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The Faults in No-Fault Insurance Plans

Bert T. Ahlstrom

THE FAULTS IN NO-FAULT INSURANCE PLANS

The first automobile accident in the United States occurred in 1897 in New York City when a pedestrian was struck by an automobile.[1] There was no claim for damages—a precedent not honored to a great extent today. Nor has the incidence of automobile accidents remained static according to a recent survey which revealed that more than 56,000 persons were killed in 1969, and more than 4,700,000 were injured.[2] This means that in the United States someone dies because of an automobile accident every 10 minutes and someone is injured every 16 seconds.[3] The cost of this death and destruction is believed to be in excess of $20 billion annually.[4]

The direct result of such statistics has been a growing concern for the compensation of the victims of automobile accidents.

The present tort system recognizes the philosophy that liability is based primarily on fault. From the very beginning of this country, if a man was injured in any way and he sought recovery from someone else, he had to prove that the person from whom he sought recovery was at fault. If he proved that the defendant was guilty of negligence and no defense (usually contributory negligence) was meaningfully interposed, the plaintiff was entitled to recover the loss of his earning capacity, his medical expenses, and he was entitled to recover for all his pain and suffering, disfigurement and permanent disability. Those unhappy or dissatisfied with the present fault system of compensation have been proposing change to a non-fault system of compensation since the "Columbia Report" of 1932 up to and including the $2 million study completed just recently by the Department of Transportation.[5] United States Senator Philip A. Hart has intro-

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1. Marryott, *A practical Framework For Examining Proposals For Changes In The Tort System For Handling Automobile Accident Cases*, 33 INS. COUNSEL J. 432 (1966). *See also*: JOURNAL OF AMERICAN INSURANCE, (Aug. 1962).
2. O'Connell & Wilson, *Public Opinion Polls on the Fault System: State Farm versus Other Surveys*, 568 INS. L. J. 261, 275 (1970).
3. Denenberg, *The Automobile Insurance Problems: Issues and Choices*, 571 INS. L. J. 455 (1970).
4. *Id.*
5. *See generally:* Volpe, *Tampering with the Tort System*, 6 TRIAL 32 (Oct./Nov. 1970).

duced national no-fault legislation which is to be considered this year.[6]

The death and destruction annually wrought by the automobile, and the consequences of this destruction both to victims and to the community at large are appalling. And, it is not to be refuted that there are basic inequities in our present fault system of compensation. Before we overthrow the system which has guided us from the very beginning of this country, however, it is imperative that we take a close look at any proposed change to insure that the results obtained will be less objectionable under a no-fault plan than those resulting under existing law. "It is not the sort of modification or improvement of the automobile tort system that can be taken in stride by the Bar, the insurance companies, the courts or the general public."[7]

Much has been written heralding the virtues of no-fault insurance, and the motoring public has been well-informed in regard to the inherent advantages in such a system. For this reason, and from an informational aspect, this Comment will lay emphasis upon the various criticisms raised in opposition to such insurance plans in order that the public be made aware and fully informed in the matter. It should be noted that the purpose of this writing is not to advocate or to criticize, but to bring to light the most commonly advanced features of no-fault insurance, and to show how critics of such plans intend or hope to refute their relevance in light of the proposed change. Hopefully this paper may serve to enlighten those who may be confronted with the dilemma of selecting the system upon which automobile compensation for future generations will be based.

No-fault insurance abolishes the concept of negligence and substitutes in its place the philosophy that one is entitled to recove for an automobile-related injury regardless of fault. The compulsory insurance would, in essence, abolish conventional tort law in about 75% of all automobile accident cases, and would provide partial indemnification for almost all per-

6. *See generally:* Hart, *A Federal Answer to a Public Demand,* 6 TRIAL 27 (Oct./Nov. 1970).

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

sons suffering bodily injury or wage loss.[8] "In other words, the plans call for the public to make a trade: in return for giving up the fault claim against the other driver's insurer (with all its uncertainty but including the possibility of receiving larger payment covering compensation for pain and suffering), the motorist would be provided with certain but smaller payment from his own insurer covering only out-of-pocket loss."[9]

Proponents of no-fault insurance generally advance the following arguments in support of such plans:

1. The present system is a failure in its measuring of compensation for personal injuries. Many receive nothing, many others recover far less than their actual special damages.

2. Injured persons must seek recompense from the other driver's insurance company.

3. Contributory negligence is a bar to recovery in a substantial number of cases.

4. Personal injury trials have fallen behind; an average delay of 31.1 months exists in metropolitan areas.

5. Costs of automobile insurance would drop an average of 15% to 25%.

6. The present system presents many opportunities for dishonesty.

7. Eliminating awards in small cases for pain and suffering would remove the opportunities for exaggeration in our present system.

8. Waste and insurance costs would be reduced if the victim was paid only actual out-of-pocket loss.

9. Deduction of collateral sources such as sick leave, hospital insurance, vacation pay, one's own accident policies and all other types of collateral sources would prevent the injured person from making a profit.[10]

At the present time only Massachusetts has enacted compulsory non-fault insurance for automobile owners. In the

8. Those intentionally causing damage are not compensated.
9. *Supra* note 2, at 262.
10. Markhoff, *Compensation Without Fault And The Keeton-O'Connell Plan: A Critique*, 43 ST. JOHN'S L. REV. 175, 188-89 (1968).

remaining states compulsion is exercised only in the form of so-called "financial responsibility laws." (See Mass. Ann. Laws ch. 90, §§ 34A to 34K).

It should be emphasized that although the faults and criticisms presented are drawn from a study of the many no-fault plans which have been proposed, this Comment is centered primarily around the well-known Keeton-O'Connell *Basic Protection Plan,*[11] which appears to encompass many previously proposed plans, and which seems to be, with few minor modifications, generally representative of all such plans.

THE MAIN ARGUMENTS AGAINST NO-FAULT INSURANCE

A study of the extensive literature on proposed and existing no-fault legislation reveals that certain arguments against such plans are recurrent while other criticisms are raised sporadically or not at all. The following comprise the recurrent and major criticisms of such plans.

Cost

Proponents of no-fault insurance steadfastly maintain that under such proposals the cost of premiums would fall by at least 15% to 25%.[12] This conception is based upon the premise that there will be an elimination of the costs of court trials, investigations, lawyers, and insurance profits. The contention is that the insurance companies would have to do less and pay less and therefore premiums would be reduced.[13]

A contrary view has been expressed by Mr. M. G. McDonald, Chief Actuary of the Division of Insurance, Department of Banking and Insurance of Massachusetts, among others, who alleges that such plans will actually cost more to the insured, and that premiums will have to *increase* as much as 35%.[14] As there has been no actuarial experience to compute these programs it is arguable that no estimate as to cost

11. R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965).

12. *Resolved, The Keeton-O'Connell basic Insurance Plan should be enacted by the Arkansas General Assembly,* 22 ARK. L. R. 574, 589 (1968).

13. Townsend, *Basic Inequities of Keeton-O'Connell,* 17 D. L. J. 133, 142 (1968).

14. Markhoff, *supra* note 10, at 191.

reduction presented thus far is sufficiently reliable to form an adequate basis for decision.

The critics allege that talk of cost savings may well be used to divert attention from the fact that such plans do not give the protection that they advertise and do not, in fact, pay the benefits that they ostensibly offer,[15] and that to equal present protection the policyholder would pay additional premiums for policies covering property damage, accidents occurring in states which have no such plans, protection for pain and suffering, inconvenience and economic loss above and below the boundries of such plans. They feel the so-called "savings" may reflect a reduction in total benefits received by the insured under the no-fault system.

> If the Plan would really cost less, the reason is only that it takes away many rights that people now enjoy. If rate reduction is the only object, then truly the cheapest insurance would be no insurance at all. Removing all benefits would correspondingly remove all premiums.[16]

Opponents of no-fault plans stand for the proposition that safety features and strict licensing laws will do more to reduce present costs by removing the unfit driver from the road than any plan yet proposed. They point to the fact that there is an estimated one million people driving cars today who have demonstrated by their records of criminal driving convictions that they cannot be trusted behind the wheel, and that the number of those driving who are physically unfit to do so is unknown.[17]

It is argued that the proponents of no-fault insurance are overly optimistic as to the cost reduction aspects of such plans as there are absolutely no present statistics to prove such a claim; that the view that costs will increase is supported by the inevitable increased overhead inherent in such a system; and that administrative costs will increase as the burden of policing such a system will fall upon the companies themselves.

15. Semerad, *Assumptions vs. Facts*, 6 TRIAL 15 (Oct./Nov. 1970).
16. Markhoff, *supra* note 10, at 192.
17. Kemper, *An Insurance Executive Looks At Proposed Changes*, 51 JUDICATURE 168, 172 (1967). The Kemper Insurance Group completed an in-depth study of the proposed Basic Protection Plan, retaining Keeton and O'Connell as independent consultants.

It is apparent that the "pay everyone-cost less" theory must be examined fully in this regard to determine whether or not it does stand for the proposition stated.

Collateral Sources

Non-fault insurance plans propose the abolition of the "collateral source" rule. Under the present fault system, an injured party can recover from a tort-feasor in a court action, and from his own insurance company in an action on his insurance contract. The justification for double compensation is stated to be that, in reality, there is no duplicate recovery involved. This policy was established as early as 1868 by the Supreme Court of Michigan in the case of *Parrott v. Shearer,* when it held that the plaintiff "recovers but once for the wrong done him, and he receives the insurance money upon a contract to which the defendant is in no way privy, and in respect to which his own wrongful act can give him no equities."[18] Proponents of the no-fault system contend that the collateral source rule breeds double compensation and waste and often results in a profit to the injured party. The opponents of such a system, on the other hand, contend that abolition of the collateral source rule will work great inequities of its own.

For example, it is pointed out that under the Basic Protection Plan all of the following benefits are subtractable from the benefits payable under the same plan:

1. Insurance proceeds of all types, including
   (a) Life insurance
   (b) Health and accident insurance
   (c) Hospital and medical insurance
2. Employment benefits, including
   (a) Sick leave
   (b) Voluntary wage payments
   (c) Pensions and retirement benefits
   (d) Medical services furnished by the employer (especially in the case of servicemen)

18. Parrott v. Shearer, 17 Mich. 48, 56 (1868).

(e) Workmen's compensation

(f) Perhaps even vacation time

3. Gratuities, often in the form of medical or nursing services

4. Social legislation benefits, including

(a) Unemployment compensation

(b) Social Security

5. Tax advantages[19]

The alleged end result is that claimants will be paying into all these collateral source programs in hopes that they will be fully protected only to learn that such investments will only serve to cut down the benefits receivable under no-fault insurance, the latter being a compulsory investment. The policyholder is, under this view, compelled to buy two or more policies for one benefit; therefore, the more comprehensive his collateral coverage, the less valuable the compulsory plan is to him; and therefore he is penalized for his prudence. It is contended that the careless driver, who would recover nothing today in tort, and who refuses to avail himself of the multitude of accident and health plans, will recover all the benefits payable under the no-fault plan and his only cost will be its premium. It is obvious to these people that the plans may prefer the negligent and improvident over the careful and thrifty.[20]

Statistics show that 81% of the people in the United States have some kind of hospital insurance, 73% have surgical benefits, 60% have non-surgical, medical benefits, and 66% have some kind of wage continuation plans.[21] It is apparent that collateral benefits are very much in force today and must be considered as a key factor in any proposed insurance system.

Discriminatory Aspects

Another aspect of the cost feature of non-fault insurance plans assailed by its critics is the so-called discrimination inherent in the distribution of costs and in the distribution of

19. Markhoff, *supra* note 10, at 188-89.
20. Townsend, *supra* note 13, at 144.
21. Sargent, *supra* note 12, at 592.

loss payments under such plans. Proponents of such plans allege greater equity will result in that they will eliminate those cases where, because of contributory negligence or the lack of a third-party tortfeasor, the injured party receives nothing. But those cases are countered by the touted hardship cases which will allegedly be produced under such "basic protection" plans, wherein benefits are paid to the drunken driver, the felon fleeing from his crime, the drag racer and the multiple accident repeater, due to the fact that these plans are basically accident policies—while, at the same time, full recovery will be denied to innocent victims such as housewives and children and elderly people in retirement who are not in the labor market, in that their "economic loss" is limited mainly or entirely to medical bills.[22] It is noted that 55% of the persons injured in auto accidents are not wage earners at the time of the accident.[23]

In addition, critics state that under no-fault insurance a large portion of the insurance cost is shifted from those people most likely to cause accidents, who, at the same time, become those persons likely to collect the most money as a result of accidents. In other words, the careful driver pays because the loss falls on all the insureds. Their view is that abolition of the fault principle shifts the distribution of costs from an equity scale which charges higher rates against the high-risk motorist to a flat-rated system which charges the good and bad driver the same, and therefore there will be a major redistribution of premium with some very possible socially dubious results:

> For the reason that the liability system is inimical to high-risk motorists, the latter are friendly to BP (Basic Protection), under which their condition would immediately improve. As victims they would automatically collect their own losses without regard to fault, and under BP's uniform rate structure their premiums, despite the heavy loss causation attributable to them, would be no higher than anyone else's. High-risk motorists are definitely on the side of BP.

22. Kemper, *supra* note 17, at 168-69.

23. Segraves, *Hazards, Pitfalls, Expenses*, 6 TRIAL 13, 14 (Oct./Nov. 1970).

24. Kemper, *supra* note 17, at 170.

> Just as fault theory hurts high-risk motorists two ways, so too would BP hurt low-risk motorists two ways: as victims their benefits would be reduced, and as premium payers their costs would be increased. In effect, they would subsidize both benefits and premiums for high-risk motorists. According to the traditional ethic this is not justice but inequity.[25]

Court Congestion

Proponents of no-fault insurance argue that since up to 75% of automobile injury claims will be embraced by the basic protection type of plan, court congestion will be drastically reduced.

This allegation is strongly contested by a long list of respected judges and law professors, including Chief Justice Tauro of the Massachusetts Superior Court, Professor Harry Kalven, Jr., Acting Dean of the University of Chicago Law School, and many others, who point out that it is doubtful whether automobile accidents are the principal or even a significant cause of court congestion and delay.[26] Court business in all areas of the law has increased with population growth and especially with modern urbanization trends. These people note that the seeming backlog of automobile cases is in large measure attributable to the higher priority given to other cases.[27] The major premise seems to be that court action will in reality be *compounded* under no-fault insurance. The critics feel that non-fault plans tend to generate their own special brand of litigation which can be as expensive, frustrating and time-consuming as current negligence litigation.[28] The argument that attorneys' fees will drop as a cost factor due to the fact that the lawyer will not be essential under such plans is considered fallacious. It is essential that the proposed plans be compared to the experience of other no-fault plans such

25. Brainard, *The Rise and Fall of Basic Protection in Massachusetts*, Dec. 1967 INS. L. J. 724.
26. Kemper, *supra* note 17, at 169. *See also:* Letter of Judge Tauro, 6 TRIAL 49 (Oct./Nov. 1970), wherein he states that, "The Superior Court's workload may well be increased by Superior Court litigation involving the administration and application of the 'no fault' plan."
27. Kuhn, *The Keeton-O'Connell Basic Protection Plan For Automobile Insurance: A Practicing Lawyer's View*, 22 ALA. L. REV. 1, 7 (1969). Mr. Kuhn points out that criminal cases, condemnation matters, suits involving various governing units, and workmen's compensation actions, all have priority either by statute or judicial fiat.
28. Semerad, *supra* note 15, at 16.

as life insurance and health policies, wherein the insured frequently ends up suing his own insurer for his benefits.

> "Past experience shows that insurance companies still dispute the injury itself, the extent of the injury, whether it was casually related to the accident and whether medical bills are reasonable. Much of the time in court is presently devoted to deciding these issues. These same questions must of necessity arise under the Plan, they will be disputed, and will ultimately be decided in the courts."[30]

It is predicted that such plans may require that one first fight with his own insurance company over so-called non-fault benefits which may involve considerable litigation, and then the victim may be told he can fight with another insurance company over the tort benefits.[30] Under this view the end result will be analagous to that of workmen's compensation experience in that court costs, lawyer's fees and court congestion tend to increase rather than decrease as a consequence of such non-fault development.

No-fault plans have also been analogized to workmen's compensation plans in that the framers of the latter legislation also expected that the law would become self-executing and justice would be mechanically ground out. The critics suggest that a purview of the numerous workmen's compensation claims in existence today and pending before the courts will refute this idealistic hypotheses.

The United States Supreme Court, in *Cardillo v. Liberty Mutual Insurance Company,* observed that workmen's compensation has become "deceptively simple" and "litigiously prolific."[31] For this reason investigation must be undertaken to determine whether dealing with one's own insurance company as to non-fault automobile claims would or could result in a different experience.

"To change the substantive law because of court congestion is to permit the tail to wag the dog. Therefore, the Keeton-O'Connell Plan should be judged independently of whether or

29. Markhoff, *supra* note 10, at 193.
30. Sargent, *A Drastic Legal Change,* 6 TRIAL 22, 23 (Oct./Nov. 1970).
31. Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469, 479 (1947).

not it momentarily makes a contribution to the transient problem of court congestion."[32]

Opportunities for Fraud

Critics of the present fault system allege that the tort system presents many opportunities for dishonesty; that plaintiffs often pad claims and commit perjury to obtain higher judgments; and that no-fault insurance plans will eliminate this fraud upon the public, the courts, and insurance companies.

It is interesting to note that a prominent official of the General Adjustment Bureau, which is one of America's largest nation-wide investigating agencies for insurance carriers, has estimated that under our present tort system, only 3 out of every 50,000 claims are fradulent.[33] It would appear that honesty is still the rule, and not the exception.

Under the Keeton-O'Connell Basic Protection Plan, injury is defined as "bodily harm, sickness or disease . . . arising out of the ownership, maintenance or use of a motor vehicle as a vehicle."[34] To the opponents of no-fault insurance this would appear to be a broad invitation in itself to fraudulent claims based upon an unwitnessed accident, in that they allege that any household injury or other non-automobile related injury could very well be compensated under the mere claim that the injury occurred while the claimant was getting into or out of the car, while washing it, or while changing a tire; and it would be almost impossible to defeat such a claim without going to court each time, the matter of proof conceivably being most difficult.

In addition, it has been argued that there is a huge potential for fraudulent concealment of collateral source benefits due to the fact that such sources serve to reduce the amount of recovery under these plans.

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32. Kalven, *Plan's philosophy strikes at heart of tort concept*, 3 TRIAL 35, 36 (Oct./Nov. 1967).

33. Markhoff, *supra* note 10, at 190. *Citing:* Fuchsberg, *A Lawyer Looks at Proposed Changes*, 51 J. AM. JUD. SOC'Y 158, 161 (1967).

34. Kemper, *supra* note 17, at 169.

Interstate Complications

The possibilities of interstate complications arising under no-fault insurance proposals serve as a major basis of attack launched by no-fault opponents. It goes without saying that the United States is a highly mobile nation, motorists frequent travel state to state, and accidents do occur on such journeys; when such an accident does occur, however, the results under such plans appear somewhat perplexing.

The following illustration is universally cited by critics of such plans to present this unique situation, to-wit: Assume Wyoming has enacted no-fault insurance and Colorado has not.

1. If a reckless driver from Colorado runs into a tree in Wyoming, he collects no-fault insurance benefits from the Wyoming assigned-claims fund, a fund to which he has contributed nothing but which has been financed by money paid by Wyoming motorists.

2. If a Colorado driver collides with a Wyoming driver in Wyoming, both collect no-fault insurance benefits; however, the Colorado driver may retain his right of action in Colorado, while the Wyoming driver would have no corresponding action in his state.

3. If a Wyoming driver collides with a Colorado driver in Colorado he will collect no-fault insurance benefits from Wyoming, and each driver will have a tort action against the other in Colorado.

And, the argument continues, the situation would not be relieved completely if both Colorado and Wyoming had enacted no-fault insurance legislation, for the reason that it is highly probable that no two states will adopt the exact same statutory no-fault plan. The consensus seems to be that the only way to avoid this factor is through passage of a uniform no-fault plan by the federal government, such as that proposed by Senator Hart. Insurance companies view such an action as a step toward complete government regulation of the industry—a development they fear most. These plans are believed to constitute a step in that direction.[35]

35. The credit for this commonly used illustration apparently goes to Mr. James S. Kemper of the Kemper Insurance Group, stemming from: Kemper, *The*

Constitutionality

Several serious constitutional questions have been raised in regard to no-fault insurance, including the following:[36] Whether the equal protection clause is violated when the various classifications created by such plans may be termed discriminatory because arbitrary or capricious. Whether the due process clause is violated when a motorist, without regard to fault, may be required to pay the prescribed compensation; and, whether a victim may be denied an action at law and be accorded only a limited review under the plans without violating this clause. Whether the right to trial by jury can be denied, as under the Basic Protection Plan, as to claims up to $5,000.[37] Whether there can constitutionally be any limitation of the amount recoverable for an injury.[38] Whether the impairment of the obligations of contracts would result when all present insurance contracts on automobiles would terminate and be null and void, except for no-fault insurance, as per the plans. And, whether the proposition that the courts are open to redress injuries is contravened when the exclusion of recovery for wrongful death, pain and suffering, property damage, etc., is a central element of such plans.

Proponents of such plans feel that their constitutional strength lies in the analogy of their plans to workmen's compensation, which has repeatedly been held constitutional. Opponents of such plans, however, generally feel that the analogy will not stand up, and that no-fault insurance will be struck down as unconstitutional as a violation of the due process and equal protection clauses of the federal and state constitutions.[39]

Another factor of grave importance which should be considered is the premise that if a state ever passed and implemented a no-fault plan of insurance, and such plan subsequently fell as unconstitutional on one of these bases, it would

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Basic Protection Plan: Reform or Regression, 1967 U. ILL. L. F. 459, 467-68. I have utilized different state names for purposes of this Comment.

36. *See generally: No-Fault Automobile Insurance In Utah—State Constitutional Issues*, 1970 UTAH L. REV. 248.

37. *See*: U. S. CONST. amend. VII in this regard.

38. *See*: WYO. CONST. art. 10, § 4. *See also*: *The Constitutionality of Automobile Compensation Plans in Wyoming*, 5 LAND & WATER L. REV. 191, 198 (1970).

39. Markhoff, *supra* note 10, at 193-94.

probably be extremely difficult, if not impossible, to go back to the tort liability system.

Additional Criticisms of No-Fault Insurance

The following criticisms are those that are less recurrent, but just as real to people considering no-fault plans, and to those people who may be subjected to the same.

Abolition of the Fault System

The benefactors of no-fault insurance criticize the present tort system on the grounds that complex time and distance relationships prevent accurate testimony, that parties and witnesses are subject to the temptations of perjury and invention, that there is often inability to determine fault, and therefore fair verdicts are impossible in most cases. Besides pointing to the fact that in more than 90% of the cases it is clear which party is at fault and therefore inability to determine fault is not a factor,[40] opponents of no-fault plans allege the main fallacy in this viewpoint to be the fact that no-fault plans retain the present tort system for the more serious cases. Under the Keeton-O'Connell Plan, for example, the present tort system is retained and utilized when the case is worth more than $10,000 in economic loss and $5,000 in pain and suffering. Such critics state that it must follow under this reasoning that parties and witnesses and juries are only competent and trustworthy when there is a serious case at bar, and that this basic inconsistency of position tends to invalidate the general proposition they advocate.

As change to a no-fault system of compensation would require renovation of the substantive and procedural law of torts, it is essential that a long hard look into such a plan be undertaken before we seek abolition of the fault system.

Lost Benefits

The critics of no-fault insurance allege such plans go too far when they reduce benefits receivable to such an extent as is indicated by the model plans.

40. Marryott, *Remarks*, 1967 U. ILL. L. F. 387. The author states that fault is generally the easiest part of the case to establish as is shown by the fact that the vast majority of insurance cases are promptly settled.

Recovery, under Basic Protection, is excluded for pain and suffering in an estimated 95% of all cases. In addition, there is generally no recovery for disfigurement, loss of future earning capacity (unless additional coverage is taken out at an increased cost), loss of internal organs, sex organs, loss of potency and consortium, for prenatal injuries, loss of eyesight, hearing, for brain damage, severe burns, catastrophe losses and property damage—all of which are very real to an injured person. Also, when compensation is paid for a dismembered organ, it is a set value that is paid regardless of the value of that organ to that particular person in his particular trade or profession. Funeral expenses are generally limited. And, there are built-in deductions in most plans which tend to negate recovery in all modest claim cases; e.g., 15% of earned income is deducted to accommodate for the fact that the compensation payments received are non-taxable. Critics list these factors, and others, as lending support to their theory that if there is a cost reduction under no-fault plans, that deduction is paid for by the benefits lost under such a system.

Effect on the Insurance Industry

No-fault insurance, according to its critics, will create a nightmare for actuaries. It is the general belief that it will require such a tremendous range in rates as to be incomprehensible to the public, and that the reliance on honest disclosure of collateral source benefits will be so great as to induce a permanent element of inequity into any rating system which may be devised.[41]

As noted earlier, many critics feel that such plans serve as a natural precursor to a complete takeover of the insurance industry by the federal government. They argue that federal regulators will be no better equipped to cope with the confusion and inherent inequities that arise under such plans than will state regulators, and therefore the temptation to seek uniformity through a system of federal automobile insurance will become irresistible.[42] Senator Hart's recent proposal is a good example of a federal plan which warrants close scrutiny in that the legislation would impose the non-fault system on all

41. Kemper, *supra* note 17, at 170.
42. *Id.* at 171.

50 states simultaneously, abolishing all state law requirements for the purchase, or acquisition of, automobile insurance.[43]

Another supposed effect on the industry is the general belief among its opponents that if such non-fault plans are widely enacted, most of the highly competitive and efficient small and medium-sized firms will be doomed to extinction, as none but the giants will be able to afford the rating uncertainties, administrative costs and retraining of personnel necessary to make such plans an operative reality.[44]

Effect on the Law Profession

It comes as no surprise that the Trial Bar of America has come out against a no-fault insurance system, and in favor of retention of the present tort liability experience.[45] The Profession appears to stand strongly against any suggestion that increased insurance costs are caused by high jury verdicts, the contingent fee, and flamboyant trial tactics. As discussed earlier in reference to the court congestion argument, such critics feel there is little cause to believe that court claims will diminish under such plans, and argue that as it seems highly probable that the lawyer and his fees will still very much be in the picture whether such plans be implemented or not, it seems doubtful that fees will be reduced significantly under no-fault insurance programs. The Trial Bar will undoubtedly be a powerful lobby against the implementation of no-fault insurance.

In General

Only the major and recurrent arguments and criticisms which have been raised to date appear here, and others may arise and increase in importance as times and conditions change. Certainly this listing is not exclusive and is not intended to be, but should provide some indication of the current thought which is prevelent in the area of automobile compensation insurance systems, and, in particular, those thoughts raised by the opponents of no-fault insurance plans.

43. Sargent, *No Miracle Cure*, 6 TRIAL 30 (Oct./Nov. 1970).
44. Kemper, *supra* note 17, at 172.
45. *The A.T.L. Position*, 6 TRIAL 50 (Oct./Nov. 1970).

CONCLUSION

Every man, woman and child in America will be an accident victim three times in an average lifetime.[46] Compensation for automobile accident victims is accordingly a matter of top priority and concern for all Americans. The present fault system is not perfect, is not claimed to be, and reform would appear to be essential. Again, it must be emphasized that many reform proposals have been advanced thus far which are worthy of consideration, but before renovation of the substantive, as well as the procedural tort law of the states occurs, care should be taken that our present system is not replaced in favor of a no-fault system with far greater injustices and inequities.

> Caution, common sense and consideration of sound public policy demand that we carefully assess the full range of alternatives and move gradually in the direction of reform, checking actual experience as we proceed. The overriding goal should be a compensation system that is efficient, offers greater flexibility and choice, is fair, gives maximum incentives to loss reduction, and that, in the final analysis, does a better job of reparating victims' losses than the one we have today.[47]

By a careful consideration of the advantages and disadvantages of our present tort system and those of the proposed non-fault insurance systems, and through utilization of a formula for progressing such as that quoted, there should result an effective compensation system meeting all the requirements of a society on wheels.

BERT T. AHLSTROM

46. Fuchsberg, *Should Justice Be Rationed?*, 6 TRIAL 47 (Oct./Nov. 1970).
47. Volpe, *supra* note 5, at 33.