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## Book Review: Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance

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*Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance.* By ROBERT E. KEETON and JEFFREY O'CONNELL. Boston: Little, Brown & Company. 1965. Pp. xv, 624. (\$13.50 U.S.)

Two American law professors have recently made a major contribution to the debate concerning the future of the automobile claims system in the common law world. Robert Keeton of Harvard University and Jeffrey O'Connell of the University of Illinois, in their new book *Basic Protection for the Traffic Victim*, have launched a blistering attack on the present method of loss distribution in the United States, documenting their charges with recently collected factual data.<sup>1</sup> After presenting their reasoned arguments for reform,

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<sup>1</sup> Adams, *A Survey of the Economic-Financial Consequences of Personal Injuries Resulting from Automobile Accidents in the City of Philadelphia: 1953 (1955)*; Conard, Morgan, Pratt, Voltz & Bombaugh, *Automobile Accident Costs and Payments (1964)*; Franklin, Chanin & Mark, *Accidents Money and the Law: A Study of the Economics of Personal Injury Litigation (1961)*, 61 Col. L. Rev. 1; Morris & Paul, *The Financial*

they outline first in principle and then in statutory form their solution, the "Basic Protection Plan", which they claim is ready for adoption. Despite the fact that some of the details of the basic protection plan may be open to criticism, particularly in Canada, the authors have lifted us to a new plateau in the tortuous climb toward the ultimate solution to this vexed problem. They have devised the most complete scheme yet proposed incorporating the new concept of "Peaceful Coexistence": any automobile accident plan should include immediate economic reimbursement on a non-fault basis without sacrificing the tort claim. However, in calling for the conditional surrender of certain tort rights in order to accommodate the non-tort aspect of their plan, the authors have polluted the purity of the peaceful coexistence principle.<sup>2</sup>

The authors' attack on the tort system echoes the complaints made by numerous critics over the years. They begin by pointing out that the tort system leaves substantial gaps in compensation,<sup>3</sup> relying on the new statistical studies, they show that no tort recovery was received by 63% of the injured in the State of Michigan,<sup>4</sup> and 45% in the State of Pennsylvania.<sup>5</sup> In Ontario the number who recover nothing via tort law is 57%.<sup>6</sup> Moreover, they contend that the tort system is cumbersome and slow,<sup>7</sup> which charge is particularly true in the larger American cities like Boston, Massachusetts, where trials were delayed thirty-two months and Chicago, Illinois, where the delay was fifty-eight months.<sup>8</sup> In the County of York, by contrast, 36% of the trials commenced were heard in less than two years while the balance were not heard until after two years had elapsed.<sup>9</sup> A further criticism levied against the system is that some victims secure more than their economic losses while at the same time others receive either nothing or less than they have lost. This result is due, in part, to double recovery by some people from both the defendant and from collateral sources, and to compensation for pain and suffering. At the same time others, who are

Impact of Automobile Accidents (1962), 110 U. Pa. L. Rev. 913. Professor Adams is currently studying the Saskatchewan system.

<sup>2</sup> Linden, Peaceful Coexistence and Automobile Accident Compensation (1966), 9 Can. Bar J. 5; Conard, The Economic Treatment of Automobile Injuries (1964), 63 Mich. L. Rev. 279; Morris & Paul, *loc. cit.*, *ibid.*; Keeton & O'Connell, Basic Protection—A Proposal for Improving Automobile Claims Systems (1964), 78 Harv. L. Rev. 329; Calabresi, Some Thoughts on Risk Distribution and the Law of Torts (1961), 70 Yale L.J. 499; Calabresi, The Decision for Accidents: An Approach to Non-fault Allocation of Costs (1965), 78 Harv. L. Rev. 713. See also Keeton, Conditional Fault in the Law of Torts (1959), 72 Harv. L. Rev. 401; Calabresi, Fault, Accidents and the Wonderful World of Blum and Kalven (1965), 75 Yale L.J. 216.

<sup>3</sup> P. 1.

<sup>4</sup> P. 43.

<sup>5</sup> P. 50.

<sup>6</sup> Report of the Osgoode Hall Study on Compensation for Victims of Automobile Accidents (1965).

<sup>7</sup> P. 1.

<sup>8</sup> P. 14.

<sup>9</sup> See Osgoode Hall Study, *supra*, footnote 6.

unable to prove fault, may receive nothing from the defendant. Next, the authors proclaim that the present system is excessively expensive because the court battles required to determine fault are costly and time-consuming.<sup>10</sup> In addition, they point out that fault may be impossible to determine,<sup>11</sup> that the ever-changing details of an unexpected accident must be recalled years later,<sup>12</sup> and that, therefore, there is a danger of distortion.<sup>13</sup> Legal costs and other administration costs have so mounted in the United States that less than 50% of the premium dollars ultimately find their way into the pockets of the traffic victim.<sup>14</sup> Finally, they bemoan the temptations to dishonesty inherent in the present system and the resultant ill effects on the administration of justice. They conclude their denunciation by saying that the present system provides "too little, too late, unfairly allocated, at wasteful cost and through means that promote dishonesty and disrespect for law".<sup>15</sup>

The authors then plead for a system of compensation regardless of fault, the cost of which is to be borne by motorists as a class. No longer does tort law choose which one of two *individuals* must bear the loss; because of the increased liability insurance coverage the choice now is which *group* in society ought to bear the loss.<sup>16</sup> They then suggest that it is fair for motorists, who receive most of the benefit of driving, to bear the cost of the accidents produced by their activity.<sup>17</sup> Furthermore, they advance a theoretical economic argument which runs as follows:

Requiring an activity to pay its own way helps both the community and individuals to make informed choices among different uses to which limited resources may be put. If this obligation is not imposed on motoring, then both the community and individuals may unwittingly engage in motoring more than they would choose to do if motoring's full cost were known. If, on the other hand, motoring is obliged to pay its way in a manner that clearly indicates its cost so that an individual can see this when deciding, for example, whether to buy a second or a third car, his opportunity to make a wise choice is improved. Thus we might attach a price tag reflecting accident costs in the form of premiums for insurance covering the use of the car.<sup>18</sup>

Prior to constructing their own plan, the authors outline some of the half-way measures in existence in the United States and describe some of the plans heretofore proposed. The compulsory liability insurance laws of Massachusetts, New York and North Carolina,<sup>19</sup> the financial responsibility laws,<sup>20</sup> the unsatisfied judgment funds,<sup>21</sup> the impounding acts,<sup>22</sup> and other such legislation are examined briefly.

<sup>10</sup> P. 2.

<sup>13</sup> P. 22.

<sup>16</sup> P. 256.

<sup>19</sup> Chapter 3.

<sup>22</sup> P. 118.

<sup>11</sup> P. 2.

<sup>14</sup> P. 70.

<sup>17</sup> P. 257.

<sup>20</sup> P. 102.

<sup>12</sup> P. 18.

<sup>15</sup> P. 3.

<sup>18</sup> P. 259 *et seq.*

<sup>21</sup> P. 110.

Over the last few decades various auto compensation plans have been devised, each one taking something from those that preceded it and adding some new ingredient. Professors Keeton and O'Connell, too, build their structure using the bricks of their predecessors' labours. The celebrated Columbia plan, the first of these proposals, urging compensation for all accident victims regardless of fault according to a fixed schedule of benefits was born in 1932. Although a board similar to the Workmen's Compensation Board was to administer the plan, the authors allowed that there might be room for private insurers to undertake the risk, as is now done with Workmen's Compensation in several of the United States. As in Workmen's Compensation legislation, the tort action was to be obliterated as was compensation for pain and suffering. In 1946 the Saskatchewan plan, embodying most of the recommendations of the Columbia proposal, was enacted.<sup>23</sup> It provided limited benefits to all those injured in car accidents regardless of fault, including \$25.00 per week to persons who were totally disabled. One attractive feature of this plan was the survival of the tort action although any benefits received from the plan would be deducted from any tort recovery. The plan was and is administered by the Saskatchewan Government Insurance Office exclusively, although liability insurance above the minimum limits is written by private insurers. Two plans closely resembling the Saskatchewan solution were proposed in Ontario in 1963 and in California in 1965. Both the Select Committee of the Legislative Assembly of Ontario<sup>24</sup> and the State Bar Association of California<sup>25</sup> urged the adoption of limited accident benefits coverage regardless of fault to be written by private insurers rather than by government. The benefits provided were to be more extensive than in Saskatchewan and the tort action was to be left inviolate except for a set-off in Ontario and subrogation in California.

In addition to these non-academic plans, various professors in the United States have designed automobile compensation plans. Professor Leon Green<sup>26</sup> has recommended a privately-run insurance system that would supply full economic reimbursement to everyone regardless of fault under which compensation for pain and suffering would be eliminated. Professor Albert Ehrenzweig<sup>27</sup> of the University of California, Berkeley, upon whom Professors Keeton and O'Connell draw heavily, urged the adoption of a voluntary, non-fault compensation scheme, providing, as an incentive to motorists, an exemption from tort liability for those who purchased his "Full Aid Insurance". Professors Morris and Paul of the University of Pennsylvania suggested that 85% of the indi-

<sup>23</sup> P. 140.

<sup>24</sup> P. 152.

<sup>25</sup> P. 148.

<sup>26</sup> Green, *Traffic Victims: Tort Law and Insurance* (1958).

<sup>27</sup> Ehrenzweig, "Full Aid" Insurance for the Traffic Victim (1954).

vidual losses incurred over \$800.00 be reimbursed by a state fund and that claims for pain and suffering below this amount be abolished. None of these academically inspired plans have yet been enacted anywhere. Because they were mostly rather sketchy, they had not been hammered out with experts in the insurance field and, most significantly, the time was not yet ripe for their reception.

In devising their plan Professors Keeton and O'Connell embraced two principles: that motoring should pay its way and that negligent motorists should pay their way.<sup>28</sup> The burden of providing a minimum level of protection against measurable economic loss for all accident victims is treated as a cost of motoring. All motorists, therefore, should share the cost of providing this non-fault basic compensation.<sup>29</sup> The mechanism to be used is compulsory automobile insurance that resembles the medical payments coverage now in use. Moreover, the tort claim would be preserved in the more serious cases for those who are able to avail themselves of it, but pain and suffering awards in the minor injury cases would be abolished. The cost of this insurance would be borne by the *negligent* drivers as is the case at the present time.

The authors have not stopped here; they have taken the next vital step and have prepared a detailed statute that purports to cover every aspect of their proposed basic protection plan<sup>30</sup> and have made lengthy comments upon each section.<sup>31</sup> In operation the plan, will be rather complicated, but unfortunately accident reparation is already a complex undertaking. Under the basic protection plan if Jones is injured in an automobile accident, he would receive up to \$10,000.00 net out-of-pocket loss as it accrues, regardless of his own fault. These payments would not be in accordance with any schedule of payments, but they would just cover the actual and reasonable expenses incurred by Jones, after a deduction is made of amounts received from collateral sources, like hospital and medical insurance. There is a limit of \$750.00 per month on the wages reimbursed and 15% (the amount of income tax saved) would be deducted therefrom. Additional coverage for pain and suffering and catastrophic losses will be made available on an optional basis. The plan does not attempt to cover losses resulting from property damage to vehicles nor losses of less than \$100.00, which is a sort of deductible feature to cut the administrative costs of small claims. These matters are left to the ordinary courts to sort out. It must be emphasized that this basic protection coverage depends not on tort liability, but it is rather a form of loss insurance.

Professors Keeton and O'Connell claim that this Utopian plan will not be more expensive to motorists; in fact, it could be pro-

<sup>28</sup> P. 268.

<sup>30</sup> Chapter 7, pp. 299-339.

<sup>29</sup> P. 269.

<sup>31</sup> Chapter 8, pp. 340-482.

vided at a saving of between 15%-25% on present insurance premiums.<sup>32</sup> However, such a miraculous feat is not accomplished without some sacrifice; the authors plan to remove some of the victims' tort rights in return for the benefits paid to them. Jones, our injury victim, will be unable to collect the first \$5,000.00 of his pain and suffering as well as his first \$10,000.00 of economic loss from the other person, even where that other person is at fault. If Jones suffers pain and loss of over \$5,000.00, however, he may recover in a tort action the amount of the excess. It is this tort liability exemption feature that makes possible the provision of the entire package at a reduced cost. The Keeton and O'Connell plan, therefore, supplies immediate compensation to all victims at reduced premium cost without sacrificing tort claims in the more serious injury cases, although the tort claims in less serious cases are removed from the courts.

The drastic surgery proposed by the basic protection plan may very well be required for the American reparation system which may be mortally infected by the soaring insurance premiums and damage awards, shocking delays, enormous legal costs of up to 50% of the award, phony claims, the lack of comparative negligence laws and the like. In Canada it is doubtful whether such medicine as the Keeton and O'Connell plan is necessary. In this country we have comparative negligence legislation, lower legal fees and awards, less delays, higher minimum limits, unsatisfied judgment funds along with broader coverage of state-assisted hospital and medical insurance. Perhaps there is also a more receptive attitude towards settlement by Canadian insurers which view may be encouraged to a degree by the requirement that he who loses a negligence action must bear the substantial costs of the other person. Moreover, Canadians are probably less claims-conscious and Canadian negligence lawyers are less aggressive, than their American counterparts. It may be that one day insurance premiums in Canada will become so high that compensation for pain and suffering will have to be limited or even abolished, but that day has not yet arrived. Prior to that time perhaps a major assault could be launched to reduce the number and severity of accidents by installation of safety features in automobiles, improved driver education, tougher licensing laws and stricter enforcement. After all, insurance costs are determined basically by the cost of accidents; they rise when accident costs go up and should decrease if accident costs are lowered. Another problem with abolishing pain and suffering claims of less than \$5,000.00 in this country is that this would be tantamount to the removal of nearly all such claims because awards are so much lower in Canada, perhaps one-quarter to one-

<sup>32</sup> Study by Frank Harwayne, F.C.A.S. prepared for the Study of the Automobile Claims System, Harvard Law School (Jan. 1966).

third as high as in the United States. Limited accident benefits coverage, which would look after most of the expenses incurred in an accident regardless of fault, could be supplied at a cost of 12%-15% of one's present liability insurance rates in Canada. With this minor reform most of the weaknesses of the Canadian system could be remedied without the need to deprive the claimant of his claim for pain and suffering to any extent. Admittedly, if one were to raise American insurance rates by this amount an outcry might be heard across the land, but in this country, because of much lower insurance premiums generally, this coverage could be supplied for an additional \$7.81 on the average policy in Toronto.<sup>33</sup>

There are a few other problems with the details of the basic protection plan. For example, one of the most desirable features of the plan is said to be that there is no schedule of payments; each person recovers his actual losses. As a bi-product, however, this means that individuals who carry health and medical insurance will receive less from the basic protection plan which covers only losses above the amounts recovered from ordinary insurance. Furthermore, there does not seem to be any feasible way of reducing the premiums of those covered by this insurance. Consequently, the people with foresight who insure themselves fully will have to pay the same amount for the basic protection coverage as those who do not. Admittedly, the equitable elimination of double recovery may well be impossible.

Another shortcoming of the proposal is that those who earn \$750.00 per month will receive more in the way of benefits than those who earn only \$400.00 per month, without paying any extra premiums for this. It appears inequitable to this reviewer that although the same premium is paid by every one, some receive more in benefits than others. It might have been preferable for the authors to arrive at a figure, sufficient for subsistence living, which could be paid to all, regardless of their individual income. The \$35.00 per week proposed by the Select Committee of the Legislative Assembly of Ontario is hopelessly inadequate<sup>34</sup>; perhaps \$50.00-\$60.00 per week, subject to increase in the case of dependents, would have been more realistic. Let the person who earns more than the average working man buy his own income maintenance policy so that the plan will not be saddled by these extra costs.<sup>35</sup>

Another difficulty inherent in the plan is that the individual who suffers a scratch or a bruise which would entitle him to \$50.00 in pain and suffering compensation is treated in the same way as the one who suffers a broken leg or a severe whiplash which would

<sup>33</sup> See Final Report of the Select Committee on Automobile Insurance (1963), Legislative Assembly of Ontario.

<sup>34</sup> *Ibid.*

<sup>35</sup> P. 283.



entitle him to \$5,000.00. No doubt such anomalies would be extant in any plan which removes tort rights. But the Ontario proposal does not suffer from such problems largely because it does not tamper in the slightest degree with pain and suffering awards. Some difficulty seems to have arisen with regard to subrogation rights under section 1.10(c)(i),<sup>36</sup> against persons who are not basic insureds which might be solved by providing this insurance to such people by a government-run motor vehicle accident claims fund or industry-run traffic victims indemnity fund.

In sum, Professors Keeton and O'Connell have done valuable service in gathering the data and articulating the arguments for an automobile compensation plan. They have drafted a comprehensive statute ready for adoption by interested legislatures. Although they may not have found the best solution for the situation in Canada, this much is clear—anyone interested in studying this problem in future must begin his research by analysing this fine book.

ALLEN M. LINDEN\*

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<sup>36</sup> P. 402.

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