BOOK REVIEW

THE INJURY INDUSTRY AND THE REMEDY OF NO-FAULT INSURANCE. By Jeffrey O'Connell. Commerce Clearing House, Inc., Chicago, Ill., 1971. Pp. 253. $8.50.

A perusal of the latest book by Professor O'Connell[1] will convince a reader of the intensity of the author's dedication to the concept of no-fault insurance. It should be noted at the outset that the problems that gave rise to the Keeton-O'Connell Basic Protection Insurance Plan[2] of no-fault tort liability are generally as relevant in 1971-72 as they were in 1965 when the plan was first proposed.[3] The author discusses those same issues with ramifications, statistics and suggested recommendations to amend or amplify the original plan and reiterates his urgent plea for adoption of a no-fault scheme.

The original premise underlying development of the no-fault concept was that even under the best of conditions traffic safety controls alone are incapable of preventing property damage, human injury and death. The foreword by Daniel P. Moynihan points out that arrest, trial and judgment have had little effect on the actual performance of motor vehicle drivers.[4] The reader is also alerted to the fact that the present overworked and congested judicial system cannot efficiently resolve the rights of persons involved in automobile mishaps.[5] Professor O'Connell points out that, on the average, 16 months elapse between the accident and the time of final payment, with larger losses accompanied by correspondingly longer delays. His statistics are frightening: the average trial delay is 47.7 months in Philadelphia, 58.1 months in Bronx County, New York and 60.7 months in Cook County, Illinois.[6]

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1. Professor of Law, University of Illinois.
2. Robert E. Keeton, Professor of Law, Harvard University, is co-author of the original Basic Protection Insurance Plan.
3. *See* R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965).
4. Moynihan, *Foreword* to J. O'CONNELL at x.
5. *Id.* at xi.
6. J. O'CONNELL at 7.

The author notes that under the present system, paradoxically, the seriously injured are cruelly underpaid, while the less seriously injured are overpaid. He quotes from a recent Department of Transportation study which found that 45 percent of those seriously injured in traffic accidents receive absolutely nothing from automobile liability insurance[7] and that, under the present tort system, the claimant who sustains under $100 of economic loss and retains a lawyer receives on the average over seven times his loss in compensation.[8] Professor O'Connell points out that it is cheaper to give an undeserving claimant $400 to dispose of a possible tort claim than to spend $800 to defeat the claim in the courthouse. The elimination of such wasteful expediency is presumably one of the chief arguments in support of the no-fault concept.

The initial indication of the author's harsh criticism of the legal profession[9] appears in the first chapter where he alleges that over one-half of the insurance dollar is "chewed up in insurance overhead and legal fees,"[10] with only 44 cents left for actual compensation of traffic victims. While this allegation may evidence some basis in fact, he fails to take into consideration that the more serious losses require longer and more involved investigations. Lawyers, he charges, have caused this disparity through abuse of their power to define the insured event. In a spirit of hyperbole, he quotes from Shakespeare's *King Henry VI* when Dick the Butcher shouts, "The first thing we do, let's kill all the lawyers." He hypothesizes that a more reasonable course is to adopt a system of no-fault insurance that will make lawyers necessary only in extraordinary situations.

The author believes that the present system requiring proof of fault is inappropriate for dealing with the factual intricacy of an automobile accident. The illogical, uncompromising doctrine of contributory negligence is assailed as unjustifiable in accident cases. His evaluation of the end product of the present system of proof is stated most succinctly: "What emerges, of course, is not so much 'the truth, the whole truth and nothing but the truth' but rather 'half truth, quarter truth or no truth at all.' "[11] In addition, he expresses only a modicum of faith in the comparative negligence doctrine,[12] although

7. J. VOLPE, REPORT TO THE CONGRESS AND THE PRESIDENT: MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES (March 1971), in *id.* at 4.

8. J. O'CONNELL at 5.

9. Professor O'Connell also attacks the medical profession. He charges doctors with being an integral part of the most serious unethical legal practices and points out that they are frequently retained not because of their expertise but instead because of their willingness to comply with the lawyer's wishes. *Id.* at 16-17.

10. *Id.* at 7.

11. *Id.* at 12.

12. Professor O'Connell concedes that adoption of the comparative negligence

he notes that an increasing number of states are adopting it. I must agree with him on this point. If the allocation of fault under notions of contributory negligence is unjustifiable, then comparative negligence is similarly indefensible because it requires determinations involving an even higher degree of complexity: "not only the *fact* but the precise *amount* of fault must be determined, calibrated to precise percentages."[13]

Professor O'Connell identifies a most serious issue involving the automobile liability field—the problem of rehabilitation. Very few insurance companies offer plans providing advance payment settlements, and the inability to receive monies during the early stages of treatment deprives many injured persons of the benefit of early rehabilitation. One cannot disagree with his position that the availability of such payments must be increased. He illustrates their importance through exemplary cases in which advance payments make it possible for persons to receive plastic surgery shortly after their accidents, thus avoiding permanent disfigurement. While agreeing with him on the question of rehabilitation, I cannot support his opposition to lump-sum payments of monies on the ground that "most victims are simply unaccustomed to the management of relatively large sums of money, and thus amounts paid are often dissipated in frivolous luxuries, such as color TV sets, as opposed to being spent constructively in mitigating the losses they are designed to 'repair'."[14] This statement and many others made by the author reflect his apparent view of no-fault as a panacea providing greater bureaucratic involvement on behalf of persons incapable of managing for themselves.

One of the most controversial questions raised by the opponents of the no-fault doctrine arises out of its failure to compensate for pain and suffering. O'Connell believes that abuses prevail in determining and compensating pain and suffering, and he is especially critical of "build up" by attorneys who work well with the medical profession. The ultimate question, however, is whether compensation for pain and suffering should be denied because of such abuses. It appears that a formula could be developed by which the dollar value of pain and suffering could be ascertained. In the area of workmen's compensation this calculation is made by a workable formula that would seem to be adaptable to the automobile accident situation. What is most signifi-

doctrine has at least one advantage over the currently prevalent contributory negligence doctrine: "[I]t probably means more people being paid at least something . . . ." *Id.* at 14.

13. *Id.*

14. *Id.* at 18.

cant in regard to this problem is the author's apparent attitude that since the issue is complicated and appears uncontrollable, then it must be avoided.

Professor O'Connell, a bitter opponent of the contingent fee concept, posits that this type of fee arrangement "is unethical almost everywhere in the world but the United States"[15] and notes that some attorneys charge contingent fees running as high as 50 percent. It is his belief that the contingent fee leads to such significant abuses as fradulent cases, ambulance chasing, fake witnesses and padded claims. The contingent fee question is not, however, a paramount issue in the debate over the respective merits of the fault and no-fault concepts. If this means of payment is immoral and creates an unfavorable climate in automobile liability, it can be attacked through legislation, bar association recommendations or judicial action.

One of the chief reasons frequently given in support of no-fault insurance is that it will ultimately result in lower insurance rates. In support of this contention, the author quotes from many reports concerning the high cost of automobile insurance, but it remains to be seen whether no-fault insurance will ultimately result in lower rates. It is at this point that serious issue must be taken with the proponents of no-fault insurance. Unless the highest degree of safety engineering and loss prevention is introduced in the automobile field, costs will rise.[16] One has only to look to the workmen's compensation field to realize that these two factors must receive the highest priority if losses are ultimately to be reduced; without them, by comparison, workmen's compensation premiums would rise substantially. Although the author does not place much reliance in action of this type, it seems that we not only have to produce safer automobiles, but we must concomitantly adopt safety legislation incorporating every conceivable means of reducing losses. Periodic testing of both cars and drivers, as well as stricter enforcement of traffic laws, should also be required.

The author also discusses discriminatory practices in the automobile insurance industry. In discussing the "untouchables" the author refers to the tremendous number of drivers who are unable to obtain insurance and must look to assigned-risk plans or substandard companies for coverage. Laws now on the books prohibit discriminatory practices, and they should be enforced. One must question whether no-

15. *Id.* at 39.

16. Dr. William Haddon, M.D., addressing the American Bar Association meeting in New York City, July 7, 1971, estimated that losses due to motor vehicle accidents increase by $1 billion each decade. This gigantic figure only substantiates my belief that rates will continue to rise unless safety is the heart of any liability program, whether it be no-fault or fault.

fault would result in a reduction in the number of substandard risk policies written. Under any system of automobile liability coverage a certain number of drivers will have poor driving records. The question to be resolved is how to deal with those who have established unsatisfactory loss records. Whichever system is ultimately adopted, a rating system must be developed that will take into account the driving habits of all licensed persons.

How has the legal profession reacted to the no-fault concept? For some time the American Bar Association and the various state bar associations moved slowly in adopting a position on this question.[17] As a result of the communications media speaking or writing favorably on no-fault,[18] however, these groups have been forced to take a stand. *For The Defense*, a publication directed at attorneys representing insurance companies, recently carried an article[19] indicating that while the defense attorneys continue to champion the fault concept of individual responsibility for one's conduct and the right to jury trial in civil cases, they apparently are reconciled to the ultimate enactment of no-fault. By contrast, chief opposition to no-fault has been generated by the American Trial Lawyers Association. A recent article in *Trial* stated that "[t]ort law is founded on the natural principle that the inalienable rights to life, liberty, and the pursuit of happiness cannot exist unless every member of society exercise[s] some care to protect his neighbor's rights."[20] It was further contended that a bill now pending before the United States Senate[21] will deny American citizens these inalienable rights. The article pointed to one of the more interesting arguments against no-fault—the charge that all polls taken indicate that the great majority of people believe in the fault system and want to retain it. Refeerence was made to a State Farm Insurance Company survey of its policyholders in which 94 percent of those participating expressed the opinion that "the driver who causes an

17. In his Epilogue, Professor O'Connell points out:

> [J]ust as doctors have for many years passionately defended our manifestly inadequate system of health care delivery, so lawyers defend our manifestly adequate system of auto insurance. In both cases, the system seems on the verge of breakdown; but the individual practitioner, whether medical or legal—working comfortably and profitably within the system—is puzzled by the attack on both the system and himself. He finds himself working hard and helping many people on a case-by-case basis. So immersed is he in the system that he fails to step back and see the system—whether medical or legal—in larger perspective, with all its inadequacies for many individuals and for society.

J. O'CONNELL at 156.

18. *See, e.g., Can No-Fault Make It?*, FORBES, Jan. 15, 1972, at 18.

19. Martin, *Defense Faces Change Confidently*, 13 FOR THE DEFENSE 1 (Jan. 1972).

20. Spannenberg, *The Federal No-Fault Plan: Benefits for Sale*, TRIAL, Nov.-Dec. 1971, at 30.

21. S. 945, 92d Cong., 2d Sess. (1971) (introduced by Senators Hart and Magnuson).

accident, or his insurance company, should pay for the loss."[22] Disbelievers assert either that such polls express only the opinion of that segment of the public which is unfamiliar with the no-fault issue or that the results depend upon the phrasing of the question.[23] One can only hope that with the great amount of publicity being given to no-fault, the public will ultimately fully understand the significance of this particular proposed change in the law.[24]

One of the chief weaknesses in no-fault is the inability of experts to ensure satisfactory benefits. This has led to the supplementation of the original Keeton-O'Connell Plan with a new approach—optional no-fault coverage. Under the coverage proposed in the Basic Protection Plan of 1965, the insured's carrier would reimburse for net out-of-pocket losses up to $10,000 without regard to fault. The insured, by his election, would be barred from making a claim to the extent of the first $5,000 of pain and suffering damages and the first $10,000 of other damages, such as wage losses and medical expenses. The optional program combines no-fault insurance and liability insurance beyond the scope of no-fault coverage.[25]

The options proposed in the new approach fall into two groups. The first would cover net economic losses beyond the $10,000 coverage of the Basic Protection Plan, while the second would provide optional coverage for items such as pain, suffering, physical impairment and inconvenience.[26] Thus, pain and suffering becomes compensable if desired. Recognizing the multiple problems of pain and suffering, disfigurement, amputation and severe emotional losses, the author now recommends the following as an ideal solution to those who favor a basic no-fault coverage without limit: compulsory insurance as

22. Spannenberg, *supra* note 20, at 33.
23. *See Can No-Fault Make It?, supra* note 18, at 20.
24. Since the American Bar Association Special Committee on Automobile Insurance Legislation has announced its support for "compulsory automobile insurance with a limited no-fault feature," 58 A.B.A.J. 388 (1972), it seems most appropriate that the ABA and the National Association of Insurance Commissioners, representing the 50 states, appoint a joint committee to prepare a model bill. These two prestigious organizations can be most influential in the ultimate adoption of such a bill. The companies and trade associations that comprise the insurance industry are divided on the type of no-fault bill that will best serve their interests as well as the interests of the public. In many instances reasons underlying differences of opinion are reflective of the existence of different types of insurance institutions. While these institutional differences should not be disregarded, the ultimate adoption of a workable no-fault system on a state-by-state basis can best be achieved through the efforts of a joint committee. In the absence of some such harmonizing influence, there will surely be federal legislative action to achieve nationwide uniformity. Crowell, *No-Fault and the Tower of Babel,* INSURANCE FIELD, Nov. 15, 1971, at 30.
25. The Secretary of Transportation agrees that an optional program is meritorious. J. VOLPE, REPORT TO THE CONGRESS AND THE PRESIDENT: MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES (March 1971) (*passim*), in J. O'CONNELL at app. IV.
26. J. O'CONNELL at 166.

a basic level of no-fault insurance for out-of-pocket losses of all victims, optional no-fault coverage for additional out-of-pocket losses without limit, and preservation of tort action for losses above the limit of the compulsory coverage unless the victim has elected to carry the unlimited no-fault coverage that would correspondingly preclude his tort claim in full.[27] Finally, because it is anticipated that some states may not adopt the Basic Protection Plan, $10,000 third-party liability coverage should be included in the compulsory package.[28]

Members of the American Trial Lawyers Association criticize the federal no-fault bill[29] which pays all hospital, medical and dental bills and all rehabilitation expenses "'necessarily" incurred.[30] They envision that under no-fault the potential for conflict between insured and insurer will still exist, for instance, with regard to the amount of physiotherapy necessary for a particular injured person's complete recovery. Thus, they say, and unquestionably they are correct, that adoption of no-fault will not create a system free of disputes and litigation. The question, however, is what progress will follow no-fault. The Association recites that alleged savings are unproven; for instance, no-fault will compensate occurrences that are not covered under the present tort system, such as injuries sustained by a driver who, traveling at high speed, strikes a bridge abutment. While their point is correct, it merely substantiates my belief that the entire issue of fault and no-fault is basically a question of societal values.

The Occupational Safety and Health Act of 1970[31] set standards for occupational safety. Federal legislation for product safety may soon follow. One need not be clairvoyant to understand what is happening in the United States: this highly involved technological society requires consumer protection measures. Although Professor O'Connell's no-fault concept may have preceded Ralph Nader's battle for consumerism, one can readily see the developing pattern of effectively protecting the individual against economic losses arising from day-to-day use of the motor vehicle or, for that matter, any product.

One of the most exciting chapters in Professor O'Connell's book is entitled "Where From Here?,"[32] in which he discusses economic losses resulting from injuries sustained as a result of mishaps other than motor vehicle accidents. He raises questions, for example,

27. *Id.* at 173.
28. *Id.* at 175.
29. See note 21 *supra.*
30. Spannenberg, *supra* note 20, at 31.
31. Act of Dec. 31, 1970, Pub. L. 91-610, 84 Stat. 1590 (codified in 29 U.S.C. §§ 5, 15, 18, 29, 42, 49 (1970)).
32. J. O'CONNELL at 139-54.

concerning injuries from manufactured products and discusses the serious losses sustained by people because of their inability to prove the defective quality of the product. He charges than only a small fraction of injuries, probably less than 5 percent, caused by poorly manufactured products are presently compensated. Concerning himself with this type of loss, he discusses the possibility that the no-fault concept in the automobile insurance field may later be extended to other areas. Perhaps he contemplates the legal doctrine of absolute liability someday being made applicable in all matters involving manufactured goods on the general premise that all persons who sustain injury resulting in economic loss should be compensated. While recognizing the infancy of the no-fault plan and the dangers of extending it prematurely into other areas, O'Connell evidences a conviction that his plan has the potential of ameliorating widespread inequities and confusion in all consumer-related areas: "In adopting no-fault insurance not only will we redeem one vast area of the law—that applicable to auto accidents —but maybe we can learn something about groping our way towards sanity in other areas as well."[33]

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33. *Id.* at 154.

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