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Book Review and Commentary

James D. Ghiardi*

The Injury Industry And The Remedy Of No-Fault Insurance. By Jeffrey O'Connell Commerce Clearing House, Inc., 1971. Pp. xii, 156. Cloth \$15.00.

Basically, there is nothing new in this latest of a series by Professor O'Connell including the title, *The Injury Industry*, which was first used in a 1960 article by the two University of Michigan researchers Conard and Voltz,¹ and which was made popular by the Defense Research Institute in 1965.²

The 156 pages of text follow the same pattern of bombast as numerous other O'Connell writings which decry failures of the organized bar without qualification and which exaggerate abuses without advancing detailed measures for improvement. The ultimate advice, as usual, is that the no-fault plan of Professors Robert E. Keeton of Harvard's Law School and of O'Connell, *Basic Protection For The Traffic Victim*, is the soothing balm for all of mankind's problems which arise from automobile accidents and the tort litigation method.³ Despite the Foreword by Daniel P. Moynihan which insists that this is a "thoroughly lawyerlike book,"⁴ those who are deeply interested in the constructive approach will be puzzled by such chapter headings as the following: "The Maw of the Law"; "Who Dunit?"; "A Pound of Flesh (All About Lawyers' Contingent Fees)"; and "The Untouchables (All About Assigned Risks)." This type of language may sell books, but it pollutes any constructive thought.

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1. Conard & Voltz, *The Economics of Injury Litigation*, 39 MICH. ST. BAR J. 32 (Aug. 1960).
2. DEFENSE RESEARCH INSTITUTE [DRI] SPECIAL REPORT, THE INJURY INDUSTRY AND THE LAW EXPLOSION (Oct. 1965).
3. See R. KEETON & J. O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM* (1965).
4. J. O'CONNELL, *THE INJURY INDUSTRY* at xii (1971) [hereinafter cited as O'CONNELL].

Professor O'Connell reciprocates in his text with numerous favorable references to Moynihan's works. His usual approach is to cite ponderously those who favor his position and decry all points advanced by those who dare to challenge it.

In addition to rapping the knuckles of those who support the legal method, O'Connell throws his support to the favorites of the day who supposedly will end bloodshed on the highways through "no-fault" and the advice of Department of Transportation payees. Responding to Moynihan's praise, "As a professor of law, he had instantly grasped the complex significance of the problem of highway safety," O'Connell fingers the beads bought at the Klein and Waller establishment⁵ and opts for changing the environment rather than attempting to influence the errant driver:

The best thinking on traffic safety today would put the lowest priority on trying to change the driver. And it would put the lowest priority in trying to change the driver on trying to change the drinking driver; and it must put the lowest priority in trying to change the drinking driver on trying to change the drinking driver through threats concerning insurance claims.⁶

Perhaps a clever, and certainly a wordy approach to the problem, this advocacy neglects at least the works of two scholars in the field which demonstrate that "no-fault" would indeed increase the carnage caused on our highways by the automobile.⁷

It also is revealing that all public opinion polls which show public support for the fault concept are slanted, while the ultimate is that of the University of Illinois Survey Research Center which was co-authored by O'Connell himself.⁸

Picking up Moynihan's expletives that the courts are overwhelmed, swamped, inundated, and choked,⁹ Professor O'Connell adds that "the courts, after all, are not clogged with any but auto insurance claims."¹⁰ despite com-

5. U.S. DEP'T OF TRANSPORTATION, CAUSATION, CULPABILITY AND DETERRENCE IN HIGHWAY CRASHES. (July 1970) (Prepared by D. Klein and J. Waller).

6. O'CONNELL, *supra* note 4, at 134.

7. Lawton, *Psychological Aspects of the Fault System As Compared with the No-Fault System of Automobile Insurance*, 1969 DRI SPECIAL REPORT No. 11 [summary published by DRI as *Fault—A Deterrent to Highway Accidents*, 1969 DRI SPECIAL REPORT No. 10]; Mancuso, *The Concept of Culpability: Its Utility in Promoting Proper Roadway Use*, 1971 DRI SPECIAL REPORT No. 8 [summary published as Mancuso, *Fault—A Basic Requisite of Sound Public Policy*, 38 INS. COUNSEL J. 397 (July 1971)]; Lawton, *No-Fault Would Increase Accidents*, 55 MARQ. L. REV. — (1972).

8. O'CONNELL, *supra* note 4, at 123; see O'Connell & Wilson, *Public Opinion on No-Fault Auto Insurance: A Survey of Surveys*, 1970 U. ILL. L. FORUM 307; but see, Ross, *Surveys, Attitudes and Propaganda*, 38 INS. COUNSEL J. 277 (Apr. 1971); *Distorted Surveys No Gauge of Public Opinion*, 10 FOR THE DEFENSE 10 (Feb. 1969).

9. O'CONNELL, *supra* note 4, at xi.

10. *Id.* at 8.

mon knowledge that the real culprits are the growth of criminal as well as all other types of lawsuits.¹¹

Apparently in the belief that men can be moved to agreement through being pole-axed, Professor O'Connell dubs the present system cruel, corrupt, self-righteous, dilatory, expensive, and wasteful.¹² And the main bad actors in this unstable and transient system are the attorneys—

. . . despite the bitter and often personal antagonism between plaintiffs' and insurance lawyers, they rally together in an unholy alliance to preserve the fault system that serves them both so well.¹³

But the Bar Associations are also to blame:

The enforcement of the Canons of Ethics by Bar Associations for any transgressions is minimal at best. But in the area of automobile accidents—where violations have long been most notorious—enforcement has long been a joke.¹⁴

These broad-brush accusations are not supported by scholarly research but are based on the research of the author of another best-seller.¹⁵

Gather round, you unethical, ambulance-chasing, contingent fee hungry practitioners of the law, a new era is dawning. The answer to your corruption is "no-fault insurance, just as that is the answer to so many other ills plaguing automobile insurance."¹⁶ Professor O'Connell supports his position by numerous citations to knowledgeable sources such as journalists, who do not recognize the intricacies or full significance of total "no-fault" plans from their linotype machines. Another worthy and "objective" source in full agreement with the O'Connell ambition is the household "bible," *Consumer Reports*, published by Consumers Union of which O'Connell is a director. The author's zeal for overstatement and hard sell is comparable to the old-fashioned medicine man selling a "total cure" elixir for one dollar per bottle.

After ridiculing those who point out that there is a relationship of the fault concept to morality and individual responsibility,¹⁷ O'Connell states that "the principle of liability based on fault really stems in the United States from about 1850 with the case of *Brown v. Kendall*."¹⁸ The fault principle runs much deeper

11. See U.S. DEP'T OF TRANSPORTATION, *AUTOMOBILE ACCIDENT LITIGATION* (Apr. 1970); *Court Congestion—A Localized Urban Problem*, 9 FOR THE DEFENSE 49 (Sept. 1967); Ross, *DRI Studies Refute Court Delay Claims of Critics*, 36 INS. COUNSEL J. 46 (Jan. 1969).

12. O'CONNELL, *supra* note 4, at 2.

13. *Id.* at 51.

14. *Id.* at 63.

15. M. BLOOM, *THE TROUBLE WITH LAWYERS* (1968).

16. O'CONNELL, *supra* note 4, at 68.

17. *Id.* at 125.

18. *Id.*

than a legal citation—Uncle Henry, Aunt Sophie and the youngster carrying his books to grade school understand and accept the precept and none has heard of Brown, let alone Kendall. Despite public recognition of a moral and legal principle, O'Connell states,

especially in the case of automobile accidents, a moralistic approach with emphasis on an individual person's performance can be a hugely wasteful and unrealistic focus Note, too, that no-fault insurance does not abrogate criminal responsibility for reckless driving, or administrative sanction such as the loss of a driver's license. . . . After all, having people 'answer for their wrongs' by having an insurance company pay in their stead is about as morally effective as allowing people to hire substitutes to serve jail sentence.¹⁹

Certainly, these statements contain essential contradictions. They deny the basic psychological premises that accepted social norms help to guide the individual, and that the process of confrontation found in the insurance-legal system adds deterrents to future unacceptable behavior. It must be noted that in disregarding the moral concepts of the fault system, the author fails to call the reader's attention to a book by his colleague, Professor Keeton.²⁰ Professor Keeton points out that the purpose of tort law is "fair and just compensation for losses. Sometimes it serves the cause of justice to shift a loss from one to another; at other times, to leave it where it has fallen."²¹ He also states:

The evidence is inconclusive, but perhaps the most appealing inference is that the theme of fault is as ancient as law itself and that early common law conceptions of responsibility for harms one had caused were rustic definitions of fault. The notions of causation and fault are close kin. Picking one or more *responsible causes* from the multitude of antecedents of a given incident is very close to finding fault.²²

Again he concludes:

Even in the writings of recent decades, as the negligence principle has come under sharp and sharper challenge, support for basing liability on negligence is traced primarily to a sense of what is just and fair, and is explained not as a conclusion reasoned from other premises, but as a perception consistent with prevailing values. Thus, the best justification offered is an asserted empiric observation—that most people believe fairness requires that one who carelessly causes harm to another pay for it, and that one who unintentionally causes injury without carelessness be free of legal responsibility.²³

19. *Id.* at 129-30.

20. R. KEETON, *VENTURING TO DO JUSTICE* (1969).

21. *Id.* at 147.

22. *Id.* at 149.

23. *Id.* at 152.

After indicating that payment for general damages, "pain and suffering," are almost impossible to determine accurately,²⁴ even though the intangible value of works of art are measured each day in the marketplace, Professor O'Connell points out that "no-fault" payments would reduce endless and expensive arguments.²⁵ The fact remains that "pain and suffering" does exist and that payment for it has been and should remain a part of the process of justice. The "no-fault" system might reduce insurance costs, but it would be at the expense of having the innocent victim suffer those costs in silence without compensation from the one who caused the accident.²⁶

Professor O'Connell contends that the first-party insurance plans approved to date at the state level are unsatisfactory—they fall short of his recommendations; there are flaws in the proposals of the American Bar Association or any group that does not favor his brand of "revolutionary change." And perhaps his true future intent, other than fulfilling the promise of another Moynihan statement that "the clarity, openness and urgency of his arguments are the marks of a man with an idea whose time is coming,"²⁷ is shown in the following statement:

In short, going beyond auto accidents for no-fault insurance gets us into very uncharted fields very quickly. All the more reason, then, to start with auto accidents where we are ready for it, where we can see where we are going and where we can make judgments about whether it is feasible to extend it to other areas.²⁸

No consideration is ever given to the position that O'Connell might be wrong or that if his plan were adopted and proved a failure, thousands of innocent people would be harmed and millions of dollars lost. Pragmatism of this nature is not even hinted at by the author.

The balance of the book deals with such topics as the role of collateral sources; whether auto insurance should be primary or secondary; and the foibles of the insurance industry according to the estimates of the Department of Transportation—including the ill-treatment of the underprivileged.

Occupying 68 pages of the volume is an epilogue apologetic for past statements, and four appendices. One appendix is a reprint of the favored Department of Transportation report to the President and Congress of March, 1971;

24. O'CONNELL, *supra* note 4, at 3.

25. *Id.* at 95.

26. See REPORT OF THE AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON AUTOMOBILE ACCIDENT REPARATIONS at 87-90 (June 1969) [hereinafter cited as A.B.A. REPORT]; DRI SPECIAL REPORT, RESPONSIBLE REFORM—A PROGRAM TO IMPROVE THE LIABILITY REPARATION SYSTEM, at 32-33 (Oct. 1969).

27. O'CONNELL, *supra* note 4, at xii.

28. *Id.* at 146.

the other three call for changes from previously asserted positions. The covers of both the hard and paperback versions are pretty, complete with the prominent display of the names, O'Connell and Moynihan.

I cannot recommend the book to either the student of the subject or to those merely interested in the "no-fault" controversy. Better material is readily available even though the paper bound edition costs only \$2.95.

The Injury Industry lumps all critics of the author's plan and all those who seek reform through other than "revolutionary" methods into one black pot. In another era, the inflammatory accusations would have been branded as "McCarthyism." A serious student of the subject has stated the issue as follows:

To be on either extremity of the automobile insurance reform movement is to risk defeat or, worse, compromise. To be in the middle, . . . is to risk abuse from all directions.

[Our] stance has been to try to help guide events so that change will be based on solid concepts and not on half-truths, slogans or cliches. John Stuart Mill foresaw the hazard that the middle ground offers when he said:

"Whether men adhere to old opinions or adopt new ones, they have . . . an invincible propensity to split the truth, and take half . . . ; and a habit of erecting their quills and bristling up like a porcupine against anyone who brings them the other half . . ." ²⁹

All segments of the organized bar, individual attorneys, insurance companies, insurance executives, political leaders, and responsible lay leaders have recognized the need for review of the automobile insurance reparations system. In light of this review, changes and improvements have been sought. The hundreds of serious proposals that have been advanced merit thoughtful analysis and good faith consideration. Professor O'Connell does not do so in his book. This work cannot be used in the classroom, in the courtroom or in the legislative halls as a fair review and analysis of the current scene.

Space does not permit a summary and analysis of all the plans and proposals that exist. Materials for this are available.³⁰ However, proposals for reform from the organized bar merit consideration. The American Bar Association has issued a 240-page report outlining 54 proposed reforms.³¹ Currently, the ABA

29. Thomas C. Morrill, *Fault and No-Fault—An Overdose of Advocacy*, paper delivered to the Executives' Club of Chicago (Oct. 1, 1971).

30. See, e.g., T. ROKES, NO-FAULT INSURANCE (1971); A.B.A. REPORT, *supra* note 26; ANALYSIS OF MAJOR AUTO COMPENSATION PROPOSALS 1971 DRI REPORT NO. 9; Ghiardi & Kircher, *Automobile Insurance: The Rockefeller-Stewart Plan*, 37 INS. COUNSEL J. 324 (July 1970); Ghiardi & Kircher, *Automobile Insurance: An Analysis of the Massachusetts Plan*, 21 SYRACUSE L. REV. 1135 (1970).

31. A.B.A. REPORT, *supra* note 26.

has a committee actively reviewing its prior report and recent developments. It will submit its report and recommendations in the near future. The organized plaintiffs' bar has sponsored reform.³² The American College of Trial Lawyers has sought reform.³³ In addition, the organized defense bar, through the Defense Research Institute, has actively sought reform.

Since the positive program of the Defense Research Institute, *Responsible Reform—A Program to Improve the Liability Reparation System*,³⁴ has been relegated to one footnote in Appendix IV,³⁵ let me hasten to explain its basic principles before it becomes distorted in still another book, with attendant royalties. *Responsible Reform* contains promise of improved efficiency and lower accident levels even though it has gained formal support by "avaricious" members of three national defense attorney associations—International Association of Insurance Counsel, Federation of Insurance Counsel, and Association of Insurance Attorneys.

Responsible Reform rejects the nearly total self-insurance proposals of Professor O'Connell and calls for retention and improvement of the present system. It is committed to the proposition that merely changing the system itself cannot solve the problems it attempts to cope with. The public has been led to believe that "no-fault" is a panacea for the ills caused by the automobile—alcoholism on the highways, traffic congestion, court congestion, fragility of automobiles, death on the highways—particularly to the young driver, inflation, etc. Reform must reach all of these problems and not merely change the automobile liability policy to an accident and health policy. *Responsible Reform* addresses itself to these problems by:

- (1) Providing that first-party (self-insurance) be made available for those who need and want it, but that such programs not be funded by the elimination of tort liability;
- (2) Assuring that the cost of operating the system can be reduced by meaningful highway safety legislation aimed at accident producers, by more efficient use of the judicial and legal effort, and by eliminating archaic rules of law and procedures;
- (3) Indicating that delay in our courts can be eliminated by the addition of more judges and by the use of innovative procedures such as small claim arbitration;

32. AMERICAN TRIAL LAWYERS ASSOCIATION, AUTOMOBILE REPARATIONS STATUTES (Jan. 1971).

33. AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE ON AUTOMOBILE ACCIDENT REPARATIONS (Mar. 1971).

34. DRI SPECIAL REPORT, RESPONSIBLE REFORM, *supra* note 26.

35. O'CONNELL, *supra* note 4, at 196.

(4) Declaring that inequity in the law can be corrected by elimination of the inequity and not the system itself.

The 11-point program of *Responsible Reform*, complete with sample legislation, can be summarized as follows:

Highway Safety. The plan promotes safety through the development and implementation of specific research programs and legislation calling for: (1) mandatory license revocation and fines for those convicted of operating a vehicle while under the influence of alcohol or drugs; (2) permanent revocation of driving privileges for habitual moving traffic law violators; (3) severe penalties for pedestrians involved in motor vehicle accidents while under the influence of alcohol or drugs; (4) uniform licensing standards for drivers with periodic physical and mental examinations and testing; and (5) mandatory use of motor vehicle safety equipment including safety belts and motorcycle safety helmets; and with the support of programs and proposals of others, efforts will be made to reduce the highway accident tolls by concentration upon motorists as a prime cause of automobile accidents.

First-Party Coverage. Each automobile insurer should offer its insureds the option to acquire minimum first party coverage for medical and hospital expenses, uninsured motorist protection, income disability and accidental death benefits for economic losses resulting from motor vehicle accidents. This insurance should cover the named insured, members of his family residing in his household, and guest passengers injured while occupying the insured vehicle.

Court Congestion and Delay. Through appropriate legislative action means should be established to: (1) provide a sufficient number of judges to keep abreast of the increasing judicial work load occasioned by population growth; and (2) employ mandatory arbitration of all suits which involve claims under 3000 dollars in jurisdictions troubled with court delay. Through additional research the root causes of court delay will be isolated in those jurisdictions in which it exists.

Contingent Fee Regulation. Contingent fees and procedures for their use should be regulated in the following manner: (1) the amount of the fee should be strictly regulated by appropriate local court rule or legislation; (2) every retainer on a contingent basis should be in writing in a fixed format and signed by the client; (3) a retainer statement should be filed with the appropriate judicial authority by the attorney after its execution; (4) there should be strict control of the division of fees between attorneys based upon work performed; and (5) upon completion of the claim or suit an attorney should file an itemized closing statement with the proper judicial authority and deliver a copy to the client.

Collateral Sources of Recovery. The collateral source rule should be modified so that evidence of the nature and extent of all benefits and services received or

to be received by the claimant as a result of the alleged injuries and damages he sustained be admissible in an action for wrongful death.

Comparative Negligence. The question of whether the rule of contributory negligence should be abandoned is a matter for local determination. However, when the rule is to be changed, the present Wisconsin comparative negligence rule and procedure is preferable and should be substituted.

Advance Payments. Liability insurers should be given the right to make advance payments for economic loss to claimants without the possibility that the claimant will be allowed to introduce evidence of the advance payments on the issue of liability during subsequent litigation. Liability insurers making advance payments should be allowed to take a credit therefore against any subsequent judgment recovered by the claimant or settlement made with him.

Elimination of Ad Damnum. Any pleading demanding relief in the form of unliquidated damages may only make a prayer for general relief and state that the amount claimed is within the minimum and maximum jurisdictional limits of the court.

Fraudulent Claims. Strict sanctions should be imposed upon those who intentionally make claims for personal injury or property damage known by them to be false or fraudulent and upon those who assist in the making of such claims with knowledge of their false or fraudulent character.

Efficient Use of Legal Effort. Practices and procedures which provide for limitation on the right to voluntary dismissals or nonsuits, the right to a split trial on issues of liability and damages, modification of appeal bond rules, summary judgment, mental and physical examinations of litigants, demands to admit the genuineness of documents or relevant facts, and offers of settlement, judgment, and damages should be adopted in those jurisdictions which do not have such rules and also in those jurisdictions whose present rules are not as workable as those which are proposed.

Regulation of Awards for Pain and Suffering. An attempt should be made to formulate a plan which will serve as a guide to the appraisal of fair compensation for pain, suffering, and inconvenience which results from the injury sustained through the fault of another.

Published in 1969, *Responsible Reform* is being examined by the defense bar in light of current studies, statistics, and proposals. It is still viable and presents the basis for change without destroying the concepts of justice and equity for the motoring public—each and every one of us in these United States.

Changes being considered include required liability and first-party coverages, expansion of first-party coverage, and expanded uninsured and underinsured motorists provisions. In addition, a formula approach, based upon medical expense which is the only constant factor in personal injury cases, is being

studied for general damages (pain, suffering, etc.) in the small case. The problem of coordinating benefits to prevent double recovery is being emphasized so that the automobile will pay its own way through the medium of making automobile insurance primary.

It is not my intent to infer that the defense lawyer proposals constitute a complete approach to improving the present automobile reparations system. If adopted and implemented, however, they would accomplish the following: insurance and legal costs would be reduced; deserving claimants would receive their due quickly; court delay would be reduced where it exists; the legal process would be streamlined; and justice would be retained.

In the passionate, sometimes irrational debate that rages in this field of endeavor, the defense bar has provided the calm expertise and resourceful leadership to resolve the argument in favor of reason and the public good. All of this has been done only after long, hard hours of study and determination by busy trial attorneys who gave of their time and effort without remuneration. Their concern was to serve the public interest which must in the end prevail.

BOOK REVIEWS

Reply of Jeffrey O'Connell to a Review by James Ghiardi of O'Connell's THE INJURY INDUSTRY

Little is served by a lengthy reply to Professor Ghiardi's review of my book. My book speaks for itself . . . as does his review. But I do take exception to his misstating my book: For example, he states:

Picking up [D.P.] Moynihan's expletives [in the Foreword] that the courts are overwhelmed, swamped, inundated and choked, Professor O'Connell adds that "the courts, after all, are not clogged with any but auto insurance claims," despite common knowledge that the real culprits are the growth of criminal as well as other types of law suits.¹

Professor Ghiardi would have the reader believe that I unfairly (or incompetently or both) ignored the effect of the rising tide of criminal cases on court congestion. But the language which he quotes to prove my unfairness is itself unfairly taken totally out of context by him. The actual passage reads as follows:

Let's structure [auto insurance] . . . so that we don't need [lawyers] . . . as a normal necessity, but only as a last resort: as with accident & health insurance—and almost every form of insurance. How often does anyone have to hire a lawyer to get a health insurance claim paid? Or a fire insurance claim? Or a life insurance claim? Rarely indeed. The courts after all, are not clogged with any but *auto* insurance claims.²

Thus it can be seen that I was not saying only auto insurance cases, among *all* types of cases, both civil and criminal, clog the courts; on the contrary I was clearly saying that *among insurance claims*, only *auto* insurance claims clog the courts. In addition, far from ignoring the effect of criminal cases, I devote considerable space in the book to a discussion of the problems of court congestion stemming from criminal cases.³

Professor Ghiardi next states:

Apparently in the belief that men can be moved to agreement

1. Ghiardi, *Book Review and Commentary*, 21 CATHOLIC U. L. REV. 333 (1972) [hereinafter cited as *Book Review*].

2. J. O'CONNELL, *THE INJURY INDUSTRY* 7-8 (1972) (emphasis in the original).

3. *Id.* at 135-37.

through being pole-axed. Professor O'Connell dubs the present system cruel, corrupt, self-righteous, dilatory, expensive, and wasteful.⁴

Well, if my words are too strong for Professor Ghiardi, let the reader judge if they are really too strong when compared to the summary conclusion of the two-year study of the tort liability system as applied to auto accidents by the U.S. Department of Transportation:

In summary, the existing system ill serves the accident victim, the insuring public and society. It is inefficient, overly costly, incomplete and slow. It allocates benefits poorly, discourages rehabilitation and overburdens the courts and the legal system. Both on the record of its performance and on the logic of its operation, it does little if anything to minimize crash losses.⁵

What Professor Ghiardi fails to understand . . . with the ineffable blindness endemic to his ilk . . . is that everyone, except those living off the present system, is bound to be moved to strong and impassioned language on examining the way it operates. And on that score, it isn't that Professor Ghiardi is incapable of impassioned language himself: it's just that he reserves his ardor for a different object. Listen again to the peroration of Professor Ghiardi, who lists both his titles—namely, Professor of Law and Director of Research for the Defense Bar:

In the passionate, sometimes irrational debate that rages in this field of endeavour, the defense bar has provided the calm expertise and resourceful leadership to resolve the argument in favor of reason and the public good. All this has been done only after long, hard hours of study and determination by busy trial attorneys who gave of their time and effort without remuneration.⁶

Touching, isn't it? And one of the most gallant tributes I've ever read from an employee to his employer.

4. Book Review, *supra* note 1, at 333.

5. U.S. DEP'T OF TRANSPORTATION, MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES 100 (March 1971) (prepared by J. Volpe).

6. Book Review, *supra* note 1, at 333.

In Defense of No-Fault: A Response to Simonett and Sargent

Jack Davies

The April 1970 issue of the *Minnesota Law Review* published the Minnesota no-fault auto insurance bill complete with my authors' comments.¹ The article stimulated a frontal attack on the no-fault principle in *The Minnesota Plan: A Responsible Alternative to No Fault Insurance* by John E. Simonett and Professor David J. Sargent.² I welcome the opportunity to respond directly to their vigorous attempt to make an intellectual case against no-fault. My response has two thrusts: first, that Simonett and Sargent are tritely moralistic; second, that they use bad evidence.

Moralistic Arguments

The moralistic attack on no-fault is at its sloganeering best in Richard Markus' effort on behalf of the plaintiff trial bar to label no-fault as "no-guilt."³ Simonett and Sargent take up that theme with enthusiasm, and with persistence. Page by page through their article the following preachments are found: responsibility for his carelessness, legal and moral obligation,⁴ personal accountability, personal responsibility,⁵ personal fault, guilt in the criminal case, apportion responsibility, personal fault, personal moral sense,⁶ deep-seated conviction, should be responsible for his conduct, carelessness, sensible rule of decent conduct, ethical thought of our community, vindicate innocence, innocence is irrelevant,⁷ irresponsible drivers, never accountable, more nearly eliminates personal responsibility,⁸ moral philosophy, accountability for personal conduct, bears a responsibility, personal responsibility, hold a person responsible, chance

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1. Davies, *The Minnesota Proposal for No-fault Auto Insurance*, 54 MINN. L. REV. 921 (1970).
 2. Simonett & Sargent, *The Minnesota Plan: A Responsible Alternative to No-fault Insurance*, 55 MINN. L. REV. 991 (1971) [hereinafter cited as SIMONETT & SARGENT].
 3. Markus, *As I See It*, 7 TRIAL 51 (May-June 1971).
 4. SIMONETT & SARGENT at 991.
 5. *Id.* at 992.
 6. *Id.* at 993.
 7. *Id.* at 994.
 8. *Id.* at 995.

to become morally mature, will be excused,⁹ responsibility and accountability, critical moral judgment, personal responsibility, the individual's responsibility, insurance tied to personal conduct,¹⁰ wholly to blame,¹¹ personal responsibility, recognizes personal responsibility,¹² personal responsibility, more to blame.¹³

This moral fervor apparently has its basis in a search for deterrence and retribution. Simonett and Sargent suggest a deterrent objective to be accomplished through financial accountability of the "wrongdoer."¹⁴ But the fault system has no advantage over no-fault as a deterrent. Under a first party no-fault system most policies will include a \$50 or \$100 deductible provision. This \$50 or \$100 uninsured loss will be applicable to almost all drivers—those in the wrong and those in the right. To the extent exposure to financial loss can deter faulty driving, no-fault produces a broader deterrent pressure than the present system. If we seek to deter, the "innocent" driver should be included. His role in highway accidents is highlighted by the following classic:

He was right, dead right
As he sped along.
But he's just as dead
As if he'd been wrong.¹⁵

That verse also illustrates the life and death deterrent present with each driver who has any awareness of consequences. Danger is a deterrent which makes the civil liability for negligent driving nothing more than a theoretical factor among many cumulative deterrents—such as the threat of injury, bent fenders, inconvenience, traffic fines, driving pride, back seat scolds, and insurance risk rating.

The United States Department of Transportation auto insurance study included a look at deterrence. The conclusion was:

In order to be effective, deterrence depends upon the presence of three factors. First, there must be strong societal sanction for the use of punitive or deterrent methods. Second, the potential offender must be sufficiently susceptible to societal sanctions and pressures so that he will respond to the fullest extent to which he is capable to the wishes of the community. Finally, the potential offender must in fact be capable of changing his behavior in the intended direction.

The actual effects of deterrent measures on the general driving public are poorly understood. There is, however, strong evidence that with

9. *Id.* at 996.

10. *Id.* at 997.

11. *Id.* at 998.

12. *Id.* at 1004.

13. *Id.* at 1005.

14. *Id.* at 996.

15. Burma Shave (1938).

respect to highway safety no one of the three factors described above exists to a sufficient degree to permit deterrence to function very effectively. As we shall show in this section, our society does not really sanction strong deterrent measures; the most flagrant offenders are affected only minimally, if at all, by societal pressures; and many among those who would respond to the wishes of the community are prevented from doing so by either personal or environmental factors or both.¹⁶

Simonett and Sargent seek primary justification for fault, not in deterrence, but in the principle of retribution.¹⁷ In effect they divide the population into two groups: the righteous and pure, who never cause accidents, and the evil and corrupt who alone are responsible for mayhem on the highway. This theme, which takes up half of the Simonett and Sargent article, is so absurd in its ethical, moral, psychological, and common sense foundations that it deserves little comment.¹⁸

Still the reader should be reminded that Simonett and Sargent endorse an overlay of first-party, no-fault insurance payable to lawsuit losers as an addition to the fault system.¹⁹ They also favor liability coverage so the lawsuit loser will not have to bear any immediate financial burden.²⁰ Simonett and Sargent believe in hell fire, but want the insurance system to provide air conditioning.

Bad Evidence

The bad evidence found in *The Minnesota Plan* relates to the following issues: public opinion toward no-fault, comparative benefits under fault and no-fault systems, the Massachusetts no-fault experience, and the constitutionality of no-fault.

Public Opinion

On the question of public opinion Simonett and Sargent quote a Minnesota Tribune poll of September, 1968.²¹ The existence of a later Minnesota poll is relevant in judging the integrity of their presentation. It is difficult to justify the omission of a poll published April 6, 1969, in which 62 percent favored no-

16. D. KLEIN & J. WALLER, CAUSATION, CULPABILITY AND DETERRENCE IN HIGHWAY CRASHES 118 (1970).

17. SIMONETT & SARGENT at 996.

18. "A typical driver has a better than even chance of having an accident every three years; just about every driver will have an accident sometime." N.Y. DEP'T OF INS., AUTOMOBILE INSURANCE—FOR WHOSE BENEFIT? 3 (1970).

19. SIMONETT & SARGENT at 1006.

20. *Id.* at 1005-06.

21. *Id.* at 994.

fault and 31 percent opposed it. This poll appeared a year after the one cited by Simonett and Sargent and two years before their article. If they believe public opinion is relevant on the issue of no-fault, as they apparently do, the authors should rely on the best evidence of current attitudes.

The most recent Minnesota polls, published after the Simonett and Sargent article, show 54 and 53 percent favorable, 30 and 29 percent unfavorable and 16 and 18 percent undecided.²² These recent polls provide impressive, and current, evidence of public support for adoption of no-fault auto insurance.

Comparative Benefits

Simonett and Sargent attack no-fault benefits as inadequate. This point is made with three selected hypotheticals.²³ No comparison is made between the typical benefits provided by the fault system and the benefits offered by no-fault. I concede that one out of ten seriously injured persons receives a greater net recovery under today's fault system than a pure no-fault bill would provide them.²⁴ In a lottery system—like today's fault system—there will be winners. But there are losers as well. We cannot preserve a lottery with 90 percent losers among the seriously injured on the basis of the attractiveness of the system for those who win the jackpot and the lawyers who represent them.

The evidence on comparative benefits presented in *The Minnesota Plan* is bad evidence—selective hypotheticals. Good evidence is available. Simonett and Sargent ignore the Department of Transportation study on the comparative benefits issue: "The Economic Consequences of Automobile Injuries,"²⁵ although the study is cited by them at other points. This study shows that victims of serious traffic crashes and their dependents in 1967 recovered from auto liability insurance an average of approximately 15% of their economic losses.²⁶

By ignoring that study Simonett and Sargent attempt to sweep under the rug the best available information on how the present system operates. Also ignored is evidence from Professor Conard,²⁷ that from the New York Department of

22. Minneapolis Tribune, April 18, 1971, at 25, col. 2; June 27, 1971, at 8, col. 3.

23. SIMONETT & SARGENT at 998.

24. Maynes & Williams, *Fault or No-Fault*, PROCEEDINGS OF A NATIONAL CONFERENCE ON AUTOMOBILE INSURANCE REFORM 87 (1970). Quoting T. Lawrence Jones, President, American Insurance Association.

25. U.S. DEP'T OF TRANSPORTATION, ECONOMIC CONSEQUENCES OF AUTOMOBILE ACCIDENT INJURIES, REPORT OF THE WESTAT RESEARCH CORPORATION, Vols. I, II (1970).

26. *Id.* at 38 and 45. Forty percent economic losses is recovered (at 38). Thirty-two percent of recovery is on tort claims (at 45).

27. A. CONARD, J. MORGAN, R. PRATT, C. VOLTZ & R. BOMBAUGH, AUTOMOBILE ACCIDENT COSTS AND PAYMENTS: STUDIES IN THE ECONOMICS OF INJURY REPARATIONS 192-99 (1964).

Insurance,²⁸ that from the American Insurance Association,²⁹ and that from the American Bar Association committee on auto reparations.³⁰

Massachusetts

The evidence of Simonett and Sargent as to experience under the Massachusetts no-fault law is limited to reporting a 38.4 percent increase in property damage premiums instituted before the effective date of no-fault.³¹ Property damage costs were not affected by the Massachusetts's no-fault system at the time Simonett and Sargent wrote. Their apparent motive is to suggest the 38.4 percent increase is relevant evidence on the cost of no-fault.

Motive aside, later evidence destroys the Simonett and Sargent suggestion of increased cost under the Massachusetts no-fault system. The most recent report proves there will be significant savings from that partial no-fault plan. The 1971 rates for bodily injury coverage were 15 percent less than the liability rates in effect in 1970. Now insurance commissioner John G. Ryan has proposed a further decrease of 27.6 percent for no-fault bodily injury premiums for 1972. Industry spokesmen have proposed an average reduction of 18.5 percent. Were the lower industry proposal adopted the total reduction after two years under modified no-fault will approximate 30 percent.³²

Simonett and Sargent also cite as evidence on no-fault costs a study by the American Mutual Insurance Alliance.³³ The AMIA was opposed to no-fault when the study was released. Simonett and Sargent say the AMIA found that a pure no-fault plan "would increase costs some 29 percent."³⁴ Anyone citing this study should note that the 29 percent increase was not in overall costs, but in "the cost of basic bodily injury coverage."³⁵ This increase in one item of cost was offset by overhead reductions and other savings so that in this study, the AMIA conceded aggregate savings of 5 percent for a substantial class of insureds and modest 5 percent to 9 percent increases for the other two classifications in its study.³⁶

28. N.Y. DEP'T OF INS., *supra* note 18 at 25-29.

29. AMERICAN INS. ASS'N, REPORT OF SPECIAL COMMITTEE TO STUDY AND EVALUATE THE KEETON-O'CONNELL BASIC PROTECTION PLAN AND AUTOMOBILE ACCIDENT REPARATIONS I (1968).

30. A.B.A. COMM. ON AUTOMOBILE ACCIDENT REPARATIONS 104 (1969).

31. SIMONETT & SARGENT at 1002.

32. *The National Underwriter*, Dec. 3, 1971, at 1.

33. SIMONETT & SARGENT at 1000.

34. *Id.* at 1000.

35. AMERICAN MUTUAL INS. ALLIANCE, ACTUARIAL REPORT ON THE ADEQUACY OF THE COSTINGS OF THE AMERICAN INSURANCE ASSOCIATIONS COMPLETE PERSONAL PROTECTION AUTOMOBILE INSURANCE PLAN I (1969).

36. *Id.*

There is good evidence pointing to significant premium savings from a no-fault system.³⁷ Most dramatic is the public pledge by two large insurance companies that if the Minnesota no-fault bill were adopted their auto insurance premiums in Minnesota would be reduced from 22 to 25 percent.³⁸

Constitutionality

Since the Simonett and Sargent article appeared with its discussion of constitutionality, the Massachusetts Supreme Court has unanimously ruled that the Massachusetts law was constitutional in *Pinnick v. Cleary*.³⁹ Unfortunately, Simonett and Sargent did not have that authority available to them when preparing their article. They did have available the Department of Transportation study, "Constitutional Problems in Automobile Accident Compensation Reform,"⁴⁰ which was published a year before their article. The three constitutional law experts who authored that 94-page study concluded that the no-fault reforms would not conflict with constitutional mandates.⁴¹ Simonett and Sargent chose to ignore the existence of the study.

Conclusion

Support for no-fault grows with each passing month. The Nixon administration,⁴² powerful members of Congress,⁴³ insurance commissioners,⁴⁴ consumer groups,⁴⁵ business groups,⁴⁶ and state legislatures⁴⁷ have endorsed no-fault since the start of this year. The National Conference of Commissioners on Uniform State Laws, with special financing from the Department of Transportation, is drafting a uniform no-fault act.⁴⁸

37. Texas Ass'n of Ins. Agents, Transcript of Proceedings, National No-Fault Conference 134-298 (1971). MASS. GEN. LAWS ANN. ch. 175 § 113B (1971).

38. The companies are Aetna Life and Casualty and the St. Paul Companies, Minneapolis Tribune, April 14, 1971, at 1, col. 1.

39. ____Mass.____, 272 N.E.2d 592 (1971).

40. U.S. DEP'T OF TRANSPORTATION, CONSTITUTIONAL PROBLEMS IN AUTOMOBILE ACCIDENT COMPENSATION REFORM (1970).

41. The authors are: Lindsey Cowen, Joseph W. Bishop, Jr., and C. Dallas Sands.

42. See Wall Street Journal, March 24, 1971, at 3, col. 2.

43. Notably Senator Warren Magnuson who assumed joint sponsorship with Philip Hart on February 24, 1971.

44. RESOLUTION OF NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, adopted June 17, 1971.

45. AFL-CIO; United Auto Workers; Consumer Federation of America; Consumers Union; National Council of Senior Citizens; American Automobile Association.

46. Chambers of Commerce, e.g., Greater Philadelphia and Los Angeles Area; American Society of Insurance Management; Car and Truck Rental and Leasing Association

47. The Florida no-fault bill was signed on June 24, 1971. Study commissions have been established in 17 states this year.

48. See page ____ for discussion of the NCCUSL project.

Growth in support for no-fault parallels growth of the evidence in favor of the no-fault principle. Lawyers can ignore that evidence only at the price of great embarrassment to the legal profession.⁴⁹ Press exposure of the lawyer self-interest on this issue becomes inevitable as the bar stands increasingly alone in its opposition to no-fault reform.⁵⁰

The merits of the no-fault reform are made obvious by the weak foundations of the case against no-fault, apparent even in such a strenuous effort as the Simonett and Sargent article. Since a legitimate case cannot be made against no-fault, individual lawyers should the public interest—and for the self respect of the profession—repudiate the position of the organized bar.⁵¹

49. "A concerted drive by trial lawyers to block any major change in the way auto accident damages are handled is frustrating the Nixon administration's hope of getting major insurance reform on a state-by-state basis." Ottenberg, *The No-Fault Insurance Fight*, Washington Star, July 6, 1971, at 1, col. 1.

50. Minneapolis Tribune, May 7, 1971, at 1, col. 4.

51. In Massachusetts a lawyers' for no-fault committee was organized. I know of no similarly statesman-like performance elsewhere.