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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.

Professor O'Connell's latest summary of the faults of auto liability insurance is a welcome departure from the pedantry of other recent studies. Hopefully, those political leaders and opinion makers who found the prior studies excessively abstruse will read this more understandable presentation. If there is a single concept that those interested in a better scheme of auto insurance should comprehend, it is Professor O'Connell's description of the traditional system's operation. Explaining that the fault system's basic difficulty is its need to establish "legal liability," the author says:

> The result is not a system for paying people automobile accident insurance after automobile accidents, but a system

> for *fighting* people about paying them. . . . The result is a system where the traffic victim—already battered enough from the accident itself—cannot know after the accident *when* he will be paid, *what* he will be paid or *if* he will be paid. . . .[1]

No insurance regulator can answer claimant complaints for long without being told by an insurance company executive that it is the company's job to avoid paying claims. As Professor O'Connell points out, the serious claim begins a process of "Injuring the Injured"[2] when:

> the ideal solution for the insurer becomes not satisfaction to you, but "claim denied" or, at a maximum, the smallest payment possible, perhaps after the longest delay possible, through shrewd and flinty bargaining. . . .[3]

The claimant's response to the cunning of insurance companies includes what O'Connell terms "Paying for Pain"[4] and such practices as padding special damages.[5] The competitive antagonism between claimants and insurance companies has been largely responsible for the fact that only 14.5 cents of each premium dollar motorists pay to insure against their out-of-pocket losses is actually used to reimburse these losses.[6] Much of the remainder is dissipated in adversarial determinations of fault and damages.

The Massachusetts "no fault" plan[7] has reduced these expenses considerably and, as a result, coverage costs for compulsory liability insurance have been cut 42.6 per cent since the plan's enactment. Moreover, there is every indication that accident victims are recovering quickly and fairly and that the public is generally satisfied with the manner in which personal injury claims have been handled.[8] However, vestiges of

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1. J. O'CONNELL, THE INJURY INDUSTRY AND THE REMEDY OF NO-FAULT INSURANCE 4 (1971) (emphasis in original) [hereinafter cited as THE INJURY INDUSTRY].
2. *Id.* at 15.
3. *Id.* at 20.
4. *Id.* at 28.
5. *Id.* at 30-31.
6. *Id.* at 36.
7. MASS. ANN. LAWS ch. 90, § 34A *et seq.* (Supp. 1970) (eff. Jan. 1, 1971). *See* Keeton & O'Connell, *Alternative Paths Toward Nonfault Automobile Insurance,* 71 COLUM. L. REV. 241, 251-54 (1971).
8. Standing alone, this would tend to verify the Consumers Union survey discussed by Prof. O'Connell which shows greater public satisfaction with no fault first-party claims than with fault claims. THE INJURY INDUSTRY, *supra* note 1, at 95-96. However, preliminary experience with a new Massachusetts property damage plan which closely follows the Keeton-O'Connell "Vehicle Protection Insurance proposal" (*see id.* at 157) raises some question as to whether this satisfaction flows from the first-party relationship or from the no fault aspect of the coverage.

fault concepts do remain in some areas of the Massachusetts plan and preliminary experience indicates that it is in these areas that the public is most dissatisfied. Thus, one option of the new Massachusetts property damage system[9] provides for direct payments to an insured by his own insurance company when another party is at fault but allows the insurance company to deny or reduce damages because of the insured's comparative negligence. The resentment of a disappointed claimant (as indicated in correspondence with the Massachusetts Insurance Department) appears to be compounded when the claimant's own company denies his recovery. Some of the dissatisfaction may stem from misconceived notions that fault is never relevant to recovery under the new system. The system is, in fact, commonly referred to as "no fault property damage insurance." However, it seems more likely that the real origin of public dissatisfaction is bitterness toward the whole fault concept.

Professor O'Connell does not directly advocate no fault auto insurance as an answer to the average motorist's resentment of tort law and its embellishments. But I think the book as a whole demonstrates that tort law is not a sensible solution to a practical problem affecting millions of citizens every day. I suggest no objective person can put down O'Connell's book without agreeing with his ultimate conclusion[10] that dissecting the conduct of each driver in millions of traffic accidents has long ago ceased to be worthwhile to anyone but those employed in O'Connell's "Injury Industry."

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9. MASS. ANN. LAWS ch. 90, § 340 (Cum. Supp. No. 9, 1972) (eff. Jan. 1, 1972). This statute is essentially the Keeton-O'Connell "Vehicle Protection Insurance proposal." *See* THE INJURY INDUSTRY, *supra* note 1, at 157.

10. *Id.* at 154.

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