, *New Hope for Consensus in The Automobile Jury Impasse*, 52 A.B.A.J. 533 (1966).

tion, besides not eliminating many of the present areas of litigation. As with any newly proposed law, there are areas which can only be interpreted through court decision, and this proposal is no exception. For example, the plan allows for "reasonable charges incurred for reasonably necessary products, services and accommodations."¹⁷ However, the plan establishes no definition of reasonableness except for the cost of hospital rooms. Another section of the plan allows for reasonable attorney's fees as the insurer pays half the fees of the claimant's attorney.¹⁸ The legal question presented is who will determine the reasonableness of fees: the legal profession, the insurers, or the courts? Another question is presented where an injured party brings suit and the jury returns a verdict in favor of the plaintiff but awards damages of less than ten thousand dollars: who pays the damages—the defendant or the plaintiff's insurance company? The litigation required to interpret these and other areas of the proposed law will add to, rather than alleviate court congestion.

In addition, there is a possibility of increasingly unwarranted and inflated claims.¹⁹ Under "basic protection" no compensation is provided for pain and suffering. However, when the claims involve more than five thousand dollars in pain and suffering the innocent victim may litigate to recover damages for pain and suffering in excess of the limitation imposed by the plan. This limitation will act as an incentive for the innocent victim to inflate his claim so as to receive compensation for pain and suffering through the present tort liability system.²⁰ Payments by the injured's own insurance company will not eliminate the desire of an innocent victim to sue for such compensation.²¹ To eliminate the incentive to inflate claims created under the "basic protection" plan, a possible solution would be to provide scheduled benefits depending on the particular type of injury for pain and suffering in addition to reparation for economic loss. The reason "basic protection" does not provide reparation for pain and suffering is that only a jury can determine the amount of pain and suffering. However, under the proposed modification there is no need for a jury determination. The idea of scheduled benefits is similar to Workmen's Compensation and a plan established in Saskatchewan, Canada.²²

¹⁷ Ill. H.B. 1548, § 1-9(a) provides: "In no event will allowable expenses within basic protection coverage include a charge for a hospital room in excess of a reasonable and customary charge for semiprivate accommodations"

¹⁸ Ill. H.B. 1548, § 3-9.

¹⁹ Address by Paul F. Laughlin, New York State Bar Association Annual Meeting, in *THE NATIONAL UNDERWRITER*, Mar. 17, 1967, at 36.

²⁰ *Id.*

²¹ Address by Gerald E. Myers, Independent Insurance Agents of Illinois Annual Meeting, in *THE NATIONAL UNDERWRITER*, Nov. 11, 1966, at 34.

²² Automobile Accident Insurance Act, 13 Eliz. 2, c. 51 (Sask. 1964). For a complete

Further, "basic protection" abolishes the collateral source rule. This rule states that a defendant cannot mitigate his damages by showing that other benefits were received by the injured.²³ The collateral source rule is followed in all federal and state courts except Alabama.²⁴ The rule is widely accepted as courts feel it is better to give the injured a windfall of additional recovery than to give it to the tortfeasor.²⁵ By allowing only net recovery of economic loss, the "basic protection" plan abolishes the collateral source rule, again increasing the possibility of inflated claims. According to the Health Insurance Institute, seventy-eight percent of the civilian population had some form of health insurance protection in 1963.²⁶ This means that a large percentage of victims will receive reduced benefits and possibly no benefits under "basic protection," and therefore, they would have little to lose by engaging in litigation.²⁷ This potential increase in unwarranted claims would further add to the backlog of cases pending in our courts.

Although it appears that the "basic protection" plan will not substantially alleviate the court's congestion, it will allow for earlier payments to the injured. This is one of the better points of the plan as earlier payments will be a great benefit to the injured victim. It is during the pending litigation that the claimant is most often placed in financial difficulty.²⁸ The plan provides that payments are due within thirty days after the insurer receives reasonable proof of loss. It also provides for interest of six percent per annum on overdue payments. The objective of earlier payment to the injured represents one of the plan's improvements over the present tort liability system.

"Basic protection" also strives to improve the present system by reducing the carrier's cost. A Michigan study showed that for each dollar paid out by insurers in claims, 1.2 dollars must be spent for administration fees.²⁹ The cost under a direct payment system would be far less. Professors Keeton and O'Connell estimate the costs under "basic protection" to be fifteen to twenty-five percent lower than the costs of the present system.³⁰ However, this does not mean that the insured would necessarily save that much in

discussion see Grad, *Recent Development in Automobile Accident Compensation*, 50 COLUM. L. REV. 300 (1950).

²³ Lambert, *The Case for the Collateral Source Rule*, 516 INS. L.J. 531 (1966).

²⁴ Peckinpugh, *An Analysis of the Collateral Source Rule*, 516 INS. L.J. 545 (1966).

²⁵ *Id.*

²⁶ Marryott, *The Tort System and Automobile Claims: Evaluating the Keeton-O'Connell Proposal*, 52 A.B.A.J. 639 (1966).

²⁷ *Id.*

²⁸ *Supra* note 16.

²⁹ *Id.*

³⁰ Keeton, *A Basic Protection Insurance for Claims of Traffic Victims*, 2 HARV. J. LEGIS. 41 (1965).

premiums. By being open to liability for damages in excess of the limitations of "basic protection" the prudent insured will carry additional coverage which according to actuaries would partially eliminate the savings provided under the plan.³¹

Lower costs to the carrier are also achieved by substantially reducing the benefits paid to each victim. Examples of these reduced benefits are as follows: no recovery is provided for pain, suffering, and inconvenience; benefits are reduced by reparation from other sources; and no recovery is allowed for the first one hundred dollars of economic loss.³² Lower costs are again achieved by minimizing the attorney's fees expended by the insurer in defending the suit and by the injured in bringing the suit to court.

It appears that lower costs will be achieved under "basic protection," but the plan provides a minimum deterrence for reducing the number of claims. The system of merit rating which provides careful drivers lower premiums can no longer be used under "basic protection," for the premiums are the same for careful and careless drivers. Frequently, only one of the drivers is at fault, but under the "basic protection" plan both the faulty and the faultless driver will be penalized.³³ Therefore, it can be said that the plan minimizes the incentive for good driving by not offering any benefits to the responsible drivers or detriment to the careless ones.³⁴

The public sanctions lower costs but fewer claims. With these two competing factors, it is interesting to try to predict the public's reaction to the "basic protection" plan. Although no survey has been taken concerning the plan, certain other factors can be used to indicate public reaction. One such factor is evident within the plan itself. It appears as if the authors felt the public would not be receptive to a proposal that entirely abolished the common law action of negligence in automobile accidents involving bodily injury. By the limitations of five thousand dollars for pain and suffering, and ten thousand dollars for total loss, the authors retained the negligence action in cases involving claims over these limitations.³⁵

Public reaction is partially revealed by a test conducted by Nationwide

³¹ Ghiarde, *DRI Official Against Keeton-O'Connell Basic Protection for Traffic Victims*, THE NATIONAL UNDERWRITER, June 23, 1967.

³² Ill. H.B. 1548 § 2-3(a) provides: "The greater of the following amounts otherwise qualifying for reimbursement under this insurance is to be excluded in calculating benefits to each claimant arising from one accident: (i) the first \$100.00 of net loss or (ii) 10% of all work loss."

³³ *Supra* note 21.

³⁴ Open letter by Defense Research Institute to all corporation presidents, in THE NATIONAL UNDERWRITER, Jan. 20, 1967, at 36.

³⁵ Knepper, *Alimony for Traffic Victim*, 15 DEFENSE L.J. 513 (1966).

Insurance Company from 1959 through 1965. Nationwide instituted a program whereby third parties involved in accidents with Nationwide drivers were permitted to choose between collecting benefits regardless of fault or proceeding under the tort liability system. Such a program is similar to the "basic protection" plan. Out of approximately forty-one thousand claims under Nationwide's program, only 8,863 claimants chose the alternative of benefits regardless of proving fault.³⁶ This limited test by Nationwide seems to indicate that the public favors litigation under the present tort liability system as compared to a plan that is very similar to "basic protection." Unfavorable public opinion greatly reduces the possibility of the "basic protection" plan being enacted in Illinois or other states.

"Basic protection" changes the essential principle of the tort liability system by establishing the principle that both the victim and tortfeasor will receive reparation for their losses. The advocates of the tort liability system feel that a wrongdoer should not be compensated for the injuries he sustains. They justify this by holding each man responsible for his own fault.³⁷ On the other hand, Professors Keeton and O'Connell and other compensationists feel that when one's life may be catastrophically transformed, society, rather than the individual, should bear the loss.

The compensationists advance several reasons for reparation to all victims regardless of fault. First, the sanctions imposed on the tortfeasor for negligence are not commensurate to the wrong.³⁸ The tortfeasor who is also injured receives no reparation and as a result suffers extreme financial hardship because of being negligent. Also, determination of fault is merely for a legal determination, as rarely is only one party truly at fault. The compensationists find that the fault requirement is wavering, as there are so many settlements indicating that the plaintiff is taking a discount because the issue of fault is unclear.³⁹

Extreme financial hardship is not a just sanction for a tortfeasor's negligence but is a poor reason for eliminating the fault system, as it can be avoided. Various types of insurance are available at low premiums to provide reparation for losses regardless of fault. Most companies offer to pay medical expenses from an automobile accident, regardless of fault, up to a limit, typically, of two thousand dollars.⁴⁰

³⁶ Report on file in the *DePaul Law Review* offices.

³⁷ KEETON & O'CONNELL, *Basic Protection—A Proposal for Improving Automobile Claims System*, 78 HARV. L. REV. 329 (1964).

³⁸ *Supra* note 16.

³⁹ *Supra* note 3.

⁴⁰ U.S. NEWS & WORLD REPORT, Oct. 2, 1967, at 50.

CONCLUSION

Professors Keeton and O'Connell have pointed out many defects in the tort liability system as applied to automobile accidents but they have proposed a system which is also burdened with defects. The difficulties that have been experienced with compulsory insurance laws will be experienced with passage of the proposed legislation. The "basic protection" plan also presents an incentive for unwarranted and inflated claims as well as reducing the incentive for careful driving.

In the final analysis, it would be unwise to eliminate a system which has proven its merit merely because of some deficiencies in favor of the proposed legislation. Instead, the present system should be modernized to promote reasonable and speedy settlements.

Edwin Josephson