The Gathering Storm in Automobile Injury Compensation: A Workable Solution

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I. INTRODUCTION

Our system of compensating the victim of an automobile accident is ripe for reform. The attack is from all quarters. Though the ingredients of the final resolution are not yet evident, it is quite clear that some changes will be made—and soon.

The current assault has roots in the groves of academe. For, today, no discussion of the problem is complete without devoting major consideration to the book published in 1965 by Robert E. Keeton and Jeffrey O'Connell, Professors of Law at Harvard and the University of Illinois respectively. Entitled Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance,¹ their book is the result of a two-year study of automobile claims systems. A staff of twenty-two persons was employed, and the result is a book of colossal proportions. The problem has been studied before,² and other solutions have been offered. However the Keeton and O'Connell effort is unique in its depth and in the exhaustive detail of the proposed solution. No other planner has gone so far as to draft model legislation, whereas Keeton and O'Connell's proposed "Motor Vehicle Basic Protection Insurance Act"

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2. See section III A of this article.
is a complete package which covers forty pages of their book. It is ready for adoption by any law making body so inclined. In fact, several state legislatures are already considering the plan.

But academia is not the only source of unrest. "Public dissatisfaction" has manifest itself in the political arena. Congressional investigations have already begun, and many commentators feel that federal regulations of insurance are "in sight." It is not clear to what extent the pending federal intervention has been engendered by the Keeton-O'Connell plan. Perhaps both the plan and the investigations have grown from the same sources of discontent. But whatever the causal relationship, clearly the Keeton-O'Connell plan, and others like it, come at a time when the political power structure is highly receptive.

Though slow to react, the insurance industry has not failed to recognize the signs of change. Industry leaders resist federal control and the new plans, but there is an air of resignation in a surprising number of their comments. In fact, the question in the minds of many leaders seems to be not whether there will be increased federal regulation, but rather how the industry should "adapt" when increased federal regulation becomes a reality.

3. KEETON & O'CONNELL 299-339.
4. In Massachusetts the Keeton-O'Connell plan has been introduced in the form of a bill which the House of Representatives has already approved.
5. An investigation of the automobile insurance industry by the staff of the House antitrust subcommittee has been ordered by Chairman Emanuel Celler, (D., N.Y.). Miami Herald, July 21, 1967, at 1, col. 1.
7. Kemper, The Federal Signposts: Danger Ahead, 532 INS. L.J. 267 (1967). The author is president of Kemper Insurance Companies. The article begins: "Less than a year ago a wave of shock swept through the insurance industry when the chief executive of a large insurance company publicly expressed the thought that federal regulation might be preferable to regulation by the 50 states, and might be "inescapable." The immediate reaction can be expressed in one word: "Heresy!" The secondary reaction was much more interesting: all of us began asking ourselves if perhaps he was right."
9. See Expanding Great Society Programs Make Federal Control of Insurance Inescapable, supra note 6, at 50, where the president of the Royal-Globe Insurance Company is reported to have urged all segments of the industry to recognize possibility of federal control and (to have) suggested consideration be given now to adapt the industry to federal regulation without sacrificing independent and competitive phases."
10. Id.
Despite the obvious dangers involved, it seems that we are being forced to consider programs under which government will subsidize certain types of risks at
There is a remaining interest group much less resigned, but no less vocal, than the insurance industry spokesmen. These are, of course, the lawyers. Both plaintiffs' and defense lawyers are united in their opposition to governmental regulation and to any plan which would bar the injured party's right to sue in tort. Since the Keeton-O'Connell plan is most effective as a mandatory form of insurance (thus calling for governmental enforcement) and since it eliminates an injured party's right to sue unless he has an out of pocket loss of over $10,000 or "pain and suffering" over $5,000, most lawyers are opposed.

Thus the stage is set, and the battle has begun. The main protagonists are the insurance companies, the injured parties, the politicians, and the lawyers. The results of their struggle will affect anyone who drives a car or rides in one. The stakes are high indeed.

This paper will document the problems of the present system. The Keeton-O'Connell plan will necessarily be given major consideration. Weaknesses in the plan will be pointed out and a new suggestion offered. It is difficult to find any area of this field not already covered by Keeton and O'Connell's exhaustive book, hence the many citations to that source.

II. THE SEEDS OF DISCONTENT: PROBLEMS IN THE PRESENT SYSTEM

A. The Automobile as a Social Problem

At the most basic level, the discontent with our present automobile compensation systems can be traced to a growing belief that the accident toll on our nation's highways is a social problem. The magnitude of the destruction is one factor which leads to this conclusion.

According to the National Safety Council estimates for 1963, traffic accidents caused wage losses of 2 billion dollars, property damage of 2.6 billion dollars, medical expenses of 450 million dollars, and insurance overhead costs of 2.65 billion dollars.

These figures also provide an obvious answer to the question of why the operation of automobiles should be singled out for special treatment.
and why it might be necessary to depart from the traditional rules of tort liability in this area but not in others.

Another factor contributing to the prevalent feeling that the automobile is a social problem is the simple fact that in our march toward a welfare state more and more activities seem to demand government regulation. Hence, more and more activities suddenly become "social" problems. Medicare, social security, unemployment payments, and the myriad of other government programs nurture the current belief that "society" must compensate the individual for his losses. Of course, the widespread acceptance of private insurance has also contributed to this attitude. It is no wonder, then, that the people seem "ready" for a truly "compensatory" automobile injury reparation system.

B. The Fault System: Too Little, Too Late

The "compensation" phenomenon outlined above has not been limited to the social "program." With the emergence of strict liability, implied warranty, res ipsa loquitur, and various statutory remedies (such as workmen's compensation) this concept is now manifest in the very fabric of our law. Indeed, there are those who feel that "our common law system has become so nearly equivalent to a compensation plan that there is nothing left to argue about."15 And, once again, the very existence of insurance has had a profound effect:

(T)he spread of liability insurance has also meant an expansion of the concept of negligence, as judges and juries have found it increasingly easier to label a defendant's conduct negligent, secure in the knowledge that it will be an insurance company—not an individual defendant—who will pay.16

There is no question that the future of "fault" is tenuous indeed. Critics of the present system build upon the inefficiencies and unfairness of "fault" as a basis for establishing civil liability.17 "Fault" is the keystone of all the current problems and with its demise, so the story goes, there will be an end to court congestion, delayed lump sum payments, excessive administrative costs (including attorneys' fees), forced or pressured settlements, perjury, and high insurance rates. There is scarcely any evil in the present system which does not owe its existence to our stubborn insistence upon finding a man at "fault" before finding him liable. Thus, most all new compensation plans dispense with "fault" in one degree or another.

Keeton and O'Connell make several assaults upon the traditional

16. KEETON & O'CONNELL at 73.
17. Keeton and O'Connell say rather bluntly that "fault is an unrealistic criterion." KEETON & O'CONNELL at 21.
requirement that there be negligence precedent to liability. First is the difficulty of "proving" negligence in an automobile accident:

Who can name all the factors involved in causing the collision? Who can know or discover or describe the conduct of the parties involved? . . . If the picture by some miracle could be truly presented, who could pass a rational judgment in the allocation of responsibility as between the parties on any basis of fault? 18

Second is the tendency of a personal injury case to develop into a "theatrical extravaganza rather than rational, dispassionate hearings" 19 with the end result a "distortion" of the facts. Adding to this "distortion" is the delay between accident and trial and the impossibility of asking witnesses to "remember accurately the minutiae of the speed and placement of cars in complex incidents that occurred in a few split seconds years ago." 20

They conclude by mentioning the various legal doctrines which presently "impede" recovery 21 and the shortcomings of the common law system of figuring damages. Indeed, say the authors, "The common law system for estimating the amount of damages seems almost designed to prevent accurate measurement." 22

This controversy over "fault" as a basis for liability is, no doubt, the heart of the matter. A more detailed discussion will follow. At present, its pervasive impact is evident in its integral role in the two major "problems" which remain to be discussed—court congestion and delayed payment.

C. Court Congestion

Court congestion is often advanced as one of the major evils of the present system. 23

Already the effect on our courts of traffic victims' attempts to gain compensation is crushing. The crowded court dockets, particularly in large metropolitan areas, have long been a scandal. 24

Without doubt, court congestion is a problem; but there is some debate whether it is a problem quickly solved by a large scale elimina-
tation of automobile accident litigation. There is also some question whether court congestion is a major problem in all regions, or just "particularly in large metropolitan areas." The answers to these questions are crucial to the consideration of any new system of compensation.

D. Methods of Payment: Evils of the Lump Sum

If the injured party, or his heir, successfully navigates the Scylla of the "fault" system and the Charybdis of court congestion, he may then be the proud owner of a "judgment." Or, for one reason or another, he may have forgone the gamble of courtroom combat and settled in return for a "payment." In short, assume that he is now entitled to some compensation for his injuries. Even here the critics find much fuel for their fire.

The inability of the current system to accurately gauge damages, and hence payment, has already been mentioned. In addition, studies indicate that those with slight injuries are "promptly and vastly overpaid," (due presumably to the nuisance value of their claim) while those more seriously injured are "grossly underpaid and only after long delay."

Other evils of the present system lurk in its insistence upon a lump sum payment. Traditionally, settlements and judgments are for a lump sum amount. This is due to the desire of both the court and the insurance companies to terminate the incident with a certain degree of finality. But the prospect of but one payment puts an unfair pressure on the injured party to settle his claim. Keeton and O'Connell tell of the injured party with a potential claim who is forced to settle merely in order to support his family and to pay his bills. And the worst part is that he is forced to settle before he learns of the true extent of his injuries. The bargaining process they say, "places the victim of a severe injury at a cruel disadvantage."

The lump sum payment is also inadequate in that it includes "not only those damages that have already accrued but also a final estimate of all the damages that will mature in the future." The common law system is taken to task for its failure to provide something "sensible" like "periodic payments for losses as they accrue."

26. KEETON & O'CONNELL at 13.
27. See section II B of this paper.
28. KEETON & O'CONNELL at 37.
29. Id.
31. KEETON & O'CONNELL at 38.
32. Id. at 28.
33. Id.
34. Id.
Finally, in any discussion of the "problems" of common law damages, one always finds that familiar whipping boy—the "collateral source" rule:

[U]nder which—in spite of the fact that tort damages are primarily meant to compensate for loss suffered—the damages a tortfeasor must pay are not diminished by virtue of the fact that the claimant's loss has already been paid from some other source (such as Blue Cross coverage or sick leave pay). This means that a victim often recovers portions of his loss two or even three times over. In turn, it means that some of the insurance moneys available to reimburse traffic victims go to enrich victims already paid, rather than being available for victims not reimbursed from other sources.8

Hence, these are the "problems" which nourish the current discontent. All new proposals attempt to solve them in some manner, but the relative merit of any individual plan depends on the degree in which it successfully resolves these problems without creating new ones. We turn then to Keeton-O'Connell and "Basic Protection."

III. THE KEETON-O'CONNELL PLAN AND SOME OTHERS

This section will merely outline the basic essentials of some of the plans which have been advanced. Particular emphasis will be placed on the Keeton-O'Connell proposal. Of necessity, the treatment here will be brief. Those interested in a more extensive analysis are referred to the plans themselves or to Chapter IV ("Potential Models for Reform") of the Keeton-O'Connell book.86

A. Some Early Plans

Though the present mood seems particularly conducive to reform, reformation plans are not only of recent vintage. They date as far back as 1932 with the introduction of the Columbia Plan.87 This plan proposed strict liability for personal injuries caused by the operation of motor vehicles. It also provided for compulsory insurance. The plan was closely patterned after the recently adopted workmen's compensation laws. Payments were to be made periodically on the basis of scheduled benefits and there would be no compensation for pain and suffering. As in workmen's compensation, the plan was to be administered by a special board.

The Columbia Plan was never enacted into law in any jurisdiction, but it was the forerunner of a plan enacted in 1946 in the Canadian

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8. Id. at 34.
86. Id. at 124.
province of Saskatchewan. This plan also provided a "schedule" of payments. However, it differed from the Columbia Plan in that it provided for compulsory personal injury "loss" insurance which paid benefits to the injured party regardless of fault. But in contrast to the Keeton-O'Connell plan, the tort action of the injured party was preserved. The main objection to the plan then is that it does nothing to reduce the likelihood of litigation. In fact litigation is enhanced for:

(W)hat has a victim to lose by pressing his common law negligence action under a Saskatchewan plan? . . . (He) has everything to gain and nothing to lose by trying for the more generous common law damages including pain and suffering.

Another objection to the Saskatchewan plan is that the "loss" insurance is written by a government insurance organization. Also, the success of the plan in a "relatively rural, isolated area" like Saskatchewan does not necessarily indicate a similar success in the urban areas of the United States.

In 1965 the Special Committee on Personal Injury Claims of the State Bar of California proposed a compulsory form of loss insurance similar to the Saskatchewan Plan. The receipt of payments under this insurance would not "deprive the payee of his tort cause of action, if any; but the insurer should be reimbursed out of any tort recovery for payments made under this coverage." The Committee rejected the device of an administrative board, relying instead upon normal court channels, and no provision was made for a government monopoly of insurance.

The objections to this plan are familiar ones. Primarily, "this plan, by simply adding loss insurance coverage, would clearly entail greater costs than the present system." This is because most people would still want to press their tort claims despite recovery under the basic loss insurance because of "the more complete reparation available to common law, including damages for pain and suffering." Since California does not force a losing plaintiff to pay the defendant's attorney's fee (as in Saskatchewan), and since California has the contingent fee (as Saskatchewan does not) which makes litigation less burdensome for the plaintiff, it seems clear that there would be much more litigation in the United States, and hence more cost. Furthermore:

38. The Automobile Accident Insurance Act, 1946, 10 Geo. 6, ch. 11 (Saskatchewan).
40. Id.
42. Id. at 153-54.
43. Id. at 209.
44. Keeton & O'Connell at 151.
45. Id. at 152.
(W)ith the loss insurers being reimbursed from proceeds of tort suits, many loss insurers would be likely to encourage or even subsidize tort litigation on the part of their payees in order to recover the loss insurance benefits paid.46

Another plan to which this objection obtains was proposed in 1963 by a committee of the Ontario Parliament.47 The Ontario plan proposed a non-compulsory form of loss insurance providing for scheduled benefits. The plan has not yet been adopted. Once again, "costs" are the major hurdle:

[A]s in Saskatchewan and under the California Bar Committee proposal, given the low levels of loss insurance benefits . . . what has a victim to lose by pressing his common law negligence action under the Ontario Plan?48

Professors Keeton and O'Connell have not been the only academicians to urge reform. Leon Green of the University of Texas and Albert A. Ehrenzweig of the University of California have both proposed new plans. Professor Green proposes a compulsory loss insurance which completely replaces the tort action for motor vehicle injuries.49 Complaints would be referred to a master appointed by a judge.

Green's plan is criticized for its "incompleteness,"50 and also because there is no "incentive to induce an insurer to settle promptly . . . given the insurer's ability to delay settlement for bargaining purposes by contesting the amount of damages."51 This points up the major weakness in Green's plan which is a "failure to provide for periodic payments,"52 and which is, of course, one of the major criticisms of the present system.

Professor Ehrenzweig's plan53 differs from that of Professor Green in that it provides for compensation on a fixed schedule of benefits rather than on the basis of common law damages. Also, Ehrenzweig's plan is "voluntary" rather than compulsory. Payments would be made periodically, the coverage would be offered by private insurers, and the contract would provide for submitting disputed matters to arbitration. The benefits would not include compensation for pain and suffering, but the insurance would replace common law liability for injuries inflicted by insured vehicles.

46. Id.
47. Ontario Legislative Assembly Select Committee on Automobile Insurance, Final Report (March 1963).
48. KEETON & O'CONNELL at 158.
50. KEETON & O'CONNELL at 163.
51. Id.
52. Id.
Ehrenzweig, like Green, is criticized for "brevity and incompleteness." The "voluntary" nature of his proposal is also subject to criticism since the success of the whole plan is dependent on voluntary purchase of full aid insurance by the great majority of car owners . . . (and) without such mass participation, the evils of the present system—which Ehrenzweig so effectively castigated—would remain with us.

But enough of history. Past plans were discussed to provide a background for the Keeton-O'Connell proposal. The discussion was necessarily brief. Most emphasis was on the "objections" to previous plans because the Keeton-O'Connell plan is best understood as an attempt to surmount these prior shortcomings. The idea of "Basic Protection" is not new. Keeton and O'Connell have merely reshaped the clay into an attractive model which they hope is not subject to the same faults as previous plans.

B. "Basic Protection for the Traffic Victim": The Strongest Challenger

The intricacies of the Keeton-O'Connell plan are set out in the forty page "Proposed Motor Vehicle Basic Protection Act." But, basically, their proposal is this:

(1) Development of a new form of compulsory automobile insurance (called basic protection insurance), which in its nature is an extension of medical payments coverage. It compensates all persons injured in automobile accidents without regard to fault for all types of out of pocket personal injury losses up to limits of $10,000 per person. Whenever an insured's automobile is in an accident and he, or a guest, is injured, his own insurance company will compensate him or his guest.

(2) Enactment of legislation granting to basic protection insureds an exemption from tort liability to some extent—an exemption eliminating tort liability entirely in those cases in which damages for pain and suffering would not exceed $5,000 and other tort damages would not exceed the $10,000 limit of basic protection coverage. In all other cases, the effect of the exemption is to reduce the tort liability of basic protection insureds by approximately these same amounts.

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54. Keeton & O'Connell at 172.
55. Id. at 175.
56. We have not attempted to discuss all the plans that have been offered. Among the most notable of those omitted is that proposed by Professors Clarence Morris and James Paul of the University of Pennsylvania Law School. See Morris & Paul, The Financial Impact of Automobile Accidents, 110 U. PA. L. REV. 913 (1962).
58. Id. at 5.
"Basic Protection" involves no government insurance programs and retains the present marketing and claims processing procedures of the insurance industry. It is similar to workmen's compensation in calling for periodic payments without regard to fault as losses accrue, but unlike it in the lack of a fixed schedule of benefits and the preservation of the tort action for cases of severe injury.

Thus, the most novel feature of the plan is not the mandatory "loss" insurance (which we have seen before in previous proposals), nor the retention of the tort remedy (the Saskatchewan Plan retained the tort remedy too), but rather the manner in which both of these divergent means of reparation are combined—without the costly process of "overlapping." The "cost" factor (we remember from objections to the Saskatchewan, California, and Ontario plans) is prohibitive when one can recover under "loss" insurance and at the same time bring an action in tort for common law damages. The "loss" insurance payments in many instances finance the common law recovery and reduce the injured party's incentive to settle. "Basic Protection" eliminates this problem by "preserving" the tort action only for damages beyond the limits of Basic Protection coverage ($10,000) or for a "pain and suffering" claim of over $5,000.

This "unique" feature is, in many ways, a compromise intended to satisfy both the "tortists" and the "compensationists." To those who favor the fault concept ("tortist") Keeton and O'Connell can show how it is retained for all "serious" injuries (over $10,000), and to those who favor compensation without regard to fault ("compensationist") Keeton and O'Connell can point to the fact that their plan institutes this procedure for the "majority" of all injuries. However, after castigating "fault" for being an "unworkable" and "unrealistic" criterion, Keeton and O'Connell are hard put to explain why it suddenly becomes "realistic" and "workable" when damages reach the magic figure of $10,000. This is particularly true in view of their pronouncement that one of the primary weaknesses of the present system is its failure to fully compensate the "seriously" injured. By retaining the fault concept for serious injuries, Keeton and O'Connell have failed to solve the very problem which they deemed so pressing in urging the need for reform. For they then said that the greatest need would arise in the cases involving the

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59. Id. at 23.
60. However, Keeton and O'Connell do maintain that Basic Protection: (S)ignificantly improves the lot of the severely—even the catastrophically—injured victim. It pays him his first $10,000 out of pocket loss promptly as it accrues—an invaluable aid during the trying period following the accident. These payments, in addition to tiding the victim over until he can make other arrangements to adjust to the changed conditions resulting from the catastrophe, will also save him from the relatively helpless bargaining position he now occupies in prosecuting his tort claim.

Id. at 269-70.
greatest amount of damages—not cases involving amounts of less than $10,000.

Though they attempt to show "special reason for preserving tort actions for more serious cases," the Professors are well aware that "the concept of liability based on fault is deeply rooted in our society and will not be lightly cast aside." It seems clear that the primary motive in retaining the tort action for "serious" injuries is a political one. They note that:

(P)roposals to eliminate the common law action for negligence arising out of automobile accidents are perhaps doomed to founder as unable to muster the necessary widespread political support.

This then is "Basic Protection" at the most basic. We have only attempted to describe the general characteristics. To appreciate the full scope and impact of this proposed legislation one must read the act itself or at least a more complete rendition than we have included. Indeed, in fairness to Keeton and O'Connell, perhaps this should be a requirement for those who read further.

IV. BASIC PROTECTION: A NEW LOOK AT SOME OLD PROBLEMS

Our effort has thus far been a reportorial one—to give the reader some background in this field, to acquaint him with recent developments, and to enable him to see some of the forces behind this small revolution. The remainder of the paper will, hopefully, involve more original thinking. In this section we will see how successfully the authors of "Basic Protection" have achieved their purposes. This will involve another look at the "problems" they set out to overcome. In the concluding section we will offer a solution of our own.

A. Court Congestion

Crowded dockets and the consequent delay in trial is a serious problem in several large metropolitan areas, but it is not a problem in every area or even in every large metropolitan area. Several jurisdictions which were crowded have since reduced their backlog by one means or another. Keeton and O'Connell's discussion of the problem

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61. Id. at 270.
62. Id. at 271.
63. Id.
64. See generally Zeisel, Kalven & Buchholz, Delay in the Court (1959); e.g., Brownell, The Problem of Backlog: A National Shortcoming in Our Courts, 42 A.B.A.J. 1932 (1956); Nima, Backlogs: Justice Denied, 42 A.B.A.J. 613 (1956).
65. See note 68 infra.
is replete with instances where "streamlining and reform . . . (have re-
duced) the jury trial waiting period from four years to below one and
two years." They point out, however, that after this reform a
certain amount of congestion reoccurred. But the point is that a direct
approach to this problem is often successful. A local operation is often
effective enough to solve a local problem. It seems improper to impose a treatment
upon the healthy parts of the body as well as the sick ones. Similarly,
it seems unfair to take the right to sue from a person in Canastota, New
York, merely because the person in New York City faces a crowded
docket.

Perhaps this view is influenced by the fact that our vantage point is
Dade County, Florida, where Miami is located (which with over a
million people must qualify as a metropolitan area), and where there is
a mere seven month delay from service of answer to trial. But the
point is that if Miami can do this without restricting any right to sue,
then other cities should be able to do so. And the point is that the Miami-
ian’s right to go to court should not be subverted just because some other
city is unable to solve its congestion problems. So much for the shotgun
approach of Basic Protection.

But there is also some question whether, even if adopted, the Basic
Protection plan would reduce litigation and hence court congestion. First,
the proposed statute retains the fault principle in five categories of motor-
ing claims: (1) all property damage claims, (2) the first $100 of personal
injury claims, (3) damages "otherwise recoverable" which exceed
$10,000, (4) injuries causing death, and (5) injuries to several persons
where the damages exceed the allocated basic protection. With this
much left for the courts and with the sensitivity of attorneys to "pain
and suffering" (which, if there is any at all, seems always to be worth
more than $5,000) there is some question how much litigation the plan
will actually remove from the courts.

Keeton and O’Connell may also be haunted by their own objections
to past compensation plans. They often maintained that other plans
failed to reduce the court workload because the injured party, once com-
penated by "loss" insurance, would have "nothing to lose" by then also
pursuing his tort action. Professor Green of New York University makes
this same criticism of the Basic Protection plan:

67. KEETON & O’CONNELL at 13.
68. Id. at 14. The authors relied on the Institute of Judicial Administration, State Trial
69. Green, Basic Protection and Court Congestion, 2 INT. SOC. OF BARRISTERS Q. 38, 41
(1967).
70. See note 48 supra.
The proposed statute provides for the payment of attorney's fees for basic protection claimants. A plaintiff's lawyer would have everything to gain and nothing to lose by trying for a big verdict in a tort suit, secure in the knowledge that he and his client would be taken care of by basic protection no matter what happened in the lawsuit.\(^{71}\)

This is a sound objection. Fortunately for us, in a recent article Keeton and O'Connell attempted to rebut this remark by Professor Green. They maintained that:

In point of fact, a lawyer will have a great deal to lose by bringing a tort action in the ordinary case. Take the case with $500 medical loss and $1,000 wage loss. If the lawyer brings a tort suit in such a case after the basic protection plan is adopted, he cannot possibly recover more than $10,000 in out of pocket loss, and unless he does his client (and thus he) will get nothing under that category either. Thus the lawyer has everything to lose by bringing such tort suits—he will lose, in Lincoln's phrase, his entire stock in trade, his time and energy.\(^{72}\)

True, the lawyer would have everything to lose by bringing suit on a claim so small as this. In fact, even before Basic Protection, he would not have much to gain by contesting this. Hence, even now, few claims this small ever get to court. So it does not appear that the Professors have met Green's objection with great force. Clearly he was not referring to claims of $1,500. His criticism is only meaningful when "pain and suffering" is substantial. Then the choice is one of alleging $5,000 worth of pain and suffering, never getting to court and never recovering anything (because Basic Protection provides for a $5,000 pain and suffering "exemption"), or of alleging more than $5,000 worth of pain and suffering, getting to court, and perhaps recovering something (what the jury awards minus the $5,000 exemption). The person with a substantial pain and suffering claim would surely be well advised to allege more than $5,000 worth and take it to a forum where there is a chance of collecting something. And he could do so in good faith, for the price tag on pain and suffering is conjectural at best. What does he have to lose? And as an aside, we wonder if the public, and the jury, can accept the proposition that pain must be endured for free up to the first $5,000, but after that will be paid for.

Apart from pain and suffering, what now of the man with a damage claim of more than $10,000. With Basic Protection payments improving his "bargaining position" (or "financing the litigation" of you please)

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71. Green, supra note 69, at 43.
he too will have "nothing to lose" by litigating his cause. So litigate he will.

But there are other problems. Unlike workmen's compensation (which made some lawyers rich anyway), the administration and enforcement of Basic Protection is completely in the hands of the court.

Not only is the common law tort action retained for any claimant who believes his interests will be better served by pursuing it, but traditional court remedies are contemplated as the exclusive means of enforcing the provisions of the basic protection coverage. In other words, the courts are in reality made the administrators of the plan and charged with the watch dog responsibility for seeing that it works.\textsuperscript{73}

The addition of a whole new area for dispute (on the Basic Protection Policy itself) may, indeed, add to the burden of the courts. Professor Green maintains that the statute "turns the courts into administrative tribunals, charged with the responsibility of investigating, policing and enforcing the myriad details of the plan,"\textsuperscript{74} and that this only serves to "increase congestion and delay and, consequently, would not serve the ends of justice."\textsuperscript{75}

Green's theory is supported by the length of the statute and its resultant complexity and ambiguity. Like the Internal Revenue Code, a statute which is so extensive and has such a great impact on so many people is bound to generate disagreements over its meaning. And many of these disagreements will end up in court.\textsuperscript{76}

To conclude the congestion problem on a rather gloomy note: many cases are now settled, and hence kept out of court, just \textit{because} of the delay problem. One theory is that were the delay reduced, the incentive to settle these cases would disappear, and they would come forward to crowd the dockets again. Professor Conard of Michigan states the problem in this manner:

For every injury case now reaching trial, there are seven more suits which are settled before trial, and the long delay is one of the reasons for settling. A slight reduction in delay will surely bring additions to the backlog of cases seeking trial. And behind the woodpile of filed cases lies a forest of unfiled cases which might become filed cases if court procedures were more expeditious.\textsuperscript{77}

\textsuperscript{73} Green, \textit{supra} note 69, at 49.
\textsuperscript{74} \textit{Id.} at 50.
\textsuperscript{75} \textit{Id.}
\textsuperscript{76} \textit{Id.} at 43-45.
Now this is a sobering thought. Only the successful measures taken by some courts to reduce congestion belie the truth of this proposition. For were it absolutely valid, then no measure would succeed. Keeton and O'Connell, acknowledging this problem, admit that delay in court "may well be one of those frustrating instances in which success breeds new failure—in which climbing upward is ineluctably followed by falling back just as far."  

B. Prompt Payment

Any new plan must provide for immediate and periodic payments to the injured person. There are two reasons for this. The first is the purely social one of preventing the injured person or his family from becoming public charges, or at least from the disastrous financial consequences of a serious injury and long periods of hospitalization or incapacity. The second is to remove the pressure to settle which the present system forces upon the injured party. The withholding of any payment until settlement places the injured person "in a pathetically inadequate bargaining position with the insurance company."

Basic Protection provides for prompt periodic payments by the injured party's own insurance company. It is thus immune from criticism on this point. But there is some question as to how great is the present system's failure to compensate the victim. Of course, it depends on the "victim." Keeton and O'Connell's "tear-jerker" is a working man with virtually no other sources of reparation, who, were it not for Basic Protection to the rescue, would be standing in a soup line, his children urchins on the street. In contrast, Professor Conard's "victim" is a carpenter who receives free emergency medical care provided by the local municipality, has a group hospital insurance plan, a liberal sick leave plan, disability benefits under social security, private medical insurance, and workmen's compensation benefits. Clearly, this view is also extreme. But the point is made that "those who lament the fate of the poor traffic victim cannot afford to ignore entirely what he may receive from other sources."

Thus, perhaps the problem of periodic payments is not so critical as Keeton and O'Connell would have us believe. Over 70 per cent of the population has hospital or medical insurance, and a smaller number

78. "This possibility tends to cast doubt on the efficacy of many proposals for attacking the backlog." KEETON & O'CONNELL at 15.  
79. Id.  
80. Id.  
82. A. CONARD, supra note 77, at 25.  
83. Id.
has disability insurance to pay them subsistence when hurt. Furthermore, there is evidence that these "other sources" of reparation are still in their infancy.

Since the end of World War II, the various forms of "social insurance" have doubled every three to five years. There is no indication that this phenomenal growth will not continue. Thus, in the future, the average "victim" will more closely resemble the fiction of Professor Conard than that created by Keeton and O'Connell.

But, despite the growth of outside sources of compensation, about 55 per cent of all payments to injury victims and their families still comes from tort liability. Hence the failure of tort liability insurance to provide for prompt and periodic payment to the injured victim is still a very real problem. But, once again, this seems a problem better dealt with directly than by wholesale destruction of the right to sue in tort. Not immune to public demand, several insurance companies have recently instituted "advance payment" programs designed specifically for the situation where "claim payments are delayed for long periods and injured victims are obliged to use up their savings and go into debt."

Advance payment programs have been highly successful. The more congenial relationship with the injured party makes settlement more likely and since the payments aid in immediate rehabilitation the total injury claim is usually reduced. Furthermore, with advance payment there is no chance of contingent fee collection, and 100 per cent of the insurance dollar is going for compensation. One insurance executive even tells of

two cases wherein the plaintiff's attorney explained that if the company were going to be that fair with his client, his client at this time did not need his services and recommended to the insurance adjuster that he deal directly with the plaintiff in hopes that an amicable settlement could be worked out without legal services.

84. Id. at 24.
85. Id. at 72.
86. Id.
87. Id. at 63.
89. "We have yet to encounter a case which we believe has cost us any more money because of advance payments." McCartney, supra, note 88, at 21.
90. Hartford Accident, Allstate, The Insurance Company of North America, Actna, Fireman's Fund, American States, Liberty Mutual, and many others are among the insurance companies reported to be giving serious consideration or to have "by this time initiated a program of advance payments and the use of rehabilitation in the third party liability claims handling." McCartney, supra note 88, at 32.
91. Id.
In short, insurance companies are increasingly aware of the need to "exercise their imagination." They realize that if they do not solve the problems themselves then the Basic Protection plan or something similar will do it for them. Clearly, advance payment plans are a giant step in this direction.

C. The Fault Concept

Keeton and O'Connell found "fault" to be "not always, but at least very often... an unrealistic criterion." Their attack was a powerful one. It centered upon the difficulties of proof, the distortion of trial, and the various legal doctrines impeding recovery. When the smoke cleared and the tort or fault concept was retained for "serious" injuries, the compromise seemed more due to political consideration than any real allegiance to the traditional remedies. Furthermore, it seemed unjust to deprive everyone of his right to sue merely because the courts are crowded in some metropolitan areas.

But apart from these considerations, there is a strong case for retaining the fault concept. And it is this "case" which makes any plan to do away with "fault" unpalatable to the public.

"Progressive" theorists who would abandon the fault concept in favor of a "compensation" system are not really so modern in their thinking. What they advocate is actually a return to the early English common law concept which required that anyone causing harm to another must respond in damages, irrespective of fault or intent to harm. The present system evolved only as society developed into a more complex structure, and as it became evident that an "individual has the duty to act and live responsibly in relation to his fellow citizens."

This basic duty is the heart of the matter. Attempts to weaken its impact generate resistance. Were one not responsible for his own acts there might indeed be some absurd results:

92. Carpenter, supra note 88, at 32.
93. It seems to me that we have remained a mighty slow moving enterprise in an era of tremendous change. In the process we have not created a favorable image in the minds of the public; nor, indeed, have we produced much profit for our companies. Is it any wonder that there are rumblings of change that might be forced upon us, such as a compensation system for automobile accident cases? McCartney, supra note 88, at 32.
94. KEETON & O'CONNELL at 23.
95. See section II B supra.
96. See note 63 supra.
99. Weston, At Fault or Not at Fault, That is the Question, 32 INS. COUNSEL J. 264, 266 (1965).
The claimant could recover for his own injuries even if he crossed the center line, without legal excuse, into the path of a driver who was obeying the law. He could fail to stop at a stop sign, crash a light, drive while intoxicated. He could drive recklessly in any number of ways and be paid for injury to himself... what happens to the sense of personal responsibility that the law seeks to promote? 100

So proponents of the fault system are on firm ground. Furthermore, they seem to represent the consensus of public opinion.

D. **A Short Summary**

Clearly then, Basic Protection is no panacea. There is well founded doubt whether it will reduce court congestion at all. And if congestion is reduced, citizens in uncongested areas seem unjustly penalized by losing their right to sue in tort. There is no indication that the problem of advance payments cannot be solved by the insurance companies themselves, and in view of Keeton and O'Connell's disenchantment with the fault criterion, it is difficult to explain why it is retained for injuries beyond the arbitrary figure of $10,000. The "magic number" approach to pain and suffering is also troublesome. The statute itself seems cumbersome and unduly complex. Some particular areas cry out for court interpretation. 101 This, plus the court's role as administrator and "watchdog" of the system, point to an increase rather than a decrease in costs. Furthermore, there is no proof that the mass increase in benefits payable will not result in even higher costs and hence higher premiums by insurance companies. And finally, any erosion of the fault concept is questionable in itself.

Thus, the solutions offered by Basic Protection are less than perfect. Perhaps they are even less perfect than the present system. But it is still true that certain shortcomings of the present system have created a situation ripe for change. The lawyer's duty is to ensure that the change is for the better.

V. **A New Proposal**

A. **Some Background**

Keeton and O'Connell proposed to lessen court congestion by severely restricting the right to sue. Under their plan, 80 per cent of all people injured in automobile accidents (those with injuries of less than $10,000 or less than $5,000 pain and suffering) will have no right to

100. *Id.* at 269.

101. For instance, lawyers and courts should certainly have fun with the act's definition of "allowable expenses": "Allowable expenses consist of *reasonable* charges incurred for *reasonably* necessary products, services, and accommodations." KEETON AND O'CONNELL at 305. (Emphasis added.)
full recovery, even against one obviously at fault. This is perhaps the primary objection to their proposal.

We believe that any new plan must preserve the injured person's "right" to a full recovery in court no matter what the size of his injuries. Since court congestion is a local problem susceptible to local solutions—a wholesale reduction in congestion does not seem worth the wholesale loss of a traditional freedom. Thus, the new plan must reduce litigation, but not at the expense of a right.

The compensation aspects of Basic Protection were deemed worthwhile. Periodic payments, immediately, to the injured party solve many of the present problems. Hence we searched for a compensation plan which did not diminish the right to sue. But the spectre of increased costs has always challenged the co-existence of the right to recover for one's injuries regardless of fault with the right to also sue in tort for a full recovery. The traditional objections are that the compensation payments will only serve to finance the litigation, and that, once compensated, the injured party will have "nothing to lose" by suing. Keeton and O'Connell solved this problem of "overlapping" remedies and excessive cost by relegating "compensation" to the small claims, and recovery in tort to the large ones. In so doing, they sacrificed much in flexibility and took from the people a large bundle of "rights."

Now it appeared to us that both increased compensation and the traditional tort remedy could exist simultaneously without excessive cost and with a decrease in litigation if there were some incentive for the injured party not to sue. Keeton and O'Connell would arbitrarily restrict the right to sue; we would make it voluntary with the injured party. The departure from past plans is that our injured party may well have "something to lose" by suing. The advantage is flexibility. Instead of depriving the victim of the right to sue, the new plan gives him the additional right of compensation.

B. An Incentive Not to Sue

What then is the "incentive not to sue" which will make this plan feasible? Money, of course. Quite simply, if the injured person decides not to sue he will be entitled to more compensation. If he does sue he will get less compensation; but, if he wins his suit, this compensation plus the judgment may well increase his ultimate recovery. The choice is his.

Under his compensation coverage, the injured party would be entitled to an immediate payment of, say, 75 per cent of all out of pocket losses.

102. See note 46 supra.
103. See note 48 supra.
104. Any originality in this idea is in large measure due to the inventive mind of James E. Tribble, member of the Florida Bar.
This takes the "pressure to settle" off the injured party and allows time for the full extent of his injury to become apparent. If he then decides to sue he can go to court. The insurer who has thus far "compensated" him would have a right to be reimbursed from any judgment. If, however, the injured party decides not to sue, then his compensation insurer must pay, say, 95 per cent of all out of pocket losses.

This additional 20 per cent of compensation is the injured party's incentive not to sue. It solves the cost problem created by retaining the tort remedy along with a system of compensation without fault. In short, it answers the question "What does he have to lose by suing?"

C. A Two Party or Three Party System?

This "incentive not to sue" is the heart of our plan. Unfortunately, it is just a starting point. We are not prepared to propose more than the most rudimentary outlines of a new plan. Keeton and O'Connell criticized other writers in this field for "incompleteness." They then pointed to the exhaustive detail of their own plan. But complexity is not necessarily a virtue, particularly when one's avowed purpose is to "reduce litigation." Perhaps the drafters of the Internal Revenue Code might have been wise to be a bit more "incomplete." At any rate, it seems unfair for Keeton and O'Connell to find fault on this basis. With a staff of twenty-two and financial support they could well afford to be complete. With the same funding we might even be tempted to "flesh out" our proposal.

A basic problem is whether the "compensation" payments should be made by the injured party's own insurer or by the other party's "liability" insurer. This is the question whether we should have a "related-insurer" system or an "unrelated" one. Keeton and O'Connell decided on the former, and we tend to agree with them.

The present tort liability system is a classic example of a third-party or unrelated insurer system. This is because the benefits are usually paid to a third-party rather than to the insured. But the two party system has several advantages. First, the injured party who presents a claim is dealing with an insurer of his own selection. This should "increase the probability of a friendly and favorable course of dealings." Furthermore, in the interest of flexibility, under a related insurer plan deductibles are much easier to administer. A related insurance program also increases the likelihood of prompt payment of economic losses as they accrue, and, finally, it eliminates the situation in which an innocent party's insurance company is forced to compensate an injured person who was completely at fault.

105. See note 48 supra.
106. KEETON & O'CONNELL at 347.
107. Id. at 349.
D. The Main Points

These are the essentials of the new proposal:

1. A new form of compensation insurance which pays to the insured who is injured in an automobile accident 75 per cent of his out of pocket loss including medical expenses and loss in wages.

2. These payments are made periodically and without regard to fault. If the injured party decides not to bring a tort action, his insurance company will then compensate him for 95 per cent of his out of pocket loss. These payments are retroactive. Upon deciding not to sue, the injured party becomes entitled to 95 per cent of all out of pocket loss including those losses for which he was only compensated 75 per cent.

3. The plan is mandatory just as liability insurance is mandatory in some states now. (A voluntary plan would work, but not as well.)

4. The minimum coverage is $10,000, but increased amounts of coverage are available.

5. If the insured decides to sue, and obtains a judgment, his own insurance company is entitled to reimbursement for any compensation payments made. But attorneys' fees and costs are deducted from any judgment before payment is made to the insurance company.

   Explanation. This last provision is intended to lessen the hardship on the injured victim who sues and recovers an amount less than the amount he has already received in compensation. In this case, he must give the entire judgment to the insurance company, but the provision for attorneys' fees and costs prevents him from being out of pocket anything—other than the right to the additional 20 per cent of compensation.

6. If the injured party decides not to sue and to collect 95 per cent compensation payments from his own compensation insurer, the compensation insurance company then "takes over" the insured's cause of action against whoever injured him. The insurer may pursue this action to recover "compensation payments" if it so desires.

   Explanation. It may seem that this merely substitutes one suit for another and would, therefore, not serve to decrease litigation. But several factors reduce the likelihood of a lawsuit.

   (1) The compensation insurer can only recover payments made to the insured. It cannot recover for "pain and suffering" which is one of the most litigated aspects of the present system:

   (2) The compensation insurer is not as likely to sue for a small amount as an individual is. The "nuisance claim" feature of the present system will be eliminated.
(3) A claim between two insurance companies is less likely to result in litigation than a dispute between an individual and an insurance company. The compensation insurer which sues to recover for its out of pocket compensation payments will almost always be dealing with the liability insurer of the party causing the injury. Since "insurers ordinarily resolve their differences by arbitration rather than litigation,\textsuperscript{108} the chances of the dispute getting to court are at least reduced. Compulsory arbitration might also be a possibility.

7. By statute, persons negotiating a "settlement" with an injured party are on notice that the settlement does not affect the rights of the injured party's compensation insurer unless the insurer joins in the settlement. The compensation insurer is entitled to reimbursement from any settlement made by the insured.

\textit{Explanation.} This is to prevent an injured party from "settling" his claim and depriving the compensation insurer of the right to sue for reimbursement.

E. \textit{In Conclusion}

These are the main points of our new plan. We think it more satisfactory than any yet offered. Comments and criticism are welcome.

Nothing is more sure than change, and seldom has anything been so ripe for change as the present automobile claims system. Those interested in preserving what is best in the present system must do more than rebut its critics. They must join together and advocate a positive program which improves the system without destroying its most treasured aspects.

\textsuperscript{108} \textit{Id.} at 368.