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Faulty No-Fault: Let the Consumer Beware

William Schwartz*

I. "Faulty" Versus "Faultless" No-Fault

No-fault is not necessarily an idea whose time has come. Rather, it is a confusing, misleading, and popularly promoted label which has been affixed to numerous proposals and plans. Over one hundred proposals and plans have been given the appellation of no-fault. Some of these proposals may be marked more by their differences than their similarities. Thus, the no-fault label has the inherent capacity of deceiving an uninformed public. It is a dramatic illustration of the power of a sonorous phrase to command uncritical acceptance.

The only feature common to all types of no-fault plans is their provision for recovery by an injured auto accident victim of some of his medical expenses and some of his wage losses without proving that a defendant driver was at fault. The various no-fault plans do differ radically in their treatment of the important general damages which an injured person suffers as a result of an accident.

By the common law, it is axiomatic that in personal injury cases, a plaintiff is entitled to compensation for his entire loss—his loss of wages, medical expenses, and what are known as “general damages”. Among the general damages recoverable by accident victims are damages for disability to body or mind; pain and suffering, including worry, embarrassment, humiliation and inability to enjoy life; disfigurement; loss of vision or hearing; loss of earning capacity or ability; and loss of comfort, society, and guidance from a relative who has been wrongfully killed.

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Some of the no-fault plans, usually referred to as "total" no-fault plans, completely eliminate the right to sue in tort to recover general damages. Others, based upon the Massachusetts approach,² allow recovery only if the injured person's medical expenses exceed a given amount ($500 in Massachusetts). In addition, this type of plan also allows recovery in the cases of certain specified types of injuries. Thus, in Massachusetts, the right to sue in tort and to recover general damages is sanctioned if the injuries involve one of the following unrelated categories: (1) death, (2) permanent serious disfigurement, (3) deafness or blindness, (4) dismemberment, or (5) any fracture.

Another type of no-fault proposal does not eliminate the right to sue in tort, but limits the amount an injured person can recover for general damages by using a formula involving medical expenses. For example, under an Illinois statute,³ which has been declared unconstitutional,⁴ the recovery for general damages would usually be limited to 50 percent of the medical expenses; provided that the medical expenses did not exceed $500.⁵ If the medical expenses exceeded $500, recovery would be limited to $250 plus an amount equal to the expenses in excess of $500. For example, if the medical expenses were $700, an accident victim could not recover more than $450 for general damages.

It is submitted that the aforementioned types of no-fault plans, and variations thereon, should be characterized as "faulty" no-fault plans. They seek to achieve the advantages of no-fault at a terrible and unnecessary price. These "faulty" no-fault plans needlessly either eliminate or limit compensation for general damages. Such plans affront the common law mandate that the dignity and human losses of men are compensable.

Faulty no-fault plans eliminate or limit the right to recover for general damages by placing the highest priority on the payment of economic losses to both the deserving accident victims - who would have recovered under the fault system - and the undeserving accident victims (those whom the fault system classified as "wrong-doers" or as presenting unmeritorious claims

⁵. Ill. Rev. Stat., supra note 3, at (c). The limitation on general damages is inoperative in the following cases: death, dismemberment, permanent total or permanent partial disability and permanent serious disfigurement,
within the framework of the common law) who would not have recovered under the fault system. These "faulty" no-fault plans proceed on the thesis that it is not economically feasible to pay economic loss benefits to both deserving and undeserving accident victims unless restrictions are placed on the right of the deserving accident victim to recover general damages. This subsidizing of the wrongdoer and the unmeritorious claimant at the expense of the deserving accident victim results in the loss of the right to individual justice.

It is possible to have both "butter and guns" in this field of the law. Oregon, Delaware, Maryland, South Dakota, and Arkansas have enacted

6. ORE. REV. STAT. § 743.786 (1971), amending ORE. REV. STAT. § 743.786 (1967). The Oregon plan requires the inclusion in policies sold of coverage which provides for the payment (on a first-party no-fault basis) of benefits for medical expenses and wage losses. The medical benefits are limited to $3,000 per person and the wage loss benefits (which exclude the first 14 days of disability from coverage) are limited to 70% of the loss of income from work. The work loss benefits need not exceed $500 per month or be paid for a period exceeding 52 weeks. In other words, the maximum benefits payable under the Oregon law are approximately $9,000. The liberal maximum no-fault benefits available in Oregon ($9,000) and Delaware ($10,000) are far superior to the limited benefits available in Massachusetts ($2,000). Despite the provision in Delaware and Oregon for such extensive maximum benefits, neither state abrogates the tort remedy. Despite the retention of the tort remedy, overall premiums have not increased in states with such statutes. The availability of first-party no-fault benefits has resulted in a claims decline in both states. Proponents of the Oregon plan have informed me that there is a claims reduction of at least 30%.

7. 58 Laws of Del., ch. 98 (1971). Under this law, a $10,000 economic loss package (first-party no-fault coverage) is provided every motorist on a compulsory basis. Victims may recover either wage losses or medical expenses or both without any ceiling, provided the aggregate recovery does not exceed the $10,000. Under the Delaware plan, special damages incurred by the victim may not be pleaded or proved in evidence (unless they exceed the $10,000 coverage available on a first-party basis). In other words, the claimant may only prove and make claim for the value of all non-economic loss plus economic loss exceeding the $10,000. Proponents of the Delaware plan have informed me it has resulted in a claims reduction of about 42%. The Delaware statute does not abrogate the right to recover for general damages.

8. MD. ANN. CODE art. 48A, § 234B (1972), amending MD. ANN. CODE art. 48A, § 234B (1970). The Maryland plan provides a $2,500 first-party no-fault package for medical expenses and wage losses. Similar to Delaware, the Maryland plan for economic benefits does not provide inner limits. In other words, the victim can draw money for either medical expenses or wage losses without limitation so long as the total benefits claimed do not exceed $2,500 in the aggregate. According to the Department of Transportation studies, a $2,500 economic loss package will pay the economic losses of 96% of all auto accident victims. This would be payment in full to that number of victims. The Maryland plan does not provide any limitation on tort recovery. It also prohibits the insurer who pays first-party no-fault benefits from claiming a right of subrogation based upon the fault of another person in causing the accident. In my opinion, based on results in other states providing economic loss benefits, the Maryland bill, which will go into effect in January, 1973, should result in a reduction of claims and no additional premium cost to the owner of the vehicle. In other words, savings from voluntary reduction in claims will be sufficient to offset any additional costs for the $2,500 package.

Another excellent feature of the Maryland statute is its treatment of the problem of the availability of insurance. It creates a state fund to provide liability insurance
constructive no-fault laws which preserve the right to recover general damages. These laws provide for the prompt payment of medical expenses and wage losses to accident victims, without the necessity of proving fault. The maximum benefits payable in Oregon and Delaware are approximately five times greater than the benefits available under the “faulty” Massachusetts no-fault law. Oregon, Delaware, Maryland, South Dakota, and Arkansas give their citizens the prompt payment of economic losses to which they are entitled, without creating a situation in which irresponsibility becomes economically advantageous at the same time. In short, such plans eliminate the problem of delayed payment, while preserving the public’s right to collect for all of their injuries.

Despite the preservation of the right to recover general damages in these five states, experience reveals that over-all premiums for auto insurance will not necessarily increase. The availability of first-party no-fault benefits for economic loss will tend to reduce the number of claims for general damages, especially in the smaller cases. On the other hand, in a subsequent
portion of this article, we will document and demonstrate that the overall costs of auto insurance can and did increase under a "faulty" no-fault plan.

In addition to eliminating or limiting the right to recover for general damages, "faulty" no-fault plans suffer from numerous other deficiencies which will be detailed in Part III of the article.

II. The Truth About Tort

For centuries, tort law has been a major guardian of the institutions which are central to our civilization. The moment two men co-existed in the world, the creation of a law of torts became imperative as an alternative to anarchy (no law) and tyranny (one-man or one-group rule). In the modern world, the law of torts serves to stabilize society by balancing, with a minimum of friction, competing social and individual interests through rules based on reason and tested by experience.\(^{12}\)

In light of its central importance to society and its evolutionary develop-
ment through the centuries, a heavy burden of proof should be cast upon those who would seek to alter substantially this element of civilization by abrogating valuable, traditional and cherished fundamental rights. In making this assertion, is not contended that the present system is perfect. On the other hand, it is not necessary to burn down the barn merely to get rid of a few mice.\textsuperscript{13}

Yet, the common law system is currently beleaguered by its critics. These criticisms are either unjustified or do not warrant the adoption of “faulty” no-fault plans which would destroy the fundamental rights of accident victims to recover for all of their human losses. The following represent the major criticisms which have been made of the fault system and this author’s responses.

\textbf{A. Delay}

Contrary to popular belief, there is not excessive delay in settling claims. A study\textsuperscript{14} conducted by the Department of Transportation shows that an overwhelming majority—76 percent—of auto accident claims are settled in less than six months after the accident. Prompt and automatic payment of benefits for economic losses can be as effectively achieved by the adoption of the constructive reforms which have been implemented in Maryland, Oregon, South Dakota, Arkansas and Delaware, as by a faulty no-fault plan.

While it takes longer to settle cases involving serious injury and injuries to minors, this delay is in the victim’s interest, since doctors must be able to examine and treat such patients in order to determine the nature and extent of loss. In such cases, medical costs and wage losses are sometimes unascertainable until many months after an accident. In the case of minors, the full extent of their injuries are sometimes not apparent until much later.\textsuperscript{15}

No-fault will not cure delay. In order to be paid by a no-fault insurance policy, the victim must, of course, prove to the insurer’s satisfaction that the claimed injury was caused by the accident. The insurance company can argue that the injuries were wholly or partly caused by another accident or a fall, and not honor the claim. Then the victim would have to sue the insurer for the no-fault benefits.

Likewise, the amount of damages must be proven to the satisfaction of

\textsuperscript{13} See Pinnick v. Cleary, 271 N.E.2d 592, 613 (1971) (Tauro, C.J., concurring opinion).

\textsuperscript{14} U.S. DEP’T OF TRANSPORTATION, AUTOMOBILE PERSONAL INJURY CLAIMS 84 (1970) [hereinafter cited as PERSONAL INJURY CLAIMS].

\textsuperscript{15} See Friedman, No-Fault Automobile Insurance—A Premature Destruction of the Tort Liability Reparations System in Automobile Accident Cases, 46 NOTRE DAME LAW. 542 (1971).
the insurance company before the victim can recover. If the insurance company doctors disagree with the victim's personal physician, again, he would have to sue the insurance company to recover his no-fault benefits.

The Opinion Research Poll of accident victims in Massachusetts revealed that about a third of the claims which are more than six months old are still unsettled despite the enactment of no-fault. A recently published study of the Institute of Judicial Administration reveals that no-fault has not as yet had a recognizable impact on the speed with which personal injury cases come to trial.

B. Adequacy of Compensation

Some deserving accident victims do not receive full compensation under the fault system primarily because of low insurance limits. The most frequently found coverage limit for automobile bodily injury liability insurance is $10,000/$20,000. As the Department of Transportation has pointed out, "since recovery under the tort system is virtually dependent on the availability of insurance, low coverage limits are tantamount to low recovery potential for the victim." Another hurdle to recovery noted by the Department involved uninsured motorists, since uninsured motorists coverage usually limits recovery to the amount stipulated in minimum financial responsibility laws.

Accident victims are also denied adequate compensation because of the presence of harsh and outmoded legal rules (i.e. contributory negligence, the immunities, and guest statutes), which have been vigorously promoted by the insurance industry, one of the leading proponents of no-fault laws.

The tort system is not intended to compensate everyone. The system is based upon the principle that one who wrongfully causes injury to another should fairly and adequately compensate the injured person to the extent he was free from fault. The tort system is operating as intended. It is not designed to compensate persons who cause accidents. Such persons should only recover under their own accident and health policies.

17. FLA. B.J. 525 (October, 1972).
19. Id.
20. Id.
21. See Heft & Heft, The Two Lawyer Cake: No-Fault & Comparative Negligence, 58 A.B.A.J. 933 (1972) (urging the preservation of the tort system and the adoption of comparative negligence coupled with first party no-fault coverage for economic losses).
No-Fault

In addition, the tort system is not intended to be the only source of compensation. There are other sources of reparations including medical insurance, workmen's compensation, sick leave and social security benefits. The victim's inability to recover fully may be attributable to deficiencies in these other systems. 23

Are some victims undercompensated, while others are overcompensated? According to a study conducted by the Department of Transportation, the minute number (one-half percent) of accident victims with losses over $10,000 (who allegedly are undercompensated) receive more than seven percent of the dollars paid out in benefits, and over 90 percent of the persons in this category do receive some benefits. In contrast, only 70 percent of those with economic losses of less than $500 receive benefits. 24 This group, which constitutes almost 80 percent of the accident victims, receives only 30 percent of the payment dollars. 25 Approximately 90 percent of the victims suffer economic losses of $1,000 or less. 26 32 percent of this group recovers less than half of its economic losses. 27 This is hardly the picture of rampant overcompensation. Further, about nine out of ten fatally or seriously injured victims obtain some compensation from at least one reparation source. 28

The more serious case certainly will be undercompensated by faulty no-fault because such a case involves serious disability to body or mind; severe pain and suffering; loss of earning ability; and in death cases, loss of companionship, comfort, and society. Under faulty no-fault, these damages are either totally eliminated or curtailed.

The contention that the smaller claims are overcompensated is based, at least in part, on the fallacious assumption that there is an automatic correlation between the amount of economic loss and the consequent indirect or psychic loss. In cooperation with the Department of Transportation, the

23. U.S. Dep't. of Transportation, Economic Consequences of Automobile Accident Injuries 43-46 (1970). [hereinafter cited as Economic Consequences] Thus, this study reveals that although 61 percent of the victims suffered some wage losses, only 18 percent benefited from sick leave, 7 percent from workmen's compensation, 2 percent from Social Security disability and 3 percent from Survivors and other future Social Security benefits. Id. at 44. Only 37 percent of the total medical expenses was recovered from hospital or medical insurance. Only 9 percent of the wage loss was collected from sick leave. Id. at 46. The study further revealed that those receiving tort reparations obtained about 60 percent of their total recovery from the tort source. Id. at 47. A Michigan study corroborates this finding. See A. Conrad, J. Morgan, R. Pratt, C. Voltz, R. Bombaugh, Automobile Accident Costs and Payments 66 (1964).
24. Economic Consequences 38.
26. Id.
27. See Economic Consequences at 42.
28. Personal Injury Claims 43.
Closed Claims subcommittee of the Insurance Advisory Committee (including the ten largest automobile volume company groups in the country) conducted a survey. The survey concluded that there was no such correlation. It found that:

The particular injury involved, the occupation of the injured, the economic stratum in which he exists, may all have a bearing by varying degree on the indirect damage segment of the loss. Thresholds of pain and tolerance thereto differ in individuals just as does the psychic impact and residual of injury. These relationships must be valued in each particular case and the absence or presence of indirect elements of damage are matters of widely varying degree.\(^2\)

C. Efficiency

Although the accident victim receives 100 percent of the benefits paid out, critics have alleged that he receives only 44 cents of the premium dollar he has paid. Even if true, this rate of return is better than that which has been experienced in Massachusetts under no-fault, as will be demonstrated in part IV below.

In addition, recent studies of collision insurance and workmen's compensation, which are both no-fault systems, fail to show any appreciable difference in efficiency between those systems and the fault system.\(^3\)

Only six percent of the total auto insurance dollar goes to plaintiffs' lawyers. A far larger proportion of the premium dollar is allocated to brokers' commissions, salaries of insurance officials, and other insurance company expenses.\(^4\) Under no-fault, money will still be paid out for these purposes. Further, even more may be paid to investigators because it may be easier to make a fraudulent claim, since under certain no-fault plans one need not prove the car was in motion. If an injured person can connect his injury in any way, to a car, he will be able to recover. Query: how many slips and falls on a driveway or walk will become auto accidents under no-fault?

D. Congestion

Surveys demonstrate that such congestion and delay are problems limited to a small number of metropolitan areas.\(^5\) Thus, the Institute for Judicial

\(^{29}\) Id. at 113.


\(^{32}\) See DEFENSE RESEARCH INSTITUTE, RESPONSIBLE REFORM, A PROGRAM TO IMPROVE THE LIABILITY REPARATIONS SYSTEM VOL. 1969, at 14 (No. 8, 1970).
Administration of New York University reports that the average period of time between the ready date and trial is 5.2 months in Iowa; 3 months in New Hampshire; 7 months in Kansas; and 8.7 months in Miami, Florida. Furthermore, the average period of time between the service of answer and trial is 6 months in Knox County, Tennessee; 5.2 months in South Dakota; 8.8 months in Portland, Oregon; 5.6 months in Oklahoma; 5.7 months in North Dakota; and 11.4 months in Miami, Florida. 38

Is the fault system a major source of court congestion? Although 4.4 million people are injured in auto accidents each year, only 220,000 auto accident lawsuits are filed. Only one-third of one percent of these injuries ever reaches a final verdict and judgment, and these lawsuits consume only 17 percent of our total court resources. 34 The real congestion is on the criminal side, where courts spend about three times as much time to protect the individual rights of criminals. It is perfectly proper to use a third as much time to determine the rights of 100 million people who drive 100 million vehicles a trillion miles a year. 35 Taken as a whole, criminal cases, land damage, zoning, equity, contract, administrative law and other cases that are not connected with auto accidents occupy the major share of the court’s time. 36 This conclusion is substantiated by the Department of Transportation study which attributed such delay to the following two factors: (1) delay in filing lawsuits, this being strongly influenced by the local statute of limitations; and (2) urbanization which results in more criminal and other types of civil cases. 37

The determination of fault is a relatively simple matter and does not augment court congestion. A recent study made by an insurance company proved that in 90 percent of all auto accidents, fault could be easily determined—usually from only the facts contained in the accident report. 38

E. Cancellations

The conception that the fault system causes the problem of cancellations is simply not true. The problem of arbitrary cancellations and non-renewals of policies results from bad insurance company practices. 39 Although

33. INSTITUTE FOR JUDICIAL ADMINISTRATION, CALENDAR STATUS STUDY 1971 (1972).
37. Supra note 33, at 8.
38. See Martyott, Testing the Criticisms of the Fault Concept, 35 INS. COUNSEL J. 112 (1968).
39. See, e.g., The Story of Non-Renewal of One Auto Insurance Policy, Hearings
some no-fault plans contain provisions designed to eliminate this evil, these provisions could be adopted just as well under the tort system.\textsuperscript{40}

\textbf{F. Costs}

Even the concept that insurance costs are excessive cannot be supported statistically. A Department of Transportation study revealed that 72 percent of the public paid less than $75 annually for automobile bodily injury and property damage insurance premiums.\textsuperscript{41}

The cost of hospital care, medical treatment, automobile repairs, and the average hourly wage—all of which make up the typical automobile accident claim—have increased rapidly in recent years. It is not the legal system of handling auto claims which has caused an increase in premiums, but rather the general inflationary trend. During a ten-year period, auto liability premiums went up at approximately the same rate as the consumer price index, and during a twenty year interval, the portion of individual income spent for auto liability insurance actually dropped!\textsuperscript{42} Auto body repair costs and hospital charges are rising faster than auto insurance rates.\textsuperscript{43} Two-thirds of the premium dollar pays for damage to the automobile itself.\textsuperscript{44} The most effective method of reducing premiums is to make vehicles safer and more durable. A strong bumper protection law, which requires "bumpers to bump and fenders to fend" would reduce physical damage by 60 to 85 percent.\textsuperscript{45}

Costs may increase under no-fault because of the greater potentiality for fraud. The fault system does not encourage fraudulent and excessive claims when contrasted with no-fault insurance which offers greater temptation for the dishonest since it removes the requirement of giving proof of fault and forsakes current legal safeguards against fraudulent claims. Accidents, such as falls on sidewalks, can be easily disguised as auto accident claims under no-fault, if the plan does not require that the vehicle be in motion.

\textit{Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, 91st Cong., 1st Sess. 9633 (1969).}

\textsuperscript{40} Friedman, \textit{supra} note 15, at 553. The Maryland statute, discussed \textit{supra} note 8, illustrates that it is feasible to treat the problem of cancellations and non-renewals without impairing the tort remedy.


\textsuperscript{44} See Ghiardi & Kirchner, \textit{Automobile Insurance: The Rockefeller-Stewart Plan}, 37 INS. COUNSEL J. 324, 326 (1970).

\textsuperscript{45} This conclusion is based upon information furnished to the author by an actuary.
No-fault would not affect significant economics in claim processing nor would it necessarily solve the problem of complexities in the claim processing. There will still be a necessity of proving the occurrence of an accident, damages, and a causal connection between the accident and the damages suffered. Claims under no-fault may involve "significant variables, such as the extent of rehabilitation and recovery, and the like. Even explaining how the figures are computed to the average claimant would be a difficult task. . . ."\textsuperscript{46}

\section*{III. The Faults in No-Fault}

Faulty no-fault plans abrogate or restrict the right of a deserving accident victim to recover all of his losses. In addition, no-fault plans are replete with numerous other deficiencies and differ in their treatment of problem areas. Hence, it is necessary to carefully evaluate each plan and to gauge the extent to which it rectifies or avoids each of these shortcomings of no-fault. In this part, the major "faults in no-fault" will be pinpointed.

Faulty no-fault plans provide the same compensation for the wrongdoer and the unmeritorious claimant as the innocent, deserving victim. The benefits paid to the wrongdoers and the unmeritorious are financed by either eliminating or sharply reducing the right of the innocent deserving accident victim to recover general damages.

Faulty no-fault plans will destroy the rights of and inadequately compensate more than 90 percent of the accident victims entitled to recovery according to statistics compiled by the Department of Transportation.\textsuperscript{47} That study reveals that the denial of general damages under faulty no-fault plans will have the following deleterious effects on deserving accident victims:

\begin{enumerate}
  \item 78.9 percent of these accident victims will lose 78 percent of their current benefits;
  \item 10 percent of these accident victims will lose 62 percent of their current benefits;
  \item 4 percent of these accident victims will lose 59 percent of their current benefits;
  \item 3.2 percent of these accident victims will lose 50 percent of their current benefits;
  \item 2.3 percent of these accident victims will lose 38 percent of their current benefits.
  \item 1.1 percent of these accident victims will lose 9 percent of their current benefits.
\end{enumerate}

\textsuperscript{46} See J. Kemper, \textit{Crisis in Car Insurance} \textit{104} (1968).
\textsuperscript{47} See \textit{Personal Injury Claims} \textit{50}; \textit{Economic Consequences} \textit{47}. 
The Department of Transportation statistics may well be conservative in their estimated reduction of benefits under no-fault. A recent study by the Jury Verdict Research Project reveals that in an average no-fault case in which damages for pain and suffering are denied, an injured person could expect to receive only 15.8 percent of what a jury would have awarded.\(^4\)

No-fault may increase the cost of insurance. Since no-fault would compensate many who were not paid before—namely, those who were wrongdoers or deemed unmeritorious by the common law—there could be an increase in the number of claims made. Estimates as to increased claims vary from 40 percent to 200 percent.\(^4\) It is also possible that fraud in concealing benefits from other sources and the making of payments periodically (rather than in a simple lump sum) will place a heavy burden on insurance companies and increase administration and investigation costs. In addition, the likelihood of fraud is inherent in those no-fault plans which do not require a showing that the car was in motion at the time of the injury.

Certain administrative and legal expenses must necessarily be incurred even under no-fault. Expenditures of time and money will be required to show a causal connection between the accident and the alleged injuries suffered and to prove the accident and the injuries. Further, it is quite difficult to assume that the insurer’s attitude will be marked by a spirit of beneficence. Insurers can and may dispute claims under the no-fault coverage which could breed costly and time consuming litigation.

A six month study conducted by the American Mutual Insurance Alliance to determine the cost of a total no-fault plan forecast an increase of 29 percent in automobile insurance premiums under such a proposal.\(^5\) The National Association of Independent Insurers recently made an actuarial analysis of the Hart-Magnuson national no-fault bill and projected that substantial increases would result under that bill, with increases as large as 61 percent in some states.

A no-fault plan which would provide no-fault benefits to cover everyone’s economic losses in full would result in an increase in premiums of at least 75 percent.\(^5\) According to the Department of Transportation, the compensable, economic loss—medical losses, wage losses, and incidental related

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\(^4\) See Bailey, Fallacies Over-Shadow Validity of Plan’s Cost Estimates, 3 TRIAL 45, 46 (Oct./Nov. 1967).
\(^5\) See Comment, Actuarial Study Challenges No-Fault Cost Savings, 10 FOR THE DEFENSE 43 (June, 1969).
expenses—was $5,689,000,000 in 1967.\textsuperscript{52} The total premiums for all bodily injury coverage in 1967 was $4,991,133,000.\textsuperscript{53} If, as proponents claim, it should be assumed that the maximum achievable pay-out efficiency of a no-fault plan is 65 percent pay-out and 35 percent administrative expenses then it would have required total bodily injury premiums (at 1967 expense levels) of $8,750,000,000—a 75 percent increase in premiums—to make those payments.

In part IV of this article, it will be documented that the overall costs of insurance have risen in Massachusetts despite no-fault and that no-fault has resulted in an increase in the \textit{true} costs of insurance.

\textit{Many no-fault plans adversely affect segments of society}

The following anticipated examples illustrate the inequities and injustices of many no-fault plans:

1. Senior Citizens. A retired senior citizen is injured in an auto accident. Medicare pays his medical expenses. The accident changes his whole life style, filling his retirement with grief, pain and unhappiness. Many no-fault plans will prevent him from receiving a cent from any insurance company for his injuries and from suing the wrongdoer.

2. Housewives. A housewife, the mother of three children, is injured in an auto accident caused by a reckless driver. She sustains a severe strain of her neck and back muscles and (during the next five years) is forced to perform her household duties in excruciating pain. Her medical expenses are $150. Many no-fault plans prohibit her from receiving more than $150 from anyone.

3. Youth. A college student’s arm is injured in an auto accident, and he is deprived of his planned future as a surgeon. His medical bills are $300. Many no-fault plans would limit his recovery to that amount.

4. Workers. A union worker suffers a herniated disc of his spine and fusion of his back and neck as a result of an auto accident. A wage continuation plan and an accident and health plan, both diligently negotiated for by his local union, pay his medical expenses and wages. Under many no-fault plans, he may not receive a single cent from any auto insurance company for his injuries and cannot sue the wrongdoer who caused the accident.

\textit{Discrimination and faulty no-fault plans}

Faulty no-fault plans force the public to buy additional insurance to cover

\textsuperscript{52} U.S. DEP’T OF TRANSPORTATION, \textit{supra} note 18, at 6.
\textsuperscript{53} \textit{Supra} note 51.
the benefits taken away from accident victims. This cost will be high for the average consumer and prohibitive for the poor. Illinois' no-fault law was recently ruled unconstitutional. One of the bases of the trial court's decision was that, since 4 out of every 5 members of low-income minority families in Chicago either own no car or drive an uninsured one, they would receive no benefits under the Illinois no-fault law. Despite the unavailability of no-fault benefits to the poor, the statute still restricted the rights of the members of this class to recover general damages.

Accident victims in lower economic brackets typically incur substantial lower medical expenses than the wealthy for the same ailment. Some faulty no-fault plans use medical expense formulas which would permit the wealthy to recover for a given injury, and deny recovery to the poor. A


The Illinois statute provided first-party no-fault coverage for medical expenses and wage losses. Medical expenses were subject to a limit of $2,000 per person. Wage loss benefits covered 85 percent of the income lost as a result of total disability subject to a limit of $150 per week for 52 weeks per person. Insurance was not made compulsory (but the aforementioned coverages had to be included in each policy issued). Thus, poor persons would not be entitled to any of the first-party benefits given to those who could afford to purchase such coverage.

The statute did not abrogate totally the right to sue in tort. Rather, it imposed limitations on the amount which could be recovered for pain and suffering. This limitation was based on a medical expense formula. Recovery was limited to 50 percent of the reasonable medical treatment expense to the extent that such expenses did not exceed $500. Recovery was limited to 100 percent of such medical expenses to the extent that such expenses exceeded $500. In other words, if the medical expenses were $1,000, recovery could not exceed $750. The limitation on recovery did not apply in cases of death, dismemberment, permanent total or permanent partial disability and permanent serious disfigurement.

In the Grace case, the trial judge held that the statute was "discrimination of the rankest kind." The finding of unconstitutionality was affirmed by the Illinois Supreme Court.

All threshold bills are subject to the same criticism. They discriminate against the poor because it is well known that the medical expenses of the poor are lower than the rich. A poor person would require a more serious injury than the affluent in order to reach the medical threshold upon which his recovery is predicated. The trial court in Grace also pointed out that hospital and medical costs varied substantially throughout the state and within many single communities and areas.

55. The evidence introduced in Grace revealed that the damages of 94.6 percent of all automobile accident victims would be limited by the statute. 47.3 percent of all accident victims would be eligible for a maximum of only $50 in general damages. Another 37.8 percent would be limited to a claim that would range from $50 to $150. An additional 4.7 percent would be limited in their recovery to a sum ranging from $150 to $250. Thus, about 90 percent of all automobile accident victims could recover less than $250 through a tort action. In order to recover these comparatively small sums, a claimant would still be required to establish negligence and his freedom from contributory negligence under traditional tort concepts. Thus, upon application of the statutory formula, the damages recoverable in 90 percent of all motor vehicle accident cases would not economically permit the filing of a law suit. See Def. Ex. 5; Record, Grace v. Howlett, CH 4737 at 298.
judge has described this as the "rankest discrimination."  

While a so-called total no-fault plan may not be subject to this same constitutional criticism since it destroys everyone's right to recover general damages, such an "even handed" abrogation of the rights of all of our citizenry is obviously not in the public interest.

Faulty no-fault plans discriminate against persons earning less than $22,000 per annum. Some faulty no-fault plans limit recovery of wage losses to a maximum of 85 percent of the accident victim's earnings. The 15 percent reduction attempts to recognize that a claimant's recovery is not subject to income taxation. This is grossly unfair to people in lower income brackets. Based on 1971 federal income tax rates, a married man with 3 children, using the standard deduction, would not pay 15 percent of his earnings as taxes unless he earned at least $22,000 per year.

Faulty no-fault plans invade the accident victim's privacy. Some no-fault plans authorize a deduction for income taxes from the benefits paid. This compels the victim to disclose to the insurance company all of his confidential financial information, including earned and unearned income, so the company can compute the victim's tax bracket and its impact on the no-fault benefits payable.

Faulty no-fault plans destroy fundamental concepts of personal security and bodily integrity. These plans impair the right to recover for such human losses as disability, enjoyment of life, pain and suffering, and earning capacity. In the case of death, such plans bar recovery for grief and the loss of companionship, society, comfort and guidance.

Faulty no-fault leads to inequitable and discriminatory rates since faulty no-fault plans set premium rates based upon the amount of injury or damage suffered, rather than caused. The biggest risk to an insurer is the party likely to sustain the most damage. In establishing rates, the insurance company is no longer primarily concerned with whether the insured is a good or poor driver. Thus, the highest premiums will be paid by the prudent and responsible family man and the cheapest rate by the unemployed "hot rodder". A further inequity results if there is no requirement that there be established a higher premium classification for larger commercial vehicles in accordance with their higher injury causing propensities. The lack of such requirement will force all other motorists to pay higher premiums to absorb the amounts that are no longer being paid by such larger commercial operators.

No-fault requires people to buy unneeded additional health and disabil-

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56. Supra note 53.
ity insurance. The overwhelming majority - more than 80 percent - do not need this protection because they already have no-fault insurance in the form of labor benefits, Blue Cross, medicare, and similar insurance.58

Faulty no-fault takes away hard-earned fringe benefits in that many of the no-fault plans require that medical expenses and wage losses be paid first out of other sources—such as other accident and health insurance, Blue Cross, and wage continuation plans—before there is reimbursement under the no-fault policy.59 This is unjust to the worker who will have his hard-earned fringe benefits taken away by no-fault insurance.

No-fault fails to treat the real problem — rising property damage costs. Two-thirds of the cost of automobile insurance premium covers damage to the automobile.60 Most no-fault plans do not provide methods of reducing the costs of property damage to the automobile. The only reliable method of reducing premiums is to compel manufacturers to produce safer and more durable cars, and to implement a stringent safety program which reduces the frequency of accidents.

Faulty no-fault puts the accident victim at the mercy of an insurance company. Some of the leading proponents of no-fault are openly seeking to limit the attorney's role. Under the fault system, the attorney acts as a buffer to protect the injured victim against the power of the insurance company. Studies reveal that the outcome in a case where there is a lawyer is likely to be more favorable to the victim than where there is no lawyer.61 At least 54 percent of all automobile accident cases are settled without lawyers.62 Generally, lawyers are used only when injured persons cannot themselves obtain an adequate settlement from an insurance company.

No-fault will increase auto accidents. The present system acts as a deterrent to the reckless driver. He knows that if he causes an accident, his insurance rates will go up or his policy will be cancelled. In contrast, no-fault removes this deterrent. The guilty driver will be rewarded, rather than penalized, for his wrongdoing. In this age of carnage on our highways, faulty and drunken driving should be penalized, not excused.

The deterrent effect of a tort judgment is not undercut by the presence of liability insurance which shelters tortfeasors from bearing the economic consequences of accidents.63 The existence of liability insurance itself

59. See e.g., the Massachusetts statute, supra note 2, under which the no-fault benefits must be reduced by benefits payable under wage continuation plans.
60. Ghiardi & Kirchner, supra note 44 at 324-26.
62. See PERSONAL INJURY CLAIMS 73.
63. Making this assertion are: Keeton, Is There a Place for Negligence in Modern
demonstrates acceptance of the concept of individual responsibility. Under the fault system, careless driving is deterred by an increase in insurance costs.64

This view is substantiated by a study conducted for the Department of Transportation wherein the researchers conclude:

We have seen that a relatively small proportion of the total buyer market produces highly abnormal claims frequencies. There is evidence that they are heavily involved in the large-loss accident and that they contribute to the total actual loss from automobile accidents out of all proportion to their numbers. In the interest of loss control and prevention, this high-risk group must be identified and treated before the accidents occur. To this end, the probabilities of loss causation must somehow be related to buyer classifications. To ignore fault is to ignore causation. The best way to reduce the high-risk insurers problem is to reduce the number of high-risk drivers. The present law and underwriting place strong economic pressure on high-risk buyers, a pressure which would be released by a non-fault system.65

The insurance market does offer extensive no-fault coverage without depriving the victims of the right to recover general damages through private companies. Faulty no-fault plans extract an unnecessary price, in light of the practice of some carriers to offer extensive no-fault coverage under the tort system. Under a plan embraced by one carrier, an injured victim can recover $7,800 in income disability benefits and $2,500 in medical indemnity benefits from his own insurance company without proving fault. This is certainly more extensive than the benefits available under the Massachusetts plan. Despite the increases in benefits, the policyholder still retains his right to sue a third party for damages. This coverage costs a nominal flat fee—ranging between $4 and $8—over and above the cost of $2,000 medical payments coverage which must be carried.66

Some faulty no-fault plans determine fault in a proceeding at which the driver is not present, represented or given an opportunity to be heard. As an example, in Massachusetts,67 fault is not actually eliminated. To the extent that so-called first-party no-fault benefits are paid to an injured victim, the carrier making such payments is subrogated to the rights of


64. See Friedman, supra note 15 at 548.


the victim and it may sue the tortfeasor and will be reimbursed by the tortfeasor if fault is shown. Under some of these plans, this process of subrogation, based upon the fault principle, is to be effectuated between insurers by arbitration. The fault of a driver will be determined in a proceeding at which he is not present, represented, or given an opportunity to be heard. The unfairness becomes even more apparent when rates are assessed. Presumably, these subrogation proceedings will be used as a basis for ascertaining bad risks and assessing rates.

Furthermore, faulty no-fault plans abrogate the innocent accident victim's right to recover for damages to his auto. If an innocent accident victim's car is damaged, his right to recover for damages to the vehicle from the other driver who caused the accident is destroyed. The innocent accident victim will have to buy collision insurance to protect himself from the damages caused by the other driver. If this collision insurance policy has a $100 deductible, the innocent accident victim will not be able to recover the first $100 of damages from his own company or from the other driver. Under the tort system, he could recover the $100 from the other driver.

A big price is also paid by the consumer in high deductibles and lengthy waiting periods. Under some no-fault plans the consumer will either receive no benefits or reduced benefits because the plan either requires or encourages him to elect a high deductible or a lengthy period of exclusion from the coverage.

The Opinion Research poll of accident victims revealed that 25 percent of the accident victims lost more than two weeks from their jobs. This means that 75 percent of the accident victims will not receive a cent of disability benefits from the no-fault coverage if the plan excludes the first two weeks of disability from the no-fault coverage.

Many institutional lenders who finance the purchase of automobiles may find higher deductibles unattractive. This would be true if there is a marginal buyer and would be intensified in the case of low down payment auto sales. Low income groups, and particularly minority groups, might find their ability to purchase an auto inhibited by a mandatory large deductible.

Another obvious deficiency of higher deductibles is that it might encourage the motivation of insured and repair shop interests to "pad" damage estimates in order to recover deductible amounts.

Who Wants No-Fault

James Kemper, Jr., President of Kemper Insurance Group has said that "a decline in the share of the automobile insurance market and underwriting losses by a group of insurance companies provided strong motivation for these companies to seek any solution, however radical, to escape from a desperate and deteriorating situation." Therefore, the insurance industry's self-serving purposes have motivated no-fault. State Farm Insurance Company recently submitted a questionnaire to its policyholders to test public preference between fault and no-fault insurance. Of the over three million tabulated responses, 94 percent favored retaining the fault system.

The Opinion Research Corporation of Princeton, New Jersey, is one of the largest, oldest and most respected polling organizations in America. Its poll of no-fault accident victims in Massachusetts reveals that the overwhelming majority of accident victims consider no-fault unfair.

72. See Editorial, Stop, Look, and Listen—There's A Powerful Case Against No-Fault, Barron's, Jan. 17, 1972, at 7, col. 1. The following is the News Release (undated) of the Opinion Research Corporation concerning its study of Massachusetts accident victims:

Princeton, N.J.: Among 502 Massachusetts automobile accident victims, of whom 414 were injured during the first year that Massachusetts' no-fault insurance law has been in effect, 62 percent say its unfair that under the Massachusetts no-fault insurance system neither the driver at fault in an accident nor his insurance company would have to pay for any of their losses. Also, 77 percent say that they would favor a system whereby the driver or his insurance company would be required to pay damages in proportion to the degree of fault of the driver in causing the accident. These are among the highlights of a recent survey conducted by Opinion Research Corporation of Princeton, New Jersey.

Among the injured in the survey sample, this is the disposition of their claims:

<table>
<thead>
<tr>
<th>Total Injured = 100%</th>
</tr>
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<tbody>
<tr>
<td>Didn't file claim</td>
</tr>
<tr>
<td>Filed but not settled</td>
</tr>
<tr>
<td>Settled and satisfied</td>
</tr>
<tr>
<td>Settled, not satisfied</td>
</tr>
<tr>
<td>Settled, uncertain</td>
</tr>
</tbody>
</table>

Among those accidents occurring from January through June, 1971, (68 percent of all injured in the survey), 32 percent of those filing a claim report that a settlement has not yet been made.

When given a test accident situation in which a car going in the opposite direction crosses over into the respondent's lane and crashes into him causing injury, 91 percent say that the driver at fault or his insurance company should have to pay for any disability or loss of some part of the body; 91 percent feel the driver at fault or his insurance company should pay for damage to the car; 89 percent think that the driver at fault or his insurance company should pay for time lost from work and medical expenses.

The Massachusetts accident victims were asked, "When the Massachusetts no-
The proponents of no-fault have repeatedly claimed that there is a grassroots public clamor for no-fault. This claim has been refuted by the voters

fault auto insurance law went into effect last January, did the overall cost of your auto insurance go up, go down or stay the same?" Twenty-eight percent say their rates went up, 6 percent say they went down, 44 percent say they stayed the same, and 22 percent indicate they don't know.

The results of this survey were obtained by telephone interviews among 502 residents of Massachusetts who were involved in automobile accidents during the time that the Massachusetts no-fault insurance law has been in effect. The interviews were conducted during the period November 29 through December 19, 1971. Following are the actual questions asked and their results.

"Did you file a claim for your injuries with (your) (your driver's) insurance company?"

"Has your claim been settled yet?"

"Were you satisfied or dissatisfied with the amount of the settlement?"

<table>
<thead>
<tr>
<th>Total Injured</th>
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</tr>
</thead>
<tbody>
<tr>
<td>Didn't file claim</td>
<td>34%</td>
</tr>
<tr>
<td>Filed but not settled</td>
<td>25</td>
</tr>
<tr>
<td>Settled and satisfied</td>
<td>28</td>
</tr>
<tr>
<td>Settled, not satisfied</td>
<td>11</td>
</tr>
<tr>
<td>Settled, uncertain</td>
<td>2</td>
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</tbody>
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The following are based on all 502 respondents.

"When the Massachusetts no-fault auto insurance law went into effect last January, did the overall cost of your auto insurance go up, go down or stay about the same?"

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
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<tbody>
<tr>
<td>WENT UP</td>
<td>28%</td>
</tr>
<tr>
<td>WENT DOWN</td>
<td>6</td>
</tr>
<tr>
<td>STAYED SAME</td>
<td>44</td>
</tr>
<tr>
<td>DON'T KNOW</td>
<td>22</td>
</tr>
</tbody>
</table>

I'd like your views on this auto accident case: Suppose you are driving within the speed limit on the right side of the road. A car coming in the opposite direction crosses over into your lane and crashes into your car and you are injured.

"Who would be at fault, you or the other driver?"

<p>| | |</p>
<table>
<thead>
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<th></th>
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</thead>
<tbody>
<tr>
<td>ME</td>
<td>1%</td>
</tr>
<tr>
<td>OTHER DRIVER</td>
<td>95</td>
</tr>
<tr>
<td>DON'T KNOW</td>
<td>4</td>
</tr>
</tbody>
</table>

"Do you think the other driver or his insurance company should or should not have to pay for the damages to your car?"

<p>| | |</p>
<table>
<thead>
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<th></th>
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</thead>
<tbody>
<tr>
<td>SHOULD</td>
<td>91%</td>
</tr>
<tr>
<td>SHOULD NOT</td>
<td>2</td>
</tr>
<tr>
<td>NO OPINION</td>
<td>7</td>
</tr>
</tbody>
</table>

"Do you think the other driver or his insurance company should or should not have to pay any time lost from your work and your medical expenses?"

<p>| | |</p>
<table>
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<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>SHOULD</td>
<td>89%</td>
</tr>
<tr>
<td>SHOULD NOT</td>
<td>5</td>
</tr>
<tr>
<td>NO OPINION</td>
<td>6</td>
</tr>
</tbody>
</table>

"If you were disabled in the accident and lost the use of some part of your body, do you think the other driver or his insurance company should or should not have to pay reasonable compensation for your disability?"

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td>SHOULD</td>
<td>91%</td>
</tr>
<tr>
<td>SHOULD NOT</td>
<td>2</td>
</tr>
<tr>
<td>NO OPINION</td>
<td>7</td>
</tr>
</tbody>
</table>

"In the accident I just described, under the Massachusetts no-fault insurance system ordinarily neither the other driver nor his insurance company would have to pay for any of your losses; your own insurance company would be
of Colorado, who, as part of the November 1972 election, were asked to adopt no-fault by a referendum measure. The voters overwhelmingly rejected no-fault by a 3-1 margin. 73

IV. Massachusetts—Success or Failure

Much has been written about the experience in Massachusetts, especially about the rate reductions which have allegedly occurred in that state. In this part, we shall endeavor to illuminate this area and to separate fact from fiction.

Have overall costs really been reduced? For a substantial number of motorists—especially those who seek fuller protection for property damage—overall costs have risen. This can be illustrated by comparing the premiums paid by a Class 1074 Boston driver who insured a new Chevrolet Impala in 1970 under the tort system with the premiums to be paid by such a driver for a new Chevrolet Impala in 1972 under no-fault. In this example, the overall costs were increased by 12 percent under no-fault.

<table>
<thead>
<tr>
<th></th>
<th>1970 (Tort System)</th>
<th>1972 (No-Fault)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bodily Injury</td>
<td>$117</td>
<td>$ 74</td>
</tr>
<tr>
<td>10/20 Coverage</td>
<td>26</td>
<td>22</td>
</tr>
<tr>
<td>Property Damage</td>
<td>49</td>
<td>21</td>
</tr>
<tr>
<td>Med. Pay</td>
<td>15</td>
<td>9</td>
</tr>
<tr>
<td>Uninsured Motorists</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Collision ($100 deductible)</td>
<td>161</td>
<td>294</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>$496</strong></td>
<td><strong>$555</strong></td>
</tr>
</tbody>
</table>

Proponents of no-fault proposals attempt to justify the increase by contending that it was caused by inflationary factors. This argument loses sight of the fact that insurers in other states, operating under the fault

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73. See Denver Post, November 9, 1972, at 1.
74. A Class 10 driver is considered to be the best risk and hence pays the lowest premium of those operating within the same geographical zone. The statutory basis for such a classification is Mass. Laws Ann. ch. 175, § 113B (1972).
system, have reduced rates. Furthermore, the Massachusetts experience is to be sharply contrasted with the successful, but less publicized, results occurring in Oregon and Delaware under those states' sound and constructive no-fault laws. Information released by the Insurance Commissioner of Oregon concerning the rates charged by four leading insurers in that State reveals that the overall cost of insurance has remained just about the same, despite the passage of a no-fault law, which provides about five times greater no-fault benefits than does the Massachusetts law.\(^7\)

The alleged 27.6 percent reduction of the personal injury premium may not be applicable to many motorists because 276 out of 351 cities and towns in Massachusetts were concurrently (with the alleged rate reduction) moved up into higher cost rating territories. One source reported that for many drivers it appeared the reduction in the personal injury premium would really be only about 10 percent.\(^6\)

One of the criticisms of proponents of no-fault against the tort system is that victims allegedly receive a small percentage of the personal injury premium dollar. Yet, figures prepared by the Massachusetts Automobile Rating and Accident Prevention Bureau reveal that under the tort system the premiums for compulsory personal injury coverage totaled $130,633,902 and the losses incurred—the benefits paid—totaled $99,192,618, whereas under no-fault the premiums totaled $111,218,794 and the losses incurred totaled $48,877,585. This means that under the tort system, companies allocated 76 percent of the premiums collected to the payment of benefits to accident victims, and that under no-fault less than 44 percent of the premiums are used for this purpose. In other words, accident victims appear to have received less of the premium dollar under no-fault than they did under the tort system. In addition, even if personal injury rates are reduced by 27.6 percent, only 63 percent of the premium paid will be devoted to the payment of benefits as contrasted with 76 percent under the tort system. Furthermore, figures released by the Massachusetts Department of Insurance to the press allege a 34 percent reduction in the number of claims.\(^7\)

The soundness of any system which pays fewer people, while reducing the flow of benefits to accident victims, must be held in question.\(^8\)

There is still the question of how much of the alleged rate reduction is at-

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\(^6\) Boston Record American, Dec. 15, 1971, at 3, col. 4.

\(^7\) Boston Herald Traveler & Record American, Aug. 3, 1972, at 3, col. 5.

\(^8\) Paradoxically, a phenomenon has been discovered in Massachusetts known as the "vanishing claimant." A study reveals a reduction of 50,000 in total claims under no-fault. "... the vanishing claimants appear to be the innocent victims of negligent motorists." Brainard, *The Impact of No-Fault on The Underwriting Results of Massachusetts Insurers*, 44 Miss. L.J. 174, 179 (1973).
tributable to no-fault. There is evidence in the Insurance Commissioner's order setting the rates and from other sources around the country that personal injury rates would have been reduced even under the tort system. Due to the cumulative impact of improved safety features in cars (which reduce the frequency and severity of accidents) insurers in "fault" states have reduced rates.\textsuperscript{79} It is interesting to note that, while the common law tort system was still in effect, the Commissioner relied to a great extent upon the 1970 experience in establishing rates for 1972. He specifically relied upon the reduction in claims frequency between 1966 and 1970. The Commissioner took investment income into consideration in setting the rates and disallowed a profit allowance of 5 percent and allowed only one percent. It is quite possible that as much as 50 percent of the alleged reduction can be attributed to factors having nothing to do with no-fault.\textsuperscript{80} The balance of the reduction is attributable to the substantial divestiture of benefits which occurs under no-fault and which results in an increase, rather than a decrease, in the true cost of insurance.

To compute the true cost of insurance, one must compare the dollars paid for the insurance with the benefits realized from the insurance system. Under the tort system, almost two-thirds of the Massachusetts market paid less than $65 for personal injury protection and the average premium paid by this substantial majority of the motoring public was $42.\textsuperscript{81} Assume that such an average motorist was involved in an accident and that under the tort system he would have recovered a settlement or verdict of $840. His cost-benefits ratio would have been 20 to 1. Based upon statistics compiled by the Department of Transportation, no-fault will result in close to 80 percent of the deserving accident victims losing 78 percent of the benefits they would have received under the tort system.\textsuperscript{82} Hence, the average deserving accident victim will receive only $184.80 under no-fault as contrasted with a recovery of $840 under the tort system. The average motorist's cost-benefits ratio has been sharply reduced from 20 to 1, to about 7 to 1. The cheapest form of life insurance would be one which provides no death benefits. This is exactly what has occurred under the alleged rate reduction. The true costs for personal injury protection have really risen.

It should be noted that the above figures tend to be conservative in their estimation of the reduction of benefits under no-fault. \textit{A recent study by the}

\begin{thebibliography}{99}
\bibitem{80} This projection is predicated upon the reductions which have occurred elsewhere (caused primarily by the impact of safety) and the consideration of investment income in setting rates.
\bibitem{81} Brainard, \textit{Prices and Politics}, 6 \textit{Trial} 24 (Oct./Nov., 1970).
\bibitem{82} \textit{Personal Injury Claims} 50.
\end{thebibliography}
Jury Verdict Research Project reveals that in an average no-fault case in which damages for pain and suffering are denied, an injured person could expect to receive only 15.8 percent of what a jury would have awarded.83

Now given that there have been rate reductions in Massachusetts, have they been equitable ones? Pure premium, which is based upon average cost, is a product of the sum of "frequency of claims" times "severity of loss". The average cost can be cut only by reducing one or both of these variables. No-fault will not necessarily reduce the frequency of claims. In fact, in setting 1972 rates, the Commissioner projected a 20 percent increase in claims under no-fault. No-fault can reduce rates only by affecting the second variable—the Severity of Loss factor—and it does so by reducing or eliminating the benefits which are paid out to a large number of people. Note, however, who suffers and benefits under this approach. The prudent and responsible good risk, the average driver who previously paid a personal injury premium of $42 under the tort system, finds that his personal injury premium has been reduced (even after all rate reductions go into effect) by only $16 and that, for this $16 savings, he is giving up 78 percent of his benefits. On the other hand, the high risk driver has had his rate reduced by $82. The high risk driver is no more prudent than he previously was and hence there is no justification for a reduction in his rates. The only rationale for the reduction is that the good risk driver is subsidizing the bad risk. This subsidy takes the form of a reduction and elimination of benefits to the good risk driver.84

Does no-fault give greater protection to property interests than to human rights and losses? In the example of the hypothetical Boston Impala owner, approximately 32 percent of the total premium dollar covered personal injury and 68 percent covered property damage under the tort system. In 1972, only 23-24 percent of the total premium dollar will cover personal injury. Two inferences may be drawn from these statistics. First of all, no-fault unfortunately gives greater protection to bumpers and fenders than to human losses. Second, it highlights the fact that the property portion of the premium dollar is more expensive since the insured receives more benefits for his money than under the personal injury coverage. This further emphasizes the fact that the alleged dramatic reduction in benefits which occurs under no-fault results in an actual rise in the true costs of insurance.

Towards Meaningful Reform

Ill and hastily conceived no-fault panaceas pose a clear and present danger to the rights of the public. The alleged advantages of faulty no-fault plans can be achieved only at a terrible and unnecessary price. It is this article's thesis that all of these alleged advantages can be achieved without subjecting the injured person to the evils and disadvantages of faulty no-fault.

In a quest for constructive improvements of the current system, legislators should be guided by the responsible no-fault laws enacted in Maryland, South Dakota, Oregon, Arkansas, and Delaware. These states are vivid illustrations of the feasibility of evolving no-fault systems which provide injured persons with prompt and automatic payment for economic losses, while preserving the rights of deserving accident victims to recover full and fair compensation for all of their losses.

Meaningful reform of the automobile accident reparation system mandates the implementation of other innovations. The major elements of responsible reform are as follows:

(1) To facilitate a reduction in auto insurance rates, there should be strict governmental regulation and scrutiny of the automobile insurance industry, insurance rates, and insurance practices.

(2) Rates can be further reduced by a requirement that the regulatory agencies consider the investment income and profits of insurers and their conglomerate-related business ventures when rates are set. In the majority of cases, investment income of insurers far exceeds the "profit" derived from the successful running of an insurance business. In addition, any loss in the "claims" operation serves as a tax "write-off" against investment income. Furthermore, "investment income" is taxed at approximately one-seventh the rate of "ordinary income."

The magnitude of investment income can be gleaned from a report that a single nationwide stock company had investments valued at $1.6 billion at the end of 1967 and that, in the year 1965, the total gain from investments by all stock companies was approximately $1.6 billion. Meaningful legislation in this area should require that rates be reduced because of the profits realized from investment income.

(3) No-faulters claim that the seriously injured - those with economic losses in excess of $25,000 - are inadequately compensated under the current system. The primary rationale for the plight of these persons, according to the Department of Transportation, is the presence of low insurance

limits. For example, the most frequently found coverage limit for automobile bodily injury liability insurance (about 30 percent of all policies) is $10,000/$20,000.86

Meaningful reform plans could insure adequate compensation for accident victims by requiring higher and more realistic minimum limits. There should also be required uninsured motorist coverage in similar, higher amounts. It should allow every motorist to protect himself against the uninsured and underinsured driver up to the liability limits of his own policy.

(4) Insurance companies should be prohibited from cancelling and refusing to renew insurance policies and from arbitrarily rejecting applications for insurance.

(5) An independent public consumer advocate should be appointed to protect the interests of the consumer in matters bearing on motor vehicle insurance. This ombudsman should be authorized to receive and act upon complaints from the public, legislatures, or executive agencies regarding actions of insurers and regulatory agencies.

(6) In the event of an accident, the economic losses of at least 96 percent of the accident victims should be paid in full, promptly and without the necessity of proving fault.87 However, deserving accident victims should be able to recover general damages by bringing a tort action. Payments to victims would also be accelerated by encouraging advance payments by insurers.88

(7) Manufacturers should have to produce safer, durable, and more crashworthy cars which can be driven into a test barrier at a speed of ten miles per hour without sustaining any damage. It has been estimated that this will reduce physical damage to autos by 60 percent to 85 percent.89 Since two-thirds of the premium dollar pays for property coverage, this essential element will dramatically reduce insurance rates.

(8) Unsafe drivers, including the alcoholic and the drug addict, should be removed from the road.

(9) A Department of Transportation Study reveals that the single largest complaint of auto insurance consumers relates to the denial of coverage by

86. U.S. DEP'T OF TRANSPORTATION, supra note 18.
87. 96.3 percent of the accident victims sustain economic losses which do not exceed $2,500. See PERSONAL INJURY CLAIMS 50 (1970). Thus, a constructive no-fault plan which provided first-party benefits for medical expenses and wage losses to an aggregate limit of $2,500 would pay the economic losses, in full, of 96.3 percent of all the accident victims. It is the author's thesis that this can be accomplished without impairing the tort remedy.
88. See Lemmon, Ingredients for Reform, 6 TRIAL 56, 58 (Oct./Nov., 1970). Although it is a relatively new procedure, 19 percent of those eligible do receive some form of advanced payment. See PERSONAL INJURY CLAIMS 120 (1970).
89. See supra note 45.
the insurer. This problem could be ameliorated by outlawing harsh and outmoded rules including governmental tort immunity, family immunity, guest statutes, and contributory negligence (which should be replaced by comparative negligence).

(10) Court congestion and delay may be a problem in some metropolitan areas of the country. This problem could be alleviated by providing for arbitration of small claims with the right to a trial de novo being preserved.

(11) The subrogation of property claims should be eliminated. "Subrogation ends up with the companies passing the same money back and forth, after jamming the courts all the more and running up litigation costs."

Public opinion polls reveal that the overwhelming majority of our citizenry favor the retention of the fault principle and the right to recover for human losses, including pain and suffering, and earning capacity. There is an old maxim, "Walk away from the people and you walk into the night." In this age of consumerism, faulty no-fault must be avoided since it will cast consumers into the darkness of an era when industry was king. The law must favor responsible reforms which put the consumer back in the driver's seat.

94. See W. Schwartz, Pure Comparative Negligence in Action, 34 ATL. L.J. 117 (1972); COMPARATIVE NEGLIGENCE MONOGRAPH (W. SCHWARTZ ed., 1970); C. HEFT AND J. HEFT, COMPARATIVE NEGLIGENCE MANUAL (1971).