Osgoode Hall Law Journal

Volume 13, Number 2 (October 1975)

Article 17

No-Fault Insurance for All Accidents

Jeffrey O'Connell

NO-FAULT INSURANCE FOR ALL ACCIDENTS

By JEFFREY O'CONNELL*

In essence, no-fault auto insurance currently being adopted in the United States is premised on the following conditions: under the old system, after an accident, Smith claims against Jones based on the fact that Smith was free (or at least relatively free) from fault and Jones was (at least relatively) at fault. Because Smith is an 'innocent' party claiming against a 'wrongdoer', Smith is allowed to claim not only for his out-of-pocket loss but for the monetary value of his pain and suffering as well. But because it is so difficult in so many cases to establish not only who was at fault but the pecuniary value of pain (what *is* an aching arm worth?), payment under the so-called 'fault system' is often non-existent, almost always delayed, and always greatly lessened by the necessity of using up so much of the insurance pool in order to pay expensive experts for haggling over who and what is to be paid.

The solution for auto accidents is now seen to be a system whereby, after an accident between Smith and Jones, each will be paid regardless of anyone's fault, by his own insurance company, periodically, month-by-month as his losses accrue, for his own out-of-pocket expense (relatively easy to tote up from, say the medical bills, in contrast to fighting over what pain is worth in dollars and cents). As a corollary, each will be required to waive his tort claim based on fault against the other. With the savings from arguments over fault and from no longer paying for non-pecuniary losses, more people are eligible for payment from the insurance pool into which fewer — or surely no more — dollars need be paid. This is, in essence, the 'miracle' being wrought by no-fault auto insurance.

But what about other accident victims — those injured by, say, manufactured products such as a power tool, or falls in stores, or in the course of medical treatment?

Actually the plight of those who suffer losses from such accidents is much worse than that of auto accident victims. At least for auto accidents a large total number of people are being paid a large total sum of money. The situation in other areas of accident is much grimmer. In the first place, the issues in, say, a products liability case are far more technical and demanding than in a typical auto case. In order to impose liability on a manufacturer for injury caused by his product, the product must be proven in some way

* Professor of Law, University of Illinois. A version of this paper was presented at the Annual Meeting of the Association of American Law Schools, Torts — Compensation Section, San Francisco, December, 1974. Both are adapted from the author's book, *Ending Insult to Injury: No-Fault Insurance for Products and Services* (Champaign, Ill.: Univ. of Illinois Press, 1975).

defective. And proving a product defective most often involves engineering evidence and testimony of the most technical and arcane kind. All the while these expensive personnel — lawyers and engineers — are huddling and conferring and later appearing in court, a *very* expensive meter is ticking.

The obstacles facing a victim injured by a manufactured product, in contrast to those faced by a traffic victim (bad as are the latter obstacles) are exacerbated by the deep umbrage the typical manufacturer takes at facing or paying a product liability claim. After all, his product is accused of being 'defective'. Quite apart from the adverse publicity involved, it deeply offends the pride of most manufacturers to be challenged in this way. It denigrates the great effort they believe they expend on such things as careful design and quality control.

As a result of all this, says the Final Report of the U.S. Commission on Product Safety, "most injuries to consumers [from manufactured products] go uncompensated". Indeed, in light of how difficult it is to prosecute a products liability claim, the Report comments that "[t]o advise a battered consumer to sue may simply add insult to injury".

And so, as the Final Report of the National Commission on Product Safety demonstrated, except for a few victims 'lucky' enough (1) to be seriously injured by a product with a demonstrably provable defect, (2) to hire a skilled plaintiff's lawyer, and (3) to possess a case which — miracle of miracles — can run the gantlet of countless legal and practical pitfalls, the many millions of dollars involved in product liability insurance accrue largely to a few highly skilled lawyers on both sides, a number of highly skilled engineers and technical experts, and some casualty insurance companies.

The scenario for medical malpractice cases follows that for products liability as in a litmus test, as demonstrated by the recent voluminous report of the National Commission on Medical Malpractice to the Secretary of Health, Education and Welfare (HEW). As to complex issues, one lawyer who has intensively studied medical malpractice has recently spoken of "the almost Byzantine nature of trying to find fault in malpractice litigation . . . ". This stems from the fact that surgical procedures, for example, along with the range of their possible consequences, are so very complicated that trying to determine whether they were properly executed makes even many difficult products liability cases look easy.

All this means too that very little of the total loss suffered as a result of medical treatment is compensated. According to a recent publication on medical malpractice by the Center for the Study of Democratic Institutions,

> Mr. [Eli P.] Bernzweig, [an attorney and executive director of the Secretary's Commission on Medical Malpractice] cited an American Medical Association professional liability survey which indicated that for every patient who files a malpractice suit 'there are probably ten times as many who never become aware of the fact that they have legitimate fault claims under our system'.

Finally, according to a Congressional study of medical malpractice, "The lion's share of the total cost to the insurance companies of malpractice suits and claims goes to the legal community". According to attorney Rick Carlson,

an attorney engaged in a study of medical malpractice, "[only] between sixteen and seventeen cents of the premium dollar ends up as benefits to victims of medical injuries", in contrast to 97 cents for Social Security, 93 cents for Blue Cross, 83 cents for much health insurance, and 44 cents for tort liability auto insurance.

This, then, is the present tort insurance system: not a system for paying accident victims from accident insurance (as sensible as that simple idea would seem to be) but a system for *fighting* accident victims about paying them from accident insurance; a system so cumbersome that the typical accident victim, after consulting a lawyer (indeed even a highly paid specialist), cannot know *when* he will be paid, *what* he will be paid, or *if* he will be paid; a system hugely wasteful of insurance dollars in sending so much into the pockets of lawyers and insurance companies and so little to victims themselves; a system highly dilatory that, when it finally gets around to disposing of cases, is usually cruelly vindictive to most and occasionally relatively generous to others, with the outcome more dependent on luck and emotion than need and reason.

Solving the problem of compensating very large losses from auto accidents, and more generally for other accidents not covered by auto reforms, on a no-fault basis is much more difficult than compensating smaller auto accident losses on a no-fault basis. No-fault auto insurance has been relatively easy to effectuate because of two interrelated factors:

1. A system of widespread fault liability insurance, readily and simply transferable into no-fault loss insurance, without much fear that the transformation would impose new and formidable burdens on anyone.
2. A sufficiently dangerous — otherwise distinctive — activity, *i.e.*, driving a motor car, such that the statute can readily identify who is to be required to pay for what loss.

But with most other accidents — those from medical malpractice or manufactured products, for example — no-fault insurance poses much greater problems because neither factor is generally applicable. For example, as to the first factor, if ladder manufacturers were to be made liable for falls from ladders, regardless of any fault or defect, wouldn't this very likely expand their liability exponentially? As to the second factor, is building a cement patio a sufficiently dangerous activity that, say the subcontractor laying the concrete should be automatically and indefinitely liable to anyone falling on the concrete and injuring himself?

Indeed even for auto accidents, the fear of the high costs in providing unlimited no-fault benefits has similarly meant reluctance to provide such benefits on the grounds it might cost substantially more than present required liability insurance.

Limited no-fault auto insurance has left us, then, with a lack of coverage for the more seriously injured traffic victim and, of course, even less coverage for other accident victims.

And so the question is how to apply the no-fault concept to this crucial remainder.

One apparent solution to compensating accident victims is simply to abandon tort liability of any kind and pay everyone injured by accidents for his wage loss and medical expenses under social security. Indeed, won't impending national health insurance largely meet the needs of those suffering serious personal injury?

Unfortunately the costs in the United States would be imposing indeed if we were to cover, under social security or some other form of social insurance, wage loss and medical expenses stemming from all accidental injury. In the United States, the costs of impending national health insurance alone are already causing great unease.

But even if national health insurance were to be passed in the immediate future on a comprehensive scale, it would still meet only a relatively small portion of the total personal injury losses of accident victims since it almost certainly would not cover wage loss. In the case of auto accidents, for example, estimates are that 74 per cent of injury losses are for wage losses, and only 22 per cent for medical losses (with four per cent for 'other expenses'). Given the high costs that any national health insurance will be likely to impose, it will be a long time indeed before any national health insurance or social security scheme is extended to cover wage loss as well. And one doubts that such protection will ever cover more than very modest levels of subsistence income.

The point is that covering wage losses, as well as medical expenses, of *all* injury victims under social insurance, as is being tested in New Zealand, is going to have to face cruel competition for public spending in coming years. One doubts very much that dismantling the tort liability system, and replacing it with a vast scheme of social insurance to cover middle class accidental wage loss, will soon rank high in social priority. All the more reason, then, to think in terms of reforming tort law itself, as was done with no-fault auto insurance. Think for a moment on the European experience. Compared to the United States, all European countries have traditionally had much higher levels of social insurance and much lower levels of affluence, with many fewer people in the prosperous middle or upper middle classes. Thus, social insurance covers much more accident loss than in the United States, but the tort claim for losses above social insurance remains intact. Both at the bottom and the top there is much less need for tort law in Europe than in the United States but it remains. *A fortiori,* it will remain in the United States.

For a variety of reasons, then, we shouldn't soon expect a solution from social security or general health insurance to the problem of accident compensation. How then to make more sense of accident compensation short of a social security solution?

I suggest a solution whereby any enterprise would be allowed to elect, if it chose, to pay from then on for the injuries it causes on a no-fault basis, thereby foreclosing claims based on fault. The enterprise would be allowed to select all or, if it chose, just certain risks of personal injury it typically creates and agree to pay for out-of-pocket losses when injury results from those risks. To the extent — and only to the extent — a guarantee of no-

fault payment exists at the time of the accident, as under no-fault auto or workers' compensation insurance, no claim based on fault or a defect would be allowed against the party electing to be covered under no-fault liability insurance.

The incentives to elect no-fault liability in place of traditional liability based on fault would be that, although the enterprise may have to pay more people for injury, it would pay them much less: it would not have to pay anything already covered by other insurance, nor anything for pain and suffering. This would eliminate paying *anything* in most cases of smaller injuries; it would also cut down substantially on what is to be paid in cases of larger injuries. Also, the enterprise would save on the huge amounts now spent on legal fees and expert witnesses to determine that intractable question of whether there was fault or a defect in causing the accident. Of great importance too for manufacturers and doctors, the *stigma* of liability would be substantially — and often totally — removed. No longer would the enterpriser be paying because his product is defective or because of his malpractice but rather on the morally neutral ground that the accident was just that — an 'accident'.

Certainly an astute enterpriser, concerned about skyrocketing products liability premiums under present law, would be inclined to check on what paying under no-fault enterprise liability would cost in comparison to regular tort liability. At least for some categories of injuries, the enterpriser might find it advantageous to pay only for out-of-pocket loss, albeit on a no-fault basis. The availability of such an option would certainly encourage many enterprises at least to develop data and focus on the question of which system of compensation would be to its advantage. Some enterprises might find the cost much less, so wasteful is the regular tort system. This would be especially true for enterprises facing myriad regular tort claims of a nuisance nature, such as falls in stores, irritatingly deleterious matter in food, and the like, where relatively trivial claims dwarf those for very serious injury. Others might find the costs closer, but it is not inconceivable that humanitarian instincts would then operate to tip the scale in favor of electing enterprise liability. When the no-fault auto insurance controversy was reaching an early peak, a chief executive of a major car rental company read of the fantastic waste of the auto liability insurance system, resulting in so little of the premiums being paid to traffic victims. Shocked and concerned by this waste — and by how little traffic victims were being paid from auto liability insurance, despite its cost — he called in his general counsel to investigate the matter further, with the eventual result that his company, along with other car rental companies, became advocates of no-fault auto insurance, even to the point of testifying and lobbying in various legislative forums, including the Congress. It is true that in this instance, projected cost savings under no-fault served as an additional spur, but the businessman's outrage at the waste and cruelty of the tort liability system was a real catalyst. It may be too much to hope that many businessmen would see a competitive advantage in being able to advertise their willingness to pay for injuries caused by their products, in that businessmen, understandably perhaps, are reluctant to raise in their advertising the spectre of injury by their products. But a concern for the inevitable actuarial toll imposed by their products is not

unimaginable on the part of many businessmen, and enterprise liability will give a beneficial outlet for that concern.

Actually there is already strong precedent in the United States for such an elective approach to no-fault accident law in the provisions of many workers' compensation laws in many states which allow employees to elect to be covered under no-fault workers' compensation, thereby avoiding liability based on fault. These laws were passed in light of early twentieth century court decisions outlawing compulsory workers' compensation as unconstitutional. Although compulsory workers' compensation has long been upheld, as to accidents from other than employment or autos, the political unfeasibility of compulsory no-fault enterprise liability immediately applicable to all businesses has already been suggested. The *relative* infeasibility of even a law imposing no-fault liability on comparatively hazardous businesses can be readily imagined in light of lobbying disputes over just which enterprises are to be singled out. And so, to repeat the workers' compensation experience, once again experimental no-fault liability would seem to make sense as a compromise, albeit this time for constitutional reasons. Indeed even as to employment injuries, about one third of the states still have elective workers' compensation laws. In those states most eligible employers choose to be covered, and that would seem to augur well for businesses and professional people electing to be covered under no-fault liability.

In effect, elective no-fault liability makes both factors which facilitate no-fault auto insurance applicable to many other kinds of accidents.

1. Those electing no-fault can decide for themselves if their fault liability insurance is readily and simply transferable into no-fault loss insurance, without therefore fearing that the transformation will impose new and formidable burdens on them.
2. The same applies to the decision as to who is to be required to pay for what is not left open-ended but defined by the one electing his own elective no-fault liability policy.

Of course the question will be raised why anyone should be allowed to elect to pay under no-fault liability a possibly lesser total amount for injuries associated with his product or activity than he might pay under tort liability based on fault. The answer is this: the premise of no-fault liability is that the regular tort liability is often absurdly and unnecessarily wasteful, dilatory, and cruel. Far better, if necessary, to spend less and spend it wisely. Paying injured parties when their needs outstrip their resources, without the expense and delay of establishing fault or a defect in a product, is much wiser than funnelling money through the regular tort liability system, where available funds so largely end up in the pockets of lawyers, expert witnesses, and insurance companies. In addition, as elective no-fault liability proves feasible, on the basis of its success in given instances compulsory no-fault liability could be *imposed* on more and more enterprises for more and more injuries, if society wished to do so.

But the great virtue of allowing injurers to elect enterprise liability is in flexibility through encouraging experimentation. Given the undeniable evils of the present system, who will be hurt by such experimentation? There are

some victims who, viewed *ex post facto,* will receive less under enterprise liability than they would have under the regular tort system. But looking at the matter from a *pre*-accident vantage-point — that being the fairest way to measure various options as to insurance — it seems that the public favors relative certainty of payment of out-of-pocket loss, as compared to a gamble for payment of out-of-pocket loss plus pain and suffering. Several reliable surveys have indicated that preference. Indeed according to one survey conducted in Illinois, few of those who were successful in claiming for compensation based on who was at fault in the accident knew about — or learned about — or cared about being paid for pain and suffering by the so-called 'wrongdoer'. Accident victims perceive what lawyers do not: 'accidents' are just that, and what accident victims want is prompt payment for their real out-of-pocket losses with a minimum of fuss and argument.

Note too the layers of flexibility possible under elective no-fault liability. The enterpriser could be allowed to experiment with no-fault liability for, say, products produced during a given period. He might also be allowed to limit the age of the product for which he assumes no-fault liability. The enterpriser might, in addition, be allowed to limit the amount of no-fault benefits for which he is liable to, say, multiples of $10,000, with the enabling legislation requiring a corresponding tort exemption for claims above the no-fault benefits equal to the $10,000 multiple measured in pain and suffering (*e.g.*, if no-fault benefits of $20,000 are provided, no tort suit could be maintained unless the value of pain and suffering exceeded $20,000. etc.). Alternatively the enabling legislation could measure the tort exemption as, say, one-half of the amount of no-fault benefits, measured in medical bills (*e.g.*, if no-fault benefits of $30,000 are provided, no tort suit could be maintained unless medical bills exceeded $15,000). The problem with any formula tied to medical bills is that it can encourage the padding of medical bills to exceed the tort exemption.

In point of fact there is no reason for the law to limit elective no-fault liability to enterprises. Normally, it is true, individuals probably will not find it as advantageous as enterprises to shift to no-fault liability in that premium savings will be less likely. No savings would likely accrue from a switch in homeowners' coverage, for example. But motorists might well find it better and/or cheaper to elect no-fault liability to cover losses in a state without any no-fault law or to cover their liability above the 'threshold' for tort suits under limited no-fault laws. Any motorist could thus insure to pay anyone injured in or by his car on a no-fault basis, just as an enterprise elects no-fault liability, in return for the abolition of tort claims against the insured. Allowing any and all thus to replace the cumbersome fault liability with no-fault liability will encourage further experimentation with no-fault coverage, with all the advantages flowing therefrom.

The mechanics of such elective no-fault auto liability might be structured to preserve the advantage of no-fault auto insurance whereby the insured and his family and the occupants of his car are paid by the insured's own insurance company, as opposed to claiming against a stranger's company. Thus in a typical two car collision between driver A and driver B, if both had elected no-fault liability, A's insurer would pay the occupants of

A's car (including A) on a no-fault basis and B's insurer would pay the occupants of B's car (including B) on the same basis, with concomitant tort exemptions. If only A had elected no-fault liability, A's insurer would be required to pay the occupants of A's car on a no-fault basis, as well as the occupants of B's car (including B). But A, as well as the occupants of both A's car and B's car would then retain their right to sue B based on fault, and out of any proceeds of payment from B, they would be required to reimburse A's insurer for any amounts previously paid to them. As to accidents involving only one car insured for no-fault liability (whether the accident involved two cars or only one), any motorist could be offered optional no-fault coverage for himself. Perhaps, indeed, such coverage should be compulsory for anyone choosing no-fault liability coverage, just as it would probably be better to make no-fault coverage of one's own family compulsory even where the jurisdiction has a law of intra-family immunity preventing one family member from suing another for regular tort liability.

Indeed, elective no-fault auto insurance could do much to alleviate the problems posed by inadequate no-fault auto insurance laws already enacted and those being urged by trial lawyers and some in the insurance industry. If, for example, the tort exemption threshold under a no-fault law is very low (as in Massachusetts) or even nonexistent (as in Delaware or Oregon), motorists could be expected to choose to initiate or greatly increase the exemption as it applies to them, in return for agreeing to pay their victims' losses on a no-fault basis when all other insurance sources of the accident victims are exhausted.

Another device for applying no-fault liability to various kinds of accidents — perhaps in conjunction with elective liability — would be to impose it on extrahazardous enterprises. In October of 1972, President Nixon signed into law the Consumer Product Safety Act, legislation stemming from the final report of the National Commission on Product Safety. The legislation created an independent federal commission, composed of five commissioners, to set up and enforce safety standards on thousands of consumer products. Data for determining which products present "unreasonable risk of injury" will be provided by so-called NEISS (a National Electronic Injury Surveillance System), a reporting system gathering data from 119 hospital emergency rooms on the frequency and severity of accidental injuries caused by household products. The Commission's mandate under the law is to set performance standards to assure safety of products. (For example, concerning architectural glass in patio and storm doors, long a source of serious injury, Malcom Jensen, an official of the new Commission, states that the new act "would let us prohibit use of non-shatterproof glass", and impose substitutes of laminated, tempered or wired glass, or even plastics.)

It certainly seems feasible to extend to the new Commission responsibility for setting no-fault enterprise liability standards. Amendments to the legislation could provide that, in addition to gathering data on risky products for the purpose of regulating their safety, the Commission could be empowered to gather data for the purpose of establishing categories of products, and injuries therefrom, for which no-fault liability could be imposed by the courts or perhaps by itself or some other administrative agency. In the alter-

native or in addition, categories of products could be singled out in legislation itself — whether federal or state — for the imposition of no-fault liability, based on data gathered by the Products Safety Commission. For example, based on the data already gathered by the National Commission on Product Safety, no-fault liability could be imposed for typical injuries stemming from specifically identified products, or under generic categories of products, such as those products with glass, products that produce intense heat, products with engines, products using electricity, products for recreation such as athletic equipment and toys — a collection of categories which includes almost all the most dangerous items identified by the Final Report of the National Commission on Product Safety.

Indeed many economists would apparently consider the Commission's time much better spent if it would concentrate on developing data and/or formulating more efficient rules for purposes of compensating accident victims, rather than mandating safety regulations. At a conference at the University of Rochester in the fall of 1972, about 40 economists focused on 'Consumerism', especially the reports produced under the aegis of Ralph Nader. One problem, according to some economists, is that from a cost-benefit viewpoint,

> Nader's reports . . . tend to assign an excessively high value to safety. [Consider] . . . the hypothetical cases of the exploding soda pop bottle, a classroom favorite for showing the economic limits of safety precautions. The riddle is this: Say one defective bottle in a million slips by the safety inspection on the assembly line. At twice the present cost, only one in two million will get by. And at four times the present cost, only one in three million bottles will pop. When is it time to limit the outlay on safety, and settle for paying off the occasional consumer who gets hurt?

Note that the economists' formulation seems to prefer paying accident victims automatically, without regard to 'fault' or 'defect', from an *economic*, not to mention humanitarian, point of view.

Concerning the two advantages leading to limited no-fault auto insurance, under extrahazardous enterprise liability, advantage number two is made applicable since the legislation (or regulation under legislation) defines who is to pay for what loss. But advantage number one is not necessarily made applicable in that there is no guarantee for any enterprise made subject to extrahazardous enterprise liability that its liability will not be *greatly* expanded. For that reason enactment of extrahazardous enterprise liability will probably be much more stoutly resisted by businesses than will elective no-fault liability.