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Eugene M. Haring

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The Profession After No-Fault: What Grist For The Mill?

Eugene M. Haring*

No-fault plans have been enacted in four states.¹ During 1970-71 no-fault plans have been under consideration in 34 other states.² A federal no-fault bill is pending.³ The principle of no-fault insurance is supported by the administration.⁴ The adoption of no-fault plans will have significant effects upon the practice of law and the legal profession. Lawyers' income will be affected. There will be changes in the nature and quality of law practice, and hopefully in the lawyer's public image.

Recently the Department of Transportation (DOT) completed its automobile insurance and compensation study.⁵ An objective of that study was the collection and evaluation of data with respect to the economic impact of motor

* Of the firm of McCarter & English, Newark, N.J.; Princeton University (A.B., 1949; A.M., 1951); J.D., Harvard Law School, 1955; member of the New Jersey Bar.

1. MASS. ST. 1970, CH. 670, EFF. JAN. 1, 1971; FLA. ST. 1971, CH. 71-252, EFF. JAN. 1, 1972; DEL. LAWS 1971, CH. 98, EFF. JAN. 1, 1972; ILL. ST. 1971, P.A. 77-305, EFF. JAN. 1, 1972; Puerto Rico also has a no-fault statute, P.R. LAWS ANN. TIT. 9, §2051 (SUPP. 1969); Oregon has a statute which, while providing for first-party motor vehicle insurance, does not provide for any immunity from tort liability. It is questionable whether Oregon will achieve the purposes of no-fault reform to any meaningful degree; consequently it has not been included in this presentation. ORE. LAWS 1971, CH. 523, EFF. JAN. 1, 1972.

2. AMERICAN INSURANCE ASSOCIATION, MANAGEMENT BULLETIN NO. 71-6-5, June 17, 1971, provides a state-by-state summary of no-fault legislation introduced and action taken thereon. The summary shows that ten states have enacted study committee bills, sixteen states have bills pending, and in eight states the bills introduced have died. Compare this summary with the N.Y. Times, May 9, 1971, at 60, col. 1, stating that 28 states considered no-fault bills in 1970-71.

3. S. 945, 92d Cong., 1st Sess. (1971). See *Hearings on S. 945 Before the Senate Commerce Comm.*, 92d Cong., 1st Sess. (1971). Changes in the original bill are included in Senate Commerce Comm. Print No. 1, 1971 on S. 945.

4. Statement of John A. Volpe, Secretary of Transportation, before the Senate Commerce Comm. March 18, 1971, in U.S. DEP'T OF TRANSPORTATION, MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES I (1971) [hereinafter cited as MOTOR VEHICLE CRASH LOSSES]; Statement of John A. Volpe, Secretary of Transportation, before the Subcomm. on Commerce and Finance of the House Interstate and Foreign Commerce Comm., April 20, 1971.

5. The study was authorized by the Act of May 22, 1968, Pub. L. No. 90-313, 82 Stat. 126. See particularly the following component studies: U.S. DEP'T OF TRANSPORTATION, AUTOMOBILE ACCIDENT LITIGATION (1970) [hereinafter cited as AUTOMOBILE ACCIDENT LITIGATION]; U.S. DEP'T OF TRANSPORTATION, AUTOMOBILE PERSONAL INJURY CLAIMS pts. I, II (1970) [hereinafter cited as AUTOMOBILE PERSONAL INJURY CLAIMS]; U.S. DEP'T OF TRANSPORTATION, ECONOMIC CONSEQUENCES OF AUTOMOBILE ACCIDENT INJURIES pts. I, II (1970).

vehicle injuries.⁶ The statistical data developed by the DOT study provide important guidelines and indicators for assessing the effect of no-fault plans upon the practice of law, both in its economic and qualitative aspects.

Many plans for reform have been presented. "[T]he complexity of the subject and its problems make possible an almost limitless number of combinations, permutations, and variations of recovery rules, insurance coverages, etc."⁷ Some programs for reform would include a "total" no-fault system under which practically all personal injury suits arising from automobile accidents would be eliminated.⁸ The effect of such plans upon automobile personal injury litigation is evident. However, most no-fault plans, and those which have been adopted, do permit personal injury tort recoveries under specified circumstances. The particular limitations placed upon tort recoveries will have varying effects upon lawyers' income.

Lawyers' Income after No-Fault

Approximately one-sixth of the legal fees paid in this country will be affected by no-fault plans. Legal fees of almost one billion dollars per year are paid for representation in automobile negligence litigation.⁹ All legal fees in the United States amount to approximately six billion dollars per year.¹⁰ Plaintiffs' attorneys receive almost four and a half times as much in legal fees as do defendants' attorneys. Of the almost one billion dollars of fees per year paid in the field of automobile negligence litigation, approximately four-fifths (794 million) is paid to plaintiffs' attorneys.¹¹ Almost one-fifth (180 million) is paid to defendants' attorneys.¹² Thirteen percent of all legal fees for any kind of legal service was paid to plaintiffs' attorneys in automobile negligence litigation. Only three percent of all legal fees went to attorneys representing defendants. Plainly the income of plaintiffs' attorneys is the more significant aspect in the consideration of the effects of no-fault plans on lawyers' income.

It has been estimated that approximately 23 cents of the premium dollar is

6. Act of May 22, 1968, Pub. L. No. 90-313, 82 Stat. 126.

7. Statement of John A. Volpe, Secretary of Transportation, before the Senate Commerce Comm., March 18, 1971, in *MOTOR VEHICLE CRASH LOSSES*, at 2.

8. *E.g.*, see note 3 *supra*; the "Rockefeller-Stewart Plan", explained in STATE OF NEW YORK INSURANCE DEPARTMENT, *AUTOMOBILE INSURANCE . . . FOR WHOSE BENEFIT?* (1970) [hereinafter cited as N.Y. INS. DEP'T REPORT]; American Insurance Association, *Personal and Property Protection Motor Vehicle Insurance Act*, Draft No. 10 (Edited), Aug. 10, 1970.

9. 1 *AUTOMOBILE PERSONAL INJURY CLAIMS* 80. The figure given is for 1968, the year covered by the DOT study. See *AUTOMOBILE ACCIDENT LITIGATION* 40, which deals with lawyers' fees and expense reimbursements from cases in suit.

10. INTERNAL REVENUE SERVICE, U.S. DEP'T OF THE TREASURY, *STATISTICS OF INCOME, 1967, BUSINESS INCOME TAX RETURNS*, Tables 2.1 and 3.1 (1970).

11. 1 *AUTOMOBILE PERSONAL INJURY CLAIMS*, Table VI-8, at 80.

12. *Id.*

used up in lawyers' fees and the payment of claims investigators.¹³ One object of no-fault plans is the reduction of "frictional costs," the costs of delivering benefits to persons injured in automobile accidents.¹⁴ Keeton and O'Connell have characterized the present system as "wastefully expensive," paying "even more for the overhead of insurers, lawyers, and courts than for the compensation of victims. . . ."¹⁵ The New York Insurance Department Report criticizes the existing system for its "profligacy of . . . operating costs."¹⁶

A measure of the effectiveness of any given no-fault plan is the extent to which it reduces attorneys' fees. The inquiry is not whether attorneys' fees will be reduced, but rather how much so and what principles of the plans will effect reductions.

The DOT study provides the information necessary to forecast generally the economic impact of no-fault plans upon lawyers.¹⁷ Such data as the percentage of lawsuits, and lawyers' income as it relates to the claimants' loss and the

13. N.Y. INS. DEP'T REPORT 34. See Warne, *Let's Hear from the Insurance Consumer*, 36 INS. COUNSEL J. 496 (1969).

14. See, e.g., R. KEETON & J. O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM: A BLUEPRINT FOR REFORMING AUTOMOBILE INSURANCE* 33, 70 (1965) [hereinafter cited as KEETON & O'CONNELL, *BASIC PROTECTION*]; N.Y. INS. DEP'T REPORT 35; Act of May 22, 1968, Pub. L. No. 90-313, 82 Stat. 126; N.Y. Times, May 9, 1971, at 60, col. 1; 117 CONG. REC. S. 1829 (daily ed. Feb. 24, 1971).

15. KEETON & O'CONNELL, *BASIC PROTECTION* 70.

16. N.Y. INS. DEP'T REPORT 37.

17. The DOT study presents in tabular form the percentage distribution of plaintiffs' attorneys' clients, lawsuits and fee income as they relate to the amount of economic loss suffered by the plaintiff to the date of settlement. 1 *AUTOMOBILE PERSONAL INJURY CLAIMS*, Table V-23, at 75. "Economic loss to date of settlement" is substantially the same as what is usually termed the "specials." It is defined further as follows:

- | | |
|--|------------|
| (1) Medical: including doctor bills, hospital bills, drugs, prosthetic devices, treatment, ambulance service, etc. | 051 |
| (2) Wages/Income: including gross wages, salary, commission and self-employment income payable before taxes without reduction for collateral source payments such as sick leave; and | 051
051 |
| (3) Other Economic Loss: including all expenses other than medical and wage/income loss directly related to bodily injury sustained. | 06 |

Id. at 27. For plaintiffs in the same brackets of economic loss the study sets forth ratios of payments to economic loss. *Id.* Table V-21, at 64. This table sets forth such ratios with and without attorney representation, and with and without suit. Table V-23 includes similar ratios as they relate to the defendant's or the claimant's "presumptive negligence." *Id.* at 66. Interestingly and significantly from the point of view of those who question the capability of the existing system to determine "fault," the ratio of payments to economic loss is identical for those injured persons sustaining economic loss up to \$1,000, no matter who was "presumptively negligent." A percentage breakdown of the components of economic loss is also presented. *Id.* Table IV-1, at 29. The average plaintiff's attorney's fee is 35.5 percent of the plaintiff's gross recovery. *AUTOMOBILE ACCIDENT LITIGATION* 7. By combining the data set forth in the DOT tables and applying the average plaintiffs' attorneys' fees, there is a basis for gauging the effect of no-fault plans upon lawyers' income.

TABLE I
COMBINED DOT DATA¹⁹

1	2	3	4	5	6	7	8	9
Economic Loss to Date of Settlement ²⁰ (a) (b) (c)	Percentage of Col. 1 which is Medical Loss ²¹ (a) \$	Percentage of Col. 1 which is Wage Loss ²¹ (a) \$	Percentage of Clients (b)	Percentage of Law Suits (b)	Percentage of Fee Income (b)	Ratio of Payments To Economic Loss (c)	Payments (Col. 7 x Col. 1)	Fee Income 35.5 x Col. 8
0			2.2	1.8	1.7		\$	\$
1-500	68.4 (0-342)	27.2 (0-136)	64.5	54.0	24.3	4.4	0-2200	0-781
501-1000	51.4 (258-514)	41.9 (210-419)	15.3	17.5	16.0	3.2	1600-3200	568-1136
1001-1500	51.1 (512-767)	39.2 (392-588)	6.5	8.2	12.1	3.3	3300-4950	1171-1757
1501-2500	48.4 (726-1210)	41.7 (626-1043)	5.3	7.9	13.3	2.9	4350-7250	1544-2574
2501-5000	52.2 (1306-2610)	40.8 (1020-2040)	3.7	6.0	14.1	2.4	6000-12000	2130-4260
5001-10,000	51.5 (2576-5150)	40.9* (2045-4090)	1.8	3.0	10.8	1.9	9500-19000	3372-6745
10,001-25,000	41.4 (4140-10350)	48.2 (4820-12050)	.7	1.3	6.7	1.6	16000-40000	5680-14200
Over 25,000 ²¹	21.0	65.4	.1	.2	1.0	.4		

Sources: (a) AUTOMOBILE PERSONAL INJURY CLAIMS, VOL. I, Table IV-1, Percentage Distribution of Economic Loss to Date of Settlement by Type of Loss and Size of Loss, at 29.

(b) AUTOMOBILE PERSONAL INJURY CLAIMS, VOL. I, Table VI-3, Percentage Distribution of Attorneys' Clients, Lawsuits and Fee Income by Size of Economic Loss to Date of Settlement, at 75.

(c) AUTOMOBILE PERSONAL INJURY CLAIMS, VOL. I, Table V-21, Ratio of Aggregate Payments to Aggregate Economic Loss to Date of Settlement by Size of Loss and Attorney Representation, at 64.

*Table IV-1 indicates a percentage of 50.9. However, that appears to be a typographical error.

average contingent fee may be combined, and conclusions from this data are suggestive. Such DOT data is contained in Table I.¹⁸

No-fault plans may provide threshold figures, exclusions or limitations upon tort recoveries, tort exemptions or court supervision of contingent fees. Any of these will affect lawyers' income. The typical no-fault plan provides a threshold below which no tort action may be brought. The threshold may be expressed in various ways. The figure may be a level of medical expenses,²³ of damages for pain and suffering,²⁴ or of first-party benefits paid.²⁵ The effect that particular thresholds will have on fee income can be gauged by the DOT data. Some plans provide either for exclusions of specified amounts from any tort recovery or for limitations upon such a recovery.²⁶ Such exclusions or limitations may reduce the amount upon which a contingent fee may be based and thus further affect attorneys' fees. Some plans provide for court supervision of all or part of the plaintiffs' attorneys' fees,²⁷ or for a limitation on contingent fees.²⁸

18. Table I deals with national averages. Inasmuch as there is a substantial difference in attorneys' income from automobile personal injury litigation among the states, there will be corresponding geographical differences in the effect of no-fault plans on lawyers' income. For instance, in California, plaintiffs' attorneys received \$94,570,000 in fees in 1968, while in Colorado they received only \$6,879,000. 1 AUTOMOBILE PERSONAL INJURY CLAIMS 80.

19. The presentation of information in ranges results in a number of discontinuities in what must be assumed to be a generally continuous relationship. For example within the range of economic loss of \$1 to \$500 the ratio of payments to economic loss is 4.4, while in the range \$501 to \$1,000 that ratio is 3.2. Yet it appears impossible that, in fact, there would be any sharp demarcation in the actual ratio between \$499 and \$501. This discontinuity would appear to be a necessary concomitant of the tabular form. Despite such discontinuities, the table reflects the range of anticipated fee income based upon the most thorough hard data available.

20. For a definition of "economic loss," see note 17, *supra*.

21. Columns 8 and 9 have not been completed for the category "Over \$25,000," since data for this category are "properly suspect since they reflect a small number of cases." 1 AUTOMOBILE PERSONAL INJURY CLAIMS 69.

22. *Id.* Table IV-1, at 29 includes a percentage distribution, not reflected on Table I, for "other" economic loss including all expenses other than medical loss or wage/income losses directly related to the bodily injury sustained. *Id.* at 27-29. This component plus the components shown in columns 2 and 3 of Table I, equal 100 percent economic loss.

23. *E.g.*, MASS. GEN. LAWS ANN. ch. 231, § 6D (1970).

24. *E.g.*, The Proposed Motor Vehicle Basis Protection Insurance Act § 4.2, in KEETON & O'CONNELL, BASIC PROTECTION 323.

25. *E.g.*, Florida Automobile Reparations Reform Act § 8(2), FLA. STAT. ANN. § 71-252 (West Supp., June, 1971), effective Jan. 1, 1972.

26. *E.g.*, MASS. GEN. LAWS ANN. ch. 90, § 34M (1970); Florida Automobile Reparations Reform Act § 7(3), FLA. STAT. ANN. § 71-252 (West Supp., June 1971), effective Jan. 1, 1972; DEL. LAWS 1971, ch. 98, § 2118(g); ILL. ANN. STAT., P.A. 77-305 (Smith-Hurd Supp., July 1971) effective Jan. 1, 1972. The Proposed Motor Vehicle Basic Protection Act § 4.3(c)(d), in KEETON & O'CONNELL, BASIC PROTECTION 324.

27. Florida Automobiles Reparations Reform Act, FLA. STAT. ANN. § 71-252 (West Supp., June 1971), effective Jan. 1, 1972.

28. NATIONAL ASS'N OF INDEPENDENT INSURERS, DUAL PROTECTION: A PROGRAM FOR IMPROVEMENT OF THE AUTOMOBILE ACCIDENT COMPENSATION SYSTEM 26-27 (1971).

The Effect on Plaintiffs' Lawyers

Those plans providing even low threshold figures eliminate many lawsuits and much lawyers' income. The threshold provided by the Massachusetts Act would reduce fee income to plaintiffs' lawyers by a statistical minimum of 42 percent.²⁹ The Massachusetts Act permits a suit for pain and suffering—general damages—only if the medical expenses exceed \$500.³⁰ This limitation has been criticized as being much too low.³¹ Nevertheless it should have a substantial effect on plaintiffs' lawyers' fees.³² According to the DOT statistics, if economic loss is between \$1,000 and \$1,500, medical expenses will constitute 51.1 percent of this loss.³³ Accordingly, a claimant should have a \$500 medical loss when his total economic loss is approximately \$1,000. Thus, under the Massachusetts Act, suits involving less than \$1,000 in out-of-pocket expenses will be substantially reduced. This should mean the elimination of approximately 82 percent of plaintiffs' lawyers' clients and about 73.3 percent of lawsuits.³⁴

The threshold in the Florida Act should also work a statistical reduction of approximately 42 percent in plaintiffs' lawyers' fee income. The Florida Act provides a threshold of \$1,000 in medical or wage loss.³⁵ Since the DOT study indicates that wage and medical loss of \$1,000 involves a medical loss of \$500 the effect of the Florida threshold should be similar to the Massachusetts threshold.

The threshold provided in the Keeton-O'Connell Plan should effect a statistical reduction of approximately two-thirds in plaintiffs' lawyers' fee income.

29. 1 AUTOMOBILE PERSONAL INJURY CLAIMS, Table VI-3, at 75; Table I, col. 6.

30. MASS. GEN. LAWS ANN. ch. 231, § 6D (1970). In addition, the Massachusetts Act provides that a tort suit for damages from pain and suffering may be brought if the accident results in death, loss of a body member, permanent and serious disfigurement, loss of sight or hearing, or a fracture. *Id.* Serious or fatal injuries such as these constitute only 7.7 percent of all claims and most frequently involve loss well above the threshold figure. 1 AUTOMOBILE PERSONAL INJURY CLAIMS, Table III-3, at 19; Tables IV-6 and IV-7, at 33. Fractures are suffered by nine percent of all paid claimants, *Id.* Table III-5, at 20, and many of these would exceed the threshold figure in any event. The comments in the text are based only on the economic threshold.

31. Keeton & O'Connell, *Alternative Paths Toward Nonfault Automobile Insurance*, 71 COLUM. L. REV. 241, 253 (1971) [hereinafter cited as Keeton & O'Connell, *Alternative Paths*].

32. The Massachusetts Act affects claims arising from accidents which occurred on or after January 1, 1971. The statute of limitations will not run for some time on earlier claims. Accordingly, accurate empirical data is not yet available on the effect of the Massachusetts Act. Initial reports are that the effect of the Massachusetts Act on lawyers' practice and income may be substantial. N.Y. Times, July 18, 1971, § 1, at 34, col. 1.

33. 1 AUTOMOBILE PERSONAL INJURY CLAIMS, Table IV-1, at 29; Table I, col. 2.

34. *Id.* at Tables I and V-27.

35. In addition, the Florida Act provides that a tort suit for damages from pain and suffering may be brought if the accident results in permanent disfigurement, a fracture to a weight-bearing bone, a compound, comminuted, displaced or compressed fracture, loss of a body member, permanent injury, permanent loss of a bodily function, or death. See note 25 *supra*. The effect of these additional categories should be insubstantial. See note 30 *supra*.

The Keeton-O'Connell Plan essentially provides two thresholds: \$5,000 in pain and suffering or \$10,000 in wage and income loss.³⁶ As a practical matter the \$5,000 pain and suffering threshold should be reached more easily in most cases. The DOT study indicates that damages for pain and suffering will exceed the Keeton and O'Connell threshold figure of \$5,000 when the plaintiff's economic loss is between \$2,500 and \$5,000.³⁷ In effect, the Keeton-O'Connell Plan eliminates suits in which the economic loss—or "specials"—approximates \$2,500 or less. The elimination of such cases, without more, would mean a reduction of plaintiffs' lawyers' clients by approximately 93.8 percent. It would reduce the number of lawsuits by about 89.4 percent.³⁸ Statistically, fee income should be reduced by 67.4 percent.³⁹

The exclusion from tort recoveries provided under some no-fault plans reduces fee income even further. Under those plans containing both a threshold and an exclusion or limitation on recovery, the plaintiff's lawyer may well be caught in a vise between the threshold figure on one side and the recovery limitation on the other. For instance, under the Massachusetts Act the defendant-insured is exempt from suit to the extent of \$2,000 in wage and medical benefits;⁴⁰ recovery of "specials" below this \$2,000 limitation is eliminated. Thus, while a suit in which the "specials" were \$1,500 would have yielded a recovery of \$4,350,⁴¹ it will now yield only \$2,850 when the appropriate reduction of "specials" is made. This of course is a significantly smaller amount upon which the plaintiff's lawyer can base his fee.

The effect of the exclusion provided by the Keeton-O'Connell Plan is more severe. Under that plan, the verdict must be cast in terms of (1) recovery for

36. The Proposed Motor Vehicle Basic Protection Insurance Act § 4.2, in KEETON & O'CONNELL, BASIC PROTECTION 323.

37. 1 AUTOMOBILE PERSONAL INJURY CLAIMS, Table V-21, at 64; Table I, col. 7.

38. *Id.* at Table VI-3, 75 and Table I, cols. 4-6.

39. *Id.* Keeton and O'Connell have criticized the nature and level of the Massachusetts threshold. Keeton & O'Connell, *Alternative Paths* 253-54. However, the difference between the Massachusetts threshold and that proposed by Keeton-O'Connell is not so great as may first appear. The DOT study indicates that \$5,000 in pain and suffering damages should result from "specials" of between \$2,500 and \$5,000. Table I, cols. 1 and 8, *supra* p. 307. This should entail medical bills of between \$1,306 and \$2,610. *Id.* at col. 2. Moreover, claims adjusters and personal injury attorneys have long used "rules of thumb" to derive pain and suffering damages as a multiple of specials, "typically from two to five depending on the practice in the area." H. ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS 108 (1970) [hereinafter cited as ROSS]. See Artstein, *Analyzing Special Damages*, 1964 INS. L.J. 261, 265 [hereinafter cited as Artstein]. Applying such rules of thumb, therefore, the Keeton-O'Connell threshold in some instances may be similar to that contained in the Massachusetts Act.

40. MASS. GEN. LAWS ANN. ch. 90, § 34M (1970).

41. 1 AUTOMOBILE PERSONAL INJURY CLAIMS, Table V-21, at 64; Table I, cols. 1 and 8.

pain and suffering, and (2) recovery for lost wage and medical expenses.⁴² Up to \$5,000 for pain and suffering and up to \$10,000 for lost wages and medical expenses must be excluded from the appropriate portions of the verdict.⁴³ Under the existing system, if an injured party has out-of-pocket expenses of \$5,000, he would receive \$12,000.⁴⁴ Under Keeton-O'Connell he would have a net recovery after exclusions of \$2,000.⁴⁵ In the higher ranges the plaintiff's lawyer would fare somewhat better. But very few cases indeed are in the higher ranges.⁴⁶

Although the Florida plan provides a threshold which should be similar in effect to that of Massachusetts, the exclusion under the Florida Act appears to have little effect upon lawyers' fees. In the Florida Act there is a so-called tort exemption up to \$5,000, but the money is recoverable from the defendant if the threshold has been reached.⁴⁷ The first-party insurer has a lien on the tort recovery to the extent of first-party benefits paid.⁴⁸ Since the attorney may be awarded a fee apportioned partly on the amount of judgment-subject-to-lien, the adverse effect of the exclusion on attorneys' fees is blunted or removed.⁴⁹

Neither the Delaware⁵⁰ nor the Illinois statutes⁵¹ contain threshold provisions. The Delaware statute provides for an exclusion from a tort verdict in an attenuated form: the claimant may not plead or prove his "specials." This should work some reduction in recovery, but the extent is uncertain.⁵² Under the Illinois Act a tort recovery must be reduced by the amount of first-party benefits received, but, most important, damages for pain and suffering are

42. The Proposed Motor Vehicle Basic Protection Act § 4.3(b), in KEETON & O'CONNELL, BASIC PROTECTION 324.

43. *Id.* § 4.3(c)(d).

44. 1 AUTOMOBILE PERSONAL INJURY CLAIMS, Table V-21, at 64; Table I, cols. 1 and 8.

45. From the \$12,000 verdict there would be subtracted the \$5,000 in wage and medical expenses, leaving \$7,000. Since the pain and suffering portion of the verdict would have exceeded \$5,000, that \$5,000 is deducted from the \$7,000, leaving \$2,000.

46. Only 1.5 percent of law suits involve recoveries over \$10,000. 1 AUTOMOBILE PERSONAL INJURY CLAIMS, Table VI-3, at 75; Table I, col. 5.

47. Florida Automobile Reparations Reform Act, FLA. STAT. ANN. § 71-252 (West Supp., June 1971), effective Jan. 1, 1972.

48. *Id.* at § 7(3).

49. With a medical and wage loss of \$2,500 a claimant would receive, according to the DOT statistics, \$7,250. Table I, col. 8. Under the Florida Act, there is a "tort exemption" of \$5,000, but the claimant nevertheless is permitted to sue in tort for the full amount if, in effect, his specials exceed \$1000. The first party insurer has a lien on the amount which has been paid. Thus, while the benefits to the injured party may be reduced, the benefits to his lawyer may not be, since his fee, although court supervised, may be based on the entire recovery, including the portion of the recovery subject to lien. Of course, the reduced benefits to the claimants may have a threshold effect. Florida Automobile Reparations Reform Act, FLA. STAT. ANN. § 71-252 (West Supp., June 1971), effective Jan. 1, 1972.

50. DEL. LAWS, ch. 98 (1971), effective Jan. 1, 1972.

51. ILL. ANN. STAT., P.A. 77-305 (Smith-Hurd Supp., July 1971), effective Jan. 1, 1972.

52. While specials of \$2,500 would have resulted in a verdict of \$7,250, Table I, col. 8, under the Delaware Act, no evidence of those specials can be introduced; thus the verdict would theoretically be reduced to \$4,750. *Supra* note 50, at § 1(9). But it remains to be seen what juries will do.

limited to one-half of the medical "specials" under \$500 and the total amount of the medical "specials" over \$500.⁵³

By combining certain DOT data and applying the threshold figures and exemptions of various plans to the data, the estimated effects of the plans upon fee income are illustrated in Table II:

By one method of calculation, the overall fee reductions which can be extrapolated from the results of Table II are striking. Keeton-O'Connell is the most drastic of the tabulated plans—a rough estimate of the total plaintiffs' attorneys' fee reduction under Keeton-O'Connell is 90 percent. Fee reductions under the enacted statutes are also highly significant. The anticipated fee reduction for Massachusetts is 46 percent, for Illinois 79 percent, and for Delaware 36 percent.⁵⁵

Provisions of no-fault plans which reduce the amount of recovery may very well have an effect similar to the threshold provisions. With the amount of potential recovery reduced, and the lawyer's fee correspondingly reduced, claimants and their attorneys may not find it worthwhile to bring actions which are over the threshold but which promise a very small recovery.

It may reasonably be assumed that some claimants will react to the threshold limitations by padding expenses. The Massachusetts Act has been criticized as

53. With a medical and wage loss of \$2,500 a claimant would receive, according to the DOT statistics, \$7,250. Table I, col. 8. Under the Illinois Act, the recovery that will be reduced by his statutory first party benefits of \$2,097 (\$1210 medical plus 85 percent of wage or \$887) to a net recovery of \$5153. In any event, the recovery will be reduced to the statutory maximum (in this range) of medical specials less \$250, or an actual recovery of \$960. The Illinois Act reads in part: "[S]uch damages as may be recoverable for pain, suffering, mental anguish and inconvenience may not exceed the total of a sum equal to 50 percent of the reasonable medical treatment expenses of the claimant if and to the extent that the total of such reasonable expenses is \$500 or less, and a sum equal to the amount of such reasonable expenses if any, in excess of \$500." ILL. ANN. STAT., P.A. 77-305 (Smith-Hurd Supp., July 1971), effective Jan. 1, 1972).

54. Table II is based upon data from the DOT study set forth in Table I. Preparation of Table II required a number of assumptions, which generally will result in a higher, rather than a lower, lawyers' fee under the various no-fault systems, although the overall effect of these assumptions should be minimal. The assumptions are as follows: (1) Under the Illinois and Massachusetts Acts the applicable wage loss portions of economic loss are compensable only to the extent of 85 percent and 75 percent respectively. For simplification, the wage losses are included here on a 100 percent basis. (2) Where thresholds in addition to economic loss are present, such as a bone fracture, they have not been taken into account, but they represent a small percentage of the overall picture. See note 30 *supra*. (3) Under some of the acts, such as Delaware and Illinois, first-party insurance covers only specials up to a certain level within a year period, and it has been assumed for purposes of simplification that all specials were incurred within the single year. (4) Further, in the case of the Florida Act, it has been assumed that the portion of the attorney's fees attributable to the lien portion of the recovery will be 35.5 percent. (5) Some acts and plans provide that economic loss is measured only after collateral sources have been taken into account; in the preparation of this table, it has been assumed that there are no collateral sources.

55. These fee reductions are generated in the following manner. First, it is assumed that the average fee in any given Table II range of specials is equal to the fee at the bottom of the range

TABLE II³⁴
 STATISTICAL ESTIMATE OF EFFECTS OF VARIOUS NO FAULT PLANS UPON FEE INCOME

Economic Loss to Date of Settlement	Percentage of Fee Income	Fee Income Present System	Fee Income Keeton-O'Connell Plan	Fee Income Massachusetts Act	Fee Income Delaware Act	Fee Income Illinois Act	Fee Income Florida Act
A. \$1-500	24.3	\$0-781	\$0	\$0	\$0-604	\$0-61	\$0
B. 501-1000	16.0	568-1136	0	0	391-781	46-94	0
C. 1001-1500	12.1	1171-1757	0	817-1225	817-1225	93-184	1171-1757
D. 1501-2500	13.3	1544-2574	0	1012-1864	1012-1686	168-341	1544-2574
E. 2501-5000	14.1	2130-4260	0-710	1420-3550	1243-2485	375-1054	2130-4260
F. 5001-10,000	10.8	3372-6745	0-1420	2663-6035	1598-3195	1030-2858	3372-6745
G. 10,001-25,000	6.7	5680-14200	355-8875	4970-13490	2130-5325	2141-8059	5680-14200

providing a temptation to pad expenses to get over the \$500 limitation and to gain a pain and suffering claim.⁵⁶ However, padding medical expenses in the personal injury field is nothing new.⁵⁷ While the practice may be expected to survive the adoption of a no-fault plan, it would appear that even the most egregious padding can do little to minimize the reduction in income which must result from an effective plan.

The Effect on Defendants' Lawyers

While no-fault plans should have a great effect upon plaintiffs' attorneys' income, the result for defendants' attorneys may be even more severe.⁵⁸ The DOT study reveals that most defendants' lawyers are paid on an hourly basis, receiving an average of \$819 per case, regardless of the verdict.⁵⁹ One conclusion reached by the DOT study is that, "[s]ince defendants' attorneys' fees tend to be spread more evenly over all lawsuits (averaging \$819 per case) an elimination of cases with economic loss to date of settlement of less than \$1,000 from the system would have proportionately greater impact on defense counsel than plaintiff's counsel."⁶⁰ Stated otherwise, plaintiffs' attorneys make more of their fee income from large cases and defendants' attorneys' income is more generally spread over all cases. The plaintiffs' attorneys' large cases carry a disproportionate share of the overhead.

Assuming the defense attorney receives the average fee for each case, the first step in determining his loss of income under no-fault is to determine the number or percentage of cases which will be eliminated under a no-fault plan. Thus, in Massachusetts, where the threshold figure should eliminate 73.3 percent of automobile personal injury suits, the defense attorney should lose 73.3 percent

plus one-half of the difference between the fee at the bottom of the range and the fee at the top of the range. Second, a weighted average of the fees for all ranges of economic loss is obtained by multiplying the aforementioned assumed average fee for the range by the percentage of law suits attributable to that range of economic loss obtained from column 5 of Table I. Finally, the weighted average which is generated for any of the plans can then be compared to the weighted average under the present system, which results in the percentage reduction stated in the text. Steps one and two are based on assumptions which may not comport with actual averages computable from more detailed information. While "lawyers have no special competence for statistical analysis," Hastings, *Automobile Accident Reparations: No-Fault Plans and the Public Interest—Part II*, 52 CHI. B. RECORD 433, 436 (1971) [hereinafter cited as HASTINGS], we believe that these figures yield orders of magnitude for the reductions which may be instructive.

56. Keeton & O'Connell, *Alternative Paths* 254.

57. ROSS 118; N.Y. INS. DEP'T REPORT 38; J. O'CONNELL, *THE INJURY INDUSTRY AND THE REMEDY OF NO-FAULT INSURANCE* 16-17 (1971) [hereinafter cited as O'CONNELL], referring to the "unedifying spectacle of a plaintiff's doctor grossly exaggerating the after-effects of an injury, while the insurance doctor equally grossly disparages them—with a hapless jury in between left to decide." For a description of another means of padding, see ARTSTEIN 264-65.

58. 1 AUTOMOBILE PERSONAL INJURY CLAIMS 75.

59. *Id.*; AUTOMOBILE ACCIDENT LITIGATION 7.

60. See note 58 *supra*.

of his income.⁶¹ There may well be practical qualifications upon this statistical conclusion, such as the fact that a large case frequently takes more time and exacts a correspondingly higher fee. Notwithstanding such qualifications, given a system which eliminates a large percentage of litigated cases, and the fact that defense attorneys' income is more evenly distributed over all cases than that of plaintiffs' attorneys, an effective no-fault plan should affect defendants' attorneys even more severely than plaintiffs' attorneys.

As defense attorneys have restricted their practice more and more to the representation of automobile liability insurance companies, they have put themselves increasingly at the mercy of their own clients. Lacking a balanced and diversified clientele, and engaged in a highly competitive area, many defense attorneys have been faced with fee schedules dictated by economy-minded clients insensitive to the lawyers' rising overhead costs. Many defense attorneys have been victims of such limitation and specialization and have been reduced to kept and captive counsel. At once they may have the most to lose yet the least to lose from no-fault.

Practice and the Profession after No-Fault

A fundamental objective of the no-fault plans is the elimination of frictional costs.⁶² The common activities of attorneys in the automobile liability field which contribute to these frictional costs should be significantly reduced or practically eliminated under no-fault plans.⁶³ Accordingly, forecasts can be made with respect to the types of activities in which attorneys will become less engaged. Attorneys will spend less time negotiating in an area involving incommensurable values and unknowns. Litigation will not be so often based upon fact situations largely beyond the capacity of any candid witness to recall. Fees will have a more apparent basis in work done; they will not be based on questionable contingencies.

It would be erroneous to view these by-products of the automobile liability insurance and tort system as the result—either good or bad—of lawyers' efforts. The combination of mid-twentieth century conditions with a nineteenth century insurance and tort system has brought about the characteristics of

61. See note 34 *supra* at 198.

62. See note 14 *supra*.

63. The impact of no-fault plans upon various groups of practicing lawyers will, of course, be different. For instance, in the automobile liability field there is a significant degree of specialization in the representation of both plaintiffs and defendants. Franklin, Chanin & Mark, *Accidents, Money, and the Law: A Study of the Economics of Personal Injury Litigation*, 61 COLUM. L. REV. 1, 12 (1961) [hereinafter cited as FRANKLIN]; KEETON & O'CONNELL, BASIC PROTECTION 33, 191. Such specialization is particularly an urban phenomenon. AUTOMOBILE ACCIDENT LITIGATION 46. No-fault plans should have a greater effect upon the specialist.

automobile liability practice today. It has been the combination of men and institutions. Criticism of lawyers for participating in such litigation would be wide of the mark. On the contrary, they have been doing their duty within the system as it exists. But the existing system is open to severe criticism.

It has been estimated that as a result of negotiation and settlement, about 90 percent of all automobile accident claims are resolved before judgment.⁶⁴ The existing system, despite its proponents' ritualistic obeisance to the principle of fault,⁶⁵ is in truth not a fault system but a compensation system. It has been aptly observed that compulsory liability insurance, financial responsibility laws, and collision and medical payments insurance are all attempts to compensate the victim of the accident and that "more and more we are trying to run a compensation system in a fault liability framework."⁶⁶ In the settlement process itself, fault is only one factor and frequently a very minor one.⁶⁷ Practical considerations, unrelated to the principle of fault, are important and often controlling factors in the disposition of the claim. The seriousness of the plaintiff's injuries, the personalities and appearances of the witnesses, the extent of the defendant's insurance coverage, the common inability of the individual defendant to pay, the degree of the plaintiff's contributory negligence—these are the stuff of settlement conferences.

The only figures in the bargaining process susceptible to reasonably accurate calculations are the "specials,"—the medical expenses, and lost wages—and

64. AUTOMOBILE ACCIDENT LITIGATION 8, 37, 40. See FRANKLIN at 18 stating that over 98 percent of cases are disposed of before trial, and Blum & Kalven, *Public Law Perspectives on a Private Law Problem—Auto Compensation Plans*, 31 U. CHI. L. REV. 641, 685 (1964) [hereinafter cited as BLUM & KALVEN], estimating the settlement ratio as "approaching ninety-seven percent for all claims."

65. "Trial lawyers and many insurance executives insist that what they are defending under the fault auto insurance system is not their fees or premiums but a basic pillar of morality—and even religion—with vast ethical significance for our whole society." O'CONNELL 124. Indeed, the basis for the defense of the existing system at times appears to be partly theological. See DEFENSE RESEARCH INSTITUTE, AN ANALYSIS AND CRITIQUE OF AN AUTOMOBILE INSURANCE PROPOSAL PREPARED FOR STUDY AND COMMENT BY THE AMERICAN INSURANCE ASSOCIATION 6 (1969), where it is indicated that "the entire fabric of the tort system is constructed around the premise that one who causes injury to another should fairly and adequately compensate him for that injury." The authority cited for this statement is *Exodus* 21:5, 18. In his statement to the SENATE SUBCOMM. ON ANTI-TRUST AND MONOPOLY LEGISLATION, Mark Martin, Chairman of the Board of the Defense Research Institute, stated that the principles of individual responsibility and accountability, which the existing system presumably embodies, "arose from a time more ancient and a power greater than mortal man." DEFENSE RESEARCH INSTITUTE, AUTOMOBILE ACCIDENT REPARATION: THIS ROAD TOWARD REFORM! 24 (1969). For a sympathetic and sophisticated analysis of the fault system, see BLUM AND KALVEN 641.

66. N.Y. INS. DEP'T REPORT 48. See Ehrenzweig, "Full Aid" Insurance for the Traffic Victim—A Voluntary Compensation Plan 43 CALIF. L. REV. 1, 6 (1955) [hereinafter cited as EHRENZWEIG].

67. N.Y. INS. DEP'T REPORT 24; ROSS 21. See James, *History of the Law Governing Recovery in Automobile Accident Cases*, 14 U. FLA. L. REV. 321, 324-5 (1962).

perhaps the attorneys' fees. Damages for intangible losses, "pain and suffering," are subject to no intrinsic guidelines. Pain and suffering cannot be made commensurate with dollars. Such losses "have no dimensions, mathematical or financial."⁶⁸ Hence somewhat arbitrary formulae for pain and suffering based on multiples of medical "specials," rounding off of figures, or "splitting the difference"⁶⁹ have arisen. One formula—perhaps with unintended acuity—would measure pain and suffering partly by the amount of the plaintiffs' lawyers' contingent fee.⁷⁰ This bargaining process is in large measure an attempt to provide compensation within the framework of a system dedicated to the fixing of blame for fault. Riddled as it is by uncertainties and consequent arbitrary "rules of thumb", the system has become, in fact, a variety of brokerage.⁷¹

The no-fault debate has portrayed the automobile negligence attorney first and foremost as a trial lawyer. In fact, since 90 percent of automobile personal injury claims are settled, it is apparent that the automobile negligence lawyer is pre-eminently a negotiator. The elimination of a large portion of automobile litigation should mean that insofar as the automobile negligence attorney remains in the litigation field, he will spend more of his time in the courtroom and less on the courthouse steps.⁷²

Insofar as the automobile negligence attorney remains a negotiator, he should find that the components of those bargaining processes in which he is engaged are ascertainable and commensurable; a more sophisticated application of negotiating ability will be required, with the likelihood of more practical and equitable results than automobile accident negotiation can achieve.

68. Zelermyer. *Damages for Pain and Suffering*, 6 SYRACUSE L. REV. 27, 28 (1954). A plausible case can be made to the effect that damages for pain and suffering may in truth be damages for "the dignitary aspects of the injury." BLUM & KALVEN 673. Nevertheless, such damages are still incommensurate with money and are, for the most part determined by "rules of thumb." See *supra* note 39. The ill-defined limits of damages for pain and suffering, and the inherent difficulty of measuring such damages, lead easily to metaphor. In an article discussing the proper settlement of "nuisance claims" it is stated that, ". . . [A]nything over and above the specials is simply that much more gravy. The adjuster must strive, therefore, to separate the gravy from the meat of the so-called specials and not merely continue to multiply the gravy." ARTSTEIN 261.

69. ROSS 106-111; ARTSTEIN 265; HASTINGS 44.

70. ROSS 108.

71. See ROSS 99-100.

72. It has been suggested that under no-fault plans the negotiating services of lawyers will still be in great demand. BLUM & KALVEN 685-87. However, experience with other types of first party insurance does not support this suggestion. First party private loss insurance, such as life insurance disability and medical insurance, constitutes 36.5 percent of all insurance paid, while total tort liability insurance accounts for only 7.9 percent of such benefits. A. CONARD, J. MORGAN, R. PRATT, C. VOLTZ & R. BOMBAUGH, *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS*, Table 1-2, at 48-49 (1964). We have yet to hear of policy litigation constituting a substantial part of the work of the courts or of lawyers. In analyzing fee income reductions, we have given no effect to any increase in policy litigation which may result from the increased number of policies and events.

Under the present system, in the unlikely event that an automobile liability case is tried, it has been observed that the trial itself may well partake of more surrealism than fact.⁷³ The accident itself happened in split seconds when, almost by definition, no one expected it. Years pass from the accident until the time of trial. Accurate recollection of such fleeting perceptions is unlikely indeed. It is not surprising that in the typical litigated case bias and pride in one's driving ability take over, creating those conflicts of testimony which characterize the automobile liability suit. "The result of all this is that no other area of contested litigation is so fraught with both innocent misrepresentation and perjury as is automobile litigation."⁷⁴

Automobile negligence litigation, frequently ill-prepared because trial is so unlikely, cannot provide a favorable impression on those members of the public sitting on the jury or in the courtroom. In the absence of hard facts the public is all too frequently presented with highly slanted lay and expert testimony brought out by counsel unconstrained by the limitations of hard evidence.

Not only does the trial partake of surrealism, it is a charade and the public knows it. The jury well knows that a substantial portion of the "damages" that it awards are not that at all but the plaintiff's attorney's fee.⁷⁵ Courts relentlessly preserve the fiction that a defendant must pay any judgment when, as the jury well knows, his insurance company will pay.⁷⁶ In fact, the nominal defendant is a shadowy figure whose only connection with the case frequently is to sign, after repeated prodding, a set of answers to the plaintiff's interrogatories. If trial occurs he is frequently a most reluctant participant.⁷⁷

Such trials, based as they are upon testimony which frequently must be unfounded in fact, and conducted on the basis of patent fictions, cannot but detract from the reputation of the legal profession. "European lawyers view the whole thing with utter amazement; and the extent to which it has damaged the courts and the legal profession by bringing the law and its administration into

73. N.Y. INS. DEP'T REPORT 23.

74. KEETON & O'CONNELL, BASIC PROTECTION 22; O'CONNELL 11-12; see Nixon, *Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW & CONTEMP. PROB. 476-77 (1936) and EHRENZWEIG 7-8.

75. Eager, *Open Forum: Contingency Fees! Bane or Boon?* 25 INS. COUNSEL J. 463, 466 (1958).

76. Ehrenzweig describes the automobile personal injury trial as "a game of hide and seek now disgracing both the institution of insurance and court procedure." EHRENZWEIG 42. Chief Justice Burger has recently criticized the present system in an interview with the N.Y. Times: "I am just very sure that there must be a better way to dispose of automobile litigation than the cumbersome and inefficient and expensive processes of the adversary system." N.Y. Times, July 4, 1971, §1, at 20, col. 4.

77. For instance, the writer recalls defending a case involving the death of a promising young girl in which the nominal defendant sat in the courtroom and, with apparent lack of concern, slept throughout the trial.

public disrepute can only be guessed."⁷⁸ One commentator takes this observation a step further, observing that automobile litigation, ". . . has created a serious crisis in our administration of justice which endangers the very fabric of our democracy—the people's confidence in the law."⁷⁹

A by-product of automobile personal injury litigation is the contingent fee. It is possible that the undesirable characteristics of this field of practice may be the consequences of this manner of payment. Considered "unethical if not criminal" in many foreign countries,⁸⁰ it is the most prevalent form of compensation to the claimant's attorney in this country.⁸¹ The DOT study reveals that the average contingent fee is 35.5 percent.⁸² In some instances it may rise above 50 percent.⁸³

The traditional justification for the contingent fee is that it makes legal services available to the impecunious claimant.⁸⁴ This has been a peculiarly American practice said to arise from the anti-professionalism of the early nineteenth century.⁸⁵ It may also have proceeded from the absence of other means of financing the prosecution of a just claim, such as taxing "costs", including attorney fees, to the loser, as is the practice in England. The adoption of no-fault plans will eliminate or reduce the need for the contingent fee in the automobile personal injury field. The injured party will receive indemnity for his loss without the necessity of sharing it with a lawyer.

The rationale for the high fees produced by the contingency system is the risk to the lawyer who invests his time but whose compensation depends upon the outcome of the case.⁸⁶ The DOT study, and other studies⁸⁷ demonstrate that this rationale is not founded in fact. In automobile cases, there is a recovery in 90 percent of the suits filed.⁸⁸ Accordingly, there is no substantial risk; the recovery, and therefore the fee, is just barely contingent.

The contingent fee has been criticized as producing a conflict of interest

78. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 558 (4th ed. 1971).

79. EHRENZWEIG 3-4.

80. KEETON & O'CONNELL, BASIC PROTECTION 33; EHRENZWEIG 9; O'CONNELL 39.

81. KEETON & O'CONNELL, BASIC PROTECTION 33, 191; FRANKLIN 22. See generally F. MACKINNON, CONTINGENT FEES FOR LEGAL SERVICES (1964) [hereinafter cited as MACKINNON].

82. 1 AUTOMOBILE PERSONAL INJURY CLAIMS 79; AUTOMOBILE ACCIDENT LITIGATION 7. See FRANKLIN 21, stating that the average contingent fee is 36 percent.

83. FRANKLIN 22; O'CONNELL 43.

84. O'CONNELL 48; Gair, *Open Forum: Contingency Fees! Bane or Boom?* 25 INS. COUNSEL J. 453, 455 (1958); Contiguglia & Sorapure, *Lawyer's Tightrope—Use and Abuse of Fees*, 41 CORN. L.Q. 683, 689 (1956). [hereinafter cited as CONTIGUGLIA].

85. MACKINNON 14-15.

86. O'CONNELL 49; CONTIGUGLIA 688. Gair, *Open Forum*, supra note 84, at 457.

87. E.g., FRANKLIN.

88. AUTOMOBILE ACCIDENT LITIGATION 7. See FRANKLIN 13, 21, stating that in cases where the claimant is represented by an attorney the frequency of recovery is 90 percent.

between the attorney and client which may arise from the attorney's interest in a whole portfolio of cases with the same insurance company or defense attorney. Further conflict may result between the attorney's costs, as distinct from the client's interest in his own individual case.⁸⁹ The contingent fee has been further criticized as leading to the exploitation of damages for pain and suffering, promoting ambulance chasing, fraudulent claims, and other unethical conduct.⁹⁰ Indeed, with the possibility of receiving so much money for so little work, ethical restraints may well be frequently strained. A manner of payment which often appears inequitable and which harbors dangers or temptations of unethical behavior cannot help but have an adverse effect upon the reputation of the profession.

While the additional increment received by a victim who retains an attorney may be more than enough to pay the contingent fee,⁹¹ it has been observed that, if this is true, "it constitutes perhaps the most severe possible indictment of the present tort-insurance system as a means for dealing with the human losses sustained in auto accidents."⁹² It is a very high cost indeed for achieving such inefficient and inequitable compensation.

Conclusions

No-fault plans will eliminate a large volume of routine and repetitive work in the practice of law. It will free the lawyer from much of his less professionally satisfying negotiation. It will free the courts of much of their less significant litigation. It will go far to relieve attorneys and clients alike of a fee system which has been, at best, a necessary evil.

These changes come at a most propitious time. New problems created by a recently expanding and changing society are presented daily to the courts and seem to be increasing exponentially. Problems with respect to civil rights, consumers' rights, products liability, the environment and the conflicting interests of economic and racial groups more and more demand the time and careful attention of both our civil and criminal courts, and thus of our lawyers. Should anyone doubt the strength of consumerism in this country he need only observe the strong movement towards the adoption of no-fault plans which exists presently. These plans have been devised and promoted due largely to the dissatisfaction of the insurance consumer with an outdated, expensive and ineffective product—automobile liability insurance.⁹³ Similar forces are no less compelling

89. ROSS 82-83. See MACKINNON 196-200 and O'CONNELL 46-47.

90. O'CONNELL 39, 44; CONTIGUGLIA 697.

91. FRANKLIN 30. See BAUM & KALVEN 686.

92. Mackey, *The Automobile Insurance and Law Problem in 1968: As Viewed by an Official of Government*, ABA INS., NEGL. & COMP. LAW SECTION 657, 659 (1968).

93. *Id.* at 660.

with respect to those areas of consumers' interests and rights which must be resolved by litigation rather than legislation. The recent rapid growth of products liability law enhanced by the doctrine of strict liability in tort is but one example of this.⁹⁴ The increased activity of public bodies dedicated to the protection of the consumer is another.⁹⁵

We may also anticipate change in the nature of litigation brought about by the interests and commitments of those who are just now entering the legal profession. Many of these law students and young lawyers may indeed seem motivated by an "ill-defined 'relevance'."⁹⁶ It may well be that the new lawyers expect too much of our court system and are misguided in their attempts to bring about social change through institutions unsuited historically or intrinsically to that purpose.⁹⁷ Nevertheless it would be unrealistic to deny that, to the extent that the young attorneys preserve at least some of their idealism and their activism, and insofar as they represent changing values and priorities of the public at large,⁹⁸ there will be change in the work which is done by the courts, and the legal profession.

When the law of negligence governing traffic accidents developed to meet the needs of horse-drawn travel and railroad transportation in the nineteenth century,⁹⁹ no one could have forecast the impact of the automobile, the alliance of insurance and tort law,¹⁰⁰ and the strong grip in which the resulting litigation has held our legal institutions. As new measures, such as no-fault plans, meet present day problems of compensation, it is likewise impossible to predict the precise ways in which the public and lawyers will interact with changing needs

94. Interestingly and significantly, this fast-growing area of law—strict liability in tort as applied in products liability law—represents another variant of the concept of liability without fault.

95. E.g., the United States Senate passed on Dec. 1, 1970, S.4459, 91st Cong., 2d Sess. (1970), which would create an independent federal agency with authority to champion and protect consumer interests. The House Comm. on Government Operations approved on Sept. 27, 1971, H.R. 10,835, 92d Cong., 1st Sess. (1971), providing similarly for a federal agency, and the administration has announced its support of the agency. N.Y. Times, Sept. 29, 1971, at 1, col. 7.

96. Garrett & Pennington, *Will They Enter Private Practice?*, 57 A.B.A.J. 663 (1971).

97. Vanderwicker, *The Angry Young Lawyers*, 84 FORTUNE, No. 3, at 74, 127 (Sept. 1971). Chief Justice Burger stated in a recent interview with the N.Y. Times: "Young people who decide to go into the law primarily on the theory that they can change the world by litigation in the courts I think may be in for some disappointments. It is not the right way to make the decision to go into the law, and that is not the route by which basic changes in the country like ours should be made. That is a legislative and policy process, part of the political process. And there is a very limited role for courts in this respect. But if they see that as lawyers they may exert great influence on the whole system, then they may not be disappointed." N.Y. Times, July 4, 1971, § 1, at 20, col. 6.

98. For a colorful analysis, see generally C. REICH, *THE GREENING OF AMERICA* (1970).

99. See James, *History of the Law Governing Recovery in Automobile Cases*, 14 U. FLA. L. REV. 321, 322 (1962).

100. HASTINGS 436.

and institutions. However, we can reasonably assume that the practice of law will not be dominated by the automobile, and that lawyers will not be engaged in activities now so characteristic of automobile personal injury practice. The profession and the courts will be freed, perhaps at the last best time, to bring their formidable resources to bear on the compelling issues of the day.