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The Keeton-O'Connell Plan: A Catalyst in the Search for a Workable Solution to the Automobile Accident Compensation Problem

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are but examples of creativity on the part of the Board. These efforts are encountering a somewhat reluctant judiciary. The courts have generally failed to view all the interests in a given situation. In addition they have applied unhelpful standards in passing on the orders created by the Board. Nevertheless, the courts remain the key to more effective remedies if such remedies are to come from the Board within its present powers and the cooperation of the courts is therefore essential. An alternative to that means of attaining the goal of more effective remedies is a broadening of the Board's power through legislative action. The result of such legislative action is not altogether predictable since its effectiveness would depend on how the Board would use the new power and ultimately how the courts would restrict that use. It would seem that Congress could best contribute to the desired end of effective remedies by encouraging the Board to continue its efforts under its present mandate. That is, the Board should be encouraged to continue to fashion remedies which in fact "effectuate the policies of the Act."

MICHAEL H. STEPHENS

THE KEETON-O'CONNELL PLAN: A CATALYST IN THE SEARCH FOR A WORKABLE SOLUTION TO THE AUTOMOBILE ACCIDENT COMPENSATION PROBLEM

I. INTRODUCTION

Since its advent on the American scene, the automobile has had a profound impact in the areas of socio-economics and law. In more recent times, the ubiquitous automobile invades most aspects of normal daily living. Our dynamic society has grown to consider such means of transportation an almost absolute necessity. In our cities, houses are being demolished every day so that new roads can be built to accommodate the increasing automotive traffic burden. And as more vehicles appear on our highways, the somber prospect is that more accidents will occur. When this happens, inevitably one's thoughts turn to liability and insurance.

The general rule of common law liability in most American jurisdictions compensates victims of automobile accidents based on the concept of fault, *i.e.*, any loss incurred by the victim is recoverable against the party at fault. The rule of contributory fault imposes the added requirement that an injured party must be free from culpability in order to recover against a wrongdoer. The validity of the fault and contributory fault principles have withstood formidable challenges in the past, but the ground swell of dissatisfaction has never been more pronounced than in the last three years. One catalyst of this increased dialogue between the proponents and the opponents of the fault system has been the proposal formulated by Professor Robert E. Keeton and Professor

Jeffrey O'Connell[1] calling for a complete restructuring of the present system. The reaction to their plan has been vehement. Trial lawyer organizations are waging devastating attacks on the proposal.[2] The academic community has responded.[3] The insurance industry, a real party in interest in this debate, has caused evaluation studies to be made.[4] The proposed legislation drafted by Keeton and O'Connell has even been scrutinized by one state legislature.[5] To cite an exhaustive list of the writings on this subject would be a task of herculean proportions. However, a careful survey of the leading articles indicates that only extreme positions have been taken.

II. The Fault System

The fault doctrine is "inseparably linked with the philosophy of individual responsibility."[6] Civil liability results when the actor has been guilty of either intentional or negligent misconduct. However,

> this philosophical blueprint was, of course, never fully translated into the law. Most notably, practical considerations, especially of administrative convenience, militated in favor of objective standards of care, rather than the individualistic test whether, given his personality and

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1. R. Keeton & J. O'Connell, Basic Protection for the Traffic Victim—A Blueprint for Reforming Automobile Insurance (1965), is a lengthy volume expanding upon the authors' original proposal which appeared in two earlier law review articles. *See* Keeton & O'Connell, *Basic Protection—A Proposal for Improving Automobile Claims Systems*, 78 Harv. L. Rev. 329 (1964); Keeton & O'Connell, *Basic Protection Insurance Act for Claims of Traffic Victims*, 2 Harv. J. Leg. 41 (1965).

2. The American Trial Lawyers Association is so intensely interested in this problem that it published a 456 page compilation of articles on this subject matter. This volume is characterized by that association as "an analysis of the Keeton-O'Connell Plan and its effect on justice and the law showing the bar's concern for protecting the public interest and welfare." *See* Justice and the Adversary System (Am. Trial Law. Ass'n ed. 1967).

3. *See generally* Green, *Basic Protection and Court Congestion*, 52 A.B.A.J. 926 (1966); Conard & Jacobs, *New Hope for Consensus in the Automobile Injury Impasse*, 52 A.B.A.J. 533 (1966); Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 Va. L. Rev. 774 (1967); James, *The Future of Negligence in Accident Law*, 53 Va. L. Rev. 911 (1967); Sargent, *Disaster Walks in Guise of Social Reform*, Trial, Oct-Nov., 1967, at 24; *see also* Symposium in Honor of Charles O. Gregory, 53 Va. L. Rev. 774 *et seq.* (1967); *reprinted in* Justice and the Adversary System, *supra* note 2, at 19-162.

4. *See* Kemper, *Keeton-O'Connell Plan: Reform or Regression?*, Trial, Oct.-Nov., 1967, at 20. *See also* other articles appearing in Justice and the Adversary System, *supra* note 2, at 230-73.

5. The Massachusetts Legislature was the first to consider the Keeton-O'Connell proposal. A bill was submitted to that legislative body closely resembling the model draft formulated by Professors Keeton and O'Connell. Although this bill originally was approved by the House of Representatives, it was ultimately rejected by the Senate and by the House on reexamination of the matter. For a discussion of the political implications of Keeton-O'Connell's consideration and rejection by the Massachusetts Legislature, *see* Sugarman & Cargill, *The Massachusetts Story: The Public's Reaction*, Trial, Oct.-Nov., 1967, at 52; Dukakis, *A Legislator Looks at Proposed Changes*, 51 Judicature 163 (1967) (Mr. Dukakis introduced the "basic protection" bill in the Massachusetts House of Representatives.).

Recently, a similar bill was introduced in the New York State Legislature. The proposed bill, filed February 6, 1968, would "amend the vehicle and traffic law, in relation to establishing the motor vehicle basic protection insurance act." S. 3055, A. 4772, N.Y.S. Legis. (1968).

6. Fleming, *The Role of Negligence in Modern Tort Law*, 53 Va. L. Rev. 815, 816 (1967).

> capacities, the particular individual had done all that could reasonably have been expected of him.[7]

Incorporated in this principle that an actor ought to be responsible for his wrongdoing is the rule that the contributory negligence of the injured party will completely bar recovery. The doctrine of contributory negligence originated in the early nineteenth century.[8] Simply stated, the rule developed that an injured plaintiff could not recover from another party unless that plaintiff's conduct was completely free from fault. This limitation on the right to recover was justified at its inception because

> it fitted in with the laissez faire philosophy of the time and the unspoken social policy of protecting valuable new industries, particularly the transportation industry, from the supposedly crippling threat of large and numerous verdicts imposed by "incurably plaintiff minded" juries.[9]

The concepts of fault and contributory fault were based in socio-economic policy. Compensation for injuries to the completely innocent victim of another's wrongdoing was the aim of this system. The idea of compensation has never encountered disfavor, and in fact, the modern thrust is toward a broader base for recovery. However, the doctrine of contributory negligence has undergone strong attack. The law was prompt in engrafting various exceptions to the absolute bar to recovery of a contributorily negligent plaintiff.[10] Among these are the doctrine of last clear chance,[11] the relaxation of negligence per se[12] and the "willful, wanton, or reckless misconduct exception."[13] Possibly more significant is the "grand arbiter" phenomenon evidenced by selected studies of jury verdicts.[14] The most dramatic proof of the disfavor of the contributory fault doctrine is the modern trend toward comparative negligence.[15]

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7. *Id.* at 817.

8. One of the first cases alluding to the doctrine of contributory negligence was Butterfield v. Forester, 11 East 59, 103 Eng. Rep. 926 (K.B. 1809).

9. Maloney, *From Contributory to Comparative Negligence: A Needed Law Reform*, 11 U. Fla. L. Rev. 135, 143 (1958).

10. *Id.* at 145.

11. *Id.* at 145-48. Generally the rule of "last clear chance" shifts the burden of loss "from a contributorily negligent plaintiff to a defendant whose negligence follows that of the plaintiff." *See also* Prosser, *Comparative Negligence*, 51 Mich. L. Rev. 465, 472 (1953).

12. *Id.* at 148-49. The doctrine of negligence per se has been relaxed in instances requiring the determination of contributory negligence. In automobile accident cases especially, statutory violations by the plaintiff will not be kept from the jury. *See also* James, *Contributory Negligence*, 62 Yale L.J. 691, 724 (1953).

13. *Id.* at 149-52. "Willful, wanton or reckless misconduct" of the defendant might make plaintiff's lesser misconduct irrelevant to recovery. For further discussion, *see generally* James, *supra* note 12, at 709-12.

14. There is a proclivity of juries to ignore the full effect of the contributory negligence rule when its application would completely bar recovery from a slightly negligent plaintiff. This phenomenon has been substantiated by experimental studies. *See* H. Kalven, Report on the Jury Project, Conference on Aims and Methods of Legal Research 28 (Univ. of Mich. Law School 1955); Kalven, *The Jury, the Law, and the Personal Injury Damage Award*, 19 Ohio S.L.J. 158, 167-68 (1958).

15. This trend will be more fully discussed later in notes 28-44 and accompanying text.

The "grave indictments" against the fault system have been discussed extensively.[16] It is useful, however, to outline the basic criticisms if a comparison is to be made of the proposed reform alternatives. First, there is a disparity in the amount of compensation awarded in proportion to the seriousness of the injury.[17] Despite the occasional well-publicized high awards, generally, serious losses are not adequately compensated. On the other hand, small loss claimants often receive more than is warranted by their injury.[18] Second, in some jurisdictions the problem of the judgment-proof defendant persists.[19] Third, compensating payment is very often delayed, especially when litigation is invoked.[20] This imposes a serious financial burden upon an injured party during the period of delay. This delay invariably places the injured persons in the lower income groups in a weaker bargaining position for settlement.[21] Fourth, there are two curious anomalies in the fault system as it applies to automobile accidents. One is the situation where the two parties were both at fault; the other situation appears when both parties were completely innocent. Under the present system, neither party would be entitled to recover in these situations.[22] Fifth, the deterrent aspect of negligence liability has been diluted by the trend toward distributing losses to the motoring public through liability insurance.[23] Sixth, it is claimed that the present system has encouraged fraudulent claims in connection with automobile accidents.[24] The final criticism usually asserted is the cost of administering the fault system, especially in the area of automobile accident liability. However, regardless of what alternative replaces the present system, it seems likely that the actuaries will dispute the economy of any plan designed to remedy the benefit gaps in the liability system.[25] The

16. *See* James, *The Columbia Study of Compensation for Automobile Accidents: An Unanswered Challenge*, 59 Colum. L. Rev. 408 (1959).

17. *Id.* at 408, *noting* Committee to Study Compensation for Automobile Accidents, Report to Columbia University Council for Research in the Social Sciences 266 (1932).

18. *Id.* at 409. In addition, similar losses often are compensated by different awards. But regardless of the amount, lump-sum payments have been known to be depleted while further economic losses from the accident continue. *Id.* at 410.

19. *Id.* at 409. In New York, the Motor Vehicle Accident Indemnification Corporation Law was enacted to insure innocent victims of motor vehicle accidents compensation for losses caused by uninsured motorists. *See* N.Y. Ins. Law §§ 600-26 (Supp. 1967).

20. *See* James & Law, *Compensation for Auto Accident Victims: A Story of Too Little and Too Late*, 26 Conn. B.J. 70 (1952); *see also* Burger, *The Courts on Trial: A Call for Action Against Delay*, 44 A.B.A.J. 738 (1958).

21. James, *supra* note 16, at 409.

22. Keeton & O'Connell, *Basic Protection—A Proposal for Improving Automobile Claims Systems*, 78 Harv. L. Rev. 329, 350 (1964). These anomalous situations are good arguments for the adoption of a comparative negligence rule.

23. *Id.* at 344. Parenthetically it seems unrealistic to argue that a forty dollar increase in liability insurance premiums has the same deterrent effect as bearing the entire liability out of one's own pocket. *See also* Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 Harv. L. Rev. 1281, 1285 (1952).

24. R. Keeton & J. O'Connell, Basic Protection for the Traffic Victim—A Blueprint for Reforming Automobile Insurance 1-3 (1965) [hereinafter cited as Basic Protection].

25. *Compare* Harwayne, *The Cost of Proposed Changes in Automobile Insurance*, in Justice and the Adversary System, *supra* note 2, at 164, *with* Bailey, *Fallacies Overshadow Validity of Plan's Cost Estimates*, Trial, Oct.-Nov., 1967, at 45, *and* R. Wolfrum, *The Answer*

aim of reform should be a better system of compensation and not the costs incident to achieving this reform.

The quest for a better system of compensation in tort liability has already begun. It is noteworthy that each new step toward reform has been taken in relation to a specific problem. For example, in the area of products liability, there is a strong trend toward strict liability.[26] Workmen's compensation laws were enacted to answer the need for compensation in work-connected injuries.[27] The rule of comparative negligence has been introduced to eliminate the inequities of the contributory negligence rule.[28]

The concept of comparative negligence[29] replaces the absolute bar to recovery by the injured party's contributory fault. The comparative negligence rule divides or apportions damage when both the plaintiff and the defendant are at fault. A negligent plaintiff will only recover from a defendant an amount of compensation which reflects the extent to which the defendant's quantum of fault exceeds his own.

Comparative negligence statutes have taken a number of different forms. The rule apportioning damages among the culpable parties is the most common type.[30] Other statutes provide for apportionment "only where the negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison."[31] A third category "provides for apportionment only if the negligence of the plaintiff 'was not as great as the negligence of the person against whom recovery is sought.' "[32] The first form of statute exemplifies an appor-

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to Plan's Low Cost, Trial, Oct.-Nov., 1967, at 47 in order to understand the disagreement among actuaries regarding the economy of "basic protection."

26. *See* Paulsen, *Eight Cases After Eight Years,* 53 Va. L. Rev. 870, 882-83 (1967), *and* James, *supra* note 3, at 914-16.

27. *See, e.g.,* N.Y. Work. Comp. Law.

28. Recently in New York, a bill was filed in the Senate to amend the Civil Practice Law and Rules by adopting the comparative negligence rule. S. 1647, N.Y.S. Legis. (1968).

29. For a brief discussion of the development of the comparative negligence doctrine, *see* Maloney, *supra* note 9 at 152-60.

30. A straight apportionment statute is exemplified by the Federal Employer's Liability Act, 45 U.S.C. § 53 (1964) which provides:

> In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee . . . .

31. An example of a comparative negligence statute requiring the distinction between "slight" and "gross" negligence is Neb. Rev. Stat. § 25-1151 (1965) which provides:

> In all actions brought to recover damages for injuries to a person or to his property caused by the negligence of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar recovery when the contributory negligence of the plaintiff was slight and the negligence of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff . . . .

32. An example of the third type of comparative negligence statute is Wis. Stat. Ann. § 895.045 (1966) which provides:

> 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

tionment of damages rule in its purest form. Moreover, this type of statute is least encumbered by considerations of degrees of fault.

The rule of comparative negligence has been met by several criticisms. One line of resistance considers the present contributory negligence system adequate.[33] It glorifies the *status quo* by maintaining that juries can adequately cope with instructions regarding contributory negligence. It also asserts that the contributory negligence rule is "a salutory check on the gambling instincts of the litigating public,"[34] calling the contributory negligence rule "the last bar . . . to complete chaos in our courts."[35] Another objection is raised by those who fear that "the average verdict and settlement will have to be greater"[36] in order that plaintiff's recovery, offset by the amount attributable to his own fault, might be adequate. Still others cite the deterrent effect of the contributory negligence rule.[37] Finally, the argument is made that comparative negligence is too complicated to be administered by the average jury,[38] especially in multiple party litigation.

Tenable answers can be advanced in response to these objections. If merely adequate systems can be improved, reform should not be resisted. Some writers hold that instructing contributory negligence, especially where the injured plaintiff is only slightly negligent, may cause a disrespect for law in the minds of the jurors.[39]

It has been found that demands for juries under the present system have been prompted by the fear that a "judge will apply the contributory negligence rule literally."[40] Further, there is every reason to believe that a judge will be as liberal in assessing damages as a jury would be. Since the prime advantage of a jury under the present system is the determination of liability, adopting the more equitable comparative negligence system would result in fewer jury trials and probably a better chance of settlement.[41] Thus court congestion would be significantly relieved.

The deterrence argument is weak. The admonitory function of tort law in automobile accident cases is no longer a matter of primary concern.[42] The

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 proportion to the amount of negligence attributable to the person recovering.

33. *See* Benson, *Comparative Negligence—Boon or Bane*, 23 Ins. Counsel J. 204 (1956).

34. *Id.* at 214.

35. *Id.*

36. *See* Benson, *Can New York State Afford Comparative Negligence?*, 27 N.Y.S.B. Bull. 291, 299 (1955).

37. *See* Maloney, *supra* note 9, at 161.

38. *See* Benson, *supra* note 33.

39. Maloney, *From Contributory to Comparative Negligence: A Needed Law Reform*, *supra* note 9, at 162.

40. *Id.*

41. *Id.* at 163. *See also* Bress, *Comparative Negligence: Let Us Hearken to the Call of Progress*, 43 A.B.A.J. 127, 130 (1957), which indicates that the size of verdicts has not increased under the comparative negligence system in Wisconsin.

42. Leflar, *Negligence in Name Only*, 27 N.Y.U.L. Rev. 564 (1952).

fear of serious injury is sufficient deterrence. Apprehension of losing a negligence lawsuit hardly seems to provide added effect.

Finally, the objections that such a system is too complicated to be administered or that the average recovery will be greater is not supported by experience.[43] Jurisdictions which have adopted the rule of comparative negligence are functioning efficiently.[44] Where comparative negligence is the rule, it is advisable to use the special verdict. In this way the court can determine the extent, if any, of the jury's confusion in assessing degrees of culpability to the various parties.

This capsule description of the fault system and the various alternatives contained therein has been offered so that comparison might be made to a proposal of liability without fault, the examination of which is the main purpose of this comment. Moreover, this background material forms an essential basis to the suggestions that will be discussed later.

III. Outline of Non-Fault Proposals Other Than the Keeton-O'Connell Proposal

The Keeton-O'Connell plan is a product of the influence exerted by earlier formulations. This history tends to focus upon the problem of liability versus compensation without fault. The common denominator of all these plans, including Keeton-O'Connell, is a dissatisfaction with the present system and an attempt at a solution.

The *Columbia plan* of 1932[45] proposed compulsory limited liability owners' insurance. Liability was imposed without regard to fault. Payments would be periodic, based on benefit schedules, but no provision was made to compensate for pain and suffering or to compensate for the first week of disability. In addition, property damage was not a compensable expense. The amount of damages would be ultimately determined by a special board. No protection was afforded to parties injured by uninsured motorists. Non-resident motorists were not covered under the plan.[46]

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43. Maloney, *supra* note 9, at 161-62.

44. A caveat is appropriate here. The efficient administration of comparative negligence by the jury system would require avoiding unnecessary joinder of parties. Multiple party situations only serve to confuse a jury determining comparative fault. Moreover, because separate trials and different juries can determine varying degrees of fault even though arising out of the same factual situation, a compulsory counterclaim rule might be utilized in a comparative negligence jurisdiction to finally settle the degree of fault between a single plaintiff and a single defendant.

45. Committee to Study Compensation for Automobile Accidents, Report to the Columbia University Council for Research in the Social Sciences (1932). *See also* Smith, *The Problem and Its Solution, in Compensation for Automobile Accidents: A Symposium,* 32 Colum. L. Rev. 785 (1932).

46. Professors Keeton and O'Connell have criticized the Columbia proposal because only damage caused by another vehicle was compensable, because no uninsured motorist fund was created, and because the payment schedules were inadequate. The first week deductible feature and the absence of compensation for property damage were also criticized. Basic Protection 133-39.

The *Saskatchewan plan*,[47] a 1946 Saskatchewan enactment incorporating liability without fault, covered property damage as well as bodily injury up to an aggregate sum of $35,000. In order that premium rates can be set on a non-profit basis, this compulsory insurance system is administered by the government. Loss suffered anywhere in North America by a Saskatchewan motorist is covered unless the insured was in breach of condition, for example, drunk driving. A non-resident is not covered for injury suffered while riding in vehicles not registered in Saskatchewan. Finally, severely injured persons are allowed to seek further relief through the common law approach.[48]

The *California State Bar Committee* in 1959 proposed[49] a compulsory form of loss insurance very similar to the Saskatchewan Plan except that it would be implemented by private rather than governmental insurance. The common law tort remedies would be maintained[50] on the theory that such coverage would only "furnish financial 'first-aid' to those who may eventually be entitled to larger compensation."[51]

The *Ontario Proposal*[52] of March, 1963, provided for voluntary loss insurance superimposed on liability insurance. The availability of a common law recovery was maintained. Here, too, benefits would be determined by reference to certain schedules.[53]

"Compulsory motor vehicle comprehensive loss insurance,"[54] proposed by Professor Leon Green in 1958, was designed to cover all types of loss "except those resulting from criminal offenses other than traffic violations and attempted or committed suicide."[55] Pain and suffering was not regarded a compensable loss. There would be a $100 deductible feature, and other monetary limitations on compensation would be set by a state commission. Compensation would be paid on a lump-sum basis determined by special masters. The tort action would be abolished.[56]

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47. Sask. Rev. Stat. c. 371 (1953). The plan is discussed in Saskatchewan Government Insurance Office, The Automobile Accident Insurance Act (1958).

48. Keeton and O'Connell disagree with the Saskatchewan plan principally because it is government insurance which would be economically unfeasible in urbanized areas. The benefit schedules and the retention of the common law remedy were not deemed to have solved the problem. Basic Protection 141-47.

49. Basic Protection 148.

50. Knepper, *Alimony for Accident Victims?*, 15 Defense L.J. 512, 521 (1966).

51. Keeton and O'Connell oppose this alternative because it would cause higher costs and increased litigation. Basic Protection 149-51.

52. Final Report of the Select Committee Appointed on April 5, 1960 to Examine into and to Report on All Matters Relating to Persons Who Suffer Financial Loss or Injury as a Result of Motor Vehicle Accidents (1963).

53. Among the criticisms advanced against this solution by Keeton and O'Connell are the probable higher cost, limited scheduled benefits and the lack of periodic compensation for partial disability. They also point out that this proposal has not yet been translated into a legislative draft. Basic Protection 153-58.

54. L. Green, Traffic Victims: Tort Law and Insurance (1958).

55. Knepper, *supra* note 50, at 522.

56. The basic criticism of this plan is that it is politically impractical because it completely eliminates common law negligence. Basic Protection 160-64.

In 1954, Professor Albert Ehrenzweig introduced the concept of *Full Aid*[57] insurance. Furnished by private insurers, this voluntary coverage would "provide (periodic) benefits based on fixed schedules and paid without regard to fault or negligence."[58] Pain and suffering and property damage would not be covered. An exemption from common law liability was afforded to those electing to carry "Full-Aid" insurance.[59]

IV. Basic Protection

The concept of "basic protection insurance" proposed by Professors Robert Keeton and Jeffrey O'Connell might be considered a conglomeration of selected aspects of the earlier proposals. Assuming change is justified,[60] the question becomes whether or not the proper "selection" has been made. Moreover, whether or not other, perhaps even more sweeping, proposals should have been added is a matter of legitimate inquiry.

The need for some reform is evidenced by the number of plans proposed to alter our present system. The philosophy of such a proposal is an appropriate keynote to its examination. The philosophy of "basic protection" has been expressed by Professor Keeton:

> The present automobile insurance system . . . makes no provision for some deserving traffic victims, and too little for others. It delivers its payments too late. It distributes them unfairly, overpaying victims with minor injuries and underpaying severely injured persons, if it pays them at all.
>
> The unfairness of the present system extends also to harsh treatment of motorists when they buy their insurance. Rates are too high. Rating classifications are often unfair. And many people have trouble getting and keeping the insurance they want and need.
>
> On top of all this, the present system has built-in inducements to exaggeration and even outright fraud that add both to its unfairness and to its wasteful costs.[61]

In order to remedy the flaws in the present system, the Keeton-O'Connell plan for "basic protection" for traffic victims was proposed. It is a lengthy and complex series of ideas which were converted into an elaborate draft of a model statute.[62] The breadth of that model draft precludes a section-by-section analysis

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57. A. Ehrenzweig, "Full Aid" Insurance for the Traffic Victim (1954).

58. W. Knepper, *supra* note 50, at 522.

59. The glaring flaw of this proposal was that the purchase of "full aid" insurance was voluntary. Basic Protection, at 166-68. *See also* Blum & Kalven, *Public Law Perspectives on a Private Law Problem—Auto Compensation Plans,* 31 U. Chi. L. Rev. 641 (1964) for a general discussion of these plans.

60. Professor Kalven states that he is "really not persuaded the catalog of woes [with respect to the present system] is as dismal as they [*i.e.*, its opponents] say it is." Kalven, *Plan's Philosophy Strikes at Heart of Tort Concept,* Trial, Oct.-Nov., 1967, at 35, 36.

61. Keeton, *Band-Aid Bills or Basic Reform: A Statement to the Joint Committee on Insurance of the Massachusetts Legislature on March 28, 1967,* in Justice and the Adversary System 39 (Am. Trial Law. Ass'n ed. 1967).

62. *See* Keeton & O'Connell, *Basic Protection Insurance Act for Claims of Traffic Victims,* 2 Harv. J. Leg. 41 (1965).

in a comment such as this. However, its principal features will be considered so that fair and constructive evaluation is possible.

"Basic protection" coverage is a new form of compulsory automobile insurance, somewhat similar to the principle underlying medical payments insurance. Medical payments insurance is a two party system designed to compensate only certain covered parties by the insurer. This is contrasted to liability insurance which is a three party system, *i.e.*, an injured third party seeking to recover damages from the insurer due to the liability of the insured. "Net economic loss" (basically out-of-pocket[63] loss) is covered up to a $10,000 maximum limit without regard to fault.[64] "Basic protection" insureds are granted "an exemption from tort liability in those cases in which tort damages recoverable in the absence of this legislation would not exceed 10,000 dollars."[65] Also, where recoverable tort damages exceed $10,000, "basic protection" insureds are granted a credit against the tort recovery to the extent of the "basic protection" benefits paid. The burden of loss for the first $5,000 in pain and suffering is placed upon the victim who may purchase "optional" insurance designed to offset such a loss.[66] Tort recoveries for pain and suffering are permitted to the extent of the excess over the $5,000 exemption. There are certain deductible features such as a standard deductible which excludes from reimbursable losses the first $100 of net loss of *all types* or ten percent of *work loss*, whichever is greater. Property damage is not within the basic protection plan.

The method of making a claim and receiving payment has also been renovated. Where "basic protection" is involved, the victim may make a claim directly against the insurer. The optional tort liability insurance retains the three party claims procedure. After one's claim is perfected, benefits are paid monthly as losses accrue, unless special circumstances warrant lump-sum payments. The maximum amount payable on any "basic protection" policy is $10,000 for injuries to one person in one accident and $100,000 for all injuries in one accident. There is an additional $750 maximum limit for work loss in any one month. And finally, notwithstanding these maximum limits, deductions and exclusions, "basic protection" only covers "net economic loss." "Overlapping with benefits

63. *Id.* at 51-53. "Loss" is defined as "accrued economic detriment from accidental injury, consisting of (i) allowable expenses [*i.e.*, "reasonable charges incurred for reasonably necessary products, service and accommodations" including a semiprivate hospital room and up to $500 for funeral expenses] and (ii) work loss [*i.e.*, loss of income by injured person and the reasonable expense of necessary services] and (iii), if injury causes death, survivors' loss." Pain, suffering, and inconvenience are not loss. "Net economic loss" generally is loss less all collateral sources except support payments, life insurance proceeds, gratuities [except payments made by employer to employee] and amounts received "by way of succession at death."

64. *Id.* at 50-51. All accidental injuries are compensable. However, injury caused or suffered intentionally are only compensable to innocent third parties claiming through the injury.

65. Keeton & O'Connell, *Basic Protection—A Proposal for Improving Automobile Claims Systems*, 78 Harv. L. Rev. 329, 357 (1964). Note that the tort exemption does not apply if the victim dies.

66. Keeton & O'Connell, *supra* note 62, at 56.

from other sources is avoided by subtracting these other benefits from gross loss in calculating net loss."[67] One deductible item, for example, is a subtraction from gross loss up to fifteen percent of loss of income to offset the income tax benefit incident to "sick pay."[68] The collateral source rule, which allows an injured party damage awards for amounts covered by insurance, is thereby virtually eliminated.

The proposal also provides for an assigned claims plan[69] designed to afford basic protection benefits "even when every vehicle involved is either uninsured or a hit-and-run car."[70]

V. The Keeton-O'Connell Plan: Its Proponents and Opponents

The case for the proponents of "basic protection"[71] is most artfully articulated by its authors. In their writings, the first premise of their argument is an indication of the flaws in the fault system.[72] They argue that "tort law is . . . public law"[73] as well as private law to justify their theme "that motoring should be required to pay its way in society."[74] Distributing rather than shifting losses is supported on the grounds of fairness and the proper allocation of resources. Those who benefit from an activity should bear the burden of its expense. Just as highway maintenance cost is assessed against the motoring public by certain taxes, the cost of damage caused by cars should be treated as an operating cost of motoring. The cost of such compulsory basic protection insurance should then be considered when deciding whether or not to buy an automobile.[75]

In making motoring pay its own way through "basic protection" coverage, Keeton and O'Connell hasten to point out that certain coverage limits have been suggested in a calculated attempt to minimize the cost. The various deductibles and exclusions[76] considered together mean that basic protection will cover a sizable percentage of all automobile accident claims.[77] This means, they argue, that common law recovery which is permitted under the "basic protection" system will be less expensive, especially the administrative expense incident to the tort system. In short, basic protection is asserted to be a better system of compensation at a lower cost.

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67. Keeton & O'Connell, *supra* note 65, at 363.
68. Keeton & O'Connell, *supra* note 62, at 53-54.
69. *Id.* at 77-79.
70. Keeton & O'Connell, *supra* note 65, at 378.
71. A strong voice in favor of the Keeton-O'Connell proposal is Daniel P. Moynihan, Director of the Joint Center for Urban Studies of M.I.T. and Harvard University. *See* Moynihan, *Are We Ready for a Drastic Change?*, Trial, Oct.-Nov., 1967, at 27. Professor Fleming James has indicated favor for the "compensation" concept. *See* James, *The Columbia Study of Compensation for Automobile Accidents: An Unanswered Challenge*, 59 Colum. L. Rev. 408 (1959).
72. Keeton & O'Connell, *supra* note 65, at 329.
73. *Id.* at 332.
74. *Id.* at 345.
75. *Id.* at 345-48.
76. *Id.* at 349.
77. Marryott, *The Tort System and Automobile Claims: Evaluating the Keeton-O'Connell Proposal*, 52 A.B.A.J. 639, 640-41 (1966).

As might be expected, there are many who oppose the revolutionary concepts included in the Keeton-O'Connell plan. Its critics can be found among lawyer groups, the insurance industry and even members of the bench.

One of the most eloquent spokesmen for the opposition is Professor David Sargent of Suffolk University Law School. He opposes the abolition of the concepts of negligence and contributory negligence. He points out that even a drunk driver would be compensated by "basic protection" and states that "Keeton and O'Connell would take money out of the hands of innocent victims and put it into the pockets of wrongdoers who perpetrated the disaster upon the innocent."[78] This would violate "the most basic principles of personal responsibility and fair play."[79] Second, Sargent argues that Keeton and O'Connell have tried to alleviate the expense objection "by removing almost all the benefits"[80] of insurance. Pointing to the many exclusions and deductions in "basic protection," he states that "the cheapest insurance is no insurance: You pay nothing and you get nothing."[81] However, basic protection premiums will be substantial. Actuarial studies conflict in their prediction regarding the "economy" of the plan.[82]

Next, Sargent carefully examines the rationale behind the fixed deductibles and exclusions. He concludes that these limitations are generally arbitrary. The exclusion for pain and suffering up to $5,000 is a good example. Keeton and O'Connell justify this exclusion by contending that pain and suffering are so intangible that they cannot be measured. Sargent retorts that "if this argument has any vitality, if pain and suffering really is not measurable, then it is *never measurable.* But if it is *ever measurable,* then it is *always measurable.*"[83]

Other flaws pointed out by Sargent also bear noting. Keeton-O'Connell would provide for an *exemption from liability,* but there is no guaranteed exemption from being sued and being required to defend a lawsuit.[84] In addition, Keeton-O'Connell might very well aggravate the problem of fraud which it originally intended to alleviate. This would result from an over-broad definition of the loss covered. Any economic loss arising out of the ownership maintenance, or use of a motor vehicle is covered.[85] Finally, Sargent asserts that the burden of administrative costs and court congestion will not be lightened.[86] In short, Sargent deems "basic protection" an utter failure.

78. Sargent, *Exploding a Myth,* in Justice and the Adversary System 127 (Am. Trial Law. Ass'n ed. 1967).
79. *Id.*
80. *Id.* at 128.
81. *Id.*
82. *See* Justice and the Adversary System 163-229 (Am. Trial Law. Ass'n ed. 1967).
83. Sargent, *supra* note 78, at 132.
84. *Id.* at 133.
85. The possibility of fraud has been eliminated by the Keeton-O'Connell proposal. A situation may be conceived where a basic protection insured falls in the bathtub in his house, for example, but later claims that the fall was related to the ownership, maintenance or use of his automobile. Such incidents will be difficult to disprove. *See* Sargent, *supra* note 78, at 135.
86. *Id.* at 136-37.

The insurance industry has been markedly vocal in this dialogue. The Kemper Insurance Group actually retained Professors Keeton and O'Connell as independent consultants in its evaluation of the plan. The results of that evaluation were announced by James Kemper, Jr.[87] Basically, the Kemper findings suggest that the Keeton-O'Connell plan creates more problems than it solves. Certain aspects of this analysis require some discussion.

The legal staff of the Kemper study group concludes that adopting such a plan would present more difficult constitutional questions than workmen's compensation did thirty years ago.[88] Keeton and O'Connell candidly admit that the plan "is unconstitutional in all of the states whose constitutions prohibit any limitation of the amount recoverable for injury."[89]

Regulation and rating will create "nightmares" for the respective state officials and actuaries.[90] Because Keeton-O'Connell is to be adopted on a state-by-state basis, interstate accident situations will certainly complicate the picture.[91] This study affirms Sargent's opinion that "basic protection" will not result in reduced insurance premiums. Finally, the *incomplete* abolition of the fault system is questioned.[92]

Two other reactions in the insurance industry must be noted. William Knepper, chairman of the board of directors of The Defense Research Institute,[93] rejects the abolition of the fault system but finds several of Keeton and O'Connell ideas worthy of some merit. He suggests that much can be done "to accomplish savings and efficiency without going to such a radical change as the 'basic protection' concept."[94] If accounting for collateral sources effects economies under "basic protection," a similar result could be obtained under the present system. Simplification of existing procedures would decrease cost and hasten compensation. Knepper concludes that a great deal of reform should be effectuated within the framework of our present system before we consider such revolutionary alternatives.

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87. Kemper, *An Insurance Executive Looks at Proposed Changes*, 51 Judicature 168 (1967).
88. *Id.* at 170.
89. *Id.*
90. *Id.* at 170-71.
91. *Id.* at 171. The Kemper article notes an example to illustrate the interstate complications:

> Assume Michigan has enacted the basic protection plan and Illinois has not:
>
> (a) If a reckless driver from Illinois runs into a tree in Michigan, he collects basic protection benefits from the Michigan assigned claims fund which has been financed by money taken from Michigan's motorists.
>
> (b) If an Illinois driver collides in Michigan with a Michigan driver, both collect basic protection benefits, but the Illinois driver may retain his right of action in Illinois if he can get service on the Michigan driver.
>
> (c) A Michigan driver who has an accident in Illinois with an Illinois driver collects basic protection benefits but has a tort action against the Illinois driver, who in turn has a tort action against him.

92. *Id.*
93. Knepper, *Alimony for Accident Victims?*, 15 Defense L.J. 512 (1966).
94. *Id.* at 540.

Franklin Marryott, Vice President and General Counsel of the Liberty Mutual Insurance Company,[95] has also written in behalf of the insurance business. His major contribution is the formulation of "the practical, as distinguished from the philosophical, criteria that might sensibly be applied in judging and evaluating proposals for changes in the automobile tort system."[96] These criteria set a very high standard to be met before change is acceptable. Generally, the change should be "evolutionary" and "gradual," leaving some "avenue of retreat" if the change proves to be a mistake. The change should be generally acceptable to all concerned, and the cost and delay of adequate compensation should be decreased. However, it may prove very difficult to justify *any* reform measured against this standard!

Finally, members of the bench and bar have expressed their respective viewpoints. The court congestion issue has illicited strong response from the judiciary. One judge has stated that the Keeton-O'Connell plan is no panacea for the continuing need for judicial manpower.[97] Another judge has heeded the warning of Dr. Calvin Brainard, Professor and Chairman of the Finance and Insurance Department of the University of Rhode Island, that "basic protection" will be the foundation for many new fraudulent claims.[98]

Two articles written by three distinguished members of the bar have taken a refreshing approach to this problem even though they must be included within the opposition faction. Alfred Conard and J. Ethan Jacobs have written an article called *New Hope for Consensus in the Automobile Injury Impasse.*[99] Its title aptly describes its theme. Avoiding the common nihilist approach of easy criticism without attempting affirmative resolution, the authors focus on the common ground between the "tortists" and the "compensationists."

> It seems to the present authors that we need not abandon either the automobile, the tort law, or public and private insurance in order to arrive at a reasonable solution. Because they are cheaper, faster and more complete in their coverage of individuals, nontort reparation systems should be strengthened where they exist and instituted where they are lacking. Because the tort system is expensive, crowded, insulated from the nominal defendants but theoretically complete in its coverage of expenses and damages, it should fill the role of backstop when other systems do not provide adequate compensation and deterrence. It should also be modernized to help promote reasonable and speedy settlements. Additional measures should be provided to impose sanctions on careless drivers.[100]

95. Marryott, *supra* note 77.
96. *Id.* at 640.
97. *See* Letter from the Hon. G. Joseph Tauro, C.J., Sup. Ct., Boston, Mass., to Gov. John Volpe, August 29, 1967, in Justice and the Adversary System 279-80 (Am. Trial Law. Ass'n ed. 1967).
98. *See* Statement Issued by Judge James R. Lawton following an appearance before Ways and Means Comm. on Mass. Legis., in Justice and the Adversary System 283-88 (Am. Trial Law. Ass'n ed. 1967).
99. Conard & Jacobs, *New Hope for Consensus in the Automobile Injury Impasse*, 52 A.B.A.J. 533 (1966).
100. *Id.* at 538.

Finally, Jacob Fuchsberg,[101] a past president of the American Trial Lawyers Association, has made several careful observations about basic protection. He begins by citing statistics which indicate that it is not surprising that insurance premiums have increased. Given fifteen years of inflationary trends, most fundamental items have increased in price. He also notes the standard objections. However, sensing a need for something more than mere criticism, he continues to list several noteworthy suggestions. He proposes compulsory liability insurance with unlimited coverage. A "universal medical payment" feature would be attached to the basic coverage.[102] Comparative negligence would replace contributory negligence, which is a system he characterized as "a law mostly honored in the breach."[103] People, not cars, should be insured, and victims should be able to proceed directly against the carrier.[104] Massive safety campaigns and tough traffic law enforcement should be instituted. Judicial budgets ought to be increased. Advance payment and rehabilitation programs must be expanded. "An insolvency insurance fund should be created to cover fly-by-night companies' defalcations."[105] Guest laws and immunity provisions should be eliminated. If these suggestions are followed, Fuchsberg contends that "financial irresponsibility would be a thing of the past and meritorious claims would be fully compensated."[106]

VI. Other Possible Alternatives

It is unfortunate that, with the exception of the last two authors mentioned, no one has attempted to present a compromise position. That is the theme of the following suggestions.

The intricacies of "basic protection" create too many gaps. These gaps have given rise to much criticism. Incorporating simplicity into a proposal might avoid opening such gaps, and this should be the keynote to any proposed reform.

Comparative negligence should provide the framework for reform. The type of comparative negligence[107] rule to be adopted will depend upon the importance assigned to the traditional concept of fault and personal responsibility. For instance, if one agrees that fault is a minor consideration in compensating for injury resulting from automobile accidents, then the "pure" type of comparative negligence rule should be adopted. Adopting a comparative approach for allocating loss will serve the ends of justice with the probability of decreased cost. In this system, pain and suffering will continue to be regarded as a real source of damage. However, the feasibility of a fixed ratio of out-of-pocket medical expense to pain and suffering might be explored. Within this new system, guest statutes and doctrines of immunity should be abolished. The pleadings

101. J. Fuchsberg, *A Lawyer Looks at Proposed Changes*, 51 Judicature 158 (1967).
102. *Id.*
103. *Id.* at 161.
104. *Id.* at 162.
105. *Id.*
106. *Id.*
107. *See supra* notes 30-32 and accompanying text.

and the pre-trial stages of litigation can be expedited and simplified. For example, in New York the twenty-day limit on the time to answer a complaint is the only effective attempt to place time limitations on the pleading stage of a lawsuit.[108] One solution might be to consolidate the functions of the complaint and the bill of particulars. Another time limitation might be imposed on the period between the origination of the lawsuit and the filing of the trial note of issue. An effective use of a pre-trial conference procedure[109] would be another improvement. A way of encouraging settlement would be to award reasonable attorney's fees against a defendant-insurer who refused to settle and subsequently lost at trial, especially when only property damage is involved. Considered in the context of a direct action provision, such a sanction would prevent the insurance company from utilizing time as a settlement weapon against a victim in the weaker bargaining position. An alternative to the reasonable attorney's fees award might be prejudgment interest.[110]

The fabric of this new system would be compulsory liability insurance with realistic coverage limits. Present minimum liability limits in New York of $10,000 or $20,000 are totally inadequate and out of tune with our modern world. In addition, the standard liability policy would embrace a compulsory medical payments feature to fill the need for finances at the early stage when medical treatment is usually required. Setting coverage limits for medical payments ought also to be realistic. Finally, in states where loss of earnings are not in some way compensable in cases of disability,[111] a limited loss of earnings insurance should be required coverage. An uninsured motorist fund must be included in any sensible program to insure compensation to victims of automobile accidents. These various new sources of compensation (*i.e.*, the medical payment and loss of earning insurance) would be limited to accidents involving moving vehicles and would cover the occupants of insured cars only. Moreover, where the medical payments and loss of earnings insurance are not provided by existing governmental programs, they should be considered collateral sources offsetting the total amount of the liability award.

It deserves no more than a casual reference that increased safety innovations and stricter traffic law enforcement are incidents of any complete plan.

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108. *See* N.Y. CPLR § 3012(a). Although N.Y. CPLR § 3042(a) requires that the service of a bill of particulars be made within ten days after demand, this time limitation is ineffective because the courts are reluctant to grant an unconditional preclusion order. Moreover, there is no time limitation requiring the prompt service of a demand for a bill of particulars. *See* J. Weinstein, H. Korn & A. Miller, New York Civil Practice § 3042.12 (1967).

109. *See, e.g.*, Fed. R. Civ. P. 16.

110. *See generally The Case of Prejudgment Interest*, 9 Am. Trial Law. Ass'n Newsletter 338 (1966).

111. *See* N.Y. Work. Comp. Law §§ 200-42 (Supp. 1967). This "Disability Benefits Law" provides certain scheduled payments for employee disability not necessarily arising out of and in the course of employment. Computed on the average weekly wage of employment with his last covered employer, these limited benefits can continue for a period of twenty-six weeks.

Also, that certain coverage is required should not preclude maintaining optional forms of insurance. To encourage this, accounting for collateral sources would only be required in the specified compulsory forms of coverage. Even if these ideas do not alleviate court congestion and some of the fraudulent claims that cause the congestion, it does not seem extravagant to suggest the addition of one or two members to the local bench. The proper interest should not be economy, but rather a fair and appropriate system of compensating loss.

VII. Conclusion

The Keeton-O'Connell proposal goes too far in certain aspects and not far enough in others. Their complicated system of exclusions and deductions leaves them open to justifiable criticism. Their concern for the injured pedestrian is laudable, but, because of this concern, their program was challenged as an added inducement for fraudulent claims. The concept of "net economic loss" lends itself to the interpretation that "basic protection" was no protection at all.

Retaining contributory fault principles to handle liability claims over certain limits in the face of their severe criticism of the fault system was simply inconsistent. Moreover, Keeton and O'Connell were content to provide for voluntary liability insurance to cover judgments over the basic protection amounts. Disparaging of fault, they would have permitted compensation for personal irresponsibility. Perhaps these inconsistencies arose because of the authors' concern for the "practical politics" of obtaining acceptance for such a proposal. If this is so, it is ironic that this practical aspect is the underlying cause for the criticism levied against their plan.

Certainly there is much that can be said in favor of the Keeton-O'Connell proposal, but in its present form it is not the answer. What this proposal has accomplished is to vitalize the dialogue attempting to remedy the flaws in the present system. This is a valuable achievement in itself. Hopefully the end product of the debate will be a fair and workable plan to compensate loss in the automobile accident area.

Robert B. Conklin

TITLE TO GOODS: THE POSITION OF THE PURCHASER AT COMMON LAW AND UNDER THE UNIFORM COMMERCIAL CODE

Under common law, the bona fide purchaser long received dichotomous treatment from commercial law. Some complained that the bona fide purchaser was being protected to the detriment of merchants, while others argued that the protection afforded the bona fide purchaser should be increased to promote the free transfer of goods.[1] The fact that these arguments were often couched

1. *See* Vold, *Worthless Check Cash Sales, "Substantially Simultaneous" and Conflicting Analysis,* 1 Hastings L.J. 111, 121 (1949). He refers to the treatment of bona fide purchasers as being "Janus-faced."