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The Injury Industry and the Remedy of No-Fault Insurance, by Jeffrey O'Connell

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

The ideal system of traffic victim reparations would provide full compensation to each injured motorist and pedestrian at the lowest possible cost to society and its individual driving members. In *The*

Injury Industry and the Remedy of No-Fault Insurance,[1] Professor Jeffrey O'Connell contends that our present system, based upon the tort principle of fault, fails miserably to meet any of the criteria.

"Injury industry" aptly describes the monstrosity which so poorly apportions the funds available to compensate the victims of traffic accidents who annually suffer over five billion dollars of "compensable economic loss." The author cites the recent Department of Transportation study[2] which concluded that approximately 45 per cent of those seriously injured in traffic accidents received no payment at all from automobile liability insurance and that only fifteen per cent of the total out-of-pocket losses were paid from that source. Moreover, the distribution of funds actually paid appears indefensible—55 per cent of all victims are unpaid, small claims are generally overpaid and the typical claimant with substantial economic loss is grossly underpaid. O'Connell further points out that the average interval between the time of the claim and its payment is nearly sixteen months—an intolerable burden in cases of substantial economic loss. However, the most damning aspect of the system is the enormous expense of its operation. No less than 56 cents of every dollar of insurance premium is consumed by administrative and legal costs, leaving only 44 cents for compensating the traffic victim. This overhead rate compares with a cost of three cents for Social Security, seven cents for Blue Cross and seventeen cents for health and accident plans.[3] In none of these other programs is "fault" or the extent of "pain and suffering" in controversy. Professor O'Connell is quick to remind us that these other insurance programs are largely successful because of the limited role which lawyers play in them.

The shortcomings of the present tort system ought to be exposed so as to have a great impact and to create provocation in the public. *The Injury Industry* certainly serves such a purpose. However, Professor O'Connell jeopardizes this objective by his resort to broad categorizations and inflammatory argument.

His criticism of the present system includes indictments of the medical profession, the trial bar and the automobile insurance industry. The author speaks of the familiar "whore" of the medical society (as if there were one on every corner) who is prepared to offer expert

1. J. O'CONNELL, THE INJURY INDUSTRY AND THE REMEDY OF NO FAULT INSURANCE (1971) [hereinafter cited as THE INJURY INDUSTRY].

2. DEP'T OF TRANSPORATION, ECONOMIC CONSEQUENCES OF AUTOMOBILE ACCIDENT INJURIES, REPORT OF THE WESTAT RESEARCH CORPORATION (1970).

3. THE INJURY INDUSTRY, *supra* note 1, at 29.

4. *Id.* at 17.

testimony for a price.[4] The plaintiff's attorney is portrayed as an "ambulance chaser," whose contingent fee contracts are equated with Shylock's demand in a chapter entitled "A Pound of Flesh."[5] The defense bar is suspect for its "indirect fondness"[6] of the unconscionable fees commanded by its opponents since these fees promote litigation business for insurance company lawyers. It is even suggested that the trial bar is singularly responsible for the perpetuation of the system:

> Thus, despite the personal antagonism between the plaintiffs' and the insurance lawyers, they rally together in an unholy alliance to preserve the fault system that serves them both so well.[7]

Finally, the automobile insurance industry is indicted for its callous and capricious attitude toward the settlement of just claims and its "ostrich-like"[8] unwillingness to consider new alternatives.[9]

With his denunciation of the corrupt system and the puffing of his remedy, Professor O'Connell resembles a sophisticated medicine showman, calling upon testimonials in support of his claims more for the impact of their rhetoric than for their soundness of reason. For example, O'Connell uses frequent, but sometimes not very relevant, quotations from "insurance executives" and "prominent attorneys." He includes a lengthy quotation from a law review note by law student Richard M. Nixon,[10] apparently less for its mastery of expression than for the present prominence of its author. The recent cinema comedy "The Fortune Cookie" is submitted as containing "uncomfortably little exaggeration"[11] in its description of the attorney who insists that his client forego treatment and rehabilitation in order to preserve the injury in its unhealed state until after the jury trial. Too frequently, Professor O'Connell yields to the temptation to select colorful, but untypical, examples of the inadequacies of the fault system. Although the practicing trial lawyer recognizes the many abuses in the present system, he is insulted intellectually by the author's repeated exaggerations of such practices. Although no fault proposals are nearly as old as the automobile itself, the author, along with Professor Robert Keeton, deserves credit

5. *Id.* at 37.
6. *Id.* at 52.
7. *Id.* at 51.
8. *Id.* at 97.
9. *Id.* at 96-98.
10. Note, *Changing Rules of Liability in Automobile Accident Litigation,* 3 LAW & CONTEMP. PROB. 476 (1936).
11. THE INJURY INDUSTRY, *supra* note 1, at 17.

for much of the current interest in no fault. One writer describes the proponents' strategy:

> Keeton and O'Connell are highly literate and articulate salesmen for their proposal, writing books and articles and stumping the nation in speaking engagements.[12]

Professor O'Connell, however, cannot offer *The Injury Industry* as a serious literary work. In light of its sensational exposé of the present system of automobile injury compensation, the book qualifies as a pop publication effort.

Like most proposed plans of compensation, *The Injury Industry* is neither all good nor all bad. The reader must applaud Professor O'Connell's able refutation of the "God, Mother, Country" arguments of those who would defend the present system. The ease of this self-imposed task is indicated by the title of his chapter, "Defending the Indefensible."[13] Symptomatic of anti-no-fault rhetoric is a warning that the no fault principle would result in dilution of "the religious belief that each of us is responsible to his God for his own conduct." O'Connell attributes this quote to the American Bar Association Section on Insurance, Negligence and Compensation Law.[14] In a similar vein, an attorney implores his brethren, "Gentlemen, I beg of you, don't repeal the Ten Commandments by enacting a no-fault plan."[15]

To those of the bar who cling to the traditional approach of liability based upon fault, the author answers that this principle has been steadily eroded over since *Brown v. Kendall,*[16] most noticeably in the area of products liability. To those who insist that the tortfeasor "answer for his wrong," Professor O'Connell argues that requiring the tortfeasor's insurance carrier to answer in money damages is "about as morally effective as allowing people to hire substitutes to serve jail sentences."[17] The author also argues that denying a negligent driver equal compensation may penalize him tens of thousands of dollars in special damages for a momentary lapse of attention, a harsh penalty indeed. In short, Professor O'Connell asserts that the fault principle of injury compensation cannot be defended on moral, traditional or economic grounds.

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12. W. ROKES, NO FAULT INSURANCE 18 (1971). This book contains a discussion of over 35 plans, some of which have been adopted.
13. THE INJURY INDUSTRY, *supra* note 1, at 122.
14. *Id.* at 125.
15. *Id.*
16. 60 Mass. (6 Cush.) 292 (1850).
17. THE INJURY INDUSTRY, *supra* note 1, at 130.

The Injury Industry repeatedly challenges the reluctance of attorneys to abandon the system based upon the fault principle:

> Lawyers are opposed to no-fault insurance because they sense that the need for lawyers will largely disappear in auto claims under no-fault insurance. No-fault insurance has indeed been called "no-lawyer insurance."[18]

While such reason for resistance has never been admitted by any representative group, one must suspect that the prospect of termination of the lucrative automobile practice has influenced the thinking of those whose practice is predominantly tied to automobile injury claims. One less skeptical than Professor O'Connell, however, might recognize the sincerity of the trial bar's argument that no system of compensation should deny full payment to the severely injured victim who must face a life of hardship and suffering. Plaintiffs' attorneys argue that pain and suffering is as real a loss to the accident victim as his deprivation of salary. The author feebly responds, however, that no payment should be made for pain and suffering because the system cannot afford the cost. In addition, O'Connell argues that such compensation promotes expensive litigation over the just amount of recovery and is subject to abuse by the unscrupulous claimant. He insists that the ideal system would limit insurance payments to out-of-pocket loss not payable from any other source.[19]

The attack made on the "collateral source rule"[20] is particularly pointed but perhaps, well deserved. It is not uncommon for a traffic victim, under our present system, to collect the full amount of his medical expenses from three different sources—his group insurance policy, the medical payments provision of his automobile policy and his jury verdict or settlement. The rationale of the rule is that a wrongdoer ought not to be relieved of payment by the innocent victim's own prior establishment of other financial sources. The staggering cost of the duplication of such reimbursements is unjustifiable in light of the inadequacies of compensatory payment to all traffic victims. Therefore, the author's proposed plan would provide coverage only for the amount of loss exceeding all other available sources of reimbursement. Medical expenses and lost wages would be paid only once, and not until sources other than auto insurance are exhausted.[21]

18. *Id.* at 139.
19. *Id.* at 115.
20. *Id.* at 29, 56, 97-104.
21. *Id.* at 115.

The statistics cited in *The Injury Industry* are not persuasive of the claim of "lower price—higher value." The author maintains that of the 44 cents of each premium dollar actually paid to the traffic victim, nearly thirty cents represents payment for pain and suffering and for duplicate payment of losses already compensated by collateral sources.[22] Certainly, the elimination of these rights of recovery will result in a cost savings. Whether it would result in a "higher value," however, is questionable. Minimizing legal expenses by eliminating the questions of fault and pain and suffering would also result in a direct and obvious cost reduction. The significant question is whether these savings will permit the system to provide benefits to the other 55 per cent of the traffic victims who are presently uncompensated. Professor O'Connell appears to be skeptical, admitting it is "less than clear" that a no fault system can provide unlimited coverage for out-of-pocket losses at a cost acceptable to the motoring public.[23]

After exposure to the vicious attack on the present tort system, the reader is shocked to learn that the Keeton-O'Connell "Basic Protection Plan"[24] is a compromise between the fault and the no fault system.[25] Unlike other proposed systems, the plan would provide for no fault coverage for out-of-pocket losses only up to a limit of 10,000 dollars and would also eliminate tort actions when special damages are within that limit. The plan, which is not set forth in detail in the book, apparently preserves the tort action where damages for pain and suffering are higher than 5,000 dollars and out-of-pocket damages exceed 10,000 dollars. Thus, the author cosponsors a plan which leaves largely intact the present system he so vehemently criticizes.

Professor O'Connell does make a persuasive case for reform in our system of compensation of traffic victims. It is reprehensible to deny compensation to the maimed motorist for actual loss merely because he was guilty of a momentary lapse of attention in his driving, while grossly overpaying the faultless driver who has sustained only a minor injury. Whether recovery for pain and suffering should be excluded or limited, however, is a value judgment which must be made actuarily, once

22. *Id.* at 36.
23. *Id.* at 118-19.
24. R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965).
25. The plan is described only generally in the text. For one explanation of how the sponsors envision the plan would work, see MICHIGAN INSTITUTE OF CONTINUING LEGAL EDUCATION, PROTECTION FOR THE TRAFFIC VICTIM: THE KEETON-O'CONNELL PLAN AND ITS CRITICS (1967). For a discussion of over 35 adopted, or proposed, plans, see ROKES, *supra* note 4.

it is determined how much the motoring public is willing to pay to operate the system.

If one accepts the necessity for adoption of some no fault system, there seems little justification for limiting the proposed reform to automobile accident victims. Why not include those injured from other common causes—the product injury, the slip-and-fall, the dog bite and the like—which seem to account for a greater portion of the litigated cases each year? The author reasons that "outside of automobile accidents we don't have a legal and insurance system readily transposable to no-fault insurance."[26] One must question his determination to torture automobile liability insurance into providing coverage presently available in health and accident insurance policies. Of course, the author's compromise plan must retain the liability policy to provide indemnification against the tort suit still possible in all but the minor injury claims. In a true no fault system, however, the automobile liability policy should cease to exist.

In recent years, the lawyer has been exposed to a barrage of biased arguments opposing no fault compensation. *The Injury Industry* exposes the affirmative arguments and responds to the opposition. While the rhetorical overkill employed by Professor O'Connell disqualifies the book as a scholarly work, its value lies in its articulation of the inadequacies of the tort system and the control exerted over it by the interest groups who profit most from it.

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26. THE INJURY INDUSTRY, *supra* note 1, at 145.

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