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NO-FAULT AUTOMOBILE INSURANCE—A PREMATURE DESTRUCTION OF THE TORT LIABILITY REPARATIONS SYSTEM IN AUTOMOBILE ACCIDENT CASES

On September 14, 1970, Senator Philip Hart introduced S. 4339 in the United States Senate. This bill provided for a nationwide system of compulsory automobile liability insurance under which any insured person involved in an automobile accident could recover from his own insurance company his net economic out-of-pocket losses, without regard to who was at fault in the accident. Senator Hart's bill does away with the present tort liability system in automobile accident cases and brings to a climax the national argument which has been raging throughout the last few years over the fate of automobile liability insurance.

While the automobile has become more essential to society, it has become the target of much criticism. The question which is currently being asked is whether the present system of automobile liability insurance is an effective and desirable means of allocating the burden of loss associated with an automobile accident.

Automobile liability insurance was first written in 1898. Basically, this early insurance protected against liability arising from the use of horsedrawn vehicles. However, these first policies provided very inconsistent protection, and it was not until May of 1935 that the first standard provisions of the automobile policy were developed for nationwide use. The first family automobile policy was written in 1956.

From these rather recent beginnings, the automobile liability insurance system has inherited a society which in 1969 alone produced 14 million accidents, killing 55,500 people—one out of every 3,675 persons in this country—injuring 3.7 million people—one out of every 50 persons—and damaging 24 million vehicles. It is estimated that someone dies in an automobile accident every ten minutes, there is an injury about every sixteen seconds, and the average driver will have an accident every third year. The economic cost of automobile accidents in the United States is over $16.5 billion a year. We have one car for every 2.4 persons; we produce cars three times faster than babies; and the automobile population will increase by 30 million in the next decade to a total vehicle population of nearly 135 million.

The present automobile liability reparations system, based on the principle that he who is at fault must pay, has been criticized as being too slow to pay

1 91st Cong., 2d Sess. (1970). This bill was still in the Committee on Commerce when the 91st Congress came to a close.
3 Franklin, Replacing the Negligence Lottery: Compensation and Selective Reimbursement, 53 Va. L. Rev. 774 (1967).
5 See Cahill, Auto Insurance — A Call for Public Dialogue, 1 Conn. L. Rev. 1, 3 (1968); Gouldin, supra note 4, at 60.
accident victims, too costly and wasteful, too impractical and cumbersome, and too inequitable to handle the ever increasing volume of liability claims and problems presented to it.\footnote{7} Congress has supposedly\footnote{8} been swamped with complaints about the rising costs of automobile insurance, the frequent insolvencies of insurance companies, the long delays in paying claims, the inadequacies of the payments, and the arbitrary cancellation of policies.\footnote{9} As a result of these complaints, the Federal Trade Commission, the Department of Transportation, and five Congressional committees are investigating or planning to investigate automobile liability insurance.\footnote{10} The Department of Transportation study is being conducted pursuant to Congressional authorization and a $2,000,000 grant,\footnote{11} and will be the most comprehensive study and investigation ever made of the existing system of compensation for motor vehicle accident losses.\footnote{12}

The automobile claims system, as it presently exists, is a segment of tort law—a body of law concerned with private redress for accidental and intentional injuries. Under the existing tort system, the burden of loss in an accident falls on the party responsible for causing the injury. This is what is termed a “third party” reparations system.\footnote{13} The insurer pays benefits to an injured party on behalf of its insured because of the insured’s tort liability for an accident; an insurer insures its customers against liability to a third person.

However, as this “third party” automobile insurance system has been increasingly criticized, many suggestions have been made to replace it with a “first party” insurance reparations system.\footnote{14} Under a “first party” system the insurer pays benefits to injured parties (the insured, passengers in his car, and pedestrians he hits) to discharge its legal obligations because of injury or damage sustained by such persons in automobile accidents. A “first party” system attempts to allocate the burden of loss in an automobile accident to all of motoring—rather than to the party at fault. Senator Hart’s bill proposes such a “first party” system for the entire United States.

The first of many proposed “first party” plans was the Columbia Plan.\footnote{15}

\footnote{7} Keeton, Basic Protection Automobile Insurance — A Reform Tailored to the Need, 5 Ga. St. Bar J. 117 (1968).
\footnote{8} Hodosh, Auto Compensation Plans and the Claims Man, 1968 Ins. L.J. 816, raises doubt as to how widespread the public’s concern about automobile insurance actually is:

How truly widespread the American public’s concern about auto insurance is may be difficult to evaluate. . . . The House Antitrust Subcommittee . . . received 520 complaints from individuals up to September 20, 1967. Assuming that various other investigative agencies and committees received about the same amount of complaints, this would amount to 3,500 to 4,000 complaints on the federal level. If we consider the fact that there are some 90 million cars in the United States, even conceding that not all dissatisfied people go to the trouble of writing their congressmen or to Congressional Committees — it is questionable whether, at the outset, this was truly a “groundswell of public opinion.” Id. at 817.

\footnote{10} Hodosh, supra note 8, at 816.
\footnote{12} The results of this study are partially completed. Brainard, The DOT Research Bomb, 6 Trial 37 (Oct./Nov. 1970); Brainard, Implications of DOT Auto Insurance Study for the Tort Liability System, 1970 Ins. L.J. 575, 576.
\footnote{14} Id. at 599-604.
\footnote{15} Columbia University Council for Research in the Social Sciences, Report by the Committee to Study Compensation for Automobile Accidents (1932). See also
Introduced in 1932, this plan proposed a "first party" system of compulsory insurance which did away with the right to recover in tort and the right to recover for pain and suffering. This plan, however, never dealt with problems of property damage or the one-car accident. Nor did it consider the insolvent, uninsured, or hit-and-run driver. The plan was never adopted in any jurisdiction.

The second "first party" plan to be proposed is, however, in effect today. This is the Saskatchewan Plan, adopted in 1946. Under this plan, personal injury benefits and claims for property damage are paid without regard to fault. The victim of a traffic accident can still sue in tort, subject to the deductions received under the plan. This insurance is written by a government-operated insurance organization.

Also in effect today is the Puerto Rico "Social Protection Plan," which became effective July 1, 1969. This is a social insurance plan with an outright assessment of $35.00 for each car. It provides tort immunity for claims under $1,000 and no recovery for pain and suffering under $2,000.

Perhaps the most widely discussed "first party" plan is the Basic Protection Plan, proposed by Professors Keeton and O'Connell in 1965. The Basic Protection Plan provides compulsory automobile insurance, but limits recovery to net economic losses. There is no recovery allowed for pain and suffering under $5,000, and where collateral insurance coverages are present, basic protection does not apply. Tort liability is eliminated for losses under $10,000. Above these limits of $5,000 and $10,000, however, the present "third party" tort system is retained.

The Basic Protection Plan was introduced in the Massachusetts legislature in 1967 and defeated. But the basic proposal, this time with a $2,000 limit on economic loss and a requirement of $500 in medical bills for pain and suffering recovery, passed the Massachusetts legislature on August 6, 1970. Also included in this adopted version was a 15% rate reduction for all coverages.

Since the passage of this bill, six Massachusetts' insurance companies have refused to write new insurance policies for 1971, and the rate reduction has been declared unconstitutional.

There are two other "first-party" plans which deserve consideration at this
point. One is the Rockefeller-Stewart Plan. 25 This plan eliminates all tort liability and all recovery for pain and suffering. The other plan is the American Insurance Association Plan. 26 It provides compulsory insurance and likewise does away with all tort liability and all recovery for pain and suffering in automobile accident cases.

Beyond these most noted plans, several other ideas for drastic reform of the insurance system have been presented. One suggestion would allow the government to control automobile insurance through the social security system. 27 Another suggestion, made by the Chief Justice of the United States Supreme Court, is to remove all automobile and personal injury cases from federal to state courts and try them without a jury. 28

These "first party" or no-fault plans have great political appeal. They fit very well into the security and consumer-conscious mood of society. Yet although such insurance has been ardently endorsed 29 it has also been vehemently attacked 30 and the American Bar Association has gone on record as being opposed to the plans. 31 The debate has been very involved, 32 due principally to the fact that once a "first party" system is adopted it may be difficult to return to a "third party" system. 33

All of these suggested "first party" plans contain certain common char-
acteristics which must be closely examined to determine if this method would better allocate the burden of loss sustained in an automobile accident than does the present “third party” system. First, these proposed plans are compulsory. Second, they propose to reform the present system by doing away with fault as the determinant of loss bearing. Third, they all limit or do away with recovery for intangible loss—pain and suffering. And last, they all propose to limit multiple recovery for tangible loss.

The authors of “first party” or no-fault automobile insurance claim that this new system would increase benefits and their availability, would return a greater percentage of the premium dollar to the policyholder, and would do all of this with greater efficiency and at substantially less cost to the driving public. They claim that a no-fault system would be most compatible with the function of insurance—compensating loss—and would be most consistent with the economic principles of insurance in society—spreading the economic loss among all users of the highway on the basis of probability, not causation. In effect, they wish to have the cost of injuries caused in traffic accidents treated as part of the cost of driving, to be spread among motorists in relation to advantages derived from motoring rather than being spread on the basis of negligence principles.

The authors of no-fault insurance propose to cure what they consider the following problems of the present automobile liability reparations system: fault is difficult to determine, and harsh application of contributory fault principles leaves deserving victims uncompensated; courts are congested and there is a substantial delay in getting to trial due to the amount of automobile accident cases; allowing recovery for pain and suffering and from collateral insurance sources is wasteful and inequitable; there are too many uninsured motorists; companies frequently become insolvent and too many policies are arbitrarily cancelled; and when payment is made under the present system it is too slow in coming. Each of these criticisms of the present system must be examined in depth to determine if they are valid.

I. Difficulty in Determining Fault

One of the primary criticisms leveled at the present automobile liability reparations system is that in automobile accidents it is often too difficult to determine who was at fault. Likewise, application of principles of contributory fault principles leaves many deserving victims uncompensated. The fault system has been called a lottery system where victims with identical injuries recover different amounts, where small claims are overcompensated, and where victims with large claims rarely get as much as 25% of their real economic loss. It is also claimed that under the fault system some 25% of all victims recover nothing.

Professor Keeton believes that in the great majority of cases the automobile

34 See, e.g., Hart, supra note 29.
35 See, e.g., Keeton, supra note 7.
36 Keeton, Basic Protection — An Answer to the Automobile Insurance Crisis, 1 CONN. L. REV. 13, 15 (1968).
37 See generally Keeton, supra note 7.
38 Franklin, supra note 3.
39 Id. at 779.
accident is the fault of no one. The accident is merely the inevitable result of the speed of automobiles, human frailties, and the rapid pace at which people live. The victim of nonnegligent motoring accidents is thus left to bear his own loss.\textsuperscript{40} The critics of the fault system say that the difficulty in determining fault causes unjustified expense and results in many wrong determinations. They stress that it is unlikely that anyone could apply a rational judgment in allocating responsibility between the parties on the basis of fault. Too much depends on the memory and honesty of the witnesses for a determination of true facts.\textsuperscript{42} Thus, they propose to eliminate all disputes over fault.

Contrary to the beliefs of these authors, a recent study conducted by the Liberty Mutual Insurance Company demonstrated that in over 90\% of all automobile accidents, fault could be easily assessed—usually from only the facts contained in the report of the accident. In addition, the claims men at Liberty Mutual were asked to estimate in what percentage of the cases fault is easily determinable. They responded, without knowledge of the study results, that about 75\% of their own cases were susceptible to a clear determination of fault in the original reports, and about 90\% could be decided upon completion of the initial investigation.\textsuperscript{42}

Determination of fault would not seem to depend on total mental recall alone. Physical science and accident reconstruction help. The final positions of the cars, the tire marks and the location and extent of the damage frequently establish very clearly how the accident happened and who was at fault. Complex accidents can be accurately analyzed even where impressions of witnesses are confused.

The belief that in the majority of auto accidents the accident is the fault of no one\textsuperscript{43} is not very widely shared. It is usually found that collisions are almost always caused by the careless driving of one or more drivers.\textsuperscript{44} It also appears that most accidents result from a failure to follow the rules of the road. This, at least, is the conclusion of one expert in accident reconstruction:

\textit{It is my view as an engineer, with more than 20 years experience in traffic safety research and accident reconstruction, that the great majority of accidents would not have occurred if the legally mandated rules of the road had been followed.}\textsuperscript{46}

The argument that in most cases fault is too difficult to determine is invalid; in the few cases where it is difficult to determine, the use of experts clarifies the situation. It would not serve the interests of society to abandon the tort system in automobile accidents for the benefit of a few cases where fault cannot be

\textsuperscript{40} Keeton, \textit{Is There a Place for Negligence in Modern Tort Law?} 53 Va. L. Rev. 886, 890 (1967).

\textsuperscript{41} See, e.g., O'Connell, \textit{The Road Ahead: For Automobile Insurance}, 1 Conn. L. Rev. 22, 23 (1968).


\textsuperscript{43} Keeton, \textit{ supra} note 40.

\textsuperscript{44} Townsend, \textit{Basic Inequalities of Keeton-O'Connell}, 17 Defense L.J. 133, 136 (1968).

determined accurately. As for the argument that the harsh application of principles of contributory fault prevents many deserving victims from recovering, a system of comparative negligence, which is discussed below, would seem to lessen the harshness of the present system.

The proponents of the fault system argue that determination of fault provides a necessary deterrent effect in our society. One commentator has stated that "the rule of liability based upon fault is an important contribution to a social system such as ours where individual responsibility plays an essential role." On the other hand, the critics of fault say that the deterrent effect of legal liability is minute when compared with other deterrents such as fear of injury, fear of criminal sanctions, and fear of losing one's license to drive. They point out that liability insurance itself seriously undercuts the supposed deterrent effect of judgments since it shelters tortfeasors from the very economic consequences that are supposed to be the principal deterrent.

Those who favor fault, however, feel that possession of liability insurance itself demonstrates acceptance of individual responsibility. Under a no-fault system drivers will see accidents (since they would be accepted as inevitable) as a social responsibility, rather than a personal one. They further believe that abdicating the role of driver responsibility under the no-fault plans would diminish the importance of the rules of the road in accident prevention. Under the present system, any incentive to drive aggressively is effectively checked by an increase in insurance costs.

The validity of either of these arguments is very difficult to determine. Yet no matter what system is in effect—fault or no-fault—there is, one must admit, a natural tendency to avoid accidents. In our society a car is a necessity, and to damage it is, at the very least, inconvenient. Also, under the present system a driver's rates are affected by his driving record, he risks excess recoveries, and he has to bear the loss of his own damage and injuries if he is at fault. He can only minimize this risk by increased care and caution.

II. COURT CONGESTION AND DELAY

Another criticism leveled at the fault system is that it creates court congestion and delays victims of automobile accidents from receiving compensation for their losses. It has been claimed that automobile accident cases are two-thirds or more of a court's civil jury docket, and that it takes at least two years between the filing of a complaint and the assignment of a case for trial. This delay is said to cause many victims to settle for inadequate compensation without,

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46 See part XI infra.
48 Franklin, supra note 3, at 781; Keeton, supra note 40, at 889-90.
49 Foley, supra note 30, at 343-49; Lawton, supra note 45, at 349-52; Morrow, supra note 47, at 205-06.
50 Cahill, supra note 5, at 4; Keeton, supra note 36, at 14.
51 Keeton, Elimination of Fault Principles and Collateral Benefits — Keys to Basic Protection, 3 TRIAL 15, 16 (Oct./Nov. 1967).
52 Cahill, supra note 5.
or against, the advice of counsel. The solution under a no-fault system is that, since there is no need for a determination of legal liability, these cases will be removed from the courts.

It now appears rather conclusively, however, that automobile accidents cannot be blamed for the court congestion in this country. One expert states that serious congestion and delay is confined only to fifteen metropolitan areas in six states, while thirty-two states have no court delay whatever. Moreover, automobile litigation makes up but 15% of our court dockets nationwide; 94% of automobile liability claims are settled without any suit being filed; 4% result in suits that are settled without a trial; and only 2% result in a trial with a final verdict. More than two-thirds of all claims are settled within three months and 90% of the cases are closed within a year. Less than one-fourth of the civil cases filed and tried in state courts are automobile liability suits. In courts where congestion does exist, it is often attributed to the increase in criminal cases. Evidently the Department of Transportation’s investigation indicates that delay is often due to the priority given the trial of criminal cases and the voluntary delay of parties filing lawsuits. Where congestion and delay do exist, the appointment of new judges and the updating of facilities and administrative procedures serve to eliminate most problems.

Not all delay can necessarily be considered evil. Often the delay in bringing a case to trial is due to the amount of preparation time needed by both parties. Accidents must be investigated, doctors must be able to examine and treat their patients in order to determine the nature and extent of loss, and medical costs and wage losses are sometimes unascertainable until many months after an accident.

Although one of the prime objectives of “first party” insurance plans is to reduce court congestion, there are those who feel these plans will in fact compound the existing congestion and delay. The authors of no-fault insurance believe that under their system the victim of a traffic accident will simply notify his insurer of his “net economic loss” and be compensated immediately. There

53 Id.
54 Barbeau, Court Delay and the Auto Accident Claim, 7 FOR THE DEFENSE 58 (Oct. 1966); Ross, DRI Studies Refute Court Delay Claims of Critics, 36 INS. COUNSEL J. 46 (1969); Court Congestion — A Localized Urban Problem, 8 FOR THE DEFENSE 49 (Sept. 1967); Automobile Torts Not Cause of Court Congestion, 8 FOR THE DEFENSE 57 (Oct. 1967); Basic Protection — Diminished Justice at High Cost, 8 FOR THE DEFENSE 73 (Dec. 1967); Injury Lawsuits Not Sole Cause of Delay, 9 FOR THE DEFENSE 49 (Sept. 1968); Auto Jury Cases Take Least Time to Try, 9 FOR THE DEFENSE 53 (Sept. 1968).
58 Martin, supra note 57.
59 Martin, supra note 57.
62 See, e.g., More Judges, New Methods Solve Delay in Connecticut, 9 FOR THE DEFENSE 17 (March 1968); Basic Protection — Diminished Justice at High Cost, 8 FOR THE DEFENSE 73 (Dec. 1967).
63 Julien, supra note 56; Kemper, Keeton-O’Connell Plan: Reform of Regression? 3 TRIAL 20, 22 (Oct./Nov. 1967); Townsend, supra note 44, at 144-46.
will be no delay in payment, no difficult determination of fault, no court claim
and no unjust recovery.

Under a "first party" system, however, there are still claims which may arise
and require court adjudication. When an injured party contacts his insurer, the
latter may very well contest the claim: were the medical expenses necessary and
reasonable, were they actually incurred by the claimant, would the money sought
as lost income actually have been earned, and is the claimant entitled to any
benefits from his automobile insurer (as his expenses may have been reimbursed
from collateral insurance sources)? Where agreement cannot be reached on
such issues, there is thus a potential lawsuit on the insurance contract.

It has also been pointed out that no-fault insurance would more than
double the total number of insurance claims. The sheer number of claims would
certainly engender disputes, and the traditional court remedies will have to be
maintained as the means of enforcing the provisions of the coverage. Thus, courts
of competent jurisdiction will, for example, have to issue orders compelling
physical and mental exams, occupying their time and turning them into admin-
istrative tribunals.64

The argument that automobile accidents are responsible for court congestion
and delay cannot be sustained as a valid reason for removing the automobile
accident case from the courts. Where court congestion does exist, such procedures
as arbitration of small claims may be tried. Pennsylvania has had a great deal
of success with the use of arbitration in automobile accident cases where the
amount in controversy is $3,000 or less.65 But at the heart of this entire system
is the preservation of trial by jury and the absolute right of appeal by any party
not satisfied with the arbitration result.

III. RECOVERY FOR INTANGIBLE LOSS—PAIN AND SUFFERING

The practice of allowing recovery for the intangible loss of pain and suffering
is often criticized as being a major source of waste and injustice in the present
tort system.66 Pain and suffering, it is contended, is too difficult to determine,
there being no definite standards by which to gauge it and allow proper compen-
sation. No-fault insurance proposes to compensate automobile accident victims
for tangible, economic losses only, by completely denying or limiting recovery for
pain and suffering. Senator Hart's proposed plan denies all such recovery.67

The reasoning put forth in favor of denying recovery for pain and suffering
has been severely criticized. Opponents contend that the right to recover for
pain and suffering in a motor tort case is not eliminated because pain and
suffering is incapable of measurement. Rather, they believe recovery is restricted
merely because no-fault insurance is designed to cheapen the cost by cheapening
the product.68

The courts have consistently held that pain and suffering is a proper element

64 Green, Basic Protection and Court Congestion, 52 A.B.A.J. 926 (1966); Townsend, supra note 44, at 144.
66 See, e.g., Hart, supra note 29; Keeton, supra note 36.
68 See, e.g., A Drastic Legal Change, 6 TRIAL 22, 23 (Oct./Nov. 1970).
of damages. In fact, verdicts awarding medical damages without a simultaneous award of damages for pain and suffering have been held to be invalid. Thus, the right to recover for pain and suffering is a recognizable legal right which should not be abandoned too quickly.

In any event, it is not necessary to adopt a no-fault system in order to effectuate a denial of recovery for pain and suffering. Should the public decide it wants a lower cost, insurance companies could provide it under the present system by simply not providing pain and suffering coverage. Therefore, the alleged waste and injustice in pain and suffering awards is not really a legitimate argument for abolishing the concept of fault as the determinant of loss bearing in automobile accidents.

IV. LIMITS ON RECOVERY FROM COLLATERAL SOURCES

No-fault automobile insurance plans propose to allow recovery for the net economic loss of a victim less any recovery from collateral insurance sources. Allowing such recovery is said to constitute waste in the present system. This is another method to eliminate one risk of loss which an insurer must insure against. If the amount payable to the victim of a traffic accident is reduced by the amount he recovers from collateral sources, insurance companies will be able to provide insurance at a lower cost to the public. A provision such as this would have a substantial impact on the American public, as more than 83% of the people in the United States are covered under independent, private hospitalization insurance.

The critics of the present system believe that allowing recovery from both collateral sources and automobile insurance provides a double award, allowing the victim to make a profit and creating waste in the reparations system. Although this may be a valid point, even these critics claim that many times victims aren’t compensated at all or are undercompensated. However, under the present system if a victim is undercompensated or receives no compensation at all he has the opportunity to turn to his collateral benefits to better repair his loss. No-fault plans would require him to rely on this alone.

The authors of no-fault insurance claim that their plans will make motoring pay its way. Thus, as part of the price of operating a motor vehicle, everyone must purchase a certain type of insurance coverage and forgo certain benefits, such as being able to sue in tort and recover for pain and suffering. But, under

72 Hart, supra note 29, at 29.
73 Kuhn, supra note 33, at 9; Sargent, No Miracle Cure, 6 TRIAL 30 (Oct./Nov. 1970).
75 Id. at 185. See also Hart, supra note 29.
76 Keeton, supra note 36.
the no-fault plans, the victim of an accident is forced to utilize his personal or group accident and health insurance coverage to cover his expenses before no-fault pays anything. Since most people are covered collaterally, isn't the burden created by motoring accidents at least partially shifted from motoring to the health and accident field? Automobile insurance would become secondary coverage in an automobile accident and this may result in serious inequities.\textsuperscript{77}

Whether or not there would be such a result remains open to question. However, there is an obvious opportunity for fraud where reliance must be made on a good faith disclosure of collateral sources. The likelihood of detailed investigations being needed to search out collateral sources could conceivably result in a cost increase rather than a deduction. Moreover, it does not offend any tenet of justice to allow one who pays a premium for coverage to be entitled to recover under the policy—regardless of whether or not he is also covered under another insurance policy. When one purchases something he should be entitled to benefit from that which he has purchased.

Again, a denial of recovery under an automobile insurance policy where collateral benefits are available could be accomplished under the present “third party” tort system. In fact, some automobile insurance policies today are written in such a manner. Should the public decide it desires a lower automobile insurance premium, this can, therefore, be accomplished without changing the present system.

\section{V. The Problem of the Uninsured Motorist}

Another complaint against the present automobile liability reparations system is that in an accident involving an uninsured motorist his victim will go uncompensated if the uninsured motorist cannot pay the claim against him. Under a “first party” system the injured party recovers from his own insurer and it does not matter whether or not the other party has insurance. In addition, such systems are compulsory insurance systems.

Although the frequency with which uninsured motorists are involved in automobile accidents is not known, it is estimated that 90\% of the cars on the road are insured.\textsuperscript{78}

Some states have attempted to handle the problem of the uninsured motorist by making automobile liability insurance compulsory.\textsuperscript{79} Most other states have enacted financial responsibility laws which require a driver without liability insurance to be able to post security or some guaranty of compensation in order to avoid losing his driver’s license.\textsuperscript{80} Another approach, and perhaps the better one from the injured party’s standpoint, has been the development of uninsured motorist coverage. Many states have enacted statutes requiring insurers to

\textsuperscript{77} Brandau, \textit{supra} note 13, at 605-08; Ghiardi & Kirchner, \textit{Automobile Insurance: The Rockefeller-Stewart Plan}, 37 INS. COUNSEL J. 324, 325 (1970).


\textsuperscript{80} See, e.g., 15A Iowa Code Ann. \S\S 321A.1 to 321A.5 (1966).
offer uninsured motorist coverage. In some states the coverage is mandatory, and in others the insured has the right to reject the coverage. Under such statutes, if the party at fault is uninsured, the injured party's own insurer will pay the loss.

The problem of the uninsured motorist can be dealt with under each system. Under a "third party" system, an insured can purchase such coverage in addition to his liability coverage. With a mandatory "first party" system, each insured, being required to purchase the insurance, just looks to his own insurer for recovery without regard to fault and irrespective of whether the other party is insured. This problem may thus be handled under either system, but the question as to which is the best system for allocating the burden of loss in automobile accidents remains unanswered.

VI. INSOLVENT COMPANIES AND ARBITRARY CANCELLATION OF POLICIES

The insolvency of an insurance company and the cancellation of policies are evils attributed to the present fault system. It is claimed that there are more than 300,000 policyholders and victims of automobile accidents who hold pending claims in excess of one-half billion dollars against total assets of insolvent companies of less than $25,000,000.

People who have several accidents are placed in assigned risk categories, have their policies cancelled, and then must rely on companies specializing in high risk insurance. These are the companies which most often become insolvent. Certainly if insurance companies are able to arbitrarily cancel or not renew policies, forcing people to purchase from high risk companies which may not be able to provide any type of protection, reform is needed.

It cannot be seriously suggested, however, that the abolition of the fault system alone will have an effect on insolvencies and cancellations. Although the authors of no-fault insurance might include provisions in their plans which are designed to eliminate these evils, these provisions exist independently of the "no-fault" concept and could be adopted just as well under the present system.

Some states have enacted non-cancellation laws to protect the motoring public. Iowa, for example, has recently enacted a law which provides that no automobile insurance policy may be cancelled other than for nonpayment of a premium or for loss of a driver's license. Under this law, a policyholder must always receive notice of cancellation and a written reason for the cancellation. The Iowa law further provides that no insurer may fail to renew a policy unless notice is given to the policyholder. In the case of either cancellation or non-renewal, the policyholder may request a hearing before the Commissioner of Insurance. If he does make such a request, the insurer has the burden of proving that the cancellation or non-renewal was reasonable. A statute such as this provides that cancellation or non-renewal will not be arbitrary.

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81 For a general discussion of the approaches taken by many states in this area see Graham, Recent Interpretation of the Uninsured Motorist Endorsement, 4 THE FORUM 160 (1969).
82 Id.
83 Hart, supra note 29, at 28; Cahill, supra note 5, at 3-4.
84 IOWA CODE ANN. Senate File 203 [1 Legislative Service 25 (Feb. 12, 1970)].
It is also possible to provide that claims against an insolvent company will be paid without doing away with the present tort liability system. Again taking Iowa as an example, a state Guaranty Association has been established by statute which will cover all claims, up to the face amount of the applicable policy, made against an insolvent automobile liability insurance company.\footnote{Iowa Code Ann. Senate File 1102 [2 Legislative Service 67 (Feb. 20, 1970)].} The funds to carry this out are assessed from each insurer doing business in the state.

VII. DELAY IN PAYING CLAIMS

Another criticism leveled at the present tort system is that oftentimes those entitled to compensation have to wait too long to be reimbursed.\footnote{Hart, supra note 29, at 29; Keeton & O'Connell, supra note 74, at 187.} Under the present system the injured party must wait until legal liability has been established before he can recover his losses. In the meantime he suffers financial hardship while paying the bills incurred because of the accident. No-fault insurance proposes to do away with the determination of legal liability so that the injured party recovers his net economic losses as they occur, rather than waiting for one lump sum payment.\footnote{Id.} This is perhaps the most inviting feature of the no-fault plans, but again it is possible to accomplish this under the present system.

Insurers now voluntarily engage in advance payment programs (payment in advance of a determination of legal liability) to get needed money to claimants without delay.\footnote{Des Champs, Advance Payment Techniques, 7 For the Defense 57 (Oct. 1966); Graham, Advance Payment in Personal Injury Claims, 3 Forum 208 (1968).} One writer, in fact, reports that several years ago most of the principal carriers operating in the liability field held a meeting with the net result that companies writing more than 80% of the liability business adopted a program of advancing payments in liability cases.\footnote{Graham, supra note 88, at 209.} It is estimated that now literally hundreds of thousands of claimants annually are being offered the benefits of this new technique.\footnote{Lemmon, Ingredients for Reform, 6 Trial 56, 58 (Oct./Nov. 1970). One company reported it was paying over $1,300,000 a month in advance payments.} Thus, as soon as an automobile accident occurs involving injury or damage, the insurer may immediately obligate itself to pay medical, hospital, nursing, drug or property damage costs, and lost income in the case of a wage earner or the cost of domestic help in the case of a housewife. When there is such an advance payment, the injured party will only be asked to sign a receipt, stating that the payments made are to be credited toward any future settlement or judgment. In the past, such an advance payment was often considered an admission of legal liability, but now several courts have held that advance payments are merely to be credited toward any future settlement or judgment and are not an admission of liability.\footnote{See, e.g., Edwards v. Passarelli Bros. Automotive Serv., Inc., 8 Ohio St.2d 6, 221 N.E.2d 708 (1966); Byrd v. Stuart, — Tenn. —, 450 S.W.2d 11 (1969).} Another suggested reform in this area would be to offer optional no-fault hospital-medical cost and income loss or disability protection in automobile insurance policies. With these coverages, payments would be made promptly to any injured victim, regardless of who was at fault; but the fault principle could
continue to be utilized to allocate the costs to the insurance of those causing the accidents, through intercompany arbitration after the claims were paid.92

Thus, under the present tort system advance payments may be provided to victims of automobile accidents in order to assure immediate compensation. Further, if a no-fault plan were adopted, there would be at least some delay while the injured party waited for the insurer to determine if collateral benefits were available.

VIII. THE HIGH COST OF INSURANCE

The biggest complaint the average consumer probably has against automobile insurance is that it costs too much. Nationwide average premium rates for "regular" liability coverage have increased 55% during the past ten years.93 Automobile insurance may cost the average insured with one car several hundred dollars a year, but unlike other expensive products, he can derive no ordinary physical benefits from it.

The critics of the fault system say that for every $2.20 paid in, only $1.00 is returned to victims in benefits. The remaining $1.20 is chewed up in insurance overhead and lawyers' fees.94 They propose that by eliminating the fault system, money will not be wasted on lawyers' fees, litigation fees, administration costs, investigation expenses, duplicate recovery and an indeterminable award for pain and suffering.95 A large rate reduction is envisioned under a no-fault system.96

On the other hand, those who favor retention of the fault system look to the compulsory aspect of the no-fault plans and examine the history of compulsory insurance in Massachusetts and New York, claiming that these two states have the highest automobile liability insurance rates in the nation.97 The compulsory nature of no-fault insurance obviously requires government intervention in the insurance business—a proposal which is not readily accepted by the insurance companies.

Under the present tort system, the national average premium for the basic limits on bodily injury liability insurance, medical payments, uninsured motorists coverage and increased liability limits is said to be $4.56 monthly per insured car.98 That would not seem to be such a high price to pay for the benefits of insurance coverage. Also, the authors of no-fault, in arriving at their figure of $1.00 returned for every $2.20 paid in, do not seem to consider the fact that there are investigation and legal defense services provided to the insured as a "returned" benefit.

It should also be noted that the consumer's dollar is certainly not being

95 Keeton & O'Connell, supra note 74, at 188.
96 See generally Brainard, Prices and Politics, 6 Trial 24 (Oct./Nov. 1970).
97 McLean, Our System of Justice Is a Strong Bulwark, 3 Trial 32, 33 (Oct./Nov. 1967).
98 Id. See also Auto Insurance Rate and Delay Charges Found Untrue, 9 For the Defense 18 (Mar. 1968).
taken in excessive company profits. The average profit of the property and liability insurance companies during the period 1955-1967 was only 3.6%.\textsuperscript{99} From 1956 to 1966, automobile liability premiums went up at approximately the same rate as the consumer price index, and from 1947 to 1967 personal income in this country increased enough so that the portion of individual income spent for automobile liability insurance actually dropped during that twenty-year period.\textsuperscript{100} Whenever the high cost of insurance is attacked, no consideration is given the fact that the cost of hospital care, medical treatment, automobile repair, and the average hourly wage—all of which make up the typical automobile accident claim—have also increased rapidly in recent years.\textsuperscript{101}

The level of the present cost of insurance is due to the fact that perhaps as much as 55\% of the automobile insurance premium dollar goes to pay for property damage coverages, including damage to automobiles.\textsuperscript{102} Some figures estimate that as much as two-thirds of the premium dollar is spent for car damage coverages, and more than ten times as many people incur damage to their cars as incur personal injuries.\textsuperscript{103} Truly, this is an area of great expense which no-fault insurance does not cover. Under a no-fault system the vehicle owner would have to buy collision and comprehensive coverage to ease the burden of shoulder-ing automobile repair costs, as this cost is not included in the “savings” of the plans. The design of cars must be improved, not the reparations system, in order to control mushrooming automobile repair costs. Something must be done on the accident prevention level, under any system, in order to reduce the cost of insurance.

Moreover, there may not be any real savings realized with a no-fault system. One study projected savings for the average New York State policyholder, under a no-fault system, ranging from a low of $.80 to a high of $1.75 per month.\textsuperscript{104} Is such a modest saving worth abandoning the entire fault system? It is said that M. G. McDonald, chief actuary for the State of Massachusetts, had estimated, prior to passage of such a law in his state, that a no-fault system there would actually increase the cost of the coverage required by statute from 19\% to 35\%.\textsuperscript{105} And it is claimed that a six-month study conducted by the American Mutual Insurance Alliance to determine the cost of the AIA plan forecast an increase of 29\% in automobile insurance premiums under AIA no-fault.\textsuperscript{106}

These estimates of a possible cost increase in a plan designed to cut the cost of insurance are due to several factors. As no-fault would pay many who weren’t paid before—namely those who were at fault—there will be an increase


\textsuperscript{100} Martin, supra note 57, at 488.

\textsuperscript{101} Worthington, Regulation: A Consumer Decision, 6 TRIAL 43, 44 (Oct./Nov. 1970).

\textsuperscript{102} Ghiardi & Kirchner, supra note 77, at 326.

\textsuperscript{103} Lemmon, supra note 90.

\textsuperscript{104} Kemper, supra note 63, at 21.

\textsuperscript{105} Kuhn, supra note 33, at 5; Sargent, Disaster Walks in Guise of Social Reform, 3 TRIAL 24, 25 (Oct./Nov. 1967).

\textsuperscript{106} Actuarial Study Challenges “No-Fault” Cost Savings, 10 FOR THE DEFENSE 43 (June 1969).
in the number of claims made. Estimates as to increased claims vary from 40% to 200%. Such an increase will certainly result in an increase in the overhead expenses necessary to handle these claims. It is possible that fraud in concealing collateral benefits and the institution of periodic payments will place a heavy burden on insurance companies and increase administration and investigation costs.

The likelihood of fraud is inherent in the no-fault plans since they provide for recovery of a loss sustained by an insured arising out of operation or use of an insured vehicle. If an insured can connect his injury, in any manner, to the use or operation of his car, he will be able to recover and there will be no adversary party to contest his claim.

Furthermore, under a no-fault system every motorist will bear the burden created by the poor driver. The system would allocate cost on the basis of the amount of injury or damage suffered, rather than caused, by each individual. Either everyone would pay the same premium, the good as well as the poor driver, or the rates of those sustaining the most damage would be increased, since causation or fault is no longer determined and allocated a higher cost. The biggest risk to the insurer would be the party who sustained the most damage.

Again, no-fault plans may be very expensive for those who will be unable to receive its benefits because they are already compensated from another source. As mentioned above, a no-fault system would make automobile insurance a secondary coverage since collateral benefits must be looked to first. Since the loss allocation principle of no-fault is that motoring should pay the cost, this means many drivers will be forced to contribute premiums to automobile insurance companies when they know there is little possibility that they will ever collect from the insurance company in the event of an accident.

Moreover, it appears that any savings obtained under the proposed no-fault systems would only be obtained through a reduction in benefits. The victim of an automobile accident under these plans forgoes his common law rights to sue in tort, have a jury trial and recover for pain and suffering. In return, he receives a promise of lower insurance cost and assured payment of his out-of-pocket losses where no other insurance applies.

The critics of the fault system tend to treat automobile accidents as inevitable, and they give very little thought to accident prevention. Yet, fewer accidents would mean less damage, fewer claims and fewer litigated cases. Perhaps it would be well to shift the reform emphasis and establish some meaningful accident prevention program. Vehicles could be made safer and more durable, and the drunk driver could be removed from the road. A society which developed the automobile should have the technology to make travel in the automobile safe and thereby reduce the economic cost of automobile ac-

107 Bailey, Fallacies Overshadow Validity of Plan's Cost Estimates, 3 TRIAL 45, 46 (Oct./Nov. 1967).
109 Keeton, supra note 36.
110 Kuhn, supra note 33, at 9.
111 See generally Keeton, supra note 40.
cidents. The public does not need a cheap premium for less insurance. It needs full protection.

IX. CONSTITUTIONALITY OF NO-FAULT INSURANCE

The constitutionality of the various no-fault plans has been, for the most part, ignored by both the critics and the proponents of the fault system. The problem arises here in connection with the requirement of the plans that a motorist waive his common law tort rights as a condition to using the public highways.

In discussing the constitutional impact of Senator Hart's proposal which provides for federal regulation of insurance, one is first met with the Supreme Court's decision in United States v. South-Eastern Underwriters Association. In that case, the Court held that insurance was a proper subject of federal regulation under the commerce clause of the Constitution, even though regulation had previously been left to the states. Congress, in reaction to this decision, passed the 1945 McCarran-Ferguson Act, which returned to the states the jurisdiction to regulate and supervise the insurance industry. This Congressional action, however, is usually not thought to be a permanent abdication of federal responsibility. Senator Magnuson of Washington, for example, states that the legislative history of the Act indicates that Congress was only making a conditional delegation of authority to the states, reserving the right to re-establish a federal role if such action were needed to protect the public interest. It thus appears that Congress could rely on the commerce clause in order to regulate automobile insurance.

If, however, the power to regulate commerce is to be relied upon as the Congressional foundation for legislative reform, then Congress must be able to relate the need for reform to the welfare of the national economy. If this is the needed method of sustaining federal reform in the insurance field, one must ask whether compensation for automobile accident losses is really rooted in considerations having to do with the welfare of the national economy. It would appear that the complaints against the present system are most naturally and obviously related to humanitarian considerations and the idea of justice, and not to the national economy. In fact, it is very questionable whether the shortcomings in the tort system for administering automobile accident compensation have very much at all to do with the state of our national economy. Factual documentation is not yet available to support a judgment that the evils in the present system have a substantial adverse bearing on the national economy. Thus, it would be very specious reasoning to predicate federal action in this area on the commerce clause.

113 322 U.S. 533 (1944).
114 Id. at 552-53.
115 Id. at 534.
117 Magnuson, Probe of Abuses, 3 TRIAL 14 (Oct./Nov. 1967).
119 Id. at 68-93.
Another constitutional problem arises under no-fault insurance because the victim of an auto accident has no recourse to a jury trial to determine whether and to what extent he should be compensated. The seventh amendment to the United States Constitution guarantees to every individual the right to trial by jury in all suits at common law where the amount in controversy exceeds twenty dollars. Although this right has not been held to apply to state action, the constitutions of practically every state also provide this right. The Supreme Court has held that the national police power does not reach so far as to permit the legislature to demand the sacrifice of a constitutionally protected right in exchange for the conferring of a valuable privilege. The valuable privilege here is the privilege to drive on the public highways.

Thus, several writers believe that the seventh amendment is a serious obstacle to federal legislation dispensing with jury trials for determining eligibility for compensation in automobile accidents. It is felt that the only way to curtail this right is by constitutional amendment.

Workmen's compensation laws guarantee recovery to most victims while limiting the right to trial by jury. Yet this type of compensation plan is made acceptable because the injured workman, in the usual case, is injured by an inanimate machine—a machine which has no capacity to be careful or careless. Moreover, unlike a no-fault system, the injured workman recovers payment from the party most closely associated with the injury—his employer or his employer's insurer—and at the same time retains a remedy for full damages from a tortfeasor other than his employer.

Another possible constitutional problem is encountered when one considers the possible conflicts which will arise between state constitutional and statutory provisions and the proposed federal law. For example, the Louisiana Civil Code provides: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." (Emphasis added.) Many state constitutions and statutes contain such a right to legal redress of injury. These state provisions forbidding any limitation on the right to recover damages for injury or death will thus clash with any federal proposal to limit these rights. The supremacy clause of the Constitution would have to be relied upon to support federal action which would compel state officials to administer a law which the state's courts would have to rule invalid under the state's constitution or laws. The constitutional propriety of this has also been placed in doubt.

120 U.S. CONST. amend. VII.
121 E.g., Wis. CONST. art. I, § 5: "The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy . . . ."
123 See, e.g., Sands, supra note 118, at 92; Kuhn, supra note 33, at 12.
124 Sands, supra note 118, at 91.
126 Markus, As I See It, 6 TRIAL 70, 71 (Oct./Nov. 1970).
128 For a general discussion of state law in this area see Ruben & Williams, The Constitutionality of Basic Protection, 1 CONN. L. REV. 44, 45 (1968).
129 Sands, supra note 118, at 91.
130 U.S. CONST. art. VI, § 2.
131 Sands, supra note 118, at 91.
X. Public Desire for No-fault Insurance

Although the public may have complaints in regard to the present liability reparations system, it is important to try to gauge whether society desires reform in the shape of a no-fault system. It is possible to see the trend to strict liability in products liability cases as a sign of society's desire to shift the focus from the defendant and his conduct to the victim and his plight. From the results of surveys which have been conducted to date, however, it appears that the public is unwilling to do away with fault as a basis for determining who should bear the burden of an automobile accident. For example, a Minnesota study of persons who had served on a jury indicated that they favored retention of the fault system. Another poll, conducted by the Minneapolis Tribune, showed that 60% of those surveyed favored the fault method in determining reparations in automobile accident lawsuits. And as might be expected, a poll of automobile insurance agents showed that they were opposed to the adoption of a no-fault system.

The largest study ever done on this subject was a nationwide survey by State Farm Automobile Insurance Company, the nation's largest automobile insurer. State Farm surveyed its eleven million policyholders and received four million responses. Of those responding, 94% favored the present fault system. The group likewise favored recovery for pain and suffering.

In the course of the study by the Department of Transportation, a survey of public attitudes toward automobile insurance was conducted. Heads of car-owning families were asked whether they were satisfied with auto insurance; 65% expressed satisfaction.

Another study, conducted by Market Facts, Inc., indicated a majority of those polled disapproved of no-fault insurance.

The results of these initial studies hardly constitute a mandate to the legislatures to abolish the present system of law and insurance and venture into the unknown.

XI. Conclusion

Having examined the various criticisms of the fault system and the various reasons put forth for changing to a no-fault system, one is able to conclude: fault is not ordinarily difficult to determine; the present tort liability system is not the reason for court congestion and delay; and reduced cost, uninsured motorist protection, protection against cancellation and insolvency, and advance pay-
ments can all be handled under the present system as well as, or better than, under a no-fault system.

The no-fault advocates have misconstrued the purpose of automobile liability insurance. It is not the primary intent of liability insurance to guarantee that all who are injured or killed on the highway will be compensated irrespective of the circumstances. Its purpose is instead to protect the insured from the claims of a third party for which he may be found legally liable. Thus, a change to a no-fault system not only changes the tort structure, but it changes the fundamental purpose of liability insurance as it presently exists. In addition, such a change would require the government to compel business to sell a different commodity than it now offers. Is this really the direction in which we wish to move?

On the other hand, what advantages does the present system hold out to society? It has been suggested that, at the very least, the present system is established and well understood. Moreover, although claimed by some to be an element lacking in the present system, justice is probably best served by the present tort liability reparations system in automobile accidents. Under our adversary system, a person who has a claim for an injury received in an automobile accident is compelled to charge that another person was responsible for the injury occurring. With a no-fault system the loss need only arise out of the ownership, maintenance or use of a motor vehicle; and recovery is gained from one's own insurer regardless of fault. There is no adversary party who may challenge the claim and require proof of the loss. Also, it seems that true basic protection is afforded under the present system by means of: cross-examination, personal observation of witnesses and counsel by the judge and jury, discovery procedures (such as the right to have a claimant examined by physicians), rules of evidence which are calculated to insure truth and fairness, and the right to appeal.

Whenever a legal claim is asserted against anyone, whether it be an individual or an insurance company, it is most important to ascertain the facts. Someone must ultimately do this. There are those who believe the jury is best able to do so:

> [A]ll judgment is... basically a matter of experience and the combined experience of 12 persons is bound to have more breadth and scope than the experience of any one person, however learned, fair and impartial.

> ...[T]hat jury [is] the finest arbiter of facts that can be had on earth under any system of justice.

The idea of compelling someone to give up his right to a jury trial and to certain common law remedies is not acceptable. It is possible to bring about many needed reforms in automobile insurance without denying basic rights. In fact,
many suggestions for improvement have been made within the present system.\textsuperscript{143} Highway safety must be improved in order to prevent accidents and save lives; more judges must be appointed and procedures adopted for more efficient use of legal effort; the sometimes excesses in the contingent fee system must be regulated; the adoption of advance payment programs must be allowed without any effect on the determination of liability; and awards for pain and suffering must be regulated by formulating a plan which will serve as a guide to the appraisal of fair compensation for this element of damage. Also, statutory temporary disability insurance (programs generally designed to provide wage loss payments for those temporarily disabled) would serve to alleviate the problem of those who receive no compensation.\textsuperscript{144}

Nationwide adoption of a comparative negligence system, such as is in effect in Wisconsin,\textsuperscript{145} would serve to alleviate the harsh application of the principles of fault and contributory fault which sometimes leave deserving victims uncompensated. As one writer pointed out:

Where one party asks that another compensate him for an injury caused by their joint negligence, the most equitable solution of the problem would be to allow him to recover only that portion of the loss for which the other had been responsible.\textsuperscript{146}

Thus, under a comparative negligence system loss is distributed in relation to the degree of each participant's negligence or fault. The harsh application of fault and contributory fault principles is alleviated and the adversary system is left intact.

Those who worked under a system of comparative negligence say it does work with reasonable efficiency and ease.\textsuperscript{147} The Wisconsin system is both just and workable, based upon nearly forty years of practical operation and judicial interpretation.\textsuperscript{148}


\textsuperscript{144} Denenberg, supra note 92.

\textsuperscript{145} Wis. Stat. Ann. § 331.045 (1958) provides:

\begin{quote}
Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.
\end{quote}


\textsuperscript{148} Ghiardi & Hogan, \textit{Comparative Negligence — The Wisconsin Rule and Procedure}, 18 DEFENSE L.J. 557 (1969). It is claimed that in Wisconsin in 1964 only 5% of all accident claims took a year or more to reach trial, while 63% were settled within six months after the accident. Hold, \textit{Basic Protection for the Traffic Victim — The Keeton and O'Connell Proposal "Too Far or Not Far Enough."}, 35 INS. COUNSEL J. 120, 127 (1968). Hold, \textit{Critique of Basic Protection for the Traffic Victim — The Keeton-O’Connell Proposal}, 1968 INS. L.J. 73, 82.
In seeking reform we should heed the words of the Secretary of Transportation, John A. Volpe:

[The problem of motor vehicle accident compensation is far more complex and far less easily resolved than many appear to believe.

While the present system has its obvious faults, we should not hastily move to a system merely because it is new. Caution, common sense and consideration of sound public policy demand that we . . . move gradually in the direction of reform. . . .

. . . I am strongly persuaded that, in the long run, reform offers its best opportunities at the state level.149

The insurance industry should give prompt and adequate compensation to traffic victims, but it is not necessary to destroy the concept that persons should be liable for the consequences of their wrongdoing. No rush should be made toward unproven plans which deny basic rights.

James D. Friedman

149 Volpe, Tampering with the Tort System, 6 TRIAL 32, 33, 36 (Oct./Nov. 1970).