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Routes to Reform of the Automobile Repairs System*

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I. INTRODUCTION

Ideas about reform of the automobile repairs system are currently spoken and published in such abundance¹ that the bibliographical analogue of a chart and compass have become essential to finding one's way through the maze. My primary purpose in these remarks is to offer a chart.

A good chart must be objective. Some people — not excluding good friends — may believe I am not able to achieve objectivity in constructing a chart concerning the repairs system. But I take a different view, and I am encouraged in that more positive expectation since the chart I propose to describe is, of course, to be used with a compass. And the compass I have in mind points unerringly to a system of nonfault insurance.

The chart to be constructed, then, concerns not whether but how we might proceed to a "nonfault" or "no-fault"² repairs system. That is, it concerns the alternative routes among which we must choose if we are to adopt a nonfault system.

I believe it is now clear that some form of nonfault insurance will become the prevailing automobile accident repairs system in the United States in the immediate future. If you disagree, then I invite you to consider the problem as you would a law school hypothetical, and I hope that the intellectual exercise will some day bear fruit — as law teachers, if not always their students

* Professor Keeton presented his views on this subject to the West Virginia Bar Association in October, 1971, at Pipestem State Park, West Virginia.

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¹ See, e.g., J. Volpe, *Motor Vehicle Crash Losses and Their Compensation in the United States*, A Report to Congress and the President (U.S. Dep't of Transp. Auto Ins. & Comp. Study 1971); KING, *The Insurance Industry and Compensation Plans*, 43 N.Y.U. L. REV. 1137 (1968); ROAKES, *AUTOMOBILE INDEMNIFICATION PROPOSALS—A COMPENDIUM* (1968).

² I use the terms "nonfault" and "no-fault" interchangeably. If "nonfault" or "no-fault" is a hidden persuader, I believe it has only become so because of growing acceptance of the principle each of these terms suggests. Various observers have expressed exactly opposite views as to whether "non-fault" is a better hidden persuader than "no-fault" or vice versa.

and former students, firmly believe to be the case with other hypotheticals.

II. THE COMMON ELEMENTS OF NONFAULT INSURANCE PROPOSALS

The central theme of all nonfault automobile insurance proposals is that for compensating victims of traffic accidents they depend primarily on that concept of insurance now identified as nonfault insurance. It turns out, however, that under other names this is the most ancient of all known concepts of insurance. It is at least as ancient as the fraternal societies of early civilizations. This concept is basically the same idea that we find to be the essence of life insurance, health and accident insurance and fire insurance. It is the concept that the criterion for determining whether benefits shall be paid will be whether the claimant has suffered a loss from the type of accident described in the insuring clause of the policy.

One of the implications of that criterion is that fault is irrelevant to the determination of compensation. A completely separate issue is the question whether fault will be relevant to determining responsibility for paying premiums into the system.³ Certainly there is a lack of consistency among the many proposals — all of the different routes to nonfault insurance — on this second issue. But they are consistent on the first issue of using a criterion for benefits that is the nonfault criterion — the straightforward insurance principle.

For most persons speaking and writing about this issue, the several different paths to nonfault insurance have in common some other implications as well. It is explicit or implicit in most such proposals that nonfault insurance will be first party insurance, that is, that the claim for benefits of the injured person will ordinarily be a claim against his own insurance company without any third party involved. Such a claim stands in contrast with the typical claim under the liability insurance coverage in which there is a third party, involved, the other driver, and in which the theory of the system is that benefits are being paid on his behalf, the insurance being in form at least one designed to protect his assets against inroads incident to his liability based on his fault.

In practice, of course, automobile liability insurance has in fact been used for a purpose of assuring compensation to victims rather

³ See, e.g., *Compensation Systems — The Search for a Viable Alternative to Negligence Law 70-76* (1971), reprinted from P. KEETON & R. KEETON, *CASES AND MATERIALS ON THE LAW OF TORTS* ch. 7 (1971) [cited hereinafter as *Compensation Systems*].

than simply to protect the assets of wrongdoers. Thus, the present system has developed complications incident to a practical use for a different purpose than the underlying theory.⁴

In contrast with this very ancient concept of nonfault insurance, liability insurance (or, under the newspeak, "fault insurance") is relatively recent in origin. This idea was invented only in the nineteenth century. It first came into vogue as a form of insurance designed to protect the employer against the consequences of what is called "employers' liability" — that is, liability of the employer for injuries to his workmen. This occurred at a time before workmen's compensation had been developed.

Of course, the moment the automobile came upon the scene and its propensities for causing injuries to others became apparent, the liability insurance concept was quickly adapted to the automobile case.

Liability insurance, then, is a relatively recent concept. In moving toward nonfault insurance for the compensation of traffic victims, we are not abandoning the wisdom of centuries as so many opponents of nonfault insurance have argued. Instead, we are simply returning to a more ancient wisdom — the concept of straightforward insurance.

Another idea common to most nonfault insurance proposals is that benefits will be paid periodically rather than in one lump sum. In the tort-and-liability-insurance system, it is customary for compensation to be determined once and forever by a judgment in a single lawsuit or settlement. Predictions are made as to what the losses will be in the future, and, of course, those predictions are always wrong since it is impossible for man to predict these losses accurately. In contrast, nonfault insurance proposals would provide for the payment of losses as they occur, in most instances month by month.

In some plans there are also provisions for special methods of adjudicating disputes⁵ and provisions for objective criteria of

⁴ Cf. NEW YORK INS. DEP'T REPORT, *Automobile Insurance . . . For Whose Benefit?* 13-14, 44-48 (1970) [hereinafter cited as N.Y. INS. DEP'T REPORT].

⁵ E.g., the Columbia Plan proposed an administrative board comparable to those used in many states for workmen's compensation claims. COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES, REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS (1932). In contrast, most current plans propose that jury trial be available for the resolution of disputed fact issues.

compensation for things beyond medical expense and wage loss.⁶ On these matters there are substantial variations among the different plans.

III. FIVE ROUTES OF REFORM

Up to this point we have been considering the principal characteristics of nonfault insurance coverage itself. On these matters, despite differences in detail, there is a large measure of similarity among the different plans. Turn now to that area with respect to which choices must be made among alternative routes to reform having very different characteristics. The key question is: To what extent will claims based on fault be eliminated or limited? It may be helpful to identify five distinctive positions that are in a sense but points along a spectrum of possibilities.

The most extreme position is the position that goes furthest toward eliminating claims based upon fault. This position is taken by the American Insurance Association,⁷ by the New York Insurance Department,⁸ and by State Senator Davies of Minnesota.⁹

These three proposals all have in common the proposition that they would eliminate tort actions almost completely. The only reason for the qualifier "almost" is that there are some exceptional provisions for "residual" tort actions. For example, the New York plan proposes to retain a right to recover tort damages against what are referred to as "obnoxious drivers": drunken drivers, drug addicts, fleeing felons, and so forth. The New York report lists several kinds of drivers that most persons would agree deserve some kind of punishment. Instead of leaving punishment in those cases to the criminal law system, or to license revocation or suspension, the New York proposal would preserve tort actions.¹⁰ As you think about the volume of cases, you will recognize that these cases amount to only a tiny percentage of all cases. For practical purposes, then, we can say of this set of

⁶ E.g., the American Mutual Insurance Alliance's Guaranteed Benefits Plan provides up to \$7,500 of "medical impairments benefits" for 100% impairment and a proportionate amount for impairment less than 100%. This plan is summarized in *Compensation Systems* 26-28.

⁷ AMERICAN INSURANCE ASSOCIATION, REPORT OF SPECIAL COMMITTEE TO STUDY AND EVALUATE THE KEETON-O'CONNELL BASIC PROTECTION PLAN AND AUTOMOBILE ACCIDENT REPARATIONS (1968) [hereinafter cited as AIA REPORT].

⁸ N.Y. INS. DEP'T REPORT 83-100.

⁹ Davies, *The Minnesota Proposal for No-Fault Auto Insurance*, 54 MINN. L. REV. 921 (1970).

¹⁰ N.Y. INS. DEP'T REPORT 83-100.

proposals — the American Insurance Association proposal, the New York Department proposal, and Senator Davies' proposal in Minnesota — that they would virtually eliminate tort actions. When one takes that extreme position, he is faced very promptly with what may be called a cost-equity dilemma.¹¹

Perhaps all of us would agree that there will be some categories of injured persons — persons suffering certain types of injuries — who deserve more compensation than just reimbursement for their economic losses, if we are to be equitable as between these groups of victims and all other groups of victims.

Consider two examples: First, the "clean, quick" amputation; no more than five hundred dollars of medical expense; a person with an office job; no loss of income except for the brief time he was out for the medical treatment. To pay that person no more than the medical expense and wage loss is to give no consideration to the drastic change in his life style that results from this kind of injury. Such a system is open to the charge that it is being unfair — inequitable as between this type of victim and another type of victim who has much greater medical expense and wage loss, but who eventually recovers fully within a year or two and consequently has no drastic change in his long-term life style comparable to that of the person with the immediate amputation.

It is on that basis of the inequity of doing nothing special about grievous harms beyond economic loss that Professor O'Connell and I came to the conclusion that we could not, on principle — and not simply as a political judgment, as has so often been charged — support a proposal that made no provision for special compensation in cases of this type.

A second illustration involving somewhat similar problems of equity is that of a young girl who suffers a severely and permanently disfiguring injury — again without very much loss of income, although you can imagine cases in which there is serious loss of income with such an injury — and again without very much loss of medical expense, because there are limits on the extent to which even the cost of plastic surgery would be incurred in such a case.

These kinds of specialized injuries led Professor O'Connell and me to the conclusion that another route to reform should be

¹¹ A more detailed discussion of the cost-equity dilemma appears in R. KEETON, *VENTURING TO DO JUSTICE* 136-39 (1969).

considered. One might consider a minimum modification of the extreme position just outlined. This variation would eliminate all the tort actions just as the AIA proposal, New York proposal and Davies proposal would do, but would make some provision within the nonfault insurance coverage itself for these specialized cases. In some of the other proposals, and even at one stage in the American Insurance Association proposal itself, there have been suggestions of this type.

Once one undertakes to move along this route, he begins to face more problems. One is the cost part of the cost-equity dilemma. That is, if you undertake to make awards for "general damages" as well as for economic losses, it may turn out that the total cost of the system exceeds that of present liability insurance. That does not mean it would be a bad bargain; indeed, it would be a better bargain anyway because you would be getting so much more for your insurance dollar. You would be providing all injury victims with these benefits rather than just those who are now able to get them as a result of the operation of the fault and tort system. But even though it might be a good bargain, nevertheless it will be necessary to face the issue — and to face it in legislatures — of a probable increase of insurance costs. That has a different ring in legislative halls from a proposal as to which the companies, who will be responsible for writing the coverage, are prepared to come in and say, as they were in Massachusetts in 1970, "We will be willing to write this proposal at reduced insurance costs." And in Massachusetts they even put in a specific figure, a fifteen percent reduction from then current rates,¹² which were conceded on all hands to be too low to cover actual costs. This meant that the real saving was much more than fifteen percent — probably thirty-five to forty percent, even on the basis of advance estimates. Early returns show the actual savings to be greater than anyone predicted.

Turn now to the second of the five positions in the spectrum. This is where the Basic Protection Plan, which Professor O'Connell and I have advanced, would fit. We proposed a tort exemption that would eliminate the tort actions in all but the cases of severe injury. It would preserve the tort actions in cases of severe injury in order to meet this problem of equity among victims without necessarily incurring higher costs than it seemed to us to be feasible or practicable to expect society to accept.

¹² Mass. Acts of 1970 ch. 670.

Our proposal was made at a time before cost studies on the practical operation of nonfault insurance were available. Shortly after advancing the proposal, we arranged for a cost study by Frank Harwayne of New York City.¹³ Subsequently, the American Insurance Association also made — and to their credit, published — a very significant cost study.¹⁴ Still later the New York Insurance Department made and published a cost study.¹⁵ As a result of these cost studies, it now appears to me and I think to others generally that the savings from a nonfault insurance system in comparison with a liability insurance system are substantially greater than Professor O'Connell and I anticipated. It makes feasible a movement nearer to the American Insurance Association position than we thought practicable at the time of our original proposal. It has led us to suggest, in a recent article in the *Columbia Law Review*,¹⁶ that in addition to preserving the tort actions for the severe injury cases, we would favor offering to policyholders on an optional basis an opportunity to buy additional coverage for nonfault benefits without limit as to economic losses. This option would offer the same kind of coverage the American Insurance Association plan proposes, with the condition attached that one would give up his tort claims completely. In other words, we think it would be feasible to have a compulsory nonfault coverage protecting everybody in all but the severe injury cases, preserving tort actions in those cases, and then offering each policyholder the opportunity to make the choice for himself that he would rather be protected against economic losses without limit than to have the tort action available if he should happen to be the victim in one of those distinctive kinds of injuries referred to in the preceding discussion.

From the point of view of equity, the matter looks very different if we give each policyholder a choice ahead of time. Under the present tort system he is unprotected to a considerable extent from the economic losses of the most severe injuries. It is a lucky man

¹³ See F. HARWAYNE, *AUTOMOBILE BASIC PROTECTION COSTS EVALUATED* (1968) (multititled, with Foreward of December, 1968, comparing findings of Harwayne's earlier studies with those of the AIA Report); Harwayne, *Insurance Costs of Basic Protection Plan in Michigan*, 1967 U. ILL. L. FORUM 479 (1967), also published in *CRISIS IN CAR INSURANCE* 119 (R. Keeton, J. O'Connell & J. McCord ed. 1967).

¹⁴ AIA REPORT.

¹⁵ N.Y. INS. DEP'T REPORT.

¹⁶ Keeton & O'Connell, *Alternative Paths Toward Nonfault Automobile Insurance*, 71 COLUM. L. REV. 241 (1971).

indeed — lucky in that secondary sense concerned with what happens after he is unluckily a victim of severe injury — who finds that there is a financially responsible source as well as a good tort action to take care of his economic losses without limit. That is a very rare occurrence today. It is an entirely rational choice, though not the only choice one might make, to say, “I would rather be protected against economic loss without limit and give up my right to general damages than have it the other way around.” We propose to make that choice available to people for the first time. The present system denies that freedom of choice.

To summarize, then, the second position on the spectrum — represented by the Basic Protection Plan — would eliminate all tort actions but those in severe injury cases and would provide the option to each policyholder to go the further distance of eliminating his tort actions completely in return for a guarantee to him of unlimited nonfault coverage for economic losses.

The third route to reform might be referred to as “scaled-down nonfault plans.” Proposals of this type would eliminate tort actions in the great body of cases that are cases of relatively minor injury, but would preserve many more tort actions than the Basic Protection Plan does. These proposals would preserve tort actions not just in the severe injury cases, but as well in what we might refer to as moderate injury cases. The Massachusetts Act, in operation since January 1, 1971, is an illustration. The Florida Act, recently passed and scheduled to go into effect on January 1, 1972, is another illustration. These two acts differ in details, but each contains a list of special kinds of injuries. If you prove that you have sustained one of the special kinds of injuries, you may recover in a tort action — if you can also prove tort liability. If you do not prove one of the special kinds of injuries, then in order to have a tort action you must prove that you have incurred more than a specified dollar loss. In Massachusetts, it is \$500 of medical expense. In Florida, it is \$1,000 of medical and wage loss combined.

The same proposition may be stated from another point of view, and this may help to clarify it. In Massachusetts you have no tort action for pain and suffering unless you either have more than \$500 in medical expense or you have a certain kind of injury — death, dismemberment, severe or permanent disfigurement, loss of sight or hearing as defined in the Workmen’s Compensation Act, or

fracture. I suppose "fracture" includes any kind of fracture — even a hairline fracture not visible on X-rays. It may happen that in Massachusetts fracture will replace whiplash as the most common allegation in tort complaints.

The Florida Act has a tort exemption that is in total effect about the same, but it is a little weaker in some respects and a little stronger in others. The dollar figure there, instead of five hundred dollars of medical, is a thousand dollars of medical and wage loss. If you have more than a thousand dollars in medical and wage loss, you have your pain and suffering claim. Also the list of special kinds of injuries is a little different. The Florida Act tightened the fracture provision. They had the benefit of advice of a doctor legislator. To get over the hurdle into the tort action for pain and suffering on the basis of fracture you must prove a fracture of a weight-bearing bone or a compound, comminuted, displaced or depressed fracture. There will be fewer cases going into the tort category on the basis of fracture than in Massachusetts. But Florida lowered the threshold in another respect: You can recover for pain and suffering if you prove a permanent loss of bodily function. That provision was in the Massachusetts draft bill at one point, but taken out when discussion made it apparent that this would be a potentially big opening. For example, probably it will be the case that if the plaintiff testifies that, because his back now hurts as a result of the accident, he cannot sit in his office chair longer than three hours and he used to be able to sit there four, and his doctor says he does not expect improvement, a jury finding of permanent loss of bodily function will be supportable.

The fourth alternative among the different routes to reform is the route of not eliminating but instead merely limiting the tort action. Proposals of this type contain a provision saying that the amount of recovery for pain and suffering will be limited by objective criteria in certain cases. This is the kind of proposal that is supported by the National Association of Independent Insurers and by the American Mutual Insurance Alliance. An Act of this type has been adopted in Illinois. This kind of plan usually has in it a definition of special categories of injury somewhat like the special categories in the Massachusetts bill and the Florida bill. As is the case under these acts, here too you have your full tort action if you can prove that you have sustained one of the special types of injury. In the absence of that proof, however, your tort action is merely

limited rather than eliminated. For example, the amount of recovery for pain and suffering might be limited to fifty cents on each dollar of medical expense up to five hundred dollars, and dollar for dollar on medical expense above that amount. The effect is that in those cases in which you cannot escape this limitation by proving you have a special category of injury, the amount of recovery for pain and suffering instead of being two, four, five, or even ten times the specials, as happens under the tort system, is limited to fifty cents on the dollar of medical for the first five hundred and dollar for dollar above that.

The fifth alternative route is one of no tort limitation whatsoever. I believe it is really misleading to refer to the proposals of this type as nonfault insurance proposals. Certainly, they do not attack the wastefulness, expense, and inequity of the distribution of benefits characteristic of the fault system. Thus, they do not have the characteristics of real reform that are associated with nonfault proposals generally.

It is partly for political reasons, no doubt, that proponents of this type of proposal wish it to be called a nonfault insurance proposal. Included in this category is the act recently passed in Delaware, under which compulsory nonfault insurance has simply been added on top of the present tort system without eliminating the right to recover in tort. Also included in this category are the acts recently passed in Oregon and South Dakota, merely requiring companies to offer nonfault insurance on an optional basis.

It is said by proponents of these proposals that they hope tort actions will be reduced because people who have been paid for their losses under the nonfault coverage promptly, efficiently, and fairly, will not choose to go through litigation just for more compensation. They argue that the perils and disadvantages of litigation are deterrent enough to cause people just to "forget it" instead of bringing their tort actions. I am deeply skeptical of this suggestion. The dollar incentive to bring the tort action is still there, and in a sense it is even increased because, as defense lawyers have so often charged, "The nonfault insurance will be used to finance the tort action." That is, the claimant can use the nonfault insurance to pay for all the medical expenses he incurs, and all the while he is building up higher "specials" to increase the value of his tort claim for general damages.

IV. NATIONAL OR STATE SYSTEMS

In these remarks I have concentrated on what seem to me to be the really critical questions about the characteristics of the compensation system itself: first, the nonfault insurance, and, second, the extent to which the tort action is to be reduced or eliminated.

Another problem that is destined to stir great debate concerns implementation. By whom is nonfault insurance to be adopted, and by whom administered? Shall we have one national system, or shall we adhere to the familiar pattern of treating these as problems for state rather than federal action?

A few years ago I would have thought it very unlikely that we would have federal legislation simply because of the deep feelings of so many in our society in favor of more localized centers of power and control. However, it has been the observation of many people on the Washington scene recently that the likelihood of federal action is very much greater now than would have seemed possible even as recently as a year ago. The only way of defeating proposals for federal action is by quick and effective action in the states, and effective action may involve a substantial approach to uniformity in the eventual response of the states if not in the first-step response.

The Department of Transportation has entered into a contract with the National Conference of Commissioners on Uniform State Laws for the drafting of a proposed Uniform Motor Vehicle Accident Reparations Act. That project is proceeding on a rapid timetable. A draft will be available before the end of this year, and probably it will be placed before the National Conference of Commissioners at their meeting next August for approval. Another factor that may affect the federal-state accommodation is the likelihood that there will be national health insurance in some form within a few years. The form and character of that proposal will also have a bearing on whether the medical expense portion of the automobile injury problem is transferred over into a completely different system.

These are uncertainties that we — all of us who are interested in the system for compensation of traffic victims — must be intensely concerned with in the immediate years ahead. I have tried in these remarks to place the whole range of nonfault proposals in perspective as an aid to reasoned judgments about the issues we must face. I make no secret of the fact that I have long since reached a conviction that reform of the reparations system is essential. It also seems clear

to me that those of us who would prefer a state-regulated, private enterprise system will have lost our last chance to head off federal action of a more drastic type if we do not achieve our goal within the immediate future. This means that a substantial number of states must enact effective nonfault legislation in 1972.

Statutes of the fourth and fifth types described in these remarks do not constitute effective nonfault legislation. I make this assertion not merely as an expression of my own opinion but also as an assessment of what views will prevail in the federal appraisal of state legislation. Moreover, I believe statutes of the third type are an insufficient response. Though the matter is more debatable at this point, I believe also that state statutes of that type would not serve to head off federal legislation. Thus, I continue to believe that the public interest will be best served by state enactments of the second type — enactments in the pattern of the Basic Protection Plan.