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An Argument to the People on No-Fault Automobile Insurance

STANLEY E. PREISER*

The "no-fault" concept of automobile reparations has been the subject of much comment, but unfortunately, much of that comment has been ill-informed and misleading.

Although various types of no-fault automobile insurance are being proposed in the legislatures of many of the states, there has been no broad-based experience upon which to found support for such schemes. A no-fault insurance program has been operating for less than a year in the State of Massachusetts; and in recent months, no-fault plans have been enacted but not tested in Florida, Illinois and Delaware.

Nonetheless, in July, Insurance Commissioner Samuel Weese of West Virginia advocated some type of no-fault insurance program for the State of West Virginia.

I. LIABILITY INSURANCE PRACTICES

During the past decade, a number of problems have evolved in the automobile insurance field. Premiums for automobile insurance have steadily increased, mostly without substantial justification, reaching levels in some areas which are prohibitive. As a result of selective underwriting practices and withdrawals from a number of markets, many motorists have been unable to buy automobile insurance protection. Abuses and delays in the payment of legitimate claims have compounded the problem, irritating and frustrating claimants.

Having created such an atmosphere, segments of the liability insurance industry have hoped that the public would be receptive to an idea which appears to suggest improvement and relief from these pressures. Promoted under the attractive and appealing label of no-fault, these plans effectively take the liability insurance companies out of the liability insurance field, put them in the health and accident business, attack the tort concept of redressing wrongs, lay the

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foundation for a tabular measure of damages regardless of human losses, and demolish the right of the individual to gain full and fair compensation for the wrongs done to him.

It is important that every lawyer learn about this deception, understand it and pass on to the public the truth about the no-fault myths.

II. NO-FAULT—A GENERAL ANALYSIS

There are more than 100 no-fault insurance proposals now current in the United States. Although they can be characterized more by their differences than their similarities, they all have certain common denominators.

- (1) They would require that every motorist purchase extra health and disability policies which would be added to their automobile policies at additional costs set by the insurance company, regardless of whether or not they needed or wanted this protection.
- (2) They would take away, or severely limit, the legal right of the innocent automobile accident victim to be fully and fairly compensated by the guilty for general damages such as pain and suffering, fears, anxieties, disfigurement, loss of enjoyment of life and impaired future earning capacity.

In this respect, the various no-fault proposals might appropriately be classified into two groups based on the extent to which the rights and the benefits for general damages would be taken away.

(a) The first group, which might appropriately be called Total Loss of Individual Rights Proposal, would include such plans as the American Insurance Association Program, and the Rockefeller-Stuart Plan and would totally eliminate the right of the innocent automobile accident victim to recover for general damages. These plans require each person to insure himself, pay economic loss up to specified limits and completely eliminate the present tort system.

(b) The second group, which might be called "Partial Loss of Individual Rights Proposal," would include such plans as the Keeton-O'Connell Plan, the Cotter Plan, the Massachusetts, Illinois and Florida programs. These are modified no-fault programs in that they extend certain direct benefits for economic loss (medical ex-

pense and work loss) but limit the right of the innocent automobile accident victim for full recovery in one of two ways. Either they set up thresholds for economic losses which must be exceeded in order for a person to proceed through legal channels to recover for general damages, or they set up formulas which tie the amount of compensation for general damages that a person can receive to the specific damages incurred.

III. THE INEQUITIES OF NO-FAULT

While it is impossible in this article to examine and discuss all the no-fault programs, it is reasonable to cite the basic inequities of the programs based on their common denominators. In so doing, it becomes evident that the true interests of the consumer cannot possibly be served by their adoption.

(1) As indicated, the no-fault programs would require a person to buy, at additional expense, first party coverage for medical expenses and wage loss whether he needs or wants it. In this connection it should be pointed out that more than 80% of the people in the United States are already covered by private hospitalization policies such as Blue Cross, Blue Shield or other forms of medical insurance. Thus, for more than 8 out of 10 people, their hospital and medical expenses for injuries involved in an automobile accident would be paid under existing policies. In addition 70% of those persons employed are covered by wage continuation programs. Accordingly, if an automobile accident should force them out of work and take away their income, they would be reimbursed under these programs. Obviously the majority of people do not need nor do they want additional accident and health insurance to pay for economic losses already covered in their present insurance.

(2) Compounding the "felony" exploited in the no-fault concept is the fact that a number of no-fault plans require that expenses for medical services and wage loss be paid first out of a person's individual or group insurance before benefits are paid out of his no-fault policy. Consequently, under no-fault, a motorist would be forced to back up his present insurance with a no-fault policy which he may never use.

(3) Hidden under the guise of the no-fault promises is the unjust loss of benefits for human damages such as pain and suffering and impaired earning capacity. As pointed out, some of the no-fault plans would completely eliminate these benefits. Even the most

modified programs would reduce these benefits to a substantial degree. Look, for example, at the Massachusetts Plan, considered a modified program, which establishes a \$500 medical expense level that must be exceeded to permit tort recovery. A study by the Department of Transportation revealed that 78.9 percent of the paid claimants had economic losses not in excess of \$500. Based on these findings, almost four out of every five persons injured in an automobile accident would be deprived of their right for full and fair recovery for all their losses under the plan. By way of illustration, see the table¹ below for a few actual cases of innocent victims of automobile accidents occurring prior to the enactment of the Massachusetts No-

¹ Court, Case, No. and Date	Nature of Injury	Medical Expense	Verdict
Superior Court (Suffolk) LaFreniere v. Gibbons #590,119 2/16/68	Torn cartilage in knee of 67 year old woman	\$264.00	\$ 9,500.00
Superior Court (Essex) Simpson v. Poor #133,309 1/25/68	Deep tissue elbow lacerations	\$450.00	\$ 4,750.00
Superior Court (Hampden) Standen v. Trago #99,388 2/7/64	Aggravation of herniated disc in back	\$212.00	\$12,500.00
U.S. District Court (Vermont) O'Neill v. Wells #4340 7/20/66	Cervical sprain Activation of neck lesion Traumatic neurosis	\$270.00	\$ 6,000.00
Superior Court (Jersey City, New Jersey) Hannon v. Bollhardt #L-17076-65 7/69	Aggravation of arthritis	\$400.00	\$37,500.00
U.S. District Court (District of Columbia) Curtis v. D.C. G.S. 8273-69	Lumbar strain Cervical strain	\$220.00	\$19,135.00
District Court (Bismarck, North Dakota) Sczgiel v. Toffin #961	Traumatic neurosis	\$500.00	\$26,600.00
Superior Court (Philadelphia) MacKenzie v. Broughan #1177-35054 6/7/67	Diabetes mellitus from shock	\$500.00	\$72,000.00
Superior Court (Perth Amboy, New Jersey) Cyr v. Pollack 5/3/70	Traumatic dermatitis	\$450.00	\$23,750.00

Fault program who would have been barred from recovery for general damages under this plan.

(4) By eliminating the question of guilt in automobile reparations, the no-fault program would permit the reckless driver to recover on an equal footing with the innocent automobile accident victim. It follows then that these plans would reward the guilty at the expense of the innocent. It is neither fair nor just to compensate the man who sustains injury while influenced by narcotics or alcohol, the motorist who crashed while intentionally running a red light, or other negligent and destructive drivers who operate their automobiles in a willful, wanton and careless manner—all at the expense of the good responsible drivers who, at the same time, would be deprived of benefits to which they are entitled as innocent victims of automobile accidents.

(5) The proponents of no-fault automobile insurance have sold their concept on the promise that it will reduce the cost of automobile insurance. This is a promise that cannot and will not be kept. There are some very good reasons why.

- (a) Since no-fault would pay many persons who are not presently paid under the tort system, namely those who are at fault, there would be an increase in the number of claims made. Estimates as to the extent of this increase vary from 40 percent to 200 percent. This increase alone will add to the cost.
- (b) In addition there are other inherent conditions of the no-fault programs which are likely to contribute to the increased expense of the program, namely the encouragement of fraud and misrepresentation. Collateral benefits are likely to be concealed by many persons while temptation to conceal accidents occurring outside the car as automobile claims will be great. James Kemper, President of the Kemper Insurance Group, has said that under no-fault insurance it will be almost impossible to deny a claim for any household injury reported as caused while getting in or out of a car, washing a car, or otherwise using or maintaining it.

IV. EXPERIENCE UNDER NO-FAULT

Governor Sargent of the State of Massachusetts, who sponsored the no-fault program in that state, has subsequently reported results suggesting the experience has been favorable.

It was alleged, for example, that the number of claims filed under the State's no-fault law for the first six months of 1971 had been reduced by 53% and that the cost of payments had been reduced by 78%. These figures are incomplete and misleading.

A fire and casualty actuary for the Massachusetts State Insurance Department recently disavowed the interpretation of these figures. He pointed out that the figures for 1970 included allocated claim costs while this year's figures included partial payments.

A recent release by the Insurance Information Institute reported that the announced data was an unreliable basis on which to predict the future experience of the new plan. Reasons cited included delays by attorneys until the constitutional question was settled; reluctance of policyholders to file against their own carriers because of possible cancellations or increased premiums; and the normal lag between the time when expenses are incurred and the time when doctors and hospitals complete their billing.

Significantly, it should be noted that if claim costs have been reduced by 78 percent while the premium charge for basic personal injury protection has been reduced by only 15 percent, that much less of the premium dollar is going back to injured victims under the no-fault system. In this connection it should be pointed out that under some of the stronger no-fault plans, which totally abrogate an individual's right to recover for general damages, the gross premium may ultimately be reduced. *However because of the significant reduction in benefits, the net or real cost of automobile insurance will actually increase.*

V. BACKGROUND FACILITIES

1. The proponents of no-fault fail to admit that the primary cause of spiraling automobile insurance costs is the automobile itself and not the people in it. Two out of every three dollars in premiums are paid for property damage coverage. No-fault plans do not address themselves to this problem. Progress toward reducing automobile insurance premiums can be made through efforts to enforce highway safety laws, to improve the crash resistance of automobiles, to build safer roads, and to produce safer drivers.

2. Another false argument used in support of no-fault legislation is that it will reduce court congestion. This problem is over-

stated. In West Virginia, case backlogs exist in only a few of the courts, and in those few instances, only a few of the cases involve automobile accidents, with the vast majority representing criminal cases. It should be remembered that almost 90 percent of all automobile cases are settled without a law suit. Of those cases in court only seven percent reach final verdict and judgment.

3. Proponents of no-fault would lead you to believe that everybody wants it — that there is a public mandate for it. A number of surveys suggest just the opposite. State Farm Insurance Company, for example, completed an opinion survey of three million policyholders, the largest sampling of motorists ever polled, on their views on the fault system; 94 percent of those surveyed said that they believed the driver who causes the accident, or his insurance company, should pay for losses of the other people involved in the accident. Market Facts, Inc., of Chicago, Illinois, one of the nation's largest consumer research firms, conducted a nationwide survey of public attitudes on automobile insurance reforms. The result showed the following:

- (a) More than nine out of ten motorists believed automobile accidents are the fault of the drivers, rejecting the theory of inevitability of accidents.
- (b) The majority of consumers felt that the driver at fault in an accident should pay for damages.
- (c) Six out of ten surveyed opposed elimination of pain and suffering from insurance claims.

While the problems of automobile insurance — high cost, restricted markets, slow claim payments, etc., — are real in many areas throughout the country, they are less serious in West Virginia. In most areas of the state, automobile insurance premiums are considerably less than they are in most other states and almost everybody who wants automobile insurance can find a company to write it. If, however, there is a need for reform, such reform should not be undertaken at the awesome price of eliminating the present tort system here and the right of the innocent automobile accident victim to receive full and fair compensation for all his losses.

VI. AN ALTERNATIVE COURSE

1. Meaningful cost reductions in automobile insurance can be achieved through highway safety programs; strong enforcement of

safety laws; legislation requiring crash-proof and collision-resistant automobiles; encouragement for the use of automobile safety equipment; measures for the removal of incompetent drivers from the highway; and regulation of insurance underwriting and rating practices.

2. Quick and fair payment of benefits to injured automobile accident victims can be achieved under no-fault coverage already available. Collision coverage, medical payments coverage and comprehensive coverage are all first-party benefits.

3. Further, any motorist who wants it should have the opportunity to purchase additional medical and disability insurance to pay medical bills and wage loss resulting from an automobile accident. However, this coverage should be offered on an optional basis without closing the courtroom doors and prohibiting or limiting the individual's right for full and just compensation for losses in an automobile accident.

4. Greater availability of automobile insurance can be achieved through legislation which would prohibit insurance companies from cancelling automobile policies except for failure to pay premiums or for loss of license and which would guarantee the renewal of automobile insurance except for these same reasons.

5. Additional improvements can be made by repeal of out-moded laws such as the guest statutes, immunities and contributory negligence which deny compensation to injured victims.

VII. AN ADVOCATE'S VIEW FROM THE ARENA

Certainly, as lawyers and as the peoples' advocates we favor any program which serves the public's interests. When we look behind the label, it becomes clear that no-fault automobile insurance would not serve such interests.

We support responsible programs of reform which would solve the problems no-fault promises to solve, but can't solve, without taking away rights and benefits from the innocent.

We cannot be deceived by a plan founded in falsehood, developed in deception and enacted in error.

If the proponents of no-fault in West Virginia truly desire to serve the interests of the people — and particularly those who are hurt, crippled and maimed in automobile accidents — let them at

least await the results of the dangerous experiments in states which already have enacted no-fault legislation. Let the results be read not from the cold statistics of insurance companies but from the human response of the innocently injured. We dare not make haste to destroy rights which, once lost, can never be regained.

Apart from humanitarian considerations which are, in themselves overwhelming, no-fault legislation in West Virginia poses substantial constitutional problems. In view of the provision of article 3, section 17 of the Constitution of West Virginia, which guarantees to every person a remedy by due course of law for all injury done to him in his person, it is highly questionable that the legislature can, by statute, compel any person to relinquish a right guaranteed by the constitution. If the no-fault plan ultimately proposed were voluntary, the constitutional issue could perhaps be avoided. However, since compulsion is embodied in most no-fault plans, the constitutional issue alone will probably be sufficient to thwart this dangerous venture.

With all its faults the very name "no-fault" is a mockery and deception.

As advocates, we have fought too hard to establish and give meaning and effect to the rights of the wronged to permit them now to be sacrificed to an experiment in injustice.