



1-1-1968

Basic Protection Plan for Traffic Accident Losses

Robert E. Keeton

Jeffrey O'Connell

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Robert E. Keeton & Jeffrey O'Connell, *Basic Protection Plan for Traffic Accident Losses*, 43 Notre Dame L. Rev. 184 (1968).

Available at: <http://scholarship.law.nd.edu/ndlr/vol43/iss2/2>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

THE BASIC PROTECTION PLAN FOR TRAFFIC ACCIDENT LOSSES

Robert E. Keeton and Jeffrey O'Connell***

I. Introduction

On August 15, 1967, to the surprise of even the closest observers on historic Beacon Hill, the Massachusetts House of Representatives gave its approving vote to House Bill 1844, providing for a system of Basic Protection insurance for traffic accidents. As the result appeared before them in the voting lights, members of the House responded with resounding, spontaneous applause for the effective and sometimes lonely fight Representative Michael Dukakis had waged for genuine reform of the ailing automobile claims system. The vote was the more impressive because by wide margins both Democrats and Republicans voted for the Basic Protection bill against the urgings of their party leaders.¹

This dramatic incident manifested a deep and pervasive dissatisfaction with the existing system. Spiraling costs of the system, perhaps more than any other factor, triggered this action. In addition to rising costs, however, there were other factors which led the Massachusetts House to adopt the Basic Protection Plan, and these factors are present not only in Massachusetts but in all the states. The present system for insuring, processing, and paying the annual multitude of claims of traffic victims is in trouble all across the nation. Immediate and thorough changes are imperative, but in the haste to reform, it must not be forgotten that they must be tailored to meet the need.

II. The Shortcomings of Insurance Based Upon Fault

In 1962, *Consumer Reports*, the magazine of Consumers Union, ran a series of articles appraising automobile insurance.² The articles concluded that a major shortcoming of the present automobile insurance system is that before payment is made for losses, legal liability must be established.

Either automobile liability insurance or negligence law by itself might be defended as reasonable; but today's combination of the two produces results which are . . . unjust, . . . capricious, and . . . wasteful of both the policyholder's and the accident victim's money . . .

. . . .

The shortcomings of our bodily injury liability system are particularly conspicuous when contrasted with other kinds of insurance written by the

* Professor of Law, Harvard Law School; B.B.A., University of Texas, 1940; L.L.B., University of Texas Law School, 1941; S.J.D., Harvard Law School, 1956.

** Professor of Law, University of Illinois Law School; A.B., Dartmouth, 1951, L.L.B., Harvard Law School, 1954.

1 Boston Herald Traveler, Aug. 16, 1967, at 1, cols. 2-5.

2 *Are You Paying Too Much for Automobile Insurance?* 27 CONSUMER REPORTS 112 (1962); *How Good Is Your Automobile Insurance?*, *id.* at 204; *How To Choose an Auto Insurance Policy*, *id.* at 246; *CU's Three-Stop Shopping Plan for Selecting Auto Insurance*, *id.* at 302; *Why Auto Insurance Costs Us Far Too Much*, *id.* at 352; *Needed: A Basic Reform of Auto Liability Insurance*, *id.* at 404; *Comments, Questions, and Answers on Auto Insurance*, *id.* at 450.

same companies or their affiliates. When you die, your life insurance company does not refuse to pay your widow on the ground that you contributed to the unfortunate result by smoking too many cigarettes or eating too much. When your house burns down, your insurance company does not refuse to pay on the ground that you should have had your roof resingled with fire-resistant materials. When you are hospitalized for a broken leg, your health insurance company will not refuse payment on the ground that if you had replaced that burned-out bulb over your staircase, you wouldn't have fallen down the stairs. Yet, defenses parallel to these are the common grist of automobile liability cases.³

It has, indeed, been a mistake to base payments by automobile insurers primarily on legal liability for negligent driving. That this is so has been highlighted by Martin Mayer's widely publicized book surveying the legal profession — *The Lawyers*.⁴ Mayer's book confirms for the general reader what has long been known by many specialists and sensed by many others — that "[f]rom any angle of approach, the realities of the legal consequences of accidents are an unconscionable mess."⁵ Mayer effectively summarizes the shortcomings of the present system:

At present, personal-injury law fails to compensate a large fraction of the victims of accidents and unjustly enriches others, clogs the courts so badly that a fundamental institution in the society is degraded, corrupts a good fraction of the bar, the medical profession and the citizenry, and removes a basic question of social welfare and social justice . . . to the trivial arena of squabbling among lawyers. The current system is also shockingly expensive to run⁶

The number of traffic victims going without compensation from present automobile insurance is graphically illustrated by a Pennsylvania study.⁷ This study indicates that in 1959, 46.8 percent of traffic victims involved in serious accidents received nothing; among those seriously injured with out-of-pocket losses of more than \$3,000, approximately 66 percent received nothing or less than half of their losses.⁸ Moreover, all this was calculated *before* the subtraction of lawyers fees! A recent Michigan study indicates that in the late 1950's, 63 percent of all traffic victims got nothing from automobile liability insurance.⁹ Even more significantly, it is pointed out that 45 percent of those seriously injured received no compensation from automobile liability insurance.¹⁰

The tragedy is, however, that while many are going without, others are, comparatively speaking, being smothered in overpayment. Every statistical study of automobile accident liability insurance shows that those with relatively

3 *Needed: A Basic Reform of Auto Liability Insurance*, 27 CONSUMER REPORTS 404, 406 (1962).

4 M. MAYER, *THE LAWYERS* (1967).

5 *Id.* at 255.

6 *Id.* at 269.

7 Morris & Paul, *The Financial Impact of Automobile Accidents*, 110 U. PA. L. REV. 913 (1962).

8 *Id.* at 916-17.

9 A. CONARD, J. MORGAN, R. PRATT, C. VOLTZ, R. BOMBAUGH, *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS* 149 (1964) (hereinafter cited as CONARD).

10 *Id.* at 161, 172.

small losses who are compensated tend to be promptly paid many times their out-of-pocket loss, while those with major injuries who are reimbursed tend to receive only a fraction of their losses and only after long delay.¹¹ This is because smaller claims are commonly paid off relatively generously and quickly as "nuisance claims," whereas serious claims are often contested by the insurance companies and become bogged down in the delay that court fights entail.

The waste of the present system based on fault is even more aggravated by the collateral source rule—a rule of law that refuses to take account of payment from nonfault sources in appraising what is due under the fault criterion. Thus, a person who is paid for his medical expenses from Blue Cross or from some other nonfault source, such as accident insurance, may be paid all over again from the other driver's negligence liability insurance. A result of this is that the negligence liability payments are often wasted on those whose bills are already paid, rather than covering those with genuine losses and needs.

Another problem with the present fault system is that it causes congested court calendars. Indeed, traffic accident cases sometimes comprise nearly two-thirds of a court's civil jury docket.¹² Two separate studies show that, although only about three percent or less of traffic accident cases reach trial,¹³ such cases are enough to cause delays *averaging* over 31 months in large metropolitan communities in the United States.¹⁴ For example, the delay in Cook County (Chicago), Illinois, averages 69.5 months!¹⁵

The fault system, then, pays nothing to some deserving traffic victims and too little to others. It delivers its payments too late. It distributes them unfairly, overpaying victims with minor injuries and underpaying severely injured persons, if it pays them at all. The unfairness of the fault system extends also to harsh treatment of motorists when they buy their insurance. Rates are too high. Rating classifications are often unfair. And many people have trouble getting and keeping the insurance they want and need. In addition to all this, the fault system has built-in inducements to exaggeration and even outright fraud that add both to its unfairness and to its wasteful costs.

These are only the symptoms of an ailing system. We submit that the central cause of these ills is the way the system handles the multitude of small claims of traffic victims. We do not indict, however, the persons operating the system—the lawyers and the insurance personnel—but the system itself. Moreover, we do not indict the whole system but, more specifically, that part of the system concerned with handling this multitude of small claims.

III. The Basic Protection Plan as a Remedy

The remedy we propose—the Basic Protection Plan—is tailored to the

11 *E.g., id.* at 6, 196-97, 222, 250-52. *See also* R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM 34-69 (1965) (hereinafter cited as BASIC PROTECTION).

12 Massachusetts and Michigan are typical examples. BASIC PROTECTION 14.

13 Studies were conducted in New York and in Michigan. *Id.* at 58-59.

14 INSTITUTE OF JUDICIAL ADMINISTRATION, STATE TRIAL COURTS OF GENERAL JURISDICTION—PERSONAL INJURY CASES at v (Calendar Status Study, 1966).

15 *Id.*

specific need of changing the way the system treats small claims.¹⁶ First, the claims in all cases not involving severe injury would be based not upon fault, but upon a simple and familiar insurance criterion — the fact of accidental injury arising from use of an automobile.¹⁷ This would reduce sharply the wasteful litigation that now occurs over ascertaining just how the accident happened. This nonfault insurance criterion used in the Basic Protection Plan is one already applied in health and accident insurance, fire insurance, and even in medical payments insurance and collision insurance under today's automobile policy. Second, in most instances, the claims would be against one's own insurer rather than the other driver's insurer, thereby reducing the spirit of antagonism over claims.¹⁸ Third, they would be claims for loss not otherwise reimbursed, avoiding duplication of benefits received from other sources such as Blue Cross coverage or sick-leave pay.¹⁹ Fourth, they would be claims for reimbursement of loss as it occurs month-by-month, rather than lump-sum claims, thereby eliminating the necessity of making estimates of long-term future disability that are bound to be wrong one way or the other.²⁰ Fifth, they would be claims only for out-of-pocket losses, which in most cases are objectively measurable.²¹ No compensation would be paid for pain and suffering unless one had purchased an optional coverage for that purpose.²²

These five changes are designed to alleviate the central problem of handling the multitude of small claims in a manner too cumbersome for the relatively small amounts involved. Thus, this proposal is designed to change not the *whole* system, but only the system for managing the small claims.

Another way of describing the Basic Protection proposal is to point out the two major principles on which it is founded: first, paying small losses regardless of fault and, second, eliminating small negligence claims for traffic injuries. The first of these two principles underlies the medical payments coverage one can buy in an automobile insurance policy today. Such coverage reimburses actual medical expenses up to stated limit (often \$500), regardless of who was at fault in the accident. Basic Protection insurance would do the same for all out-of-pocket losses up to a limit of \$10,000 per person.²³ Under the Basic Protection Plan, a person injured in an automobile accident would be reimbursed for doctor bills, hospital bills and lost wages.²⁴ The insurance company would be required to pay month-by-month as losses occurred, rather than delaying until the injured person and the company could agree on a lump-sum settlement.²⁵

The second basic principle exempts Basic Protection insureds from tort

16 The details of the Basic Protection Plan, including a draft statute, together with documentation of the pressing need for its adoption, are presented in *Basic Protection*. See also R. KEETON & J. O'CONNELL, *AFTER CARS CRASH—THE NEED FOR LEGAL AND INSURANCE REFORM* (1967), a version written for the general reader.

17 BASIC PROTECTION 276-77.

18 *Id.* at 274.

19 *Id.* at 278-79.

20 *Id.* at 277-78.

21 *Id.* at 280, 283.

22 *Id.* at 285-86.

23 *Id.* at 273, 283.

24 *Id.* at 280.

25 *Id.* at 277-78.

liability. This eliminates claims based on negligence unless the damages are higher than \$5,000 for pain and suffering or \$10,000 for all other items such as medical expense and wage loss.²⁶ This would mean that all but a very small percentage of the claims for personal injuries in automobile accidents would be covered by the new Basic Protection Plan.

The key impact of the tort exemption in negligence claims less than \$10,000 is to reduce waste. One source of waste stems from the tax dollars the public currently pays to provide courts for trials of these automobile accident cases. This burden in taxes runs even higher than the amount of the benefits delivered in the thousands of the less severe injury cases heard every year. For example, the cost to the public of providing a courtroom, a judge, an officer, a court reporter, clerks, clerical personnel, and a jury to spend two days or more trying a case is exceedingly expensive. Yet, the traffic victim, when he is successful in court, frequently wins a verdict of not more than \$1,500, of which he receives less than \$1,000 after deducting his lawyer's fees and other expenses.

A second source of waste stems from the high cost of shifting automobile insurance dollars. At present, the waste in insurance dollars is so great that on a nationwide basis automobile liability insurance has the worst efficiency rating of any major form of insurance in use today. The policyholders must pay \$2.20 in premiums for each dollar in net benefits that are returned to some injured person.²⁷ A large part of the reason for this low efficiency is the cost of controversy, investigation, and negotiation for the multitude of small claims, and the cost of a full-dress trial in the cases that crowd the court dockets, but yet constitute only a small percentage of all the small claims.

Consider how great the savings in insurance costs can be. Under the negligence system, the endless and innumerable fights over fault and over how much pain is "worth" are big items of expense. These are eliminated under Basic Protection insurance. The actual cost of paying for pain and suffering up to \$5,000 is also eliminated. Since this often equals several times the out-of-pocket losses in the smaller cases, this means a very substantial saving. The Basic Protection Plan, furthermore, does not duplicate payments made from other sources such as sick leave or Blue Cross. In contrast, as stated above, a tremendous amount of waste accumulates under the present system because payments are so often made to cover losses already paid for. Moreover, the waste includes a heavy charge for the overhead of paying these duplicating benefits through an insurance system. Finally, because of deductibles, Basic Protection insurance does not pay for the first \$100 of loss or 10 percent of wage loss, whichever is greater,²⁸ and this means substantial savings. It reduces payments by these amounts and also avoids the administrative expense and waste of having small amounts paid through the mechanism of insurance.

The prediction of substantial savings is fortified by an actuarial study made for the authors by Frank Harwayne of New York City, a distinguished independent consulting actuary. In a paper presented at the annual meeting of the

26 *Id.* at 274-76.

27 CONARD 59.

28 BASIC PROTECTION 281-82.

Casualty Actuarial Society at Virginia Beach in May, 1966, Harwayne estimated that for drivers as a whole, insurance under the Basic Protection system would cost substantially less than insurance under the negligence system, even though it would reimburse substantially more people.²⁹ The study was based on what would happen if New York State adopted the Basic Protection system; the conclusion was that insurance premiums would be reduced by 15 to 25 percent or more.³⁰ (The savings would amount to nine percent more if the same \$20,000 insurance limit for all payments arising out of one accident, now applicable under New York's negligence liability insurance, were afforded by Basic Protection.³¹ Instead, Basic Protection more generously provides a \$100,000 per accident limit. Under both New York's negligence liability system and Basic Protection, the limit available to any one person is \$10,000.)³²

It is submitted that those who believe in fair compensation for pain and suffering as well as economic loss are offered a better and fairer deal under the Basic Protection Plan than they get today. Today, trivially injured victims receive several times as much compensation as their out-of-pocket losses. This is justified as pain and suffering damages, but in fact it is basically a reflection of the "nuisance value" of such claims. This nuisance value is significant because the amorphous and indefinite task of evaluating pain and suffering makes every claim potentially expensive to defend. In contrast with the overpayment for trivial injuries, those who are severely injured and who suffer the most pain receive less than their out-of-pocket losses. Few among them are compensated for more than a mere fraction of their losses; thus, they receive nothing extra for their pain.³³ The Basic Protection Plan seeks to do more for the severely injured person by guaranteeing payment of his out-of-pocket losses up to \$10,000 while preserving his right to recover in a negligence claim for his pain and suffering damages of more than \$5,000 and his out-of-pocket losses of more than \$10,000.

Moreover, under the Basic Protection Plan, coverage for "pain and inconvenience" is optional.³⁴ Today, the motorist automatically pays the cost of pain and suffering damages if he buys any liability insurance at all. This is because pain and suffering damages are part of the legal liability that insurance companies pay to others on behalf of their insureds, and it is not feasible to give an option. For the first time, then, motorists would be given some choice about whether pain and suffering damages are worth the cost.

Additionally, actuarial estimates show that the savings under the Basic Protection Plan would make it possible for the motorist to buy such optional pain and inconvenience coverage along with Basic Protection insurance at a price no greater than he pays today for coverage that provides much less pro-

29 Keeton & O'Connell, *Basic Protection and the Costs of Traffic Accidents*, 38 N.Y.S.B.J. 255, 256-57 (1966).

30 *Id.*

31 *Id.*

32 *Id.* at 256.

33 CONARD 179.

34 BASIC PROTECTION 285-86.

tection.³⁵ Thus, policyholders generally would have a better deal even on pain and suffering damages.³⁶ For those who might elect to forego pain and suffering damages, a very substantial reduction of their insurance premiums would result.

Opponents of Basic Protection argue against nonfault insurance on the basis of morality. Typical of this line of argument are the following remarks of Edward W. Kuhn, a prominent Memphis trial lawyer and former president of the American Bar Association:

With one stroke [non-fault payment in automobile cases] . . . would abolish [the] moral . . . responsibility of the individual who carelessly and negligently inflicts personal injury on another. Even worse, it would make such a person the beneficiary of his own carelessness and his own disregard for his fellow man.³⁷

The moral principle involved, of course, applies only if one is talking about individuals paying one another. A different question arises when the party paying is not the person causing the harm but an insurance company. In fact, except for automobile liability insurance, *most* insurance today is paid without reference to fault. Indeed, even for traffic accidents, a comprehensive study revealed that in 1959 almost half of what is paid to traffic victims came from nonfault sources such as the collision and medical payments coverage under automobile insurance, accident and health insurance, life insurance and social security.³⁸ If it is morally repugnant to pay automobile insurance to a traffic victim without reference to fault, why is it morally acceptable to pay the same victim from accident and health insurance, from wage replacement insurance, from social security disability insurance, and indeed from the widespread medical payment and collision coverages of the automobile insurance policy itself, all of which are payable without reference to fault? And why is it morally acceptable to allow liability insurance itself? Observe that the very purpose of liability insurance is to benefit a person at fault by discharging on his behalf his liability to others.

Opponents of basic reform have also argued that paying benefits without regard to fault would tend to make good drivers bad and bad drivers worse. A moment's thought will reveal that there is a basic assumption underlying all such arguments: the assumption that a person's driving habits depend to a

35 In his actuarial report, Harwayne estimated that a package of insurance protection containing Basic Protection coverage plus Added Protection coverage paying the same amount of pain and inconvenience coverage as is paid for pain and suffering under the present tort system would cost 98 percent—or 2 percent less than present tort liability insurance. Harwayne, *Insurance Cost of Automobile Basic Protection Plan in Relation to Automobile Bodily Injury Liability Costs*, in 13 PROCEEDINGS, CAS. ACTUARIAL SOC'Y 123, 130 (1966).

36 One exception, however, is the trivially injured person who is overpaid today on the theory of pain and suffering; actually, the real reason he is overpaid is because of the nuisance value of his claim. He might get less under the Basic Protection Plan, and for that we do not apologize. Others under the Basic Protection Plan, paying no higher premiums than under the present insurance system, could get as much for pain and suffering as they receive under today's insurance, while being assured also of reimbursement of net out-of-pocket losses, regardless of fault.

37 Kuhn, *Arguments for the Tort System*, in DRIVERS, AND ACCIDENTS: THE ENVIRONMENT OF AUTOMOBILE INSURANCE 31, 41 (J. Wickman ed. 1967).

38 CONARD 62-64.

significant extent upon how concerned he is about the effect of his carelessness on the automobile insurance claims that may result from an accident. Unless that assumption is sound, this whole structure of arguments collapses like a house of cards.

There is no doubt that the typical motorist fears the consequences of bad driving. Probably uppermost among the typical motorist's concerns of this type are fear of injury to himself or to members of his family, fear of criminal fines for violating traffic laws, and fear of loss of his driver's license. If the combination of these fears will not stop him from taking unreasonable chances in driving, is it realistic to believe that his fear of being held legally responsible for any injuries caused to others by his negligence would turn the tide? Similarly, is it realistic to believe that he would be deterred from unsafe driving by the fear that such conduct would prevent him from being paid by another careless driver? We think not.

There are many reasons why a driver would hardly ever pause to think about these possible legal consequences. One of these reasons especially serves to make the point. A motorist cannot reach even the threshold of thinking about the legal consequences of his carelessness until his mind admits that he is driving carelessly and that he may have an accident. But motorists are notoriously optimistic about not becoming accident statistics themselves, notoriously quick to blame the other fellow when an accident occurs, and notoriously generous in appraising the quality of their own driving. Thus, we are fighting an uphill battle against human nature if we try to base a campaign for safe driving on the fear of what will happen with insurance claims.

Suppose for a moment the argument is accepted that providing insurance for traffic victims makes drivers less careful. If it is desired to outlaw this assumed inducement to danger, all insurance under the present system covering negligent use of the automobile would have to be outlawed. In short, the whole development of automobile negligence insurance runs contrary to the idea that it is worthwhile to try to make drivers more careful by requiring them to pay personally for all the consequences of the accidents they cause. To be realistic, moreover, the undeniable fact must be faced that automobile insurance is here to stay.³⁹

Let it be clear that what we have been saying is not in opposition to merit rating (tying drivers' insurance premiums to their driving records) and competitive rating (allowing companies to charge different rates to compete for preferred business). It is possible to pay the claims of injured victims without regard to fault and still allow both a merit and competitive rating system charging higher rates to bad drivers.⁴⁰ The Basic Protection Plan can work with or without merit and competitive ratings.

³⁹ This discussion on the effect of nonfault insurance on driving habits had been adapted from R. KEETON & J. O'CONNELL, *supra* note 16, at 117-18.

⁴⁰ The surcharge for bad driving could be based—as it often is as a practical matter today—simply on accident involvement since, in the long run, people who get in the most accidents are our worst drivers. As another possibility, the surcharge could be based on a point system similar to that in effect in many states for the purposes of driver licensing whereby one "earns" demerits by, for example, traffic citations or convictions.

IV. What Is the Course for the Future?

Within the insurance industry and among lawyers—even among *trial* lawyers—there are some who believe, as we do, that to work for keeping the present system with all its evils is to work against the best long-term interests of the insurance industry, the bar and the public. Public disrespect for the present system produces public disrespect for the insurance industry, lawyers, and the law itself. Reform will come. The public interest will prevail. The question in doubt is not *whether* nonfault insurance will be adopted for the multitude of small claims arising from traffic injuries, but merely *when*. The need is already critical. We believe that there is available a proposal that meets this need—the Basic Protection Plan.