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A Trial Lawyer Looks at No-Fault

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A TRIAL LAWYER LOOKS AT NO-FAULT

by

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HISTORY

Once there was a concept that a person injured through the fault of another should be allowed to recover his damages from the party at fault. However, in 1965, two professors decided that such an archaic concept should be changed when applied to innocent victims of automobile accidents.[1]

Since 1970, twenty-four states have agreed with Professors Keeton and O'Connell and have enacted various forms of no-fault motor vehicle laws.[2] The alleged reason for making this change was, as the words "no-fault" suggest, that everyone injured should be entitled to recover his economic loss regardless of who was at fault.[3] However, to those who fought against legislative enactment of no-fault laws the reason was obvious. Automobile insurance rates were climbing and the public demanded relief. Without the presence of high automobile insurance rates, no-fault probably would have had as much chance of legislative approval as the proverbial snowball. This conclusion can best be supported by the clamor raised for enactment of a no-fault products liability law when the rates for products liability insurance soared.

It is the purpose of this article to examine no-fault from a trial lawyer's viewpoint by way of a thorough look at the Florida experience.

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[1]R. KEETON & J. O'CONNELL, BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965).

[2]Siedel, *The Constitutionality of No-Fault Insurance: The Courts Speak*, 26 DRAKE L. REV. 794 (1977) [hereinafter cited as Siedel]. The twenty-four states which at one time had no-fault legislation are: Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, North Dakota, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Utah, and Virginia. Nine states have since repealed their no-fault legislation: Arkansas, Delaware, Maryland, Nevada, Oregon, South Carolina, South Dakota, Texas, and Virginia.

[3]As to the alleged reasons for no-fault legislation, the author has never heard a person who was totally at fault in an accident state that he felt that he should recover his economic loss.

WHAT IS NO-FAULT?

At common law the innocent victim of a tort could recover his economic injuries, that is medical bills and wage losses, as well as pain and suffering damages from the party who caused him injury. The no-fault concept alters this by requiring the injured person to recover economic losses from his own insurance carrier. The innocent victim thus compensated by his own insurance for economic injuries then gives up his claim for pain and suffering damages against the tortfeasor.

The insurance coverage which protects the innocent victim or first party is called Person Injury Protection (P.I.P.). The nature and extent of P.I.P. coverage varies among the no-fault states.[4] For example, in Massachusetts $2,000 is the maximum recoverable for economic losses,[5] but in Michigan an unlimited recovery is allowed for medical bills and a $36,000 ceiling is placed on wage losses.[6] The state plans also vary as to the requirement of a medical threshold which must be reached by the injured first party in order to make a pain and suffering claim. For example, in New Jersey an innocent victim must have at least $200 in medical bills to make a pain and suffering claim,[7] however, Minnesota requires a $2,000 threshold.[8] In other states a verbal threshold is required to be reached in order to make the pain and suffering claim.[9] Michigan's verbal threshold requires a permanent injury.[10]

On January 1, 1972, Florida's no-fault law went into effect. The Florida P.I.P. coverage paid 100% of medical bills and 85% of wage loss up to a total recovery of $5,000.[11] In order to recover pain and suffering damages, the innocent victim of a motor vehicle accident

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[4]This right to claim damages varies from state to state according to the particular no-fault law.

[5]MASS. ANN. LAWS ch 90, § 34A (Michie/Law. Co-op 1975). *See also* State No-Fault Automobile Insurance Experience, Florida Department of Transportation 9 (June 1977) [hereinafter cited as 1977 State No-Fault Insurance Experience].

[6]MICH. COMP. LAWS ANN. § 500.3107 (Supp. 1979). *See also* 1977 State No-Fault Insurance Experience, *supra* note 5, at 9.

[7]N. J. STAT. ANN. § 39:6A-B (West 1973). *See also* 1977 State No-Fault Insurance Experience, *supra* note 5, at 10.

[8]MINN. STAT. ANN. § 72A.1494 (West 1970). *See also* 1977 State No-Fault Insurance Experience, *supra* note 5, at 9.

[9]Some statutes allow tort actions for pain and suffering when the medical expenses exceed a specified amount; *see* notes 7, 8, and accompanying textual material, *supra*. There are certain types of injuries, however, that involve considerable pain and suffering yet do not reach the medical threshold. A verbal threshold may be reached by allowing a medical doctor's testimony of the permanent injury, permanent dismemberment, or serious injury notwithstanding the lack of medical bills.

[10]MICH. COMP. LAWS ANN. § 500.3135(1) (Supp. 1979). *See also* 1977 State No-Fault Insurance Experience, *supra* note 5, at 9.

[11]FLA. STAT. § 627.736 (1972).

had to have incurred at least $1,000 in medical bills.[12] The proponents of no-fault successfully argued that the $1,000 threshold would eliminate 92% of all bodily injury claims as a result of motor vehicle accidents.[13] The Florida Legislature also mandated a 15% reduction in the rates for bodily injury liability coverage (including P.I.P.) from the previous year's bodily injury liability coverage premiums.[14]

On paper, the Florida no-fault plan was actuarially sound. Of course, it didn't take an actuary to tell a person that bodily injury liability rates would come down substantially if 92% of the bodily injury liability cases were eliminated. But, it was too good to be true. Everyone got his economic losses paid, the seriously injured could still recover for pain and suffering damages and motor vehicle insurance premiums were coming down. Unfortunately, there were a couple of documents—the Constitutions of Florida and the United States—that stood between this beautiful concept and it becoming a reality.

IS NO-FAULT CONSTITUTIONAL?

Even though the framers of the Constitution knew nothing of automobiles or no-fault laws, the constitutional guarantees of equal protection, due process and access to courts, have stood the test of time and may be applied to these situations. Certainly the law professors who conceived and proposed no-fault recognized these constitutional guarantees. The United States Supreme Court in 1917 approved workmen's compensation as an alternative remedy to the common law tort stating that there was no constitutional violation if the change provided a reasonable alternative to the pre-existing common law right.[15]

Following the Supreme Court reasoning the Florida Supreme Court ruled no-fault constitutional by holding that P.I.P. was a reasonable alternative to a claim for pain and suffering.[16] In *Lasky*, the court justified its position by stating repeatedly that the common law right of pain and suffering was being replaced by this reasonable alternative in only a very limited number of cases.[17]

How would the Florida Supreme Court decide if the right to claim damages for pain and suffering was being taken from innocent victims in the great majority of motor vehicle cases? The court may soon have the opportunity to decide this question. Effective January 1, 1979, the threshold for pain and suffering damages in Florida became

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[12]FLA. STAT. § 627.737 (1972).

[13]Automobile Personal Injury Claims, Florida Department of Transportation (1970).

[14]FLA. STAT. § 627.741 (1972).

[15]New York Cent. R. Co. v. White, 243 U.S. 188 (1917).

[16]Lasky v. State Farm Ins. Co., 296 So. 2d 9 (Fla. 1974).

[17]*Id.* at 14.

"permanent injury within a reasonable degree of medical probability. . . ."[18]

It can be argued that Florida's new threshold requirement is unconstitutional. One reason is that the victim's accessability to the courts for pain and suffering claims is made dependent upon a determination by the medical profession. The new no-fault law grants immunity to a motor vehicle tortfeasor unless a member of the medical profession says the innocent victim has incurred a permanent injury. Thus the victim is dependent on the medical profession to obtain his day in court. This requirement is different from the testimony elicited from a physician as to the permanency of an injury. The latter incident goes only to the question of evidence and damages and not to whether the action may be brought to court at all. No court has ever allowed the question of access to court to be delegated. Even if such a delegation were permissible, it should not be made to the medical profession, which, in most instances, has various opinions as to the permanency of an injury.

The most important constitutional hurdle that Florida's new threshold requirement must overcome is the denial of access to the courts which may result if the medical determination prohibits a substantial number of cases from being brought. What may have been a reasonable alternative to a claim for pain and suffering in a very few cases, may not be a reasonable alternative when it eliminates substantial rights in the great majority of the cases.

In *Lasky*, the Florida Supreme Court left the door open when it stated:

> It may seem from the above discussion that we are ascribing consequences to our no-fault insurance law which have yet to be demonstrated, and which may turn out to be non-existent. What we actually are doing is presuming the existence of circumstances supporting the validity of the Legislature's action, in the absence of any evidence to the contrary.[19]

As noted by Professor Siedel:

> Despite the decisions upholding the general nature of no-fault insurance, no-fault advocates face a major problem which has not yet been thoroughly considered by the courts. As noted by Feminist Ingrid Bergis: "I am very wary of conclusions that precede the experience." All of the no-fault decisions to date have "preceded the experience" and for this reason the courts have placed great reliance on legislative determination of the necessity for no-fault insurance.[20]

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[18]FLA. STAT. § 627.737(2) (b) (Supp. 1978).

[19]296 So. 2d at 17.

[20]Siedel, *supra* note 2, at 823 (footnote omitted).

IS P.I.P. A REASONABLE ALTERNATIVE?

The constitutionality of Florida's no-fault act was grounded on the theory that the legislature can provide a reasonable alternative to the traditional tort action as was done with the enactment of workmen's compensation. However, there are vast differences between the employee contractually consenting to this reasonable alternative as with workmen's compensation and the situation between the injured claimant and the negligent tortfeasor, who prior to the accident have never met.

In 1972 when Florida's no-fault law went into effect, nine out of ten Americans were protected by one or more forms of private health insurance and others had similar coverage through Medicare and Medicaid.[21] At the same time, seven out of eight workers were covered by disability income protection coverage.[22] By the end of 1976, nine out of ten Americans under age sixty-five were protected by private health insurance.[23] Sixty percent of those over sixty-five had private health insurance in addition to Medicare.[24] Furthermore, three out of four Americans under age sixty-five were protected by some form of "catastrophic" private health insurance.[25] The percentage of medical bills paid by health insurance as a result of accidents in 1977 was 88.2%.[26] In 1976, 77.4 million persons out of an employed civilian labor force of 85.4 million persons[27] were protected by disability income protection.[28] Therefore, over 90% of the employed civilians were protected in 1976 by private insurance for disability income protection exclusive of Social Security.

Nine out of ten Floridians already have medical insurance which pays 88.2% of medical bills related to an accident.[29] The no-fault law requires these people to purchase additional coverage (P.I.P) which pays 80% of medical bills related to automobile accidents.[30] Futhermore, the 90% of working Floridians who have private disability income protection are required to purchase P.I.P. which covers 60% of gross earnings.[31]

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[21]Ring, *The Fault With "No-Fault,"* 49 NOTRE DAME LAW. 796, 798 (1974).

[22]Source Book of Health Insurance Data 1972-73 at 25, Health Insurance Institute (1972).

[23]Source Book of Health Insurance Data 1977-78 at 20, Health Insurance Institute (1977).

[24]*Id.*

[25]*Id.* at 30.

[26]*Id.* at 36.

[27]U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 355 (1976).

[28]*Id.* at 31.

[29]This figure is based on the assumption that the national percentage of medical bills paid by health insurance is indicative of the percentage paid by health insurance in Florida.

[30]FLA. STAT. § 627.736(1) (a) (Supp. 1978).

[31]*Id.* § 627.736(1) (b) (Supp. 1978).

To summarize, it may be assumed that 90% of Floridians have private insurance to cover medical bills and wage losses.[32] If these people were the innocent victims of an automobile accident, P.I.P. combined with their private medical coverage enables them in effect to take double recovery for economic losses as a substitute for the pre-no-fault right to go against the tortfeasor's insurance carrier. Double recovery may also be obtained if the person is at fault in the accident. However, the person at fault gives up no right to seek redress in the courts since he never had such a right. When it is recognized that most group coverages have coordination of benefits provisions that prevent a person from recovering more than 100% of his medical losses (including P.I.P.), it is realized that many innocent accident victims receive nothing for giving up their right to sue the tortfeasor for economic losses and pain and suffering. Florida allows for substantial deductibles where there is private health insurance.[33] In the situation of a substantial deductible, the injured person would receive his medical bills and disability income protection from his private health insurance[34] thus again forfeiting his right to claim damages for economic losses and pain and suffering from the tortfeasor.

It appears that the innocent victim, at the very best, receives some unnecessary double coverage for giving up his rights against the tortfeasor. In many situations, the innocent victim, because of coordination of benefits through group insurance or because of a deductible through P.I.P. coverage, receives nothing for giving up these rights. When considering the constitutionality of no-fault the primary concern should be the innocent victim since he has given up a right he possessed under the traditional tort system. The party at fault had no such right, notwithstanding comparative negligence laws. Seemingly, even the most staunch proponents of no-fault would be hard-pressed to argue that a portion of innocent victims receiving double recovery is a reasonable alternative to the right of all innocent victims to recover.

Proponents of no-fault have argued that the existence of uninsured tortfeasors prevents innocent victims from recovering in the traditional tort system against the uninsureds. The counter argument to this is to make some assumptions by examining the percentage of Floridians who have no private insurance to cover medical bills or wage loss. Reports show that 10% of Floridians do not have private health insurance.[35] Before no-fault, if the 10% were the innocent vic-

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[32] *See* note 29, *supra*.

[33] *Id.* § 627.739 (Supp. 1978).

[34] Since the insured is allowed to deduct up to $8,000 from the P.I.P. coverage under the statute, it appears that most persons would choose to accept coverage under their own private health insurance, rather than forgo the initial $8,000 to proceed under P.I.P.

[35] *See* notes 23, 29, *supra*.

tims of an automobile accident, they could have recovered medical and wage loss against the tortfeasor. Assuming that the 10% were involved in an accident and half of them were innocent victims, then 5% of the total accident victims in Florida would not have their economic losses paid because they either did not have private health insurance or were at fault in the accident. After passage of the no-fault law, what happens to the 10% without private health insurance? The Florida Department of Insurance estimates that more than 10% of the motor vehicles in Florida are uninsured.[36] It is submitted that it would be a reasonable assumption that the 10% who have no private health insurance are more than likely the same 10% who have no motor vehicle liability insurance and after no-fault, no P.I.P. coverage. Again, let's assume that half of the 10% without private health insurance were innocent victims of an accident. Since these persons are more than likely individuals who also do not have P.I.P. coverage, under the Florida no-fault law, these uninsured, innocent victims would be unable to recover anything. Under the present Florida law, if a motor vehicle is uninsured, the accident victim cannot be paid P.I.P. and also cannot claim damages from the tortfeasor.[37] At least, prior to no-fault, the innocent victim of an accident who did not have private health insurance and did not have his own motor vehicle insured could recover his economic losses (as well as pain and suffering) from the negligent tortfeasor.

The net effect of P.I.P. is to require 90% of Floridians to purchase double coverage and to prevent the remaining 10% from recovering medical bills and wage loss that they could have recovered under the pure tort law if they were innocent victims. P.I.P., therefore, could be found to result in less people having their medical bills and wage loss paid than would be paid under a pure tort action. P.I.P. allows some innocent accident victims to make a claim against the tortfeasor for both economic losses and damages for pain and suffering. But can a double recovery for some innocent accident victims possibly be so beneficial as to make P.I.P. a reasonable alternative for all innocent accident victims?

DOUBLE COVERAGE IS DISASTROUS

It is submitted that P.I.P., in fact, gives no realistic beneficial effect to the injured victim of an automobile accident and causes less people to recover economic losses than would have been able to recover under a pure tort action. The only possible beneficial effect of P.I.P. is a double recovery for a portion of the innocent accident victims. It is the purpose of this section of the article to show that not on-

[36] A Program to Solve the Automobile Insurance Rate Crisis, Office of Treasurer and Insurance Commission of Florida Department of Insurance 5 (1977).

[37] FLA. STAT. §§ 627.730-.741 (Supp. 1978).

ly is the beneficial possibility nonexistent, but that the detrimental effect of double recovery is even greater than the opponents of no-fault could ever imagine.

The no-fault law required all automobile owners to purchase P.I.P. At the time the Florida Legislature enacted no-fault, nine out of ten Americans were protected by one or more forms of private health insurance[38] and seven out of eight working Americans were covered by disability income protection.[39] P.I.P., it could be argued, created unneeded double coverage for these people.

Prior to no-fault, when a wage earner was injured in an automobile accident, his employer's or his own disability income insurance paid a percentage of his wages tax free, for example, 60%, while he was disabled from work. After no-fault, the injured wage earner would still receive 60% of wages tax free from his own personal coverage or from his employer's but in addition he immediately received 85%[40] of his wages tax free from the no-fault coverage. The injured wage earner could thus stay at home and draw almost one and a half times his gross wages, tax free. Instead of missing a few days from work, the injured wage earner found it very profitable to stay away from work as long as possible.[41] The result was that the disability for the innocent victim became much more serious. Likewise, the culpable accident victim and even the victim of a one-car accident were offered an incentive to stay home.

A like situation occurred with medical expenses. Prior to no-fault, private health insurance paid approximately 80% of all medical bills incurred whether as a result of accident or sickness. Following no-fault, the injured accident victim received 100%[42] of his medical expenses through the no-fault coverage in addition to his other medical coverage. Therefore, the accident victim was receiving $180 for every $100 in medical bills. No-fault created an incentive for the accident victim to get as much medical care and as expensive care as he could possibly obtain.

Before no-fault, the health care provider would refuse to give any type of medical care (other than emergency care) without being paid in full. The accident victim was required to pay in advance the difference between what his insurance carrier would pay and the amount of the medical bill. Hardly a day went by when a personal in-

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[38] *See* note 21, *supra*.

[39] *See* note 22, *supra*.

[40] Since 1977, this figure has been 60%. *See* FLA. STAT. § 627.736(1) (b) (Supp. 1978).

[41] There are no statistics based on the human element. The human element under Florida no-fault discussed in this article is based upon the opinion of the author from his experience with approximately 1,000 cases since no-fault went into effect in Florida, and at least that number of cases prior to the enactment of no-fault.

[42] In 1977, this figure was reduced to 80%. *See* FLA. STAT. § 627.736(1) (a) (Supp. 1978).

jury lawyer was not called by a doctor or a hospital requesting that the lawyer guarantee the accident victim's bill. The health care provider was not willing to wait years to see if he would receive his money following a successful tort suit.

Following no-fault, the health care provider realized that no-fault coverage was better than the private health insurance that the accident victim carried. No-fault paid 100% of the medical bills immediately. There was no limitation on hospital room rates, on surgery fees, and on the number or cost of x-rays; nor were there limitations on the number or cost of physical therapy sessions. No-fault created an incentive for overutilization by health care providers. Since the enactment of no-fault, most orthopedic surgeons in Florida now provide x-rays in the office and many groups of orthopedic surgeons have their own physical therapists. Since the enactment of no-fault, injured accident victims who used to be placed in wards are now receiving treatment in private hospital rooms.[43]

It can be argued that no-fault has created an unconscionable condition in the marketplace. The accident victim wants more medical care and more expensive medical care, and the health care provider wants to give more medical care and more expensive medical care; therefore the health care provider justifies his overutilization by finding that the patient has a continuing or permanent injury.

It can be argued that the overutilization of medical care by the accident victim and by the health care provider which may be encouraged by no-fault has raised health insurance costs. Every time an injured person receives additional medical care, he receives benefits not only from the no-fault insurance carrier, but also from his personal health insurance. It is submitted that if the reader checks with Blue Cross/Blue Shield in any no-fault state (after a couple of year's experience) he will find that those rates are now approaching a crisis.

In 1977, the Florida Legislature reduced P.I.P. benefits from 100% medical to 80% and from 85% wage loss to 60%.[44] This allows the accident victim to recover approximately 160% of his medical bills and 120% of his wage loss, which is still incentive enough to continue to overutilize.

At the beginning of the article, it was stated that rising automobile insurance premiums was apparently the real reason for enactment of no-fault. The following section will show that no-fault has had the exact opposite effect.

NO-FAULT HAS CAUSED SKY-ROCKETING INSURANCE PREMIUMS

The Florida Legislature in adopting no-fault was trying to correct

[43] *See generally* C. Gregory, H. Kalven, R. Epstein, CASES AND MATERIALS ON TORTS 870-71 (3d ed. 1977).

[44] *See* notes 40, 42, *supra*.

what it considered a severe insurance premium crisis. In 1970 alone personal coverage, including bodily injury liability, medical payment coverage and uninsured motorist coverage, on both commercial and private vehicles paid approximately $140 million in claims.[45] However, the no-fault experience apparently has failed to curb the premium rises. In 1976, for example, approximately $140 million was paid for P.I.P. coverage alone on only private passenger vehicles.[46] However, proponents of no-fault contend that automobile insurance rates would have been even higher if Florida had remained a traditional tort state.

In order to substantiate the author's opinion that no-fault was the cause of sky-rocketing insurance rates, it is necessary to find a statistical basis that would disregard the effect of inflation, gasoline shortage, speed limit changes, and the effects of overutilization. No-fault does not affect property coverages. However, the same things that affect the cost of personal injuries also affect the cost of property coverages. If there are more accidents, then property coverages should be affected the same as personal coverages. It would therefore seem that if we knew what percentage of the automobile insurance dollar was concerned with property coverages we could then determine the cost of no-fault.

Prior to 1971, the Insurance Department of Florida produced statistics which showed the amount of premiums paid by Floridians for so-called people coverages, that is bodily injury liability, medical payments, and uninsured motorist coverage, and separated the amount paid for all property coverages. They were as follows:

	In Dollars		% Of Premium Dollars	
Calendar Year	People Coverage	Property Coverage	People Coverage	Property Coverage
1967[47]	$152,000,000	$152,000,000	50	50
1968[48]	175,000,000	174,000,000	50.1	49.9
1969[49]	208,000,000	207,000,000	50.1	49.9
1970[50]	247,000,000	243,000,000	50.4	49.6

[45]Report of Insurance Department, Office of Treasurer and Insurance Commission of Florida Department of Insurance 173 (June 30, 1971).

[46]Report of Insurance Department, Office of Treasurer and Insurance Commission of Florida Department of Insurance 200 (June 30, 1977).

[47]Report of Insurance Department, Office of Treasurer and Insurance Commission of Florida Department of Insurance 180 (June 30, 1968).

[48]Report of Insurance Department, Office of Treasurer and Insurance Commission of Florida Department of Insurance 179 (June 30, 1969).

[49]Report of Insurance Department, Office of Treasurer and Insurance Commission of Florida Department of Insurance 177 (June 30, 1970).

[50]Report of Insurance Department, Office of Treasurer and Insurance Commission of Florida Department of Insurance 173 (June 30, 1971).

Beginning in 1971, the Insurance Department of Florida did not produce similar statistics, however, the author was able to obtain the following table from Allstate Insurance, one of the two largest writers of automobile insurance in Florida.[51]

FLORIDA

PRIVATE PASSENGER AUTOMOBILE DISTRIBUTION OF INCURRED LOSSES BY COVERAGES

	People Coverages					Property Coverages
Calendar Year	Bodily Injury	Medical Payments	P.I.P.	Uninsured Motorist	Total People Coverages	Total Property Coverages
1971	35.2%	7.0%		7.5%	49.7%	50.3%
1972[52]	35.1	2.2	15.4	4.6	57.3	42.7
1973	40.4	1.2	12.7	4.9	59.2	40.8
1974	39.3	1.1	10.1	11.5	62.0	38.0
1975	39.6	.4	13.4	14.4	67.8	32.2
1976	43.1	1.4	11.9	11.4	67.8	32.2

In the hearings before the Subcommittee on Commerce and Finance of the 92nd Congress, the following appeared:

> For the period 1959-68 the Senate Antitrust and Monopoly Committee found the following earned premiums for auto insurance (in billions): Property Damage Liability 15.2; Collision 17.6; Comprehensive 9.4; Bodily Injury Liability 37.0; total 79.2. Thus, coverage relating to vehicle damages represented 53.4% for the average of that past time interval. More recently the percent related to vehicle damage has increased. Thus in the October, 1970 issue of *Trial Magazine*, Vestal Lemmon (President, National Association of Independent Insurers) said (at p.56): "The typical, current package of complete auto coverage indicates that almost two-thirds of the premium dollar is spent for car damage coverages, and only one-third for injury coverages."
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> Subsequent oral estimates from prominent insurance industry officials indicate that the auto damage portion of the premium is rapidly approaching 70% and has reached or passed that allocation in some areas.[53]

According to the testimony before the Congressional Subcommittee, the insurance industry expected property coverages to continue to take an ever increasing percentage of the auto insurance dollar. However, assuming the Allstate experience in Florida is indicative of what actually occurred in Florida following no-fault, we find that in 1976 instead of there being a dollar in people coverages for every

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[51]Letter from Darrell W. Ehlert, Senior Actuary, Allstate Insurance Companies, to Fredric Levin (June 17, 1977).

[52]No-fault went into effect in Florida on January 1, 1972.

[53]*No-Fault Motor Vehicle Insurance: Hearings on H. Con. Res. 241 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 92d Cong. 1st Sess. 319 (1971).

dollar in property coverages, the people of Florida paid $2.15 for people coverages for every dollar paid in property coverages.

Ratios may be a little difficult to understand. Total private passenger automobile insurance premiums in Florida in the year 1976 totalled $970 million.[54] Assuming the Allstate figures to be indicative of the total industry, $318 million was spent on all property coverages. If we assume that people coverages would have remained approximately half of the total automobile premium dollar, then $318 million should have been spent on people coverages for a total of $636 million had no-fault not been enacted. Taking this assumption as correct, the enactment of no-fault cost the people of Florida $334 million in 1976 alone, i.e. $970 million actual premiums less an estimated $636 million if no-fault had not been enacted.

The insurance industry authorized Conning and Company to prepare an evaluation of no-fault insurance costs for the American Insurance Association which was released in 1977.[55] Conning and Company selected twelve states that had no-fault laws and compared those states with five states without no-fault.[56]

Conning and Company analyzed the actual cost of no-fault for the "average insured." Of course, the statistics used in the people coverage to property coverage ratio was for all insureds. Conning and Company determined the "weighted costs" for bodily injury liability, medical payments and uninsured motorist coverage before no-fault and the same coverage plus P.I.P. during no-fault. These "people coverages" before no-fault and during no-fault were adjusted to compensate for external elements such as inflation and the gasoline shortage.[57] To do this, they took the trends in "people coverages" in the five pure tort states and used these trends in analyzing the no-fault states. In the people coverage to property coverage ratio, there was no need to go to other states to attempt to adjust the figures.

Eleven of the no-fault states used by Conning and Company had a

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[54]Report of Insurance Department, Office of Treasurer and Insurance Commission of Florida Department of Insurance 200 (June 30, 1972).

[55]An Evaluation of No-Fault Insurance Costs, Conning and Company (1977). Conning and Company is a Hartford, Connecticut-based brokerage firm which deals primarily in insurance stocks and bonds and occasionally conducts a research study for its clients.

Numerous attempts were made by the author to obtain additonal data from Allstate and other insurance companies. Those contacted refused to release any information regarding the ratio of people coverages to property coverages on any state. It should be simple for a statistician to take such ratios for all of the states and either prove or disprove the relative cost of no-fault.

[56]*Id.* at 1, 3. The twelve no-fault states were Massachusetts, Delaware, Florida, Oregon, Maryland, Connecticut, New Jersey, Washington, Michigan, Kansas, New York, and Minnesota. The five pure tort states were California, Indiana, Louisiana, Missouri, and Ohio.

[57]*Id.* at 3.

three-year experience. Conning reported that eight of the eleven states showed an increase in premiums for people coverages over what those premiums would have been had no-fault never been enacted.[58]

In analyzing the Conning study, a very interesting trend appears. The analysis of the no-fault states with similar P.I.P. coverages ($5,000 to $10,000 in benefits) indicated that at the end of the three-year experience insurance premiums increased as the threshold became greater.[59] Connecticut had a $400 threshold with $5,000 P.I.P. and showed a 3.6% savings as a result of no-fault. Kansas had a $500 medical threshold with $2,000 medical P.I.P. and $7,800 wage loss P.I.P. and showed a 4.2% increase in premiums as a result of no-fault. Florida had a $1,000 threshold with $5,000 in P.I.P. benefits and showed a 15.5% increase in premiums as a result of no-fault.[60] Therefore, it certainly appears that the higher the medical threshold, the more disastrous the results of no-fault in regard to increases in insurance premiums.

In an effort to reduce bodily injury liability premiums, no-fault removes the small lawsuit. Regardless of the threshold, no case below the threshold can make a claim for pain and suffering. Actuarially, the Florida no-fault law was supposed to prevent 92% of the accident victims from making claims for pain and suffering. But as a practical matter, this appears not to have worked. Although there are no accurate figures available, this author has found in interviews with personal injury lawyers that less than half of the cases were eliminated by the threshold. This simply means that approximately 42% of the accident cases below the threshold prior to no-fault, became cases that exceeded the threshold.

By telling an innocent accident victim that he must turn to his own insurance company because he failed to incur enough medical expenses to go against the tortfeasor's insurance, no-fault can be said to give the victim a medical expense goal to shoot for. Subconsciously the victim may find there is nothing wrong in wanting the person who caused the injury to have to pay. He may try to reach the threshold, thus promoting fraud and subconscious exageration. Therefore, it could be argued that cases after no-fault are being settled for $1,500 or more because of a subconscious exageration of injuries.

From the above, three conclusions may be drawn:

(1) P.I.P. is a disastrous alternative. It promotes overutilization and therefore must drive up rates which has a corresponding adverse effect on private health insurance. In no way can it be considered a *reasonable* alternative.

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[58] *Id.* at 8.
[59] *Id.* at 7.
[60] *Id.*

(2) No-fault substantially increased the premiums on people coverages in Florida and cost the citizens of Florida in excess of $300 million in 1976, alone, over the cost that would have been expected if Florida had remained a traditional tort state.

(3) If the innocent injured accident victim is given a reachable goal in order for him to recover against the tortfeasor, he will reach it and fraud and exageration may be the result.

WHAT IS THE ANSWER?

There are two possible answers to correct the problems of no-fault. One is a return to the traditional tort system. Prior to no-fault, insurance rates were going up no faster than other consumer products.[61] We have never been able to effectively legislate away the legitimate rights of the people. Prohibition proved this. There is nothing more ingrained in people than the basic doctrine that if someone injures another, the tortfeasor should be made to pay. To this author it is immoral to legislate that a person at fault should not be responsible for his actions. If a legislator has any doubts as to the moral issue involved, let him sit down as I have done and try to explain to the innocent victim of an accident who suffered serious injury and substantial pain and suffering, that the person who caused the accident is not responsible for anything more than the $25 traffic fine. The injured client is left bewildered by an explanation that his only recovery is for his economic losses against his own insurance carrier which in turn drives up his insurance rates. When that injured client happened not to have been able to afford automobile insurance coverage on his personal vehicle and the attorney explains that he recovers nothing the client is often left stricken.

The second possible answer is to make the threshold high enough to prevent the innocent victim from having a reachable goal. For example, a $50,000 medical threshold would reduce bodily injury liability rates to almost an insignificant premium. Even a $5,000 medical threshold will substantially reduce bodily injury liability premiums. Certainly, if death was the only threshold for a personal injury case, this will reduce bodily injury premiums some.[62] However, when the threshold is increased to realistically eliminate a cause of action for pain and suffering in over 95% of the cases, then serious con-

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[61] U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 422-23 (1975). A comparison of the average Consumer Price Index with the Auto Insurance Rate Component of the Consumer Price Index for the years 1960, 1965, 1968, 1969, and 1970 shows that insurance rates rose no faster than other consumer goods or services during the time period 1960 to 1970.

[62] An Evaluation of No-Fault Insurance Costs, Conning and Company (1977). Conning and Company reports a 16.2% savings after three years on all people coverages under Michigan's threshold of permanent injury.

stitutional problems as to access to the courts is created. As has been shown above, regardless of the threshold, P.I.P. cannot be conceived as a reasonable alternative.

In order to have a high threshold which will withstand constitutional challenge a reasonable alternative must be found. Since no alternative other than P.I.P. has been suggested, the only constitutional way to take away a person's right to pain and suffering is by a constitutional amendment to eliminate pain and suffering. However, it would be noted that such a constitutional amendment would be the beginning of the end for the automobile insurance industry. If there were such a constitutional amendment, nine out of ten people who have private health coverage and 90% of the working people who have income disability protection coverage would have absolutely no reason to purchase bodily injury liability, uninsured motorist coverage or P.I.P. coverage. Of course, there is a possibility that national health care will pass Congress, and with increased Social Security income protection benefits, the only personal insurance anyone would need is life insurance. If the reader or the insurance industry thinks this is a fairy tale, or that this is simply scare tactics, they only need to look to Florida. In 1977, the Insurance Commissioner of Florida proposed a constitutional amendment to eliminate pain and suffering as a result of motor vehicle accidents. The people of Florida responded with over 350,000 signatures to put the amendment on the 1978 ballot. Fortunately, the Insurance Commissioner of Florida realized that the people would actually agree to destroy this basic right in order to save themselves from the economic destruction apparently brought on by no-fault and he withdrew the proposed amendment.

Of the two possible answers, the only real solution to this crisis is as simple as the solution to most crises. In those traditional tort states, it is necessary that legislative leadership be informed as to the results of no-fault. In those states that have passed no-fault, it is going to be extremely difficult for the legislative leadership to admit a mistake such as Florida's. If the no-fault states' legislatures are not willing to admit a mistake, then it will be up to the lawyer to make an effective constitutional attack based on statistics.

Up to this date, all of the constitutional decisions on no-fault were decided without the benefit of the statistics showing absolutely no need for P.I.P. Likewise, these decisions preceded the disastrous rise in insurance premiums caused by the P.I.P. It is submitted that no court will have any reason to find no-fault constitutional in light of the actual experience.